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11 (erroneously sued herein as HAYES VALLEY LIMITED PARTNERSHIP)

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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

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20 SHARON BRIDGEWATER,) CASE NO. C 10-03022 CW
21 Plaintiff,)
22 v.) DEFENDANT HAYES VALLEY
23) APARTMENTS II, LP'S MEMORANDUM
24) OF POINTS AND AUTHORITIES IN
25) SUPPORT OF MOTION TO DISMISS
26 HAYES VALLEY LIMITED PARTNERSHIP;) PLAINTIFF'S FIRST AMENDED
27 SHAWN BANKSON, JANE CREASON AND) COMPLAINT PURSUANT TO FRCP
28 THE LAW FIRM OF KIMBALL, TIREY AND) 12(b)(1);12(b)(5); 12(b)(6); MOTION TO
10 ST. JOHN LLP, et al.) STRIKE PURSUANT TO FRCP 12(f)
11
12 Defendants.) Date: September 30, 2010
13) Time: 2:00 p.m.
14) Dept.: Courtroom 2, Oakland
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16 Action Filed: July 16, 2010
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1 I. INTRODUCTION

2 The present action is subject to a motion to dismiss and motion to strike pursuant to
3 Federal Rules of Civil Procedure 12(b)(1); 12(b)(5); 12(b)(6); and 12(f) for the following reasons:

4 ● This court does not have personal jurisdiction over HVALP because plaintiff's
5 service of process is improper. (Fed. R. Civ. P. 12(b)(5).) Plaintiff failed to properly serve
6 HVALP, which is a limited partnership.

7 ● Plaintiff's claims under 42 U.S.C. §1985(3) are time-barred. State personal injury
8 statute governs sections 1981 and 1985. (*McDougal v. County of Imperial*, 942 F.2d 668, 672-674
9 (9th Cir. 1991).) Thus, plaintiff's claim under section 1985 is barred by the two years statute of
10 limitations. (Cal. Code Civ. P. §335.1.)

11 ● This court does not have subject matter jurisdiction. (Fed. R. Civ. P. 12(b)(1).)
12 Plaintiff's single federal claim against defendant Hayes Valley Apartments II, LP ("HVALP")
13 pursuant to 42 U.S.C. §1331 is insubstantial and frivolous, and only alleged to improperly obtain
14 federal jurisdiction.

15 ● This court does not have supplemental jurisdiction over plaintiff's nine other
16 causes of actions against "HVALP" because they are all state claims. (28 U.S.C. §1337 (2010).)
17 Additionally, this court does not have jurisdiction to review a state court decision which arises out
18 of an unlawful detainer action. (*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462,
19 483 (1983); *Olson Farms, Inc. v. Barbosa* 134 F.3d 933 (9th Cir. 1998).)

20 ● Plaintiff's first amended complaint fails to state a claim upon which relief can be
21 granted because the state claims are time-barred. (Fed. R. Civ. P. 12(b)(6).) Plaintiff's (1) first
22 cause of action for Breach of Lease Agreement Contract; (2) second cause of action for Malicious
23 Prosecution; (3) third cause of action for Conspiracy to Wrongfully Evict; (4) fourth cause of
24 action for Wrongful Eviction; (5) fifth cause of action for Conspiracy to Maliciously Prosecute; (8)
25 eighth cause of action for Retaliatory Eviction; (9) ninth cause of action for Retaliatory Eviction,
26 all arise out of an unlawful detainer action which has been dismissed by the state court. Plaintiff's
27 claims should have been raised as defenses in the state court action, and her failure to do so bars
28 her from pursuing these claims in the present action. (*Johnson v. DeGrandy* 512 U.S. 997, 1005-

1 1006 (1994).) Plaintiff's (6) sixth of action for Conspiracy to Defraud the Court and (7) seventh
2 cause of action for Fraud on the Court fail because they are not pled with the requisite specificity
3 and fails to state a cause of action. Lastly, plaintiff's (10) tenth cause of action for negligent
4 infliction of emotional distress is also barred by the California two year statute of limitations for
5 personal injury. (Cal. Code Civ. P. §335.1.)

6 • Plaintiff's prayer for punitive damages should be stricken. (Fed. R. Civ. P. 12(f).)

7 The FAC is devoid of any specific factual allegations to support a claim that HVALP acted with
8 malice, fraud, and/or oppression. (Cal. Code Civ. P. §3294.)

9 • Plaintiff's prayer for attorney's fees should be stricken. (Fed. R. Civ. P. 12(f).)

10 There is no statutory or contractual basis for attorney's fees in plaintiff's FAC. (Cal. Code Civ. P. §
11 1021 and §1717(a).)

12 II. PROCEDURAL HISTORY

13 Pro se plaintiff is no stranger to this court. Over the past year, plaintiff has filed a total of
14 seven cases in the Northern District of California, including the instant action, and two lawsuits in
15 San Francisco County Superior Court based on personal injury and contract claims, all arising out
16 of a dismissed unlawful detainer action.^{1/} All (but two)^{2/} of plaintiff's prior complaints filed in the
17 Northern District Court have been dismissed by the court *sua sponte*, for lack of subject matter
18 jurisdiction and failure to state an action for which relief can be granted. (Request for Judicial
19 Notice "RFJN" Exhibits A, B, C, and D.) Although plaintiff's claims in each complaint were
20 characterized differently, they all arise out of an unlawful detainer action filed on behalf of
21 HVALP on April 24, 2006, which was subsequently dismissed by a stipulation and judgment

22
23 ^{1/} Following numerous unmeritorious motions and attempts to re-litigate the same issues
24 already decided by the San Francisco Superior Court in case No. CGC-08-478207, HVLAP filed a
25 motion to declare plaintiff a vexatious litigant. Judge Busch denied the motion without prejudice,
26 and ordered that the court, *sua sponte*, or upon noticed motion may declare plaintiff a vexatious
litigant should plaintiff attempt to relitigate the same issues already decided in the actions filed in
San Francisco Superior Court. (RFJN Exhibit E.) Following this order, plaintiff proceeded with
her litany of filings in the Northern District Court.

27 ^{2/} The two current open cases in Northern District are case Nos. 10-0703 and 10-0704 filed
28 on February 18, 2010. This court denied plaintiff's application for *in forma pauperis* and ordered
plaintiff to pay the requisite filing fees in order to continue the case. Plaintiff did not do this but
instead filed a new complaint. (RFJN Exhibit D.)

1 entered on February 19, 2008. (*Hayes Valley Limited Partnership v. Bridgewater*; San Francisco
2 Superior Court Case No. CUD-06-617995.) (Plaintiff's FAC Exhibit 11.) In fact, plaintiff's First
3 Amended Complaint ("FAC") was filed on August 6, 2010, one day after HVALP filed its motion
4 to dismiss and motion to strike. Plaintiff's FAC alleges the same eleven causes of actions against
5 HVALP and KTS as in her original complaint. Plaintiff's FAC simply contains additional
6 irrelevant factual allegations and additional exhibits, including her medical reports.

7 Unsurprisingly, this is plaintiff's pattern of conduct in the course of this litigation - file a
8 complaint, file an amended complaint, and/or file numerous frivolous *ex parte* motions. (Request
9 for Judicial Notice Exhibit D and Exhibit B to Plaintiff's FAC, containing the Register of Actions
10 for cases filed in the Northern District.)

11 On December 17, 2008, plaintiff filed a complaint in the Northern District Court (Case No.
12 08-05622) alleging seven causes of actions against HVALP and its defense attorneys. On
13 December 24, 2008, plaintiff amended her complaint alleging five causes of actions against
14 HVALP and its defense attorneys. On January 26, 2009, this court dismissed plaintiff's complaint
15 for plaintiff's failure to establish subject matter jurisdiction and denied her application to file *in*
16 *forma pauperis*. (RFJN Exhibit A, a copy of the order executed by Judge Marilyn Hall Patel on
17 January 26, 2009.)

