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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TAMARA ELISE RUBIN, Plaintiff, v. THE STATE OF OREGON, KRIS KALANGES, MICHAEL GLENN, KAREN ERTEL, MARK KLEYNA, and JOHN/JANE DOE, Defendants.	Case No. 3:19-CV-01377-IM STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT **REQUEST FOR ORAL ARGUMENT**

I. INTRODUCTION.

The State Defendants' ("Defendants"[1]) motion for summary judgment should be granted. Plaintiff's response is literally too little, too late. Her untimely brief provides little or no evidence to support her specific claims against specific defendants. Rather, she makes generalized arguments against "defendants" as a whole, relying in large part on the opinions of

[1] The State Defendants or "Defendants" do not include the John/Jane Doe defendants.

prior lawyers instead of actual, admissible evidence. Furthermore, she fails to address several key defenses, perhaps for lack of any good counter arguments.

In short, plaintiff raises nothing that stands in the way of complete summary judgment in favor of the State Defendants.

II. PLAINTIFF'S BRIEF FLOUTS PROCEDURAL RULES.

Plaintiff's brief was filed late. It was due, by Court order, on January 28, 2022. (ECF No. 77.) It was filed on January 29, 2022, with the declaration and exhibits filed the following day, January 30, 2022. (ECF Nos. 83, 84.) Plaintiff offered no explanation for her delay.

This untimely filing not only ignored the Court order, but unfairly shortened defendants' time to prepare this reply.

In addition, the brief did not include the required table of contents and authorities. Under Local Rule 7-1(c), legal memoranda exceeding twenty pages require such tables. Plaintiff's brief is well beyond twenty pages; it is thirty-one pages. As such, it does not comply with the rule. And again, plaintiff offers no explanation for this.

At a minimum, these failures suggest the Court should look at plaintiff's brief with an especially critical eye.

III. PLAINTIFF RELIES ON INADMISSIBLE EVIDENCE.

A. LR 56-1(b) Certification

Counsel for the parties have conferred on this evidentiary objection, but were unable to resolve the issue.

B. Letters and memos from attorneys are inadmissible in whole or in part.

In supporting or opposing summary judgment, stated facts must be supported by material that is either admissible as evidence or could be provided in a form that would be admissible in evidence. Fed. R. Civ. P. 56(c) (2); s*ee also JL Beverage Company, LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016) (court may consider hearsay evidence so long as evidence "could be presented in an admissible form at trial, such as by live testimony.").

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Despite this rule, plaintiff's alleged facts (to the extent they differ from defendants') rely in part on inadmissible evidence.

Particularly egregious is plaintiff's citation to four adversarial documents prepared by plaintiff's prior attorneys. These were attached as Exhibits 1, 3, 10, and 11 to the declaration of plaintiff's current attorney, Zack Duffly. Exhibit 1 is, according to Mr. Duffly's declaration, a draft legal memorandum prepared by plaintiff's former criminal attorneys and sent to the District Attorney ("DA"). Ex. 3 is a memo about the IRS audit, prepared by one of the criminal attorneys and also sent to the DA. Exhibits 10 and 11 are additional letters the attorney wrote to the DA. Significantly, Exhibit 10 refers to additional enclosed memoranda which are not included, except for the first one, which appears to be Exhibit 3. *See* Pl's Ex. 10, at 5; Duffly Decl. ¶ 5.

None of these letters is admissible in evidence. Rather, the letters are statements of alleged fact, law, and argument made by lawyers on behalf of plaintiff in an adversarial process. Except for occasional statements about the writing attorneys' involvement in discovery and meetings, there is no indication the remaining alleged facts were within the authors' personal knowledge. This includes plaintiff's background and involvement with lead advocacy, actions and investigations by some of the defendants, the IRS audit, plaintiff's statement and actions regarding the IRS and DOJ investigations, actions by LSAF's Board, statements and actions by another attorney (Mr. Bezanson), the timing of the receipt of documents by DOJ, and plaintiff's eligibility and actions regarding DHS benefits. Pl's Exs. 1, 3, 10, 11. All such information is inadmissible. Fed. R. Evid. 602 (witnesses can testify only to matters within their personal knowledge).

Only the attorneys' description of meetings they attended and actions they took, while currently hearsay, could be made admissible through direct testimony at trial. Fed. R. Evid. 801(c) (definition of hearsay). However, plaintiff has not indicated they would be available as witnesses.

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These attorney documents should be stricken or disregarded.

