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United States District Court, D. Arizona.

Rhonda COX, Plaintiff,
v.
Lando VOYLES, et al., Defendants.

No. CV-15-01386-PHX-DJH
|
Signed 08/18/2017

**Attorneys and Law Firms**

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**ORDER**

Honorable Diane J. Humetewa, United States District Judge

***1** Pending before the Court are three motions to dismiss: Defendants Voyles, Babeu[1], Cameron, and Hunt's Motion to Dismiss (Doc. 24), Defendant Amanda Stanford's Motion to Dismiss (Doc. 27), and Intervenor-Defendant State of Arizona's Motion to Dismiss Under Rule 12(b), Fed. R. Civ. P. (Doc. 32)[2]. For the following reasons, the Court grants the motions in part and denies the motions in part.

## I. BACKGROUND

Arizona law enforcement agencies directly benefit economically from property seized pursuant to Arizona's forfeiture statutes. Specifically, ARS § 13-4315(A) and (B)(2) provide that "[a]ny property, including all interests in property, forfeited to the state under this title shall be transferred as requested by the attorney for the state to the seizing agency or to the agency or political subdivision employing the attorney for the state ..." and "[i]f the property declared forfeited is an interest in a vehicle, the court shall order it forfeited to the local, state, or other law enforcement agency seizing the vehicle for forfeiture or to the seizing agency." In other words, all the proceeds from Arizona state forfeitures go to the law enforcement agencies involved in seizing and prosecuting the case. These agencies, as a result, are able to supplement their budgets through the seizure and forfeiture of property.

Many state agency departments are entirely funded through forfeiture money. For instance, the Arizona Department of Public Safety's bomb squad, S.W.A.T. team, and hazardous materials unit rely entirely on forfeiture money. Other agencies use their forfeiture money to pay overtime, retirement contributions of employees, and department vehicles to name a few. Department heads also use the money to fund "pet projects" including the Pinal County Sheriff's Office Justice Foundation, Inc. (Doc. 1 at 18 ¶ 112).

It is under this unique statutory scheme that this case arises.

Plaintiff Rhonda Cox owned a truck, which she occasionally let her son borrow. On August 1, 2013, Plaintiff's son drove the truck to a parking lot, where he was "contacted" by deputies of the Pinal County Sheriff's Department. (Doc. 1 at 8 ¶ 47). The deputies were investigating the earlier theft of a truck hood and cover. They eventually concluded that the cover and hood attached to Plaintiff's truck had been stolen. They arrested Plaintiff's son and began forfeiture proceedings for the truck.

***2** The first step in Arizona's forfeiture proceeding is issuing a "Notice of Property Seizure & Pending Uncontested Forfeiture" ("NOPS") for the property at issue. The issuance of the NOPS is statutorily required to bring the case against the property. In this instance, defendant Samuel Hunt, a deputy of the Pinal County Sheriff's Office, in consultation with defendant Craig Cameron, Deputy Pinal County Attorney, issued a NOPS for the truck. The NOPS contained numerous errors including identifying the wrong seizing agency, alleging the forfeiture was authorized under statutes that pertain to racketeering and narcotics, stating that the forfeiture was particularly authorized by the burglary in the third degree statute, which does not allow for forfeiture, and finally the NOPS contained a blank affidavit of service on which the name of the person allegedly served was blank.

On August 28, 2013, defendant Lando Voyles, Pinal County Attorney, through defendant Cameron, sent Plaintiff a “Notice of Pending Uncontested Forfeiture” (“NOPUF”) by mail letting her know, as the interest holder of the property, that her truck had been seized. The Notice of Pending Uncontested Forfeiture contained similar errors as the NOPS.

Under the forfeiture statutes, after an owner is notified of the seizure, the owner has two options: she can either file a claim with the Arizona Superior Court within thirty days after the notice or she can file a Petition for Remission or Mitigation of Forfeiture (“Petition”) with the attorney for the state. *See* ARS § 13-4309. Plaintiff elected to file a Petition with defendant Voyles, which required her to detail the reasons her property should not be forfeited. She noted in her petition that she was an innocent owner of the truck and did not know about any illegal acts involving the truck. Defendant Voyles was then required to inquire into whether the property was subject to forfeiture and the facts and circumstances surrounding her Petition. He determined that the truck was subject to forfeiture because the truck was purchased for “family use.” (Doc. 1 at 11 ¶ 68).