18 On August 3, 2009, plaintiff filed a complaint in the Northern District Court (Case No. 09-
19 03551) alleging 22 causes of actions against HVALP and other corporate defendants. Plaintiff
20 filed a similar complaint (Case No. 09-03639) on August 7, 2009 against the attorneys and the law
21 firm who handled the unlawful detainer action on behalf of HVALP. On November 20, 2009, this
22 court dismissed both complaints on the grounds that it lacked federal jurisdiction and that the
23 claims were time-barred. (RFJN Exhibit B, a copy of the order executed by Judge Phyllis J.
24 Hamilton on November 20, 2009.)

25 On December 1, 2009, plaintiff filed a complaint in the Northern District Court (Case No.
26 09-05663) alleging 8 causes of action against HVALP and other corporate defendants. Plaintiff
27 then filed an amended complaint on December 14, 2009 alleging 12 causes of action against the
28 same defendants. This court dismissed plaintiff's federal claims with prejudice, declined to

1 exercise jurisdiction over the state law claims, and denied plaintiff's *in forma pauperis* status.

2 (RFJN Exhibit C, a copy of the order executed by Saundra Armstrong on January 18, 2010.)

3 On February 18, 2010, plaintiff filed a complaint in the Northern District Court (Case No.
4 10-0703) alleging 13 causes of action against HVALP and other corporate defendants. Plaintiff
5 also filed a similar complaint against the attorneys and the law firm who handled the unlawful
6 detainer action. This court denied plaintiff's *forma pauperis* status with prejudice and ordered
7 plaintiff to pay the requisite filing fees. (RFJN Exhibit D, a copy of the order executed by Saundra
8 Armstrong on June 2, 2010.) Rather than pay the requisite filing fees to continue the case before
9 Judge Armstrong, plaintiff filed the present action (presumably in an attempt to avoid having her
10 case before the same judge that previously dismissed her claims).

11 III. FACTUAL BACKGROUND

12 This action arises out of the allegation that plaintiff was unlawfully evicted from her
13 former housing at 427 Page Street in San Francisco ("Premises"). Plaintiff and HVALP entered
14 into a lease agreement for the Premises on January 3, 2005. Plaintiff failed to pay rent from
15 September 2005 to May 2006. As a result, HVALP served plaintiff with a 5 Day Notice to Pay
16 Rent or Quit. When plaintiff did not respond to the Notice, HVALP brought an unlawful detainer
17 action against plaintiff on April 24, 2006. (*Hayes Valley Limited Partnership v. Bridgewater*, San
18 Francisco Superior Court case number CUD-06-617995.) Before the eviction process was
19 completed, on May 11, 2006, HVALP and plaintiff entered into a Stipulation and Judgment ("May
20 2006 Stipulation," RFJN Exhibit G), which allowed plaintiff to remain at the Premises, subject to
21 her payment of rent and back rent.³

22 Plaintiff failed to meet the terms of the May 2006 Stipulation and stopped paying rent
23 beginning June 2007 until she moved out of the Premises in May 2008. As a result, HVALP
24 entered judgment against plaintiff for failing to comply with the stipulated repayment terms.
25 Plaintiff petitioned the court to vacate the judgment, alleging that she did not execute or authorize

27
28 ³ Plaintiff later denied that the stipulation was signed or authorized by her. Plaintiff
nonetheless stayed at the Premises and complied with the repayment plan as stipulated from May
2006 to May 2007.

1 the May 2006 Stipulation. On January 22, 2008, the court vacated the May 2006 Stipulation,
2 which resumed the unlawful detainer action. On February 19, 2008, plaintiff and HVALP engaged
3 in a mandatory settlement conference. The parties signed a Stipulation and Entry of Judgment,
4 which provided that HVALP was to receive possession of the Premises by April 30, 2008, in
5 exchange for a waiver of all past due rent and a waiver of attorney's fees and costs. (Plaintiff's
6 FAC Exhibit 11, a copy of the February 19, 2008 Stipulation and Judgment.)

7 **IV. PLAINTIFF'S PRESENT ACTION**

8 Pro se plaintiff alleges the following 11 causes of actions against defendants Hayes Valley
9 Apartments II, LP ("HVALP"), McCormack Baron Ragan Management Co.; MBA Development
10 Co.; The Related Companies of California; Sunamerica Affordable Housing Partnership Inc.⁴;
11 Shawn Bankson, Jane Creason, and the law firm of Kimball, Tirey, and St. John LLP: (1) first
12 cause of action for Breach of Lease Agreement Contract; (2) second cause of action for Malicious
13 Prosecution; (3) third cause of action for Conspiracy to Wrongfully Evict; (4) fourth cause of
14 action for Wrongful Eviction; (5) fifth cause of action for Conspiracy to Maliciously Prosecute; (6)
15 sixth cause of action for Conspiracy to Defraud the Court; (7) seventh cause of action for Fraud on
16 the Court; (8) eighth cause of action for Conspiracy to Violate Civil Rights; (9) ninth cause of
17 action for Retaliatory Eviction; and (10) tenth cause of action for Negligent Infliction of Emotional
18 Distress. Plaintiff's (11) eleventh cause of action for Violation of the Fair Debt Collection
19 Practice is only against defendants Shawn Bankson, Jane Creason and the law firm of Kimball,
20 Tirey & St. John LLP.

21 Although plaintiff's 46-page FAC is rather difficult to understand, it appears plaintiff
22 alleges that HVALP conspired with the attorneys and law firm who handled the unlawful detainer
23 action to unlawfully evict her from the Premises following her failure to pay rent. As a result, she
24 allegedly sustained personal injuries, including a broken foot and emotional distress.

25
26
27 ⁴ Plaintiff has not served the following defendants: McCormack Baron Ragan Management
28 Co.; MBA Development Co.; The Related Companies of California; Sunamerica Affordable
Housing Partnership Inc.

V. LEGAL ARGUMENT

A. The Court Must Dismiss This Action Because It Does Not Have Personal Jurisdiction Over HVALP Because Service of Process Is Insufficient Pursuant To FRCP 12(b)(5)

Federal courts cannot exercise personal jurisdiction over a defendant without proper service of process. (*Omni Capital Int'l, Ltd. v. Wolff & Co.*, 484 U.S. 97, 104 (1987).) “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion under 12(b)(5) for insufficient service. . .” (Fed. R. Civ. P. 12(b)(5).)

Federal Rule of Civil Procedure 4(h) prescribes the proper method of service of a summons and complaint to a Corporation, Partnership, or Association, and states in pertinent part:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant; . . .

Federal Rule of Civil Procedure 4(e)(1) provides that service may be effectuated by: "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." HVALP is a California limited partnership. (Declaration of Zimmerman ¶2.) Thus, in order for plaintiff to properly effectuate service on HVALP, the summons must have been served "to the person designated as agent for service of process in a statement filed with the Secretary of State or to a general partner or the general manager of the partnership." (Cal. Code Civ. P. §416.40(a)). This was not done.

According to plaintiff's proof of service filed with this court, on July 14, 2010, "Nakia Pinkerton," a purported Hayes Valley Resident, unknown age, served the summons on "April," the purported "office manager" at the leasing office at Hayes Valley Apartments. (Attached to Toal Declaration as Exhibit A is a copy of the Proof of Service filed with this court, reflecting service on "April.") The summons was also served on the receptionist, Anna Wong at defense counsel's law office on July 16, 2010 by "Amani Manning," again of unknown age. (Attached to Toal

1 Declaration as Exhibit B is a copy of the Proof of Service filed with this court reflecting service on
2 Anna Wong.) This was followed by service of the summons and compliant by mail to defense
3 counsel's law office. (Declaration of Toal.)

4 All methods of service of the summons attempted by plaintiff are improper. First, the
5 process server must be at least 18 years of age to effectuate service of the summons. (Cal. Code
6 Civ. P. §414.10). Here, the ages of Ms. Pinkerton and Mr. Manning are unknown. Second,
7 service was not properly effectuated on HVALP, a limited partnership, by serving the summons on
8 one of its employees (nor is service properly effectuated by serving the receptionist at defense
9 counsel's law firm). (Fed. R. Civ. P. 4(h); Cal. Code Civ. P. §416.40(a)). Service must be made
10 on an individual "who holds a position that indicates authority within the organization." (*Gidding*
11 *v. Anderson*, Case No. 07-04755 2008 U.S. Dist. LEXIS 65898 (N.D. Cal. August 27, 2008).)
12 Here, April, as a leasing agent for the property at Hayes Valley South clearly does not hold any
13 "authority" for the purposes of service upon a partnership. (Declaration of Zimmerman ¶3.) As
14 such, this court must grant HVALP's motion to dismiss based on improper service.

