

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

OCT 25 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

BARBARA E. BROWN,

Plaintiff-Appellant,

v.

COUNTY OF SAN BERNARDINO; et al.,

Defendants-Appellees.

No. 19-55850

D.C. No.

5:19-cv-01131-CJC-E

Central District of California,  
Riverside

ORDER

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

Upon a review of the record and the response to the court's August 21, 2019 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 2), *see* 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

**DISMISSED.**

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APPENDIX A

JS-6

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

BARBARA BROWN,

CASE NUMBER

ED CV 19-1131-CJC(E)

PLAINTIFF(S)

v.

COUNTY OF SAN BERNARDINO, et al.,

**ORDER RE REQUEST TO PROCEED  
IN FORMA PAUPERIS**

DEFENDANT(S)

**IT IS ORDERED** that the Request to Proceed *In Forma Pauperis* is hereby GRANTED.

Date

United States Magistrate Judge

**IT IS RECOMMENDED** that the Request to Proceed *In Forma Pauperis* be **DENIED** for the following reason(s):

- ☐ Inadequate showing of indigency  
☒ Legally and/or factually patently frivolous  
☒ Other: See Attachment.

- ☐ District Court lacks jurisdiction  
☒ Immunity as to individual defendants

Comments: See Attachment.

Date

United States Magistrate Judge

**IT IS ORDERED** that the Request to Proceed *In Forma Pauperis* is hereby:

- ☒ GRANTED  
☐ DENIED (see comments above). IT IS FURTHER ORDERED that:  
☐ Plaintiff SHALL PAY THE FILING FEES IN FULL within 30 days or this case will be dismissed.  
☒ This case is hereby DISMISSED immediately.  
☐ This case is hereby REMANDED to state court.

June 24, 2019

Date

United States District Judge

**ATTACHMENT**

**NO. ED CV 19-1131-CJC(E)**

Plaintiff seeks to sue the County of San Bernardino ("County"), the San Bernardino County Sheriff's Office and two County Sheriff's Department officials, Deputy McCracken and Detective Montbriand, pursuant to 42 U.S.C. section 1983. Plaintiff's claims purportedly arise out of the filing of assertedly false declarations in a separate civil case pending in this Court. See Brown v. County of San Bernardino, ED CV 13-130-DSF(FFMx) ("Alice Brown case"). In that case, Plaintiff's sister, Alice Brown, is suing the County and certain Sheriff's Deputies in connection with a January 24, 2011 incident which assertedly resulted in the removal of Alice Brown's minor son from Alice Brown's custody.

In the present proposed Complaint, Plaintiff alleges that Defendants McCracken and Montbriand defamed Plaintiff in declarations filed in opposition to a motion for summary judgment in the Alice Brown case. Defendant McCracken reportedly stated in a declaration that, during the January 24, 2011 incident:

(1) Plaintiff assertedly was "hostile," refused to cooperate and refused to provide a key to Alice Brown's home; and (2) Plaintiff

assertedly was an obstructionist, an accomplice and "complicit in days events" (id.). Defendant McCracken also allegedly stated falsely in the declaration that Plaintiff had never attempted to give McCracken a note from Alice Brown (id.). Defendant Montbriand's declaration allegedly "concur[red]" with that of Defendant McCracken (id.). Plaintiff insists that, during the January 24, 2011 incident, Plaintiff was cooperative and did in fact give her sister's note to "all officers within hearing" (id.).

The proposed Complaint purports to state: (1) a claim against all Defendants for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq.; (2) a claim against the County pursuant to Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) ("Monell"), based on a theory that the County supposedly had a custom or practice of sanctioning conspiracy to commit perjury; (3) a claim against Defendants McCracken and Montbriand for perjury in violation of 18 U.S.C. section 1621; (4) a claim against all Defendants for obstruction of justice in violation of 18 U.S.C. section 1503; and (5) a claim for defamation against the individual Defendants. Plaintiff seeks compensatory and punitive damages and an order requiring the criminal prosecution

of Defendants McCracken and Montbriand. As discussed below, all of Plaintiff's claims fail as a matter of law. Leave to amend would be futile.

As the Court previously advised Plaintiff in two prior civil rights actions filed by Plaintiff in this Court,<sup>1</sup> Plaintiff may not sue the County or the Sheriff's Department on a theory of respondeat superior, which is not a theory of liability cognizable under 42 U.S.C. section 1983. See Connick v. Thompson, 563 U.S. 51, 60 (2011); Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009); Polk County v. Dodson, 454 U.S. 312, 325 (1981). A municipal entity may be held liable only if the alleged wrongdoing was committed pursuant to a municipal policy, custom or usage. See Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 402-04 (1997); Monell, 436 U.S. at 691. The Court previously advised Plaintiff that conclusory allegations, such as those Plaintiff again makes, do not suffice

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<sup>1</sup> See "Order Dismissing Complaint With Leave to Amend" filed February 21, 2013 in Brown v. State of Calif., ED CV 13-145-CJC(E); "Order re First Amended Complaint" filed April 1, 2013 in Brown v. State of Calif., ED CV 13-145-CJC(E); "Order Dismissing Complaint With Leave to Amend," filed March 9, 2015, in Brown v. County of San Bernardino, ED CV 15-294-CJC(E); "Order Dismissing Certain Claims From First Amended Complaint," filed April 16, 2015 in Brown v. County of San Bernardino, ED CV 15-294-CJC(E).

to plead a municipal liability claim. See Ashcroft v. Iqbal, 556 U.S. at 678 (plaintiff must allege more than an "unadorned, the-defendant-unlawfully-harmed-me accusation"; a pleading that "offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do"); Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (en banc), cert. denied, 566 U.S. 982 (2012) ("allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively"); see also AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 637 (9th Cir. 2012) (pleading standards set forth in Starr v. Baca govern municipal liability claims). Plaintiff's municipal liability claims are plainly insufficient.

