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DAVID M. BENNION

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

MARK CHRISTOPHER TRACY, d/b/a Emigration Canyon Home Owners Association, Plaintiff, vs. SIMPLIFI COMPANY, a Utah corporation, JENNIFER HAWKES, an individual, ERIC HAWKES, an individual, JEREMY R. COOK, an individual, DAVID M. BENNION, an individual and DOES 1–46, Defendants.	**DEFENDANT DAVID M. BENNION'S MOTION TO DISMISS** Case No. 2:21-cv-00444 Judge Daphne A. Oberg

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and in accordance with DUCivR 7-1, defendant David M. Bennion ("Bennion") moves the Court to dismiss the complaint of plaintiff Mark Christopher Tracy ("Tracy") on three grounds: (1) Tracy lacks standing because a civil rights claim cannot be assigned to him; (2) the statute of limitations bars Tracy's untimely claim; and (3) Tracy's claim is implausible and fails to satisfy the pleading standards of *Twombly* and *Iqbal*. Additionally, Bennion incorporates by this

reference the grounds for dismissal detailed in the argument section of the motion to dismiss filed by defendants Simplifi Company ("Simplifi"), Eric Hawkes, Jennifer Hawkes, and Jeremy R. Cook (Aug. 27, 2021) (Dkt. 6), which apply equally to Bennion.

INTRODUCTION

This action against Bennion should be dismissed. Based on the allegations of the complaint, Bennion has no involvement in the underlying water billing dispute. His only tie to this case is that he allegedly told church members—more than six years ago while serving as an ecclesiastical leader—to pay their water bills.[1] There is no law or construction under which such a statement, even if made, could be deemed unlawful or actionable. Encouraging others to pay their bills cannot be a violation of anyone's civil rights. Tracy has failed to make any specific allegation of any conspiracy, agreement, overt wrongful act, or other tie between Bennion and the wrongdoing that he alleges against the other defendants. There is no allegation that the district failed to bring action against church members due to an agreement with Bennion or based on a statement made by Bennion. Under the plausibility standards of *Twombly* and *Iqbal*, Tracy has failed to state a claim against Bennion.

Alternatively, Tracy's claim is time barred. The single act of Bennion alleged in the complaint—the alleged encouragement to church members to pay their bills—occurred six years ago, well outside the applicable four-year statute of limitations.

[1] Bennion vehemently denies that he ever made any such statement, but for purposes of this motion only, Bennion assumes for purposes of this argument that the statement was made. Even assuming the truth of Tracy's "on information and belief" allegation in paragraph 39 of the complaint of a statement by Bennion, the complaint still fails to state a plausible claim for relief against Bennion, as detailed below.

Last, and fundamentally, this action fails because Tracy only owns the claims in this action by assignment, but civil rights claims under Sections 1983 and 1985 are not assignable. On each of these grounds, dismissal is warranted.

STATEMENT OF FACTS

For purposes of this motion only, the following facts are deemed true:

1. Karen Penske ("Penske") purports to own a water right in Emigration Canyon. Complaint at ¶ 12 (July 22, 2021) (Dkt. 1).

2. Defendant Simplifi Company ("Simplifi") operates a water company that services the Emigration Oaks subdivision in Emigration Canyon. *Id.* at ¶ 13.

3. Simplifi charged Penske—not Tracy—various fees related to the water system operated by Simplifi, *id.* at ¶ 38, and Penske was required to make certain payments to the Salt Lake County Treasurer to avoid foreclosure proceedings, *id.* at ¶¶ 41–42.

4. Simplifi allegedly impaired Penske's alleged constitutional right to the use of her water right. *Id.* at ¶ 44.

5. Simplifi allegedly violated civil rights by only certifying delinquent water accounts for nonmembers of the Church. *Id.* at ¶ 37.

6. In fall 2015, during a religious meeting he attended while serving as a bishop of The Church of Jesus Christ of Latter-day Saints (the "Church"), Bennion allegedly admonished fellow members of the Church in the area to pay their bills due to Simplifi. *Id.* at ¶ 39.

7. Penske is not a member of the Church and therefore was not told anything by Bennion. *Id.* at 1 (contending that this action centers on improper billing to nonmembers of the Church).[2]

8. The complaint fails to assert any conspiracy or joint action between Bennion and an of the other defendants.

9. Penske purported to assign ownership of the Section 1983 and 1985 claims at issue in this action to Tracy, who resides in Sandy, Utah. *Id.* at 2.