15 **B. The Court Must Dismiss This Action Because There Is No Subject Matter
16 Jurisdiction Pursuant To FRCP 12(b)(1)**

17 **1. Plaintiff's Eighth Cause of Action for Conspiracy to Violate Civil
18 Rights Pursuant to 42 USC 1985 (3) Is Time-Barred**

19 State personal injury statute governs sections 1981 and 1985. (*McDougal v. County of*
20 *Imperial* 942 F.2d 668, 672-674 (9th Cir. 1991).) Plaintiff's eighth cause of action for Conspiracy
21 to Violate Civil Rights arises out of the unlawful detainer action in state court and is time-barred.
22 Under federal law, a claim accrues "when the plaintiff knows or has reason to know of the injury
23 which is the basis of the action." (*Olsen v. Idaho State Board of Med.* 363 F.3d 916, 926 (9th Cir.
24 2004).) The statute of limitations began to run at the very latest on February 19, 2008, when
25 plaintiff entered into the Stipulation and Judgment where should agreed to move out of the
26 premises in exchange for HVALP's waiver of past rent. (Plaintiff's FAC Exhibit 11.) Plaintiff
27 filed this action on July 9, 2010. As such, plaintiff's claim under 42 U.S.C. 1985(3) is time-
28 barred.

2. Plaintiff's Eighth Cause of Action for Conspiracy to Violate Civil Rights Pursuant to 42 USC 1985 (3) Is Insubstantial And Frivolous

“A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be made on the basis that the complaint fails to allege grounds for federal matter jurisdiction as required by Rule 8(a).” (*Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003.) Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” The complaint must also give defendant “fair notice of what the claim is and the grounds upon which it rests.” (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).)

"It is well established that the party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists." (*Morgan v. Napolitano*, Case No. 09-2649 2010 U.S. Dist. LEXIS 61392 (E.D. Cal. June 1, 2010).) Federal district courts have original jurisdiction in actions that arise under the Constitution, laws, or treaties of the United States. (28 U.S.C. §1331 (2010).) This statute, however, has been narrowly construed by the courts. It is insufficient that a case merely "arises under" federal law. "Rather, for jurisdiction under §1331, courts insist that there be a substantial question of federal law involved; and that the federal question appear in a well-pleaded complaint." (*Schwazer, Tashima, Wagstaffe, Cal. Prac. Guide: Fed. Civ. Proc. Before Trial*, §2:69 and §2:70 (The Rutter Group 2009).) For a case to "arise under" federal law, federal courts focus solely on the necessary allegations of plaintiff's complaint, i.e. those essential to the cause of action. (*Gully v. First Nat'l Bank* 299 U.S. 109, 112 (1936).)

The United States Supreme Court, in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-90 (1998), stated that:

jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. Rather, the District Court has jurisdiction if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, *id.*, at 685, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

1 (Citing to *Bell v. Hood*, 327 U.S. 678, 682 (1946). Emphasis added.)

2 Plaintiff's single federal claim under 42 U.S.C. §1985(3), in her eighth cause of action for
3 Conspiracy to Interfere with Civil Rights, is wholly insubstantial and frivolous, and alleged solely
4 for the purpose of obtaining federal jurisdiction. This is improper and cannot be allowed. (*Steel*
5 *Co. v. Citizens for a Better Env't, supra*, 523 U.S. at 89-90; *Bell v. Hood, supra*, 327 U.S. at 682.)

6 Plaintiff must allege that defendants acted from "some racial, or perhaps otherwise class-
7 based, invidiously discriminatory animus" in conspiring to deprive him of equal protection of the
8 laws, or of equal privileges and immunities under the laws." (42 U.S.C. §1985(3) (2010).)

9 Section 1985(3) has been extended beyond race by the Ninth Circuit "only when the class in
10 question can show that there has been a governmental determination that its members require and
11 warrant special federal assistance in protecting their civil rights." (*Toler v. Paulson*, 551 F. Supp.
12 2d 1039, 1048 (E.D. Cal. 2008).) Mere allegations that plaintiff was "denied due process of law"
13 do not raise a "colorable" constitutional claim for subject matter jurisdiction. The complaint must
14 allege facts showing bias or prejudice on which the due process claim is based. (*Hoye v. Sullivan*,
15 958 F.2d 990, 991 (9th Cir. 1993).)

16 Plaintiff fails to sufficiently allege that HVALP and KTS conspired to deprive her of the
17 equal protection of the laws based on her race. Plaintiff asserts HVALP and KTS "conspired to
18 charge the African American tenants and/or minority tenants and/or plaintiff additional rents..."
19 (Plaintiff's FAC p.11:6-7.) Plaintiff fails to identify these purported tenants and when their rights
20 were purportedly violated. Moreover, she has no standing to bring a lawsuit on their behalf.
21 Plaintiff further contends that she was evicted without due process of law. Although plaintiff's
22 allegations are muddled, it appears she asserts that defendants violated her rights by filing an
23 unlawful detainer action against her following her failure to pay rent.

24 Assuming *arguendo* that plaintiff's allegations are true, the FAC still fails to state
25 that defendants' filing of an unlawful detainer action constitutes a "class-based, invidiously
26 discriminatory animus" to deprive her of the equal protection of the laws. (42 U.S.C. § 1985(3).)
27 As alleged in plaintiff's FAC, the filing of an unlawful detainer action was based on plaintiff's
28 failure to pay rent, and not based on race or class, or any other discriminatory basis.

1 Plaintiff's other allegations and the exhibits attached to her FAC contradict her contention
2 that she was evicted without due process. Federal Rule of Civil Procedure Rule 10(c) provides
3 that a "statement in a pleading may be adopted by reference elsewhere in the same pleading or in
4 any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a
5 part of the pleading for all purposes." Where a "plaintiff chooses to provide additional facts,
6 beyond the short and plain statement requirement, the plaintiff cannot prevent the defense from
7 suggesting that those same facts demonstrate the plaintiff is not entitled to relief." (*Thompson v.*
8 *Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002).) Additionally, if "a plaintiff
9 chooses to plead particulars, and they show he has no claim, then he is out of luck - he has pleaded
10 himself out of court." (*Jefferson v. Ambroz*, 90 F.3d 1291, 1296 (7th Cir. 1996).)

11 Plaintiff's FAC attaches as Exhibit 11 a copy of the "Stipulation for Entry of Judgment
12 and Order" executed by her on February 19, 2008. The Stipulated Judgment relates to the
13 unlawful detainer action filed on behalf of HVALP on April 24, 2006, in San Francisco Superior
14 Court, bearing case no. CUD-06-617995. This demonstrates that plaintiff was provided with
15 notice of the unlawful detainer action against her and was not evicted without due process. In fact,
16 plaintiff appeared at a mandatory settlement conference on February 19, 2008 and agreed to the
17 entry of the Stipulation and Judgment with HVALP before Judge Pro Tem, Alexander Anolik.
18 (Plaintiff's FAC Exhibit 11 and 12.)

19 Even a "pro se complainant can plead himself out of court by pleading facts that undermine
20 the allegations set forth in his complaint." (*Gutierrez v. Peters*, 111 F.3d 1364, 1374; (7th Cir.
21 1997); *Henderson v. Sheahan*, 196 F.3d 839, 846 (7th Cir. 1999).) Here, plaintiff's contradictory
22 allegations in her FAC and attached exhibits undermine her assertions that defendants conspired to
23 violate her civil rights by evicting her without due process. Plaintiff's eighth cause of action for
24 Conspiracy to Interfere with Civil Rights under 42 U.S.C. §1985(3) is frivolous and simply a sham
25 to improperly obtain federal jurisdiction.

26 **3. There Is No Supplemental Jurisdiction For Plaintiff's State Claims**

27 "In federal question cases, a valid federal claim must be pleaded before a federal court can
28 exercise supplemental jurisdiction." (Schwazer, Tashima, Wagstaffe, Cal. Prac. Guide: Fed. Civ.