Plaintiff alleges that defendant Voyles was biased in his determination of her Petition because he stood to directly benefit from any assets forfeited. In fact, Plaintiff alleges that defendant Volyes’s personal home security system was paid for by forfeiture money. He also paid the personnel costs of his employees in his Office with forfeiture money. And finally, he used forfeiture funds to donate to causes he supports such as the Pinal County Sheriff’s Office Justice Foundation, Inc. Plaintiff alleges that the direct monetary benefit from forfeiture money “incentivize[s]” law enforcement to deny all Petitions. (Doc. 1 at 15 ¶ 94).

***3** Once the attorney for the state denies a Petition, the attorney must then seek forfeiture in Arizona Superior Court. Upon defendant Voyles’s denial of Plaintiff’s petition, defendant Cameron filed a Complaint in Arizona Superior Court seeking forfeiture of her truck. Plaintiff filed an Answer, again challenging the State’s claims for forfeiture. In order to file her Answer, she was required to pay a $ 304 filing fee to the Pinal County Clerk of Court.[3] After the initiation of the case, Plaintiff and defendant Cameron participated in limited discovery. After defendant Cameron served Plaintiff with Requests for Admission, however, Plaintiff wrote defendant Cameron notifying him that she was unable to proceed as she had no chance to prevail over someone like defendant Cameron “who [did] this every day.” (Doc. 1 at 12 ¶ 77). He responded stating that she should consider filing a motion to withdrawal so that she would not have to pay attorneys’ fees under the now amended ARS § 13-4314(G).[4] Fearing further financial hardship, Plaintiff filed a “Motion to Withdrawal Claim” in order to avoid having to pay attorneys’ fees in the event she lost.

After Plaintiff’s withdrawal, the State applied for and received an order forfeiting the truck to the State. The truck and its contents were forfeited and awarded to the Pinal County Sheriff’s Department. This lawsuit was filed shortly thereafter.

Plaintiff asserts a series of claims against defendants Voyles, Babeu, Stanford, Cameron and Hunt under 42 U.S.C. § 1983. (Doc. 1 at 21-28). The claims focus on Defendants’ involvement with the initial seizure, notice of seizure, the uncontested forfeiture proceedings, and the Arizona Superior Court forfeiture proceedings. Defendants argue that the Court does not have subject matter jurisdiction to hear Plaintiff’s claims and her claims are barred by res judicata. Defendants Cameron and Stanford argue they are entitled to absolute immunity, and defendant Hunt argues he is entitled to qualified immunity. Finally, all Defendants argue that Plaintiff fails to state a claim upon which relief may be granted.

## II. DISCUSSION

### *A. Rule 12 Dismissal Motions*

Defendants are moving for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction arguing that Plaintiff has no standing to bring this action and that the action is barred by the *Rooker-Feldman* doctrine. (Docs. 24, 27, 32). Defendants are also urging dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Id.* But, because federal courts must have jurisdiction to hear any challenges on the merits, the Court will first address the subject matter jurisdiction arguments.

#### *i. Subject Matter Jurisdiction*

“Presumptively, federal courts are without jurisdiction over civil actions [.]” *Harrison v. Howmedica Osteonics*

*Corp.*, 2008 WL 615886, at *1 (D. Ariz. Mar. 3, 2008) (citing *Kokken v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1989)). Additionally, it is well-settled that "[t]he burden of establishing subject matter jurisdiction rests on the party asserting that the court has jurisdiction." *In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir. 2013) (citing *McNurt v. GM Acceptance Corp.*, 298 U.S. 178, 182–83 (1936)). Therefore, where, as here, Defendants are challenging subject matter jurisdiction, the burden is on Plaintiff to prove the existence of such jurisdiction. *See Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013) (internal quotations and citation omitted) ("Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence.")

### *a. Rooker-Feldman*

***4** Among these varied asserted bases for dismissal, the Court will first consider whether Plaintiff's complaint is barred by the *Rooker-Feldman* doctrine. "The *Rooker–Feldman* doctrine instructs that federal district courts are without jurisdiction to hear direct appeals from the judgments of state courts." *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012). Federal district courts lack subject matter jurisdiction over such appeals because "Congress, in 28 U.S.C. § 1257, vests the United States Supreme Court, not the lower federal courts, with appellate jurisdiction over state court judgments." *Id.* (citing *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (per curiam)).