C. Unsupported statements.

Once those documents are removed from consideration, the following allegations and conclusions are unsupported:

A. Description of Kalanges reaching a conclusion about "income." Pl's Resp at 4 (citing Pl's Ex. 1).

B. Description of IRS audit—including the nature of the audit, the documents reviewed (including whether they were the same as what DOJ and DHS had), and the conclusions reached. Pl's Resp at 5-6 (citing Pl's Ex. 3). Indeed, the evidence shows that the IRS reviewed different documents than what DOJ and DHS originally had, since plaintiff's counsel provided the IRS documents later.

C. Description of telephone conversation on Oct. 17, 2017. Pl's Resp at 8 (citing Pl's Ex. 3).

D. Description of Feb. 8, 2018 phone call; and alleged admission by Kalanges on Feb. 9, 2018, that he had withheld information from DHS and DA. Pl's Resp at 11 (citing Pl's Ex. 1).[2] Note that even if plaintiff could get around the hearsay exception in using the attorney's memo, the cited portions of the memo do not even contain the alleged statement by Kalanges. Language is important. There is an implicit difference between not providing certain information and "withholding it." There is no evidence of the latter.

E. Conclusion that defendants had incorrectly calculated plaintiff's income and resources. Pl's Resp at 11-12 (citing Pl's Ex. 10). While the fact that Ms. Howes sent the DA a letter making this argument could likely be made admissible, the conclusion itself is just a legal opinion, not admissible evidence. *See Stephens v.*

[2] Note that Defendant Kalanges will be correcting his deposition testimony to indicate that he did attend the February 2018 meeting, having forgotten this at the deposition.

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Union Pacific Railroad Company, 935 F.3d 852, 856 (2019) ("A party's own speculation is insufficient to create a genuine issue of material fact[.]"). Significantly, Kalanges did not even characterize his cash flow analysis as addressing income, except in the general sense that all money coming in is income. Pl's Ex. 15, at 25 (Kalanges' Depo 165:4-9).

F. Description of exchange of letters and discovery between plaintiff's attorneys and the DA. Pl's Resp at 12 (citing Pl's Exs. 1, 11.) Again, the fact of these exchanges could likely be made admissible. However, the conclusions made in the documents and in the Response are unsupported.

In relying on this evidence, plaintiff has failed to carry his burden of showing a genuine issue of material fact on these points.

IV. PLAINTIFF ALSO IMPERMISSIBLY RELIES ON SPECULATION, OPINIONS, AND CONCLUSIONS.

Besides relying on inadmissible evidence, plaintiff also relies on unsubstantiated statements that are nothing more than speculation, opinions, and conclusions. This, too, is insufficient to create a genuine issue of material fact. *Stephens*, 935 F.3d at 856 (speculation insufficient).

This deficiency is especially acute in the following portions of the response brief:

A. Tax attorney's description of IRS audit. Pl's Resp at 6 (citing Ex. 4). This is an opinion or conclusion, not fact.

B. Description of email chain in October 2017. Pl's Resp at 8 (citing Ex. 6). Not all the language quoted in included in Exhibits 6, thought defendants are not disputing the language.

C. Descriptions of facts that are "possible" or cannot "be ruled out." This includes statement that "Glenn could not rule out that he was familiar with the IRS audit and conclusions" by the date of his grand jury testimony. It also includes the idea

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that "It is possible that Glenn discussed the IRS audit with Kalanges before one or both of them testified before the grand jury." Pl's Resp at 9. These are merely speculations.

D. Circumstances of plaintiff's arrest. Pl's Resp at 10. No citation whatsoever is provided to support this claim.

E. Description of DHS process, including the statements that 1) DHS's concern was "based on the same transactions and information that DOJ, the IRS, and the County had all just examined;" 2) that plaintiff met with defendant Ertel on Feb. 4, 2019, and "demonstrated" anything; and 3) that plaintiff signed the settlement agreement "under duress." Pl's Resp at 13. Again, no citations to any source is provided.

These statements are not supported by admissible evidence and should be disregarded.

V. PLAINTIFF BLURS TIMING OF PLAINTIFF'S PROVISION OF ADDITIONAL DOCUMENTS.

In addition to all the above, plaintiff blurs an important fact: After plaintiff met with Kalanges and learned of his analysis, she did not immediately provide him the documents he needed to complete his analysis. Pl's Resp at 4. The citations plaintiff offer do not prove that point. The Answer admits only that LSAF produced "some" records. Answer to Third Amended Complaint ¶ 13. The cited portion of Kalanges' deposition shows only that the Rubins offered to provide information. Pl's Ex. 15, at 11 (Kalanges Depo 114:7-13.)