1 Proc. Before Trial §2:145 (The Rutter Group 2009).) Supplemental jurisdiction does not exist
2 until after a court has independently retained jurisdiction over a federal cause of action. (*Hunter v.*
3 *United Van Lines*, 746 F.2d 632, 649 (9th Cir. 1984).) Supplemental jurisdiction may exist even
4 when a federal claim fails for lack of merit, however, the subject matter jurisdiction over the
5 federal claim cannot be insubstantial, such that it is absolutely devoid of merit or obviously
6 frivolous. (*Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991).)

7 This court does not have subject matter jurisdiction over plaintiff's remaining state claims
8 against HVALP for plaintiff's: (1) first cause of action for Breach of Lease Agreement Contract;
9 (2) second cause of action for Malicious Prosecution; (3) third cause of action for Conspiracy to
10 Wrongfully Evict; (4) fourth cause of action for Wrongful Eviction; (5) fifth cause of action for
11 Conspiracy to Maliciously Prosecute; (6) sixth cause of action for Conspiracy to Defraud the
12 Court; (7) seventh cause of action for Fraud on the Court; (8) eighth cause of action for Retaliatory
13 Eviction; (9) ninth cause of action for Retaliatory Eviction; and (10) tenth cause of action for
14 Negligent Infliction of Emotional Distress. There is no supplemental jurisdiction where plaintiff's
15 single federal claim against HVALP under 42 U.S.C. §1983(3) is devoid of merit and simply
16 frivolous.

17 4. **This Court Lacks Jurisdiction To Review Plaintiff's State Claims
18 Which Arise Out of the Unlawful Detainer Action**

19 “[F]ederal courts possess no power whatever to sit in direct review of state court decisions.
20 (*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983); *Olson Farms, Inc.*
21 *v. Barbosa*, 134 F.3d 933 (9th Cir. 1998).) This rule applies regardless of whether or not the
22 claims were raised in state court. (*District of Columbia Court of Appeals, supra*, (1983) 460 U.S.
23 462 at 483-487.) Therefore, a losing party is “barred from seeking what in substance would be
24 appellate review of the state judgment in a United States district court based on the losing party’s
25 claim that the state judgment itself violates the loser’s federal rights.” (*Johnson v. DeGrandy*, 512
26 U.S. 997, 1005-1006 (1994).)

27 Plaintiff is barred from seeking this court’s review of the February 19, 2008 Stipulation of
28 Judgment and Dismissal which embodied the final resolution of the state unlawful detainer action,

1 and included the resolution of any affirmative defenses that plaintiff could have brought in the
2 state action. Here, plaintiff's (1) first cause of action for Breach of Lease Agreement Contract; (2)
3 second cause of action for Malicious Prosecution; (3) third cause of action for Conspiracy to
4 Wrongfully Evict; (4) fourth cause of action for Wrongful Eviction; (5) fifth cause of action for
5 Conspiracy to Maliciously Prosecute; (8) eighth cause of action for Retaliatory Eviction; (9) ninth
6 cause of action for Retaliatory Eviction all arise out of the unlawful detainer action which was
7 dismissed by the state court. (RFJN Exhibit F, a copy of the dismissal filed on May 7, 2008.)

8 **C. THE COURT MUST DISMISS THIS ACTION FOR FAILURE TO STATE
9 A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO
FRCP 12(B)(6)**

10 Federal Rules of Civil Procedure Rule 12(b)(6) allows the dismissal of a claim based on
11 plaintiff's "failure to state a claim upon which relief can be granted." (Fed. R. Civ. P. 12(b)(6).)
12 A claim must be dismissed as a matter of law, if "it is clear that no relief could be granted under
13 any set of facts that could be proved consistent with the allegations." (*Neitzke v. Williams*, 490
14 U.S. 319, 327 (1989).)

15 "In a federal question action that involves supplemental jurisdiction over state law claims,
16 we apply the choice of law rules of the forum state--here, California." (*Paulsen v. CNF Inc.* (9th
17 Cir. Cal. 2009) 559 F.3d 1061, 1080.) Should this court find that supplemental jurisdiction exists
18 over plaintiff's state claims, it must apply California law to such claims.

19 **1. Plaintiff's First, Second, Third, Fourth, Fifth, Eighth, Ninth, And
20 Tenth Causes of Actions Must Be Dismissed Because They Are
Precluded**

21 Under California law, tenants in an unlawful detainer actions may assert legal or equitable
22 defenses that "directly relate to the issue of possession and which, if established would result in
23 the tenant's retention of the premises." (*Green v. Superior Court of San Francisco* (1974) 10 Cal.
24 3d 616, 633.) These defenses include claims of discriminatory and retaliatory evictions, which
25 plaintiff alleged in this action. (*Id.*) In *Abstract Investment Co. v. Hutchinson*, 204 Cal.App.2d
26 242 (1962), the Court of Appeal permitted a tenant to raise the landlord's alleged racially
27 discriminatory motive as a defense in an unlawful detainer action. Applying *Abstract*, in
28 *Schweiger v. Superior Court*, 3 Cal.3d 507 (1970), the California Supreme Court upheld a tenant's

1 defense to an unlawful detainer action on the basis that the landlord's attempt to evict a tenant was
2 in retaliation for his exercise of the right to deduct for repairs. Further, a tenant may defend
3 against an unlawful detainer action "by asserting that the lessor has not provided proper notice of
4 termination, as required by statute." (*Wasatch Property Management v. Degrade*, 35 Cal.4th 1111,
5 1117 (2005).)

6 Applying the foregoing cases, plaintiff's (1) first cause of action for Breach of Lease
7 Agreement Contract; (2) second cause of action for Malicious Prosecution; (3) third cause of
8 action for Conspiracy to Wrongfully Evict; (4) fourth cause of action for Wrongful Eviction; (5)
9 fifth cause of action for Conspiracy to Maliciously Prosecute; (8) eighth cause of action for
10 Retaliatory Eviction; and (9) ninth cause of action for Retaliatory Eviction, must be dismissed as
11 they are precluded due to plaintiff's failure to raise them in the state action. The foregoing causes
12 of actions arise solely from the unlawful detainer action filed in state court on April 24, 2006 and
13 dismissed on May 7, 2008, following a Stipulated Judgment executed by plaintiff and HVALP on
14 February 19, 2008. (Plaintiff's FAC, Exhibit 11; RFJN Exhibit F.) Thus, plaintiff's claims relating
15 to the November 12, 2007 notice to pay rent or quit, the December 19, 2007 and/or December 24,
16 2007 judgment for possession of the premises, and the February 19, 2008 Stipulation and
17 Judgment, should have been raised as defenses in the underlying unlawful detainer action.
18 Plaintiff's failure to raise them in the state action bars her from bringing these claims in this action.
19 (*Schweiger v. Superior Court, supra*, 3 Cal.3d at 507; *Green v. Superior Court of San Francisco*,
20 *supra*, 10 Cal.3d at 633; *Abstract Investment Co. v. Hutchinson, supra*, 204 Cal.App.2d at 242;
21 *Wasatch Property Management v. Degrade, supra*, 35 Cal.4th at 1117.)

22 **2. Plaintiff's Tenth Cause of Action for Negligent Infliction of Emotional
23 Distress Must Be Dismissed Because It Is Time-Barred**

24 Plaintiff's tenth cause of action for negligent infliction of emotional distress is barred by
25 the two-year statute of limitations. (Cal. Code Civ. P. §335.1.) Under California law, a personal
26 injury claim accrues and the period of limitations commences when the wrongful act takes place.
27 (*G. D. Searle & Co. v. Superior Court*, 49 Cal.App.3d 22, 25 (1975).) Plaintiff asserts that she
28 was under "extreme mental distress" after being evicted and broke her foot in the process of

moving. (Plaintiff's FAC p.16:25-26.) Plaintiff's FAC alleges that she was evicted from the Premises during "Christmas 2007/New Year 2008" when she received a writ of possession posted on her door. (Plaintiff's FAC p.16:16-18.)