The *Rooker–Feldman* "doctrine forbids a losing party in state court from filing suit in federal district court complaining of an injury caused by a state court judgment, and seeking federal court review and rejection of that judgment." *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013) (citing *Skinner v. Switzer*, 562 U.S. 521, 531 (2011)). "To determine whether the *Rooker–Feldman* bar is applicable, a district court first must determine whether the action contains a forbidden de facto appeal of a state court decision." *Id.* (citation and footnote omitted). "A de facto appeal exists when 'a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision.' " *Id.* (quoting *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003)). If however, the plaintiff "asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker–Feldman* does not bar jurisdiction." *Noel*, 341 F.3d at 1164. If the cause of action does *"not* contain a forbidden de facto appeal, the *Rooker–Feldman* inquiry ends." *Bell*, 709 F.3d at 897.

"[R]ecognizing that the Supreme Court has been very sparing in its invocation of the [*Rooker–Feldman*] doctrine," the Ninth Circuit has been, as must this Court, "careful not to sweep too broadly[ ]" in applying that doctrine. *See Cooper*, 704 F.3d at 778 (citation omitted). As a result, that "doctrine does not preclude a plaintiff from bringing an 'independent claim' that, though similar or even identical to issues aired in state court, was not the subject of a previous judgment by the state court." *Id.* (quoting *Skinner*, 562 U.S. at 531).

Applying these principles to the facts of this case, it is clear that the *Rooker-Feldman* doctrine does not save the day for Defendants. The legal wrong asserted in Plaintiff's complaint is not that the state court erroneously determined her truck was subject to forfeiture, but rather, the continued enforcement of the forfeiture statutes Plaintiff alleges are unconstitutional. Moreover, Plaintiff's "as applied" claims assert "an allegedly illegal act" by an adverse party. Specifically, her complaint alleges that Defendants unlawfully seized Plaintiff's truck prior to even instituting a state court action. Thus, *Rooker-Feldman* does not apply.

Defendants' alternative argument, that the relief requested by Plaintiff acts as a de facto appeal, is similarly without merit. Defendants contend that Plaintiff is making a de facto appeal of her state court judgment by asking the court to disgorge the forfeiture sale proceeds and enjoin enforcement of the statutes. Defendants argue that by asking for such relief, Plaintiff is undercutting the state ruling. Yet, as the Ninth Circuit has expressed, in order for *Rooker-Feldman* to apply, "a plaintiff must seek not only to set aside a state court judgment; he or she must also allege a legal error by the state court as the basis for that relief." *Maldonado v. Harris*, 370 F.3d 945, 950 (9th Cir. 2004) (citing *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004)). As noted above, Plaintiff has not alleged a legal error in the prior state court proceeding. Because both elements are not met, Plaintiff's federal action is not a de facto appeal and the *Rooker-Feldman* doctrine does not apply.

***5** Finally, the Court does not have to reach the issue of whether Plaintiff's general constitutional challenges are "inextricably intertwined" with claims asserted in the state court action because Plaintiff's federal court action is not a de facto appeal. *See Maldonado*, 370 F.3d at 950.

### *b. Standing (Defendants Voyles, Babeu, Hunt and Cameron)*

"Article III of the United States Constitution 'requires a litigant to have standing to invoke the power of a federal court.' " *Williams v. Boeing Co.*, 517 F.3d 1120, 1126-27 (9th Cir. 2008) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)) (other quotation marks and citation omitted). "To have standing, a 'plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.* (quoting *Allen*, 468 U.S. at 751). Succinctly put, Article III standing comprises three elements: (1) injury in fact; (2) causation; and (3) redressability. *See Barnum Timber Co. v. U.S. Environmental Protection Agency*, 633 F.3d 894, 897 (9th Cir. 2011). The plaintiff bears the burden of establishing the existence of a justiciable case or controversy, and " 'must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

Defendants allege that Plaintiff is lacking standing due to the "injury in-fact" prong, thus the Court will primarily focus on that prong. To have standing, "the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "An injury sufficient to satisfy Article III must be 'concrete and particularized' and 'actual or imminent,' not 'conjectural' or 'hypothetical.' " *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560). A plaintiff seeking equitable relief must further demonstrate a likelihood of future injury. *See Hodgers–Durgin v. De La Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999). This requires a showing that plaintiff is " 'realistically threatened by a *repetition* of the violation.' " *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (quoting *Armstrong v. Davis*, 275 F.3d 849, 860–61 (9th Cir. 2001) (emphasis in original)).