The remainder of the undisputed evidence shows that the Rubins provided some material about six months later. State's MSJ at 3 (citing Kalanges Depo 87:20-88:9). Additional information was provided in late 2017, after the IRS investigation had concluded.

Absent the needed information, Kalanges was not able to reach any conclusions about the cash flows he observed between the Rubins and LSAF. State's MSJ at 3.

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VI. PLAINTIFF DOES NOT CHALLENGE KEY FACTS.

Plaintiff does not provide evidence to dispute key facts. It is now undisputed that:

A. Defendants Kalanges and Glenn testified to the grand jury on November 1 and 9, 2017. Pl's Resp at 9.

B. Mr. Bezason did not send an email with a link to documents until November 10, 2017, *after* the grand jury testimony. Pl's Resp. at 9.

C. Defendants Kalanges and Kleyna did not read Mr. Bezanson's email with the document link until November 13, 2017. Pl's Resp at 10. This is *after* they testified to the grand jury, and was the very day the indictment came out.

D. Mr. Bezanson did not provide the password to the Quickbooks subset of documents he had linked to until December 21, 2017. Pl's Resp at 10. This is more than a month after the indictment, and weeks after plaintiff's arrest. Pl's Resp at 10.

E. The IRS audit did not determine the same issue as the DOJ, DHS, or DA were looking into. While Defendant Kleyna indicated it appeared the IRS conclusions did not agree with DOJ's analysis, he needed to look at the IRS documents to be sure. Pl's Resp at 8. On the other hand, Defendant Kalanges, who formerly worked for the IRS, explained that the IRS was looking into excess benefits, which means if a person working for a nonprofit is paied more than industry standard. Pl's Ex. 15, at 18 (Kalanges Depo 148:3-9). By contrast, the DOJ as looking into proper oversight of the organization's assets, financial management, and exercise of fiduciary duty. Pl's Ex. 15, at 14 (Kalanges Depo 134:15-25.) Similarly, Defendant Glenn explained that the IRS determination regarding tax had nothing to do with his overpayment investigation. Pl's Ex. 16, at 6 (Glenn Depo 109:1-24). None of this suggests anyone believe their investigations had been nullified.

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These are important concessions because they wholly defeat the claim that Kalanges and Glenn had the IRS documents before they testified.

VII. PLAINTIFF DOES NOT ADDRESS INDIVIDUAL DEFENDANTS' LIABILITY.

Plaintiff does not seriously evaluate the liability of each individual defendant. The focus of plaintiff's brief is on defendant Kalanges or on "defendants" generally. There is limited discussion of the other individual defendants. In so doing (or not doing) she ignores the requirement, for section 1983 liability, that each individual defendant must have personally participated in the alleged constitutional violations. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154 (1999).

As for Defendant AAG Kleyna, the evidence shows only that he sent the initial CID for the DOJ investigation, and later received communications regarding the IRS investigation and documents. There is no argument for how this violated the constitution, especially since he did not testify to the grand jury. The blithe statement that he participated is nothing more than a conclusion.

Similarly, there is no indication that defendant Ertel—the DHS employee involved in the overpayment case—participated in any constitutional violation. Her involvement with plaintiff comes well after the criminal case was over. She did not testify to the grand jury or have any role in the criminal investigation. Plaintiff's argument against Ertel is simply that she pursued the DHS contested case against plaintiff. Pl's Resp at 13. How or why this would violate the constitution is not explained.

Finally, defendant Glenn is also a nonparticipant for section 1983 purposes. Admittedly, he did a DHS investigation and referred the case to the DA. However, there is no evidence he fabricated anything in his investigation or in his testimony to the grand jury. There is no evidence he had the documents ultimately provided by plaintiff. There is only a possibility that he even knew of the result of the IRS investigation at the time of his grand jury testimony. Pl's

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Resp at 9. Simply making a contrary assertion is not evidence. *See* Pl's Resp at 19, 26 (Glenn intentionally fabricated facts or knew his report was false).

The claims against these three defendants should be dismissed and judgment given in their favor.

VIII. STATUTE OF LIMITATIONS BARS CLAIMS BASED ON KALANGES ANALYSIS.

Plaintiff essentially concedes that claims based on the alleged wrongfulness of Kalanges' cash flow analysis are time-barred. She shifts the claims to "when plaintiff knew or had reason to know that Kalanges withheld the IRS materials form DHS and the DA." Pl's Resp at 15. In other word, plaintiff's arguments regarding whether Kalanges' analysis was wrong or even fabricated are barred.