Plaintiff's allegations establish that she was aware of the alleged injuries at the time of their occurrence. Therefore, the alleged wrongful act which caused plaintiff's purported injuries occurred at the very latest in January 2008. Since plaintiff filed the present action on July 9, 2010, she is barred by the two year statute of limitations from bringing a claim for negligent infliction of emotional distress. (Cal. Code Civ. P. §335.1.)

3. Plaintiff's Sixth Cause of Action For Conspiracy to Defraud the Court And Seventh Cause of Actions For Fraud On The Court Must Be Dismissed Because They Are Not Pled With Particularity

The elements of a civil conspiracy are: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto: and (3) the damage resulting. (*Mosier v. Southern California Physicians Insurance Exchange*, 63 Cal.App.4th 1022, 1048 (1998).) “Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it.” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333.) Further, it is insufficient that the “conspiring officers knew of an intended wrongful act, they had to agree, - expressly or tacitly - to achieve it... The independent acts of two or more wrongdoers do not amount to a conspiracy.” (*Id.*)

"A claim for fraud in federal court must satisfy Rule 9(b)'s heightened pleading requirements. This rule provides that '[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.' (*Khan v. GMAC Mortg., LLC*, case no. 10-CV-00900 2010 U.S. Dist. LEXIS 71238, 17-18 (E.D. Cal. June 29, 2010.) The required specificity includes the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." (*Id.*) Where multiple defendants are asked to

1 respond to allegations of fraud, “the complaint must inform each defendant of his alleged
2 participation in the fraud.” (*Id.*)

3 Plaintiff’s conclusory allegations that “HVL P, Shawn Bankson and/or Jane Creason and
4 the law firm KTS willingly, knowingly, agreed and conspired to execute and/or enforce and/or
5 obtain void judgment(s) and suppress and/or conceal known facts from the Plaintiff and/or Judge
6 and conspired to defraud the court” are insufficient to allege a cause of action for “conspiracy to
7 defraud.” (Plaintiff’s FAC, p. 36, ¶102.) Plaintiff fails to sufficiently plead facts which show the
8 *time, place, and/or specific content* of the alleged fraudulent representations. (*Id.*) Specifically,
9 plaintiff fails to allege which individuals actually acted in concert and came to a mutual
10 understanding to accomplish an unlawful plan, i.e., fraud on the court. Plaintiff’s FAC fails to
11 allege how HVALP purportedly committed such fraud. Plaintiff’s allegations fail to *inform* how
12 HVALP or KTS participated in the alleged fraud with any particularity. (*Id.*)

13 HVALP is a limited partnership. (Declaration of Zimmerman, ¶2.) Thus, it is clearly
14 uncertain *who* on behalf of HVALP allegedly “conspired,” and with *whom*, to “execute and/or
15 enforce” the “void judgments.” (Plaintiff’s FAC, p. 36, ¶102.) It is unclear what “void judgments”
16 plaintiff is referring to, or what “known facts” HVALP attempted to conceal. It is also uncertain
17 how the alleged fraud on the court caused plaintiff harm. Simply put, HVALP cannot sufficiently
18 understand plaintiff’s allegations to assist it in preparation of its defense. As such, plaintiff’s sixth
19 cause of action for Conspiracy to Defraud the Court, and seventh cause of action for Fraud on the
20 Court must be dismissed because they are not plead with the requisite particularity as required
21 under federal pleading requirements and fail to state a claim. (Fed. R. Civ. P. 9.)

22 **D. THIS COURT HAS THE AUTHORITY TO GRANT HVALP’S MOTION TO
23 STRIKE PURSUANT TO FRCP 12(F)**

24 Under Federal Rules of Civil Procedure 12(f), a party may move to strike any, “insufficient
25 defense or any redundant, immaterial, impertinent or scandalous matter.” “Immaterial matters” are
26 those which have no essential or important relationship to the claim for relief or the defenses being
27 pleaded. (*Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993).) “Impertinent matters”
28 consist of any allegation not responsive nor relevant to the issues involved in the action. A matter

1 is "scandalous" when it improperly casts a derogatory light on someone, usually a party in the
2 action. (*Survivor Prods. LLC v. Fox Broad. Co.*, Case No. 01-3234 2001 U.S. Dist. LEXIS 25512
3 (C.D. Cal. June 11, 2001.)

4 **1. The Court Must Strike Plaintiff's Prayer for Punitive Damages**

5 A motion to strike is "appropriate to address requested relief, such as punitive damages,
6 which is not recoverable as a matter of law." (*Wilkerson v. Butler* 229 Federal Rules Decisions
7 166, 170 (E.D. Cal. 2005).) Since plaintiff's single federal claim against HVALP is barred by the
8 statute of limitations, she cannot recover punitive damages pursuant to U.S.C. §1985(3) as a matter
9 of law. With regard to her remaining state claims, in order to establish a claim of punitive
10 damages, plaintiff must show "by clear and convincing evidence that the defendant has been guilty
11 of oppression, fraud, or malice." (*Linkenhoker v. Rupf*, Case No. 6-05432 2007 U.S. Dist. LEXIS
12 11368, 26-27 (N.D. Cal. Feb. 1, 2007, citing Cal. Civ. C. §3294(a).))

13 California Civil Code §3294 expressly excludes punitive damages arising out of contract
14 claims and further limits recovery of exemplary damages to instances in which "the defendant has
15 been guilty of oppression, fraud, or malice." Contract and negligence actions cannot support an
16 award for punitive damages. Here, plaintiff's prayer for punitive damages should be stricken
17 because plaintiff's action is essentially for breach of contract. All of plaintiff's claims stem from
18 the allegation that she was unlawfully evicted from the Premises and that HVALP breached the
19 lease agreement by the eviction of plaintiff. Therefore, plaintiff is not entitled to punitive damages.
20 (*Freeman and Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85 (1995); *Applied Equipment Corp. v.*
21 *Litton Saudi Arabia Ltd.*, 7 Cal.4th 503 (1994).) "The party who merely breaches his contract should
22 in all cases be exposed only to contractual liability. It is appropriate to enforce only such
23 obligations as each party voluntarily assumed, and to give him only such benefits as he expected to
24 receive; this is the function of contract law." (*Applied Equipment Corp. v. Litton Saudi Arabia*
25 *Ltd., supra*, 7 Cal.4th 503, 517.) The court further stated that imposing tort damages and punitive
26 damages would thwart the legal policy of limiting contract damages to those reasonably foreseeable
27 by the parties. (*Id.*)

1 Additionally, recovery of punitive damages is purely statutory and may only be imposed
2 where there is strict compliance with the requirements of Civil Code §3294 which reads as follows:

3 (a) In an action for the breach of an obligation not arising from a
4 contract, where it is proven by clear and convincing evidence
5 that the defendant has been guilty of oppression, fraud, or
6 malice, the plaintiff, in addition to the actual damages, may
7 recover damages for the sake of example and by way of
8 punishing the defendant.

9 (c) As used in this section, the following definitions shall apply:

10 (1) "Malice" means conduct which is intended by the defendant
11 to cause injury to the plaintiff or despicable conduct which is carried on
12 by the defendant with a conscious disregard of the rights or safety of
13 others.

14 (2) "Oppression" means subjecting a person to cruel or unjust
15 hardship in conscious disregard of that person's rights.

16 (3) "Fraud" means an intentional misrepresentation, deceit, or
17 concealment of a material fact known to the defendant with the intention
18 on the part of the defendant of thereby depriving a person of property or
19 legal rights or otherwise causing injury.

20 (Cal. Code Civ. P. §3294(a) and (c).) (Emphasis added.)

21 In order to properly pray for punitive damages, plaintiff must plead the ultimate facts which
22 give rise to liability. Punitive damages cannot be pleaded generally, and allegations that defendant
23 acted with fraud, malice and oppression toward plaintiff are merely conclusions. Specific factual
24 allegations must be pled to support a claim for punitive damages. (*Brousseau v. Jarrett*, 73
25 Cal.App.3d 864, 872 (1977).) Furthermore, "pleading in the language of the statute is acceptable
26 provided that sufficient facts are pleaded to support the allegations... The terms 'willful,'
27 'fraudulent,' 'malicious,' and 'oppressive' are the statutory description of the type of conduct which
28 can sustain a cause of action for punitive damages." However, the "terms themselves are
conclusory." (*Blegen v. Superior Court of Los Angeles County*, 125 Cal.App.3d 959, 963 (1981).)
Conclusory allegations that simply characterize a defendant's conduct with the statutory language
are insufficient and are subject to a motion to strike. (*Smith v. Superior Court*, 10 Cal.App. 4th
1033, 1042 (1992).)