Defendants allege that Plaintiff does not have standing to seek injunctive and equitable relief. Defendants contend that Plaintiff has not established that she is likely to suffer future injury from being involved in another civil *in rem* forfeiture proceeding. Relying almost exclusively on the Supreme Court decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), Defendants argue that Plaintiff has not demonstrated the likelihood that she will suffer future harm *again* because her argument that she might be subjected to Arizona's forfeiture laws in the future is too tenuous. Defendants argue that merely being subjected to a statute is not enough to show that she is likely to suffer the same harm again. However, that is inconsistent with Ninth Circuit precedent promulgated in the aftermath of *Lyons*.

After the *Lyons* decision, the Ninth Circuit "enumerated two ways in which a plaintiff can demonstrate that [the alleged threatened] injury is likely to recur." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (quoting *Armstrong*, 275 F.3d at 861). "First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy. Second, the plaintiff may demonstrate that the harm is part of a 'pattern of officially sanctioned ... behavior, violative of the plaintiffs' [federal] rights.' " *Id.*

***6** Here, Plaintiff asserts that her injury stems from the enforcement of ARS § 13-4301 to § 13-4315 by defendants Voyles, Babeu, Hunt and Cameron. Specifically, she states that because the forfeiture statutes act as a written policy, her property might be seized and subject to a forfeiture proceeding in the future anytime she loans her car to a friend or family member. These statutes were in effect at the time of Plaintiff's alleged injury and continue to be in effect. She also points to a practice of law enforcement defendants using the forfeiture laws to enrich themselves and their departments. Coupled together, Plaintiff has shown a likelihood that her alleged injury is likely to recur under the Ninth Circuit's test.[5] Accordingly, she has standing to assert her claims against defendants Voyles, Babeu, Hunt, and Cameron.

### *c. Standing (Defendant Stanford)*

Plaintiff separately alleges a First Amendment and Due Process challenge against the Clerk of the Superior Court, Defendant Stanford, for imposition of a filing fee in order to contest the seizure. On August 9, 2017, an amendment of Arizona's Forfeiture Statutes went into effect. One of the changes to the statute is dispensing with the filing fee requirement. *See* ARS § 13-4311 ("An owner or interest holder may not be charged a filing fee or any other charge for filing the claim"). In supplemental briefing, defendant Standford argued that "this statutory change erases any possibility of future harm." (Doc. 58 at 2). Thus, her alleged injury is unlikely to recur. Plaintiff agrees that this statutory change "will moot [her] claim for prospective injunctive relief." (Doc. 60 at 2). Accordingly, the claims against Defendant Stanford will be dismissed.

### *d. Claim Preclusion*

"To determine the preclusive effect of a state court judgment, federal courts look to state law." *Intri–Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (citation omitted). "Under Arizona law, a claim is barred by res judicata if a court previously issued a final judgment on the merits involving the same cause of action with the same parties." *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 716 P.2d 28, 30 (1986). Arizona is one of the few states that use the "same evidence" test for determining whether an earlier action is the same as the current action. *See Phoenix Newspapers, Inc. v. Dep't of Corrections, State of Ariz.*, 188 Ariz. 237, 934 P.2d 801, 804 (Ariz. Ct. App. 1997). Under this test, "[i]f no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred." *Id.; see also Rousselle v. Jewett*, 101 Ariz. 510, 421 P.2d 529, 531 (1966). Because the "same evidence" test is quite liberal, it allows a plaintiff to avoid preclusion "merely by posturing the same claim as a new legal theory," even if both theories rely on the same underlying occurrence. *Phoenix Newspapers, Inc.*, 934 P.2d at 805.

Applying the "same evidence" test to the case at issue, it is clear that res judicata does not bar Plaintiff's claims. Although the claim asserted in the state court action arises under the same underlying dispute and relies upon many of the same facts as Plaintiff's federal action, Plaintiff's claims in this case are legally and factually distinct. In the prior state court action, Plaintiff was required to prove a so-called "innocent owner defense." This required her to offer evidence establishing:

> ***7** (a) She acquired the interest before or during the conduct giving rise to forfeiture.
>
> (b) She did not empower any person whose act or omission gives rise to forfeiture with legal or equitable power to convey the interest, as to a bona fide purchaser for value, and she was not married to any such person or if married to such person, held the property as separate property.
>
> (c) She did not know and could not reasonably have known of the act or omission or that it was likely to occur.