Additionally, as the Court previously advised Plaintiff,<sup>2</sup> the Court must construe the official capacity claims against the individual Defendants as claims against the County. See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). Accordingly, those

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<sup>2</sup> See "Order Dismissing Complaint With Leave to Amend," filed March 9, 2015 in Brown v. County of San Bernardino, ED CV 15-294-CJC(E); "Order Dismissing Certain Claims From First Amended Complaint," filed April 16, 2015 in Brown v. County of San Bernardino, ED CV 15-294-CJC(E).

claims fail for the same reasons Plaintiff's claims against the County fail.

Plaintiff's RICO claim is plainly insufficient. "Civil rights violations and injury to reputation do not fall within the statutory definition of 'racketeering activity,'" and hence are not predicate acts for RICO purposes. Bowen v. Oistead, 125 F.3d 800, 806 (9th Cir. 1997), cert. denied, 524 U.S. 938 (1998).

Plaintiff may not sue to enforce the rights of, or redress alleged injuries suffered by, Alice Brown, Alice Brown's son or any person other than Plaintiff herself. As the Court previously advised Plaintiff,<sup>3</sup> Plaintiff "has standing to seek redress for injuries done to [her], but may not seek redress for injuries done to others." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972). Standing is not gained by allegations of psychological injury suffered by one who observes conduct with which he or she disagrees. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 485-87 (1982); see also Cato v. United States, 70 F.3d 1103, 1109 (9th Cir.

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<sup>3</sup> See "Order Dismissing Complaint with Leave to Amend," filed March 9, 2015, in Brown v. County of San Bernardino, ED CV 15-294-CJC(E).

1995) ("No plaintiff has standing to complain simply that their Government is violating the law.") (citation and internal quotations omitted); La Fargue v. Supreme Court of Louisiana, 634 F.2d 315, 315 (5th Cir.), cert. denied, 452 U.S. 939 (1981) ("No litigant in the federal courts may appear as a self designated ombudsman for the rights of others"). As the Court previously advised Plaintiff, a pro se plaintiff may not represent anyone other than himself or herself. See Campbell v. Burt, 141 F.3d 927, 931 (9th Cir. 1998); Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997); C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987). "[C]onstitutional claims are personal and cannot be asserted vicariously." Johns v. County of San Diego, 114 F.3d at 876 (citation omitted).

Plaintiff may not predicate claims on the allegedly false declarations of McCracken and Montbriand filed in opposition to a summary judgment motion in the Alice Brown case. A witness other than a complaining witness is immune from damages under section 1983 for his or her testimony in judicial proceedings. Malley v. Briggs, 475 U.S. 335, 340-41 (1986); Briscoe v. LaHue, 460 U.S. 325, 330-34 (1983); Burns v. County of King, 883 F.2d 819, 822-23 (9th Cir. 1989) (witness immunity extends to statements made in adversarial pretrial proceedings; witness immune for statements



made in affidavit presented at bail revocation hearing); Shaw v. Simpson, 2015 WL 8294301, at \*2 (N.D. Cal. Dec. 8, 2015) (witnesses immune for statements made in declarations in a prior federal civil rights action).

Even apart from witness immunity, Plaintiff could not maintain a federal claim for defamation based on the allegations in the proposed Complaint. As this Court previously advised Plaintiff,<sup>4</sup> "[d]amage to reputation alone is not actionable under section 1983." Hart v. Parks, 450 F.3d 1059, 1069 (9th Cir. 2006) (citing Paul v. Davis, 424 U.S. 693, 711-12 (1976)). A plaintiff must show that the injury to reputation "was inflicted in connection with the deprivation of a federally protected right" and "caused the denial of a federally protected right." Hart v. Parks, 450 F.3d at 1070 (original emphasis). The Complaint fails to allege the deprivation of any federally protected right.

With respect to Plaintiff's state law claim or claims, California's litigation privilege, California Code of Civil

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<sup>4</sup> See "Order re Third Amended Complaint," filed February 25, 2019, in Brown v. CA DMV, et al., ED CV 18-1418-CJC(E).

Procedure section 47(b)(2),<sup>5</sup> shields a witness from liability for statements made in declarations functioning as written testimony. See Pollock v. Univ. of So. Calif., 112 Cal. App. 4th 1416, 1430-31, 6 Cal. Rptr. 3d 122 (2003) (litigation privilege applied to statements made in declaration filed in prior lawsuit). Accordingly, Plaintiff cannot maintain a state law claim for defamation based on declarations filed in the Alice Brown case.

As the Court previously advised Plaintiff,<sup>6</sup> no private right of action exists for violations of federal criminal statutes. See Allen v. Gold Country Casino, 464 F.3d 1044, 1048 (9th Cir. 2006), cert. denied, 549 U.S. 1231 (2007); Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). Therefore, Plaintiff's claims under 18 U.S.C. sections 1621 and 1503 plainly fail.

Finally, Plaintiff may not properly seek in this action the criminal investigation and/or prosecution of any Defendant. "In our criminal justice system, the Government retains 'broad

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<sup>5</sup> California Civil Code section 47(b)(2) defines a privileged communication to include a communication made in "any . . . judicial proceeding. . . ."

<sup>6</sup> See "Order Dismissing Complaint With Leave to Amend," filed February 21, 2013 in Brown v. State of Calif., ED CV 13-0145-CJC(E).

discretion' as to whom to prosecute." Wayte v. United States, 470 U.S. 598, 607 (1985). "[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973).

Because of the fundamental nature of the defects in the proposed Complaint discussed above, the granting of leave to amend would be an idle act.

**Additional material  
from this filing is  
available in the  
Clerk's Office.**