1 Here, plaintiff's blanket insertion of the statutory language that HVALP acted "with fraud,
2 malice, oppression and reckless disregard" without pleading specific facts in support of her
3 allegations is insufficient for punitive damages. Plaintiff's FAC is devoid of any factual allegations
4 that describe how HVALP's conduct was "despicable" so that it warrants punitive damages. (Cal.
5 Civ. P. §3294.) Rather, HVALP simply evicted plaintiff in an unlawful detainer action after she
6 failed to pay her rent for months. Thus, plaintiff's prayer for punitive damages must be stricken.

7 **2. This Court Must Strike Plaintiff's Request for Attorney's Fees**

8 "In the absence of a statute, or a contractual provision for the recovery of attorneys' fees,
9 attorneys' fees are not recoverable as an element of damages in an ordinary civil action. (*Zendejas*
10 *v. GMAC Wholesale Mortg. Corp.*, case no. 10-CV-00184 2010 U.S. Dist. LEXIS 64903, 6-7 (E.D.
11 Cal. June 28, 2010, citing Cal. Code Civ. P. §1021.)

12 Code of Civil Procedure section 1021 states:

13 Except as attorney's fees are specifically provided for by statute, the
14 measure and mode of compensation of attorneys and counselors at law
15 is left to the agreement, expressed or implied, of the parties; but parties
to actions or proceedings are entitled to their costs, as hereinafter
provided.

16 Civil Code section 1717(a) specifically limits the recovery of attorney's
17 fees as follows:

18 In any action on the contract, where the contract specifically provides
19 that attorney's fees and costs, which are incurred to enforce that
20 contract, shall be awarded either to one of the parties or to the prevailing
party, then the party who is determined to be the party prevailing on the
contract... shall be entitled to reasonable attorney's fees in addition to
other costs.

21 Plaintiff's prayer for attorney's fees must be stricken because there is no statutory or
22 contractual basis for her request. Plaintiff's requests for attorney's fees and costs are based on her
23 allegations of conspiracy to violate her civil rights. This is improper as section 1985(3) does not
24 award attorney's fees. Nonetheless, plaintiff's claim under 42 U.S.C. §1985(3) are time-barred.
(*McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668, 672-674.)

25 **VI. CONCLUSION**

26 Plaintiff's action is subject to a motion to dismiss and motion to strike pursuant to Federal
27
28

1 Rules of Civil Procedure 12(b)(1); 12(b)(5); 12(b)(6); and 12(f). This court does not have personal
2 jurisdiction over HVALP because plaintiff's service of process of the summons on HVALP is
3 improper. (Fed. R. Civ. P. 12(b)(5).) A motion to dismiss must be granted because plaintiff's
4 claims under 42 U.S.C. 1985(3) are time-barred. State personal injury statute governs sections
5 1981 and 1985. (*McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668, 672-674.) Thus,
6 plaintiff's claim under section 1985 is barred by the two years statute of limitations. (Cal. Code
7 Civ. P. §335.1.) Additionally, this court does not have subject matter jurisdiction because
8 plaintiff's single federal claim against HVALP pursuant to 42 U.S.C §1331 is insubstantial and
9 frivolous, and only alleged to improperly obtain federal jurisdiction. (Fed. R. Civ. P. 12(b)(1).) As
10 such, this court does not have supplemental jurisdiction over plaintiff's nine other causes of actions
11 against which are all state claims. (28 U.S.C. §1367 (2010).) This court also does not have
12 jurisdiction to review a state court decision which arises out of an unlawful detainer action.
13 (*District of Columbia Court of Appeals, supra*, 134 F.3d at 933; *Olson Farms, Inc. v. Barbosa*,
14 *supra*, 134 F.3d 933 at p. 933.)

15 Should this court exercise jurisdiction over plaintiff's state claims, a motion to dismiss is
16 proper because plaintiff's FAC fails to state claims upon which relief can be granted. (Fed. R. Civ.
17 P. 12(b)(6).) Plaintiff's (1) first cause of action for Breach of Lease Agreement Contract; (2)
18 second cause of action for Malicious Prosecution; (3) third cause of action for Conspiracy to
19 Wrongfully Evict; (4) fourth cause of action for Wrongful Eviction; (5) fifth cause of action for
20 Conspiracy to Maliciously Prosecute; (8) eighth cause of action for Retaliatory Eviction; (9) ninth
21 cause of action for Retaliatory Eviction, and (10) tenth cause of action for negligent infliction of
22 emotional distress are time-barred. Plaintiff's (6) sixth cause of action for Conspiracy to Defraud
23 the Court and (7) cause of action for Fraud on the Court should also be dismissed because they are
24 not alleged with the requisite particularity and fail to state a claim. Therefore a motion to dismiss is
25 proper.

26 Plaintiff's prayer for punitive damages should be stricken because the FAC fails to
27
28

1 assert specific factual allegations that HVALP acted with malice, fraud, and oppression. Plaintiff's
2 prayer for attorney's fees should also be stricken because there is no statutory or contractual basis
3 for the request.

4
5 DATED: August 20, 2010

LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7 By J. G. K.

8 JEFFERY G. BAIREY
9 JOHN A. TOAL
10 WINNIE YEUNG
11 Attorneys for Defendant HAYES VALLEY
12 APARTMENTS II, L.P.

CERTIFICATE OF SERVICE

Sharon Bridgewater v. Hayes Valley Limited Partnership, et al.
U.S. District Court, Northern Division, Case No. C 10-03022 CW

I, the undersigned, hereby certify that I am an employee of LEWIS, BRISBOIS, BISGAARD & SMITH, LLP, over 18 years of age and not a party to the action. My business address is One Sansome Street, Suite 1400, San Francisco, California 94104.

On August 20, 2010, I served a true and correct copy of the attached:

DEFENDANT HAYES VALLEY APARTMENTS II, LP'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(1);12(b)(5); 12(b)(6); MOTION TO STRIKE PURSUANT TO FRCP 12(f)

(BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system.

(BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

(BY U.S. MAIL) by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope [] in the U.S. Mail, or [X] by placing said copy(ies) sealed in the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with my firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

Sharon Bridgewater 12070 W. Outer Drive Detroit, MI 48223	Plaintiff <i>IN PRO PER</i> Telephone: (808) 205-3114
-----------------------------------------------------------------	----------------------------------------------------------

Dated: August 20, 2010

Amanda Hampton
Amanda Hampton

1 LEWIS BRISBOIS BISGAARD & SMITH LLP
2 JEFFERY G. BAIREY, SB# 111271
3 JOHN A. TOAL, SB# 194041
4 WINNIE YEUNG, SB# 238473
5 One Sansome Street, Suite 1400
6 San Francisco, California 94104
7 Telephone: (415) 362-2580
8 Facsimile: (415) 434-0882

9
10 Attorneys for Defendant HAYES VALLEY APARTMENTS II, LP
11 (erroneously sued herein as HAYES VALLEY LIMITED PARTNERSHIP)

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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

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20 SHARON BRIDGEWATER,) CASE NO. C 10-03022 CW
21 Plaintiff,)) DEFENDANT HAYES VALLEY
22 v.)) APARTMENTS II, LP'S NOTICE OF
23 HAYES VALLEY LIMITED PARTNERSHIP;)) MOTION AND MOTION TO DISMISS
24 SHAWN BANKSON, JANE CREASON AND)) PLAINTIFF'S FIRST AMENDED
25 THE LAW FIRM OF KIMBALL, TIREY AND)) COMPLAINT PURSUANT TO FRCP
26 ST. JOHN LLP,)) 12(b)(1);12(b)(5); 12(b)(6); NOTICE OF
27)) MOTION AND MOTION TO STRIKE TO
28)) FRCP 12(f)
29
30 Defendants.) Date: September 30, 2010
31) Time: 2:00 p.m.
32) Dept.: Courtroom 2, Oakland
33) Action Filed: July 16, 2010

34 TO: PLAINTIFF SHARON BRIDGEWATER, IN PRO SE

35 PLEASE TAKE NOTICE that on September 30, 2010, at 2:00 p.m. or as soon thereafter
36 as the matter may be heard in Courtroom 2 of the United States District Court, Northern District,
37 located at 1301 Clay Street, Oakland, California, defendant Hayes Valley Apartments II, LP
38 ("HVALP") will and hereby moves this court for an Order dismissing the entire action herein.