A.R.S. § 13-4304(4).

Plaintiff confined her evidence to establish those elements. (*See* Doc. 1 Ex 1 at 4-5). In the current case, Plaintiff must offer evidence demonstrating that Defendants' acts *during* the initial seizure and forfeiture proceedings violated her First Amendment, Fourth Amendment, and Due Process rights under the U.S. Constitution. This requires her to prove much more than that she was an innocent owner.

Defendants argue that Plaintiff has not shown the additional evidence necessary to maintain this federal action. However, a reading of the Complaint reveals multiple pieces of evidence that were not necessary for her innocent owner defense. Specifically, Plaintiff's complaint contains considerable information on the financial motivation that "incentivize[s]" Defendants to zealously pursue forfeiture. (Doc. 1 at 15 ¶ 94). Additionally, Plaintiff provides evidence of a defective NOPS to prove her "as applied" Fourth Amendment challenges. This evidence supports new legal theories and therefore, fails the "same evidence" test. Because Plaintiff is not relying on the same legal theories or the same evidence, her claims are not barred by res judicata.

### *e. Absolute Immunity*

Section § 1983 provides that every "person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Although the statute does not expressly contain immunities for certain functions of public officials, courts have recognized that § 1983 does maintain common law "immunities 'well grounded in history and reason.' " *Id.* at 418 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). Most public officials are presumed to have qualified immunity, which protects them from liability for discretionary functions they perform with reasonable care. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Prosecutors, however, are absolutely immune from liability for conduct that is "intimately associated with the judicial phase of the criminal process" such as initiating a prosecution or presenting the state's case. *Burns v. Reed*, 500 U.S. 478, 486 (1991) (citing *Imbler*, 424 U.S. at 430).

Courts use a functional approach "which looks to 'the nature of the function performed, not the identity of the actor who performed it' " to determine whether a prosecutor is entitled to absolute or qualified immunity in a particular case. *Buckley*, 509 U.S. at 269 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Buckley*, 509 U.S. at 273. But "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id.*

***8** "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns*, 500 U.S. at 486. Absolute immunity, when applicable, may be invoked in actions filed under § 1983 and the common law. *Id.*, at 478.

The Ninth Circuit recently affirmed that absolute immunity applies to prosecutors in civil forfeiture actions. *Torres v. Goddard*, 793 F.3d 1046, 1052 (9th Cir. 2015). It reasoned that "[i]n rem proceedings seeking the forfeiture of property connected to criminal activity are functionally analogous to criminal proceedings." *Id.*

Defendant Cameron argues he is entitled to absolute immunity in Plaintiff's Fourth Amendment claim because all his actions undertaken during the forfeiture proceeding were done in his prosecutorial capacity. Plaintiff argues that his initial seizure of her truck without a warrant was the function of a police officer, and he is not entitled to absolute immunity for that action. Because the Court is required to evaluate immunity step-by-step, the Court will look at defendant Cameron's first act in the seizure and forfeiture of the truck.

Defendant Cameron was contacted from the scene of the seizure and approved the seizure, as noted by defendant Hunt signing the NOPS on his behalf. Under ARS § 13-4301 it is the role of a peace officer to actually seize the item. Plaintiff argues that because Defendant Cameron participated in the seizure, he was performing a function analogous to a police office and therefore does not have absolute immunity. Defendant Cameron points out that he was not actually seizing the truck, but merely signing the NOPS. The NOPS essentially states that it is probable that the property is subject to forfeiture and the statutory basis for forfeiture, which under ARS § 13-4308(A) is a function for the state's attorney. Further bolstering defendant Cameron's argument that he was acting in a prosecutorial capacity, Plaintiff's complaint states that the NOPS is "legally required to begin the case against the Truck and without which the State would have no case." (Doc. 1 at 8 ¶49). Because this document is a procedural step that begins the forfeiture proceedings, defendant Cameron's signature on the NOPS was done in his prosecutorial capacity, and he therefore has absolute immunity for this action.