Plaintiff tries to blur this conclusion by saying "one or more of plaintiff's claims accrued on or after February 9, 2018[,]" and "[o]ther claims arose after August 28, 2017, and are based on Kalanges's analysis, but not the intiialy of that analysis." Pl's Resp at 16. These vague conclusions are not arguments at all. Without saying which claims accrued when and why, plaintiff has failed to create an issue of law or fact.

Thus, plaintiff's claims are limited to those arising out of Kalanges' knowledge of the results and documents from the IRS audit.

IX. GRAND JURY TESTIMONY IS ABSOLUTELY PROTECTED.

Plaintiff's discussion regarding grand jury testimonial immunity sidesteps the point. *See* Pl's Resp at 29-30. Sure, grand jury immunity may not shield actions taken outside the jury room. That is immaterial. Plaintiff's claims are based in part on the assertion that defendants Glenn and Kalanges were wrongful *during* their testimony to the grand jury by not disclosing information about the IRS audit. *See* Pl's Resp at 19 (defendant knew of the IRS information before they testified, yet did not share the information with DA before or at the grand jury).

Regardless of what the witness said in the grand jury room, they have absolute immunity.

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X. PROCEDURAL DUE PROCESS CLAIM WAS NOT ALLEGED.

The procedural due process claim was not alleged in the complaint and is therefore barred.

The argument is raised on page 23 of Plaintiff's Response. However, the Third Amended Complaint does not include such a claim. Its sole due process claim is expressly based on substantive due process. TAC ¶¶ 91-92.

Moreover, the procedural due process argument is not even fleshed out. After citing the elements for the claim, plaintiff fails to set forth what procedures were lacking.

The Court should disregard this argument.

XI. DEFENDANTS DID NOT FABRICATE ANY EVIDENCE.

Plaintiff's brief is replete with conclusory statements that one or more defendants fabricated evidence. *See* Pl's Resp at 16-21, 23-29. This statement is untrue and unsupported.

There is no dispute that Kalanges prepared his cash flow analysis based on what he had. There is no evidence he represented it was anything other than what it was. There is no indication Glenn thought his overpayment analysis was incorrect, let alone fabricated. There is no evidence Kleyna fabricated anything. There is no evidence Ertel fabricated anything; indeed, the ultimate settlement and admission of liability by plaintiff shows that Rubins had received at least some overpayments.

The most plaintiff's arguments show is that Kalanges did not update his analysis (or tell others to do so) when he learned about the IRS audit. This is not deliberate fabrication. At most, it might be some type of negligence. *See* Pl's Response at 16 (deliberate fabrication required for Fourteenth Amendment claim). However, the evidence shows that he did not believe the IRS result had anything to do with his investigation; and that he did not have access to the underlying documents until well after the indictment.

There is simply no support for the conclusion that any of the defendants fabricated anything, and certainly not intentionally. Since all the claims are based on this supposition, they

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are all defeated, or at least substantially weakened. At a minimum, the defendants are protected by qualified immunity on this point.

XII. DEFENDANTS DID NOT SUPPRESS ANY EVIDENCE.

Another substantial portion of plaintiff's argument is based on the unsupported idea that one or more defendants deliberately suppressed evidence regarding the IRS audit. *See* Pl's Resp at 16-21, 23-28. Again, there is no evidence for this. When Kleyna and Kalanges learned of the results of the audit, they either (for Kleyna) lacked sufficient information to evaluate it or (for Kalanges) believed it had no relation to the DOJ investigation. Glenn felt the same as Kalanges. None of them suppressed evidence they thought had any bearing on the case. There is no indication any of the defendants' understanding of the IRS case changed once DOJ finally got the documents in December.

Furthermore, before his grand jury testimony, Kalanges offered to provide documents to the DA. Supp White Decl Ex. 5 (Kalanges Depo at 177:1-5). The DA declined the offer. *Id.* This defeats the claim that anything was supressed.

As with the lack of fabrication, the lack of willful suppression of evidence defeats or weakens all plaintiff's claims. And again, qualified immunity would apply to the extent this issue is uncertain.