39 This motion is based upon this notice, the memorandum of points and authorities,
40 Declaration of John Toal, Declaration of Hillary B. Zimmerman, Request for Judicial Notice, all
41 pleadings, records, and papers on file in this action, and upon such oral, documentary, and
42 demonstrative evidence as may be introduced at the hearing of this application.

1 HVALP brings this motion to dismiss plaintiff Sharon Bridgewater's First Amended
2 Complaint on each of the following grounds:

3 1. This court does not have personal jurisdiction over HVALP because plaintiff's
4 service of process is insufficient. (Fed. R. Civ. P. 12(b)(5).) Plaintiff failed to properly serve
5 HVALP, which is a limited partnership.

6 2. This court does not have subject matter jurisdiction. (Fed. R. Civ. P. 12(b)(1).)
7 Plaintiff's claims under 42 U.S.C. §1985(3) are time-barred. State personal injury statute governs
8 sections 1981 and 1985. (*McDougal v. County of Imperial*, 942 F.2d 668, 672-674
9 (9th Cir. 1991).) Thus, plaintiff's claim under section 1985 is barred by the two years statute of
10 limitations. (Cal. Civ. P. §335.1.) Additionally, plaintiff's single federal claim against HVALP
11 pursuant to 42 U.S.C. §1331 is insubstantial and frivolous, and only alleged to improperly obtain
12 federal jurisdiction.

13 3. This court does not have supplemental jurisdiction over plaintiff's nine other
14 causes of actions against HVALP because they are all state claims. (28 U.S.C. §1337 (2010).)
15 Additionally, this court does not have jurisdiction to review a state court decision which arises out
16 of an unlawful detainer action. (*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462,
17 483 (1983); *Olson Farms, Inc. v. Barbosa*, 134 F.3d 933 (9th Cir. 1998).)

18 4. Plaintiff's complaint fails to state a claim upon which relief can be granted. (Fed. R.
19 Civ. P. 12(b)(6).)

20 HVALP brings this motion to strike portions of plaintiff' Sharon Bridgewater's complaint
21 on the following grounds:

22 1. Plaintiff's prayer for punitive damages should be stricken. (Fed. R. Civ. P. 12(f).)
23 The complaint is devoid of any specific factual allegations to support a claim that HVALP acted
24 with malice, fraud, and/or oppression. (Cal. Civ. P. §3294.)

25 2. Plaintiff's prayer for attorney's fees should be stricken. (Fed. R. Civ. P. 12(f).)
26 There is no statutory or contractual basis for attorney's fees in plaintiff's complaint. (Cal. Civ. P.
27 §1021 and §1717(a).)

1 DATED: August 20, 2010

LEWIS BRISBOIS BISGAARD & SMITH LLP

3 By J.L.A.H.
4

5 JEFFERY G. BAIREY

6 JOHN A. TOAL

7 WINNIE YEUNG

8 Attorneys for Defendant HAYES VALLEY

9 APARTMENTS II, L.P.

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LEWIS
BRISBOIS
BISGAARD
& SMITH LLP

4833-5043-9431.1

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DEFENDANT HAYES VALLEY APARTMENTS II, L.P.'S NOTICE OF MOTION AND MOTION TO
DISMISS PLF'S FIRST AMENDED COMPLAINT AND MOTION TO STRIKE- C-10-03022 CW

CERTIFICATE OF SERVICE

Sharon Bridgewater v. Hayes Valley Limited Partnership, et al.
U.S. District Court, Northern Division, Case No. C 10-03022 CW

I, the undersigned, hereby certify that I am an employee of LEWIS, BRISBOIS, BISGAARD & SMITH, LLP, over 18 years of age and not a party to the action. My business address is One Sansome Street, Suite 1400, San Francisco, California 94104.

On August 20, 2010, I served a true and correct copy of the attached:

DEFENDANT HAYES VALLEY APARTMENTS II, LP'S NOTICE OF MOTION AND
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO
FRCP 12(b)(1);12(b)(5); 12(b)(6); NOTICE OF MOTION AND MOTION TO STRIKE TO
FRCP 12(f)

(BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system.

(BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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Sharon Bridgewater 12070 W. Outer Drive Detroit, MI 48223	Plaintiff <i>IN PRO PER</i> Telephone: (808) 205-3114
-----------------------------------------------------------------	----------------------------------------------------------

Dated: August 20, 2010

Amanda Hampton
Amanda Hampton

1 LEWIS BRISBOIS BISGAARD & SMITH LLP
2 JEFFERY G. BAIREY, SB# 111271
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9 Attorneys for Defendant HAYES VALLEY APARTMENTS II, LP
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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

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28 SHARON BRIDGEWATER,) CASE NO. C 10-03022 CW
29 Plaintiff,)) DEFENDANT HAYES VALLEY
30 v.)) APARTMENTS II, LP'S REQUEST FOR
31 HAYES VALLEY LIMITED PARTNERSHIP;) JUDICIAL NOTICE IN SUPPORT OF ITS
32 SHAWN BANKSON, JANE CREASON AND) MOTION TO DISMISS PLAINTIFF'S
33 THE LAW FIRM OF KIMBALL, TIREY AND) FIRST AMENDED COMPLAINT AND
34 ST. JOHN LLP,) MOTION TO STRIKE PURSUANT TO
35) FRCP 12(b)(1);12(b)(5); 12(b)(6); 12(f)
36 Defendants.) Date: September 30, 2010
37) Time: 2:00 p.m.
38) Dept.: Courtroom 2, Oakland
39) Action Filed: July 16, 2010

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48 Defendant HAYES VALLEY APARTMENTS II, LP ("HVALP") requests the Court to
49 take judicial notice pursuant to Federal Rule of Evidence Rule 201 of the following documents, in
50 support of HVALP'S Motion to Dismiss Plaintiff's First Amended Complaint and Motion to
51 Strike attached as exhibits as follows:

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60 1. Exhibit A: A true and correct copy of the January 26, 2009 order executed by
61 Honorable Judge Marilyn Hall Patel for the Northern District Court, case no. 08-05622.
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63 2. Exhibit B: A true and correct copy of the November 20, 2009 order executed by
64 Honorable Judge Phyllis J. Hamilton for the Northern District Court, case nos. 09-03551.
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66 3. Exhibit C: A true and correct copy of the January 18, 2010 order executed by

1 Honorable Judge Saundra Armstrong for the Northern District Court, case nos. 09-05663 and 09-
2 5663:

3 4. Exhibit D: A true and correct copy of the June 2, 2010 order executed by
4 Honorable Judge Saundra Armstrong for the Northern District Court, case nos. 10-0703 and 10-
5 0704.

6 5. Exhibit E: A true and correct copy of the order executed by Honorable Judge
7 Peter J. Busch of the San Francisco Superior Court, regarding defendant Hayes Valley Apartments
8 II, LP's Motion to Declare Plaintiff Sharon Bridgewater a Vexatious Litigant, and Prefiling Order
9 Precluding New Litigation, dated November 17, 2009. *Bridgewater v. Hayes Valley Limited*
10 *Partnership*, case nos CGC-08-478207, CUD-06-617995, and CGC-09-486994.

11 6. Exhibit F: A true and correct copy of the Request for Dismissal with Prejudice
12 filed on May 12, 2008 in the unlawful detainer action filed in San Francisco Superior Court, *Hayes*
13 *Valley Limited Partnership v. Sharon Bridgewater*, case no. CUD-06-617995.