Plaintiff does not argue that defendant Cameron is not absolutely immune from any act after the signing of the NOPS. Accordingly, defendant Cameron is absolutely immune and the claim against defendant Cameron is dismissed.

### *f. Qualified Immunity*

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Before a government official can be subject to liability for civil damages, both prongs of the qualified immunity analysis must be satisfied: (1) whether the official violated the plaintiff's constitutional rights, and if so, (2) whether the right violated was clearly established at the time of the official's conduct. *Pearson*, 555 U.S. at 232.

***9** Defendant Hunt argues that he is entitled to qualified immunity. Turning first to the constitutional violation prong, Plaintiff argues that the seizure of her truck without a warrant was *per se* unreasonable within the meaning of the Fourth Amendment unless defendant Hunt could establish an exception to the warrant requirement. For his part, defendant Hunt identified three such exceptions that authorized the warrantless seizure of Plaintiff's truck: the incident to arrest exception, the automobile exception, and the plain view exception. It is undisputed that the deputies had probable cause to arrest Plaintiff's son and to believe that the truck contained evidence of a crime, as the stolen cover and hood were attached to the truck. Thus, the Court is satisfied that any one of the three exceptions apply to the warrantless seizure of Plaintiff's truck.

Plaintiff also asserts that her truck was seized unlawfully. In the NOPS and the NOPUF, defendants Hunt and Cameron specifically identify that Plaintiff's truck was seized "particularly" under A.R.S. § 13-1506(A)(1). (Doc. 1 at Ex. 2). The provision pertains to burglary in the third degree and does not authorize forfeiture. Plaintiff alleges that because her truck was taken pursuant to a state statute that does not authorize forfeiture, it was taken unlawfully. Defendant Hunt points out that even if this were true, it does not amount to a Fourth Amendment violation. *See Kraushaar v. Flanigan*, 45 F.3d 1040, 1048 (7th Cir. 1995) ("a violation of a state statute is not a per se violation of the federal Constitution.") Indeed, the Court previously found the truck was properly seized pursuant to any one of the three enumerated warrant requirement exceptions. Thus, the truck was seized pursuant to a lawful basis, and defendant Hunt is entitled to qualified immunity.

### *ii. Failure to State a Claim*

Finally, the Court turns to the merits. Defendants allege that Plaintiffs' claims one two, and five do not state a cognizable due process claim.[6] Plaintiff disagrees. A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199–1200 (9th Cir. 2003). A complaint must contain a "short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8, however, requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

A complaint need not contain detailed factual allegations to avoid a Rule 12(b)(6) dismissal; it simply must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A complaint has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 556).

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that defendant has acted unlawfully." *Iqbal*, 556 U.S. at 677 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (citation omitted). In addition, the Court must interpret the facts alleged in the complaint in the light most favorable to the plaintiff, while also accepting all well-pleaded factual allegations as true. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). That rule does not apply, however, to legal conclusions. *Iqbal*, 556 U.S. at 677. A complaint that provides "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor will a complaint suffice if it presents nothing more than "naked assertions" without "further factual enhancement." *Id.* at 557.

#### *a. Count One*

***10** Plaintiff's count one alleges that she was denied her due process procedural rights because A.R.S. § 13-4315[7] financially "incentivize[s]" defendants Voyles and Babeu to seize and forfeit as much property as they can from whomever they can. (Doc. 1 at 15 ¶ 94). Count one does not address any failings in the uncontested forfeiture proceedings or the judicial forfeiture proceedings. Defendants argue even if they have a financial interest in the outcome of forfeiture proceedings, Plaintiff's due process rights are not violated because a disinterested court adjudicates *in rem* forfeiture proceedings, therefore negating any potential bias. Plaintiff contends that even in forfeiture proceedings that are decided by the Arizona Superior Court, her due process rights are violated by the impermissible risk of bias in the statute's enforcement and administration.

Plaintiff primarily relies on the Supreme Court's decision in *Marshall v. Jerrico*, Inc., 446 U.S. 238 (1980), to argue that financial incentives that effect the enforcement of a statute violate due process even if the violation is ultimately decided by a neutral adjudicator. In *Marshall*, the Supreme Court found that regional Department of Labor administrators serving in a prosecutorial function did not have a sufficient financial interest in enforcement of child labor laws to violate due process because no government official stood to profit economically from vigorous enforcement of the Act, the penalties collected constituted only 1% of the agencies annual budget, and the agencies national office determined the amount of funds to be distributed to regional agencies. Plaintiff argues that these same factors are not present in the enforcement of Arizona's forfeiture statutes.