ARGUMENT

I. TRACY LACKS STANDING TO ASSERT CIVIL RIGHTS CLAIMS, WHICH CANNOT BE ASSIGNED AS A MATTER OF LAW.

The complaint should be dismissed because Tracy has no standing to assert civil rights claims he admittedly acquired by assignment from Penske.[3] Section 1983 and 1985 claims cannot be assigned under Utah law. *See American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, No. 2:08-cv-875-RJS, 2016 WL 4775527, at *6 (D. Utah Sept. 13, 2016) (unpublished) ("Section 1983 claims are not assignable in Utah."). The purpose of civil rights claims is to ensure that individuals whose rights are abridged may recover damages or secure injunctive relief. *Id.* Those goals are not met when claims are assigned to disinterested third parties. *Id.* The law requires plaintiffs to have "a personal stake in the outcome of the controversy" to have standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

[2] Tellingly, the complaint contains no allegation that Penske ever attended any Church meeting, that she ever heard Bennion say anything, or that she has ever met or known Bennion.
[3] Bennion incorporates herein the arguments made by the Simplifi defendants in Point I of their motion to dismiss (Dkt. 6).

Tracy has no personal stake in this case. The allegations center on Simplifi's billing and enforcement actions against Emigration Canyon resident Penske—not Tracy. Statement of Facts ("SOF") 3–4. Tracy resides in Sandy and fails to allege any tie to the underlying facts of this case. SOF 9. Tracy acquired Penske's civil rights claims by assignment. *Id.* Because Penske could not assign her civil rights claims to Tracy, Tracy has no standing and this Court should dismiss the case pursuant to Rule 12(b)(1).

II. TRACY'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS BECAUSE BENNION'S ALLEGED CONDUCT OCCURRED IN 2015.

Even if the assignment were valid to give Tracy standing, the statute of limitations applicable to civil rights claims bars Tracy's claims. Federal courts apply the forum state's statute of limitations to Section 1983 and 1985 claims. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (applying statute for personal injury action). As Judge Shelby addressed in detail in *Jenkins v. Utah County Jail*, federal courts in this district traditionally apply a four-year statute of limitations based on Utah's "catch-all" statute of limitations of four years in Utah Code § 78B-2-307(3). *See* No. 2:11-cv-761-RJS, 2015 WL 164194, at *19 & n.108 (unpublished) (citing cases).[4]

Tracy filed his complaint on July 22, 2021. As a result, the four-year statute of limitations bars claims for any conduct that occurred before July 22, 2017. Yet, the only act of Bennion alleged in the complaint is his alleged statement to Church members in fall 2015 to pay their water bills. SOF 6. Even if such a statement were actionable (which is not the case, as

[4] Utah Code § 78B-2-304 provides a two-year limitations period for suits against a political subdivision of the state and its employees for injury to the personal rights of another. Regardless whether it is a two-year limit or a four-year limit, plaintiff's 2021 claim for Bennion's alleged actions in 2015 is untimely.

detailed below), and even if it were in fact made, any claim based on the statement is outside of the statute of limitations. In these circumstances, Tracy's claims against Bennion are untimely and should be dismissed.

III. TRACY HAS FAILED TO ALLEGE FACTS TO SUPPORT A PLAUSIBLE CLAIM AGAINST BENNION.

The complaint is devoid of facts supporting a plausible claim.[5] Dismissal is appropriate when a complaint does not contain sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (internal quotation marks omitted)). Under this standard, courts employ a two-part analysis in handling a Rule 12(b)(6) motion: (1) accepting as true all facts alleged in the complaint, but not conclusory allegations; and (2) determining whether the factual allegations in the complaint plausibly suggest an entitlement to relief. In accepting as true the facts alleged, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678. Likewise, allegations that are mere "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" do not suffice. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555); *see also Howard v. Halliday*, No. 2:12-CV-00445, 2012 WL 7070659-DBP, at *2 (D. Utah Nov. 9, 2012) (unpublished) (dismissing complaint that lacked sufficient factual allegations).

To be plausible, the factual allegations must be able to raise a right to relief above the "speculative level." *Hall*, 584 F.3d at 863 (upholding dismissal of *pro se* plaintiff's Section 1983 and Section 1985 claims under Rule 12(b)(6)). A pleading that offers only "labels and

[5] Bennion incorporates herein the arguments made by the Simplifi defendants in Point II of their motion to dismiss (Dkt. 6).

conclusions" or mere "naked assertion[s]" without "further factual enhancement" cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 678. As detailed below, Tracy's complaint fails to meet these standards in alleging against Bennion.

A. Tracy Failed to State a Plausible Factual Basis for Concluding That Bennion Acted "under Color of Law."

Based on the allegations of the complaint, there is no plausible basis to conclude that Bennion was a state actor or in conspiracy with a state actor. To state a claim under Section 1983, a plaintiff must establish that he was deprived of a protected right and that the alleged deprivation was committed "under color of law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). To hold a private actor liable, a plaintiff must generally show that the conduct was fairly attributable to the state, which is accomplished through one of various tests. *See Barnett v. Hall*, 956 F.3d 1228, 1235 (10th Cir. 2020) (describing various tests to find attributable conduct); *Wittner v. Banner Health*, 720 F.3d 770, 776-77 (10th Cir. 2013) (applying tests). Under the joint action test, a private party must be jointly engaged with state officials in the conduct allegedly violating the federal right before he may be classified as a state actor under color of law. *Barnett*, 956 F.3d at 1235 (concluding no joint action). When a plaintiff seeks to prove state action based on a conspiracy theory, the plaintiff must show "that both public and private actors share a common, unconstitutional goal." *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1126 (10th Cir. 2000). Conclusory allegations of a tie are not enough. "Rather, the plaintiff must specifically plead facts tending to show agreement and concerted action. *Beedle v. Wilson*, 422 F.3d 1059, 1073 (10th Cir. 2005) (finding no color of law for law firm because there were no allegations firm had a direct interest in lawsuit or was acting in any capacity other than counsel).