14 7. Exhibit G: A true and correct copy of the Stipulation for Entry of Judgment
15 Dismissal; Order filed on May 11, 2006, in the unlawful detainer action filed in San Francisco
16 Superior Court, *Hayes Valley Limited Partnership v. Sharon Bridgewater*, case no. CUD-06-
17 617995.

18 8. Exhibit H: A true and correct copy of the order executed by Honorable Claudia
19 Wilken of the Northern District Court, denying plaintiff's ex parte request for injunctive relief in
20 this action, dated July 21, 2010.

22 DATED: August 20, 2010

LEWIS BRISBOIS BISGAARD & SMITH LLP

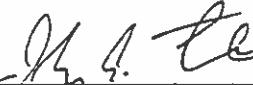
23
24 By 
25 JEFFERY G. BAIREY
26 JOHN A. TOAL
27 WINNIE YEUNG
28 Attorneys for Defendant HAYES VALLEY
APARTMENTS II, L.P.

EXHIBIT A

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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9
10 SHARON BRIDGEWATER,
11 Plaintiff(s),
12 vs.
13 HAYES VALLEY LIMITED PARTNERSHIP, et al,
14 Defendant(s).

No. 08-5622 MHP

ORDER DISMISSING
COMPLAINT AND
DENYING IN FORMA
PAUPERIS

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17 This action stems from unlawful detainer proceedings in the Superior Court for the County of
18 San Francisco. A stipulation for entry of judgment and dismissal was filed in 2006; a declaration of
19 non-compliance and judgment thereon was entered and subsequently vacated; and a stipulation for
20 entry of judgment was entered on February 19, 2008, finally disposing of the matter. The stipulated
21 judgment in that action, CUD-06-617995, provides that: "This stipulation shall be dispositive of all
22 issues raised in Plaintiff's Complaint and all affirmative defenses which could have been raised in
23 Defendant's Answer." Clearly, the stipulated judgment contemplated finality.

24 Plaintiff filed this action in federal court on December 17, 2008, making a variety of state law
25 claims related to her treatment in the detainer proceedings including claims of wrongful eviction,
26 breach of contract based upon the lease agreement which was the subject of those proceedings and
27 various tort claims including species of fraud. Plaintiff has now filed an amended complaint adding

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1 claims alleging violations of a "HUD Regulatory/Management Agreement" and statutes and
2 regulations governing HUD ("Housing and Urban Development").

3 Plaintiff's complaint as originally filed was premised on diversity jurisdiction. However, the
4 complaint fails to properly allege such jurisdiction and it appears that diversity jurisdiction does not
5 exist. Plaintiff alleges not citizenship as is required under 28 U.S.C. section 1332(a), but rather
6 residence, stating that she is a "resident" of Hawaii. Residence is not the same as citizenship, and it
7 is citizenship that must be alleged. Furthermore, it appears from the amended complaint that
8 plaintiff is staying in California to pursue this lawsuit. So, it is not clear of what jurisdiction plaintiff
9 is a citizen. Her allegations regarding defendants' citizenship is equally problematic, given that the
10 first three named defendants are partnerships and it is necessary for diversity jurisdiction purposes to
11 allege the citizenship of all partners.

12 The addition of the HUD claims in plaintiff's most recent amended complaint do not aid her
13 in affording federal question jurisdiction since there is no private right of action to pursue a claim
14 under the federal statutes and regulations relied on by plaintiff and the Agreement alleged in her
15 tenth cause of action does not create an actionable right in a tenant.

16 It is also important to note that Federal Rule of Civil Procedure 8(a)(2) requires that a
17 plaintiff set forth a "short and plain statement of the claim" or claims. Plaintiff's claims are neither
18 short nor plain. They include a lot of facts and verbiage that are not pertinent or appropriate to a
19 short and plain statement.

20 Finally, the nature of plaintiff's complaint taken together with the stipulated judgment in the
21 state court action indicates that plaintiff is attempting to revisit the state court action, even though the
22 claims are characterized differently. To the extent plaintiff has legitimate claims she should file
23 them in state court and seek a reopening of that action.

24 As stated above, plaintiff has failed to satisfy the jurisdictional requirements of either
25 diversity or federal question jurisdiction. Since these are fundamental to this court's jurisdiction, in
26 the absence of jurisdiction this court must dismiss the complaint. Therefore,

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1 IT IS HEREBY ORDERED that the complaint, including the amended complaint with its
2 first amendment, is DISMISSED without prejudice to plaintiff filing an action in the state court and
3 her application to file in forma pauperis is DENIED.

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5 Date: January 26, 2009

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MARILYN HALL PATEL
Judge
United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SHARON BRIDGEWATER,

Plaintiff,

Case Number: CV08-05622 MHP

CERTIFICATE OF SERVICE

v.

HAYES VALLEY et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 27, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Sharon Bridgewater
105 Miner Place
Makawao, Maui, HI 97678

Dated: January 27, 2009

Richard W. Wiking, Clerk
By: Anthony Bowser, Deputy Clerk

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

12 SHARON BRIDGEWATER,
13 Plaintiff, No. C 09-3551 PJH
14 v. ORDER OF DISMISSAL
15 HAYES VALLEY LIMITED
16 PARTNERSHIP, et al.,
17 Defendants.
18 Plaintiff Sharon Bridgewater filed this action on August 3, 2009, against defendants
19 Hayes Valley Limited Partnership (a/k/a Hayes Valley Apartments II L.P.) ("HVLP");
20 McCormack Baron Ragan Management Services, Inc.; MBA Urban Development Co.; The
21 Related Companies of California, Inc.; and Sunamerica Affordable Housing Partnership.
22 Also on August 3, 2009, plaintiff filed a request for leave to proceed in forma pauperis
23 ("IFP"). Because the court finds that the complaint fails to state a claim, the complaint is
24 hereby dismissed pursuant to 28 U.S.C. § 1915(e).

BACKGROUND

26 The following facts are taken from the allegations in the complaint and from the
27 papers attached as exhibits to the complaint.

28 Plaintiff Sharon Bridgewater ("Bridgewater") is a participant in the United States

1 Government's Housing and Urban Development (HUD) rental assistance program (known
2 as "Section 8").¹ On January 5, 2005, Bridgewater entered into an agreement on January
3 5, 2005, with defendant Hayes Valley Limited Partnership ("HVLP"), owner of Hayes Valley
4 Apartments, for lease of an apartment located at 427 Page Street in San Francisco.

5 On April 12, 2006, HVLP served Bridgewater with a notice to pay rent or quit. The
6 notice asserted that Bridgewater was delinquent in payment of the rent for the premises
7 located at 427 Page Street, for the period September 2005 through March 2006.

8 On April 24, 2006, HVLP filed an unlawful detainer action against Bridgewater in the
9 Superior Court of California, County of San Francisco, based on Bridgewater's alleged
10 failure to pay rent as agreed.

11 On May 11, 2006, the parties entered into a stipulation for entry of judgment and
12 dismissal. HVLP agreed that Bridgewater could remain in possession of the premises at
13 427 Page Street if she paid a total of \$2,674.00, which included past rent, attorney's fees,
14 and court costs, to be paid in installments with payment complete by November 5, 2007.
15 Bridgewater alleges that she did not sign the stipulation, and that the person who did sign
16 was a "household member" without authorization to sign for her.

17 On November 12, 2007, Bridgewater was served with another notice to pay rent or
18 quit. On November 26, 2007, HVLP filed a declaration of non-compliance with the May 11,
19 2006 stipulation for entry of judgment and dismissal, stating that Bridgewater had paid
20 \$2,036.00 toward the total of \$2,674.00, but had failed to pay the remainder. HVLP
21 requested judgment in the amount of \$638.00, possession of the property located at 427
22 Page Street, and a writ of possession to be issued immediately.

23 On December 17, 2007, the Superior Court entered judgment against Bridgewater
24 for \$638.00, and a judgment for possession of the premises at 427 Page Street. The
25 Sheriff of the County of San Francisco executed a proof of service dated January 16, 2008,
26 showing service of the writ of possession on Bridgewater, and placing HVLP in possession

27
28 ¹ This is a reference to Section 8 of the United States Housing Act of 1937, 42 U.S.C.
§ 1437, et seq.