Plaintiff's complaint contains allegations that law enforcement agencies rely on forfeiture money for a variety of expenses, including funding entire departments. Thus, Defendants are "incentivized" to rigorously enforce forfeiture laws. (Doc. 1 at 15 ¶ 94). Bolstering this argument, Plaintiff's complaint contains an excerpt from a forfeiture training stating "when your bosses can't find any money in their budget they get depressed. When they get depressed they tell you to start doing forfeiture cases ... When you feel like a winner you go back to your jurisdiction and just start seizing everything in sight." (Doc. 1 at Ex. 11 pg. 47). Finally, unlike the regional agencies in *Marshall*, individual law enforcement agencies get to keep all proceeds from their forfeiture enforcement efforts.

While the *Marshall* court did not "say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function" it implied that there is a limit. *Marshall*, 446 U.S. at 250. At this stage in the proceedings, the Court finds that Plaintiff's complaint sets out a plausible claim for violation of her due process rights in the enforcement of the Arizona forfeiture statutes because Defendants have a financial incentive to zealously enforce the forfeiture laws.

#### *b. Count Two*

Count two alleges that Plaintiff was denied procedural due process in the uncontested forfeiture proceeding. She contends that defendant Voyles acts as "the prosecutor, the adjudicator, and the profiteer" in uncontested forfeiture proceedings, which violates Plaintiff's right to a fair hearing. (Doc. 34 at 25). Defendant Voyles asserts that Plaintiff's financial motivation theory underlying Claim two fails because every Arizona *in rem* forfeiture proceeding receives judicial review and adjudication. (Doc. 32 at 11).

***11** Courts have recognized two types of financial bias as violations of procedural due process: (1) Where decision-makers gain personal financial benefits from their decision (*Tumey v. Ohio*, 273 U.S. 510 (1927)); and (2) where decision-makers have an institutional financial interest that may lead them to make biased decisions (*Ward v. Village of Monroeville*, 409 U.S. 57 (1972)).

Plaintiff alleges that both types of bias occur under the Arizona forfeiture statutes. Under the *Tumey* prong, Plaintiff has asserted facts that show agencies heads are able to use forfeiture money for personal use. For instance, Plaintiff's complaint states that defendant Voyles received a direct pecuniary gain from the forfeiture of property as evidenced by his home security system, which was paid for with forfeiture proceeds. (Doc. 1 at 19 ¶115).

Under the *Ward* prong, Plaintiff has alleged numerous ways defendant Voyles has potentially had an institutional financial interest in the outcome of the forfeiture proceedings.[8] Of note are Plaintiff's allegations that the "Arizona Department of Public Safety relies entirely on forfeiture monies to fund its bomb squad, S.W.A.T. team, and hazardous materials unit." (Doc. 1 at 17 ¶104). Plaintiff also alleges that law enforcement agencies "are dependent on forfeiture moneis for their continuing operations, paying for everything from traditional law enforcement equipment to office supplies, furniture, office refreshments, and even toilets." (Doc. 1 at 16 ¶101). Finally, Plaintiff contends that defendant Voyles pays personnel costs of employees and retirement contributions of employees in his Office with forfeiture monies. (Doc. 1 at 19 ¶116-17).

Taken as true, these allegations allow the Court to make a reasonable inference that defendant Voyles could be biased in adjudicating uncontested forfeitures and therefore violate Plaintiff's procedural due process rights.

#### *c. Count Five*

Plaintiff's claim five alleges a due process violation based on the "cumulative combination of failures" of defendants Voyles, Babeu, and Stanford. (Doc. 1 at 25-26). She specifically alleges that defendants Voyles's and Babeu's financial incentive to aggressively pursue seizures and forfeitures coupled with a filing fee and threat of attorneys' fees to contest the forfeiture violate Plaintiff's procedural due process rights. As noted above, however, Arizona revised its forfeiture statutes and now does not require a filing fee to contest forfeiture and a petitioner does not have to pay the State's attorneys' fees even if he or she loses.