Here, Tracy has failed to allege any facts to establish that Bennion acted under color of state law. Tracy's conspiracy claim is conclusory, utterly devoid of allegations of specific facts linking Bennion to acts or conduct of Simplifi. SOF 8. At most, Tracy alleges that Bennion made a comment at church about the duty of Church members to pay their water bills. SOF 6. That, without more, does not constitute state action, nor does it support any plausible agreement or concert with any state actor. There are no facts to support an unconstitutional goal for Bennion. There are no factual allegations to support a plausible claim that Bennion acted in concert with the water district to deprive Penske—much less Tracy—of any rights. As a result, dismissal of the claims against Bennion is warranted.

B. Tracy's Claims Against Bennion Are Illogical and Conclusory.

Without factual support, Tracy appears to complain that Simplifi violated civil rights by only certifying delinquent water accounts for nonmembers of the Church. SOF 5. But there are no factual allegations that Bennion had any involvement with certifying delinquent water accounts. SOF 8. As alleged, Bennion's only tie to this case is an alleged instruction to church members to pay water bills. SOF 6. As to Bennion, the complaint is no better than the deficient pleading described in *Iqbal* that "tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678.

Nor is there a plausible basis to conclude that Bennion had anything to do with tax notices or foreclosure sales. Under Utah Code § 17B-1-902, only a local tax district may certify past due amounts. Bennion is not a local tax district. There are no factual allegations describing contact between him and the local district or any management role he occupied for the local district. Likewise, under Section 17B-1-902(3), it is a county treasurer that provides notices to

delinquent property owners. The county treasurer is the one charged with compiling records of delinquent amounts owed (Utah Code § 59-2-1339), preparing for tax sales (Utah Code §59-2-1343), and issuing certificates of redemption (Utah Code § 59-2-1348). Bennion is not a county treasurer. There are no facts describing contact between him and the Salt Lake County treasurer. There are simply no well-pled facts to raise Tracy's right to relief against Bennion above the "speculative level," as required by federal caselaw.

Tracy's claim is also illogical. Tracy alleges that Bennion instructed fellow Church members to pay fees and costs. SOF 6. That does not infringe on civil rights. If heeded, such advice would only lead to church members paying their water bills—which would avoid delinquencies and increase revenue for the water district from Church members. Such a benign statement cannot support a civil rights violation. It is also irrational to conclude that Bennion would admonish Church members to pay fees, and at the same time actively conspire with defendants to devise a scheme that would allow Church members to not pay those same fees. Regardless, the allegations of the complaint do not even set forth the facts to detail such a scenario, even if it were plausible. Tracy's complaint against Bennion does not meet the plausibility standard and should therefore be dismissed.

IV. THE COURT SHOULD AWARD ATTORNEY FEES TO BENNION.

On the same grounds detailed in Point III of the Simplifi defendants' motion to dismiss (Dkt. 6), incorporated herein, Bennion should be awarded the attorney fees he has incurred in connection with this action. As detailed above, Tracy lacks standing to bring his claims against Bennion, his claims against Bennion are barred by the statute of limitations, and he has failed to make any plausible claim against Bennion. As courts have concluded in other matters, Tracy's

conduct in bringing this action is vexatious. In these circumstances, the Court is well within its discretion under 42 U.S.C. § 1988 to award attorney fees to Bennion as the prevailing party. *See also Garmet Co. v. EEOC*, 434 U.S. 412, 421–22 (1978) (prevailing defendant may be awarded attorney fees and costs when "in the exercise of its discretion [the trial court] has found that the plaintiff's actions were frivolous, unreasonable, or without foundation" or if the plaintiff "continued to litigate after it clearly became so").

CONCLUSION

Based on the foregoing, the Court should dismiss the complaint against Bennion, grant to Bennion his reasonable attorney fees and costs, and provide such other relief as the Court deems appropriate.

DATED this 22nd day of September, 2021.

MARSHALL OLSON & HULL, P.C.

BY: /s/ Erik A. Olson
ERIK A. OLSON

ATTORNEYS FOR DEFENDANT
DAVID M. BENNION

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of September, 2021, I caused the foregoing **DEFENDANT DAVID M. BENNION'S MOTION TO DISMISS** to be filed through the Court's CM/ECF electronic filing system, which transmitted notice of such filing to all counsel of record.

/s/ Erik A. Olson