XIII. DEFENDANTS ARE NOT THE DISTRICT ATTORNEY AND HAD NO BRADY DUTIES.

This seems an obvious point, but apparently not. None of the defendants worked for the DA. None of them participated in the decision to prosecute, the ultimate determination of probable cause, or the arrest. Despite this, plaintiff conflates them with the DA They are not.[3]

Given this, it is unclear why plaintiff's focuses on probable cause to arrest or prosecute. Pl's Resp at 21-23. None of the defendants made the decision to arrest or prosecute. And, as

[3] Defendant notes plaintiff's citation to *Rose v. Whitbeck*, 277 Or. 791, *as modified*, 278 Or. 463 (1977), may be sufficient to create an issue of fact as to whether the dismissal of the indictment was in plaintiff's favor.

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discussed above, none of them fabricated or suppressed any evidence relevant to those determinations.

Moreover, as non-prosecutors, plaintiff has not shown the individual defendants had a duty to disclose anything, even if they believed they had something relevant. She does not explain why what is essentially a *Brady* rule would apply to them.

Even if, in principle, it did, that would not change the result. As set forth in the motion for summary judgment, *Brady* does not apply to testimony before a grand jury. *Lapena v. Grigas*, 736 Fed. Appx. 651, 655 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 647 (2018), citing *U.S. v. Williams*, 504 U.S. 36 (1992) (prosecutor has no duty to disclose exculpatory evidence to grand jury).

Nor does she explain why information provided by plaintiff had to be disclosed back to her. Plaintiff's citation to *Tennison v. City and County of San Francisco*, 570 F.3d 1078, 1091 (9th Cir. 2009) does not answer the question. That case held that the mere fact that a criminal defendant is aware of that a witness may have relevant evidence does not abrogate the need to disclose under *Brady.* However, the case distinguished the facts before it from a situation where the evidence at issue was within the defendant's own medical records. *Id.* The Court noted that the defendant should be aware of his own medical history and could get the records. *Id.*

This case is even more compelling than the referenced medical records case. These documents were not only easily available to plaintiff, but were provided by her to begin with. There cannot be a duty to disclose them back to her.

XIV. THE INDIVIDUAL DEFENDANTS ARE PROTECTED BY QUALIFIED IMMUNITY.

Plaintiff barely addresses this important defense. She makes no arguments and provides no evidence that that a reasonable person would have known—for each individual defendant—that what they were doing violated the constitution.

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The general idea that investigators have a duty to disclose material impeachment evidence does not help plaintiff. That duty is not "'particularized' to the facts of the case[.]" *White v. Pauly*, __ US __, 137 S. Ct. 548, 552 (2017) (citations omitted). No reasonable person would have believed that these individuals—none of whom were criminal prosecutors—had a clear duty to disclose information that had come directly from the plaintiff herself, via her lawyer. Moreover, that duty would not even affect defendant Ertel—who was not the recipient of the information—or Glenn—who may or may not have had the information at the time of his testimony.

The section 1983 claims should all be decided in favor of the individual defendants.

XV. NO SUPPORT FOR ABUSE OF PROCESS CLAIM.

Plaintiff's state law abuse of process claim has no evidentiary support. The argument that the State had an intention to silence "plaintiff's advocacy for children potentially exposed to lead poisoning" is almost laughably groundless. Pl's Response at 29. Plaintiff's only support is that because plaintiff was a lead poisoning advocate and that someone thought her work could lead to "a corporate conspiracy to silence" her, that must be what hapened here. Pl's Resp at 28. This should be rejected out of hand.

As for the idea that any of the investigations had something to do with a cover up of Kalanges' analysis, there is no support for that. Plaintiff offers no proof that Kalanges' analysis was meant as anything other than what it was: an initial cash flow chart. She offers nothing to show that Kalanges or any other defendant believed the chart was false, such that they would want to cover anything up.

Summary judgment should be granted on the abuse of process claim.

XVI. CLAIM AND ISSUE PRECLUSION BAR CLAIMS AGAINST DHS.

Plaintiff does not address the argument that claim and issue preclusion bar the claims against DHS relating the overpayment dispute. This issue was indisputably settled and incorporated in a final order.

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Plaintiff's bald statement that she entered into the settlement "under duress" is unsupported. Pl's Resp at 13. Moreover, no arguments are made regarding the effect of alleged duress on the preclusive effect of the settlement.

The claims against DHS regarding the overpayments should be dismissed.

XVII. CONCLUSION.

For all these reasons, and those set forth in the motion for summary judgment, all claims should be dismissed. The Court should grant summary judgment on all claim in favor of all defendants.

DATED February 11 , 2022.

Respectfully submitted,

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