In supplemental briefing, Defendants argue that because two out of the three bases for this claim are moot, Plaintiff's cumulative effects claim fails. Because the only element of the "cumulative combination of failures" claim that still remains has already been plead in claims one and two, the Court dismisses claim five.

### *B. Amendment*

***12** When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246–47 (9th Cir. 1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus.*, Inc., 912 F.2d 291, 296 (9th Cir. 1990). Here, Counts Three, Four, and Five cannot be saved by amendment because they rely on statutes that have been amended rendering the claims moot. Count Six cannot be saved by amendment because defendants Cameron and Hunt are immune from suit. Plaintiff will therefore not be granted leave to amend Counts three through six.

**III. CONCLUSION**

For the reasons discussed herein, **IT IS ORDERED** that the Court hereby

(1) **GRANTS** Defendants Voyles, Babeu, Cameron, and Hunt's Motion to Dismiss (Doc. 24) in part and **DENIES** Defendants Voyles, Babeu, Cameron, and Hunt's Motion to Dismiss in part.

(2) **GRANTS** Defendant Amanda Stanford's Motion to Dismiss (Doc. 27).

(3) **GRANTS** Intervenor Defendant's Motion to Dismiss (Doc. 32) in part and **DENIES** Intervenor Defendant's Motion to Dismiss in part.

**All Citations**

Not Reported in Fed. Supp., 2017 WL 11205981

## Footnotes

1 Defendants Voyles and Babeu were elected officials who were named in this action only in their official capacities – capacities in which they no longer serve. Mark Lamb has been substituted for defendant Paul Babeu and Kent Volkmer has been substituted for defendant Voyles. (Doc. 64). For ease of reference, this Order will continue to reference defendants Voyles and Babeu as they were named in the complaint and the motions to dismiss.

2 Plaintiff has requested oral argument. The Court denies the request because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed.R.Civ.P. 78(b) (court may decide motions without oral hearings); LRCiv 7.2(f) (same).

3 On August 7, 2017, the Arizona forfeiture statutes were revised. Under these revisions, an owner or interest holder is not required to pay a filing fee to contest forfeiture. A.R.S. § 13-4311.

4 Under the revised statute "the court may award reasonable attorney fees, expenses and damages for the loss of the use of the property to any claimant who substantially prevails by an adjudication on the merits of the claim." A.R.S. § 13-4314. Plaintiff's claim three alleges that the one-way attorneys' fee statute "imposed an unconstitutional burden, disincentive, and tax upon [Plaintiff's] right to petition the State to redress her grievances and return her Truck." (Doc. 1 at 24¶ 154). Because that statute is no longer in effect, Plaintiff's claim three against defendant Cameron is moot. *See Smith v. Univ. of Washington,* 233 F.3d 1188, 1195 (9th Cir. 2000) ("if a challenged law is repealed or expires, the case becomes moot."). The other claims against defendant Voyles remain.

5 Defendants state a separate argument that Plaintiff does not have standing for Declaratory relief. However, the same legal standard applies to injunctive and declaratory forms of equitable relief. *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006). Thus, the declaratory standing arguments were not addressed as they were repetitive and subsumed in the injunctive relief arguments.

6 Defendants also state that claims three and four do not state cognizable due process claims, but because of the change in Arizona's forfeiture statutes, Plaintiff's claims three and four are moot, as already explained.

7 A.R.S. § 13-4315 states in pertinent part "Any property, including all interests in property, forfeited to the state under this title shall be transferred as requested by the attorney for the state to the seizing agency or to the agency or political subdivision employing the attorney for the state, which may do any of the following: Sell, lease, lend or transfer the property to any local or state government entity or agency or political subdivision, law enforcement agency or prosecutorial agency or any federal law enforcement agency which operates within this state for official federal, state or political subdivision use within this state, with expenses for keeping and transferring such property to be paid by the recipient."

8 Although sued only in his official capacity, Plaintiff alleged a number of allegations that specifically identified how defendant Voyles used the forfeiture proceeds. Defendant Voyles "used the profits of forfeitures to fund 'pet projects,' including many that provide favorable exposure to" him amongst his constituents. (Doc. 1 at 18 ¶112). Defendant Voyles issued a press release on September 4, 2013, touting the community groups to which his Office had given $ 188,000 in forfeiture monies. (Doc. 1 at 18 ¶113).

**End of Document**