IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MARY JO STADE,

Plaintiff,

v.

OREGON DEPARTMENT OF HUMAN SERVICES, OREGON DEPARTMENT OF JUSTICE, MULTNOMAH COUNTY DISTRICT ATTORNEY, CHRISTINA SCHLICHTEN, and JOHN/JANE DOE,

Defendants.

Case No. 3:21-cv-01217-JR

FINDINGS AND RECOMMENDATION

RUSSO, Magistrate Judge:

Defendants the Oregon Department of Human Services ("DHS"), Oregon Department of Justice ("ODOJ"), Multnomah County District Attorney ("MCDA"), and Christina Schlichten move to dismiss pro se plaintiff Mary Jo Stade's complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons stated below, defendants' motions should be granted.

BACKGROUND

Plaintiff is the paternal grandmother of MD and BM, born on April 4, 2012, and November 19, 2014, respectively. Second Am. Compl. ("SAC") ¶ 10 (doc. 26). From 2013 until "on or about February 15, 2015," when DHS removed him from her care for unspecified reasons, plaintiff was the "legal guardian" of and resided with MD. *Id.* at ¶ 11. Based on these facts, plaintiff asserts that she has "established a child-parent relationship with her grandsons and has emotional ties granting her rights under the laws of the State of Oregon pursuant to ORS 109.119." *Id.* at ¶ 12.

Plaintiff "had a pending case for theft from 2017-2018." *Id.* at ¶ 13. Although plaintiff and MCDA "agreed to a plea deal for restitution and probation," plaintiff was nonetheless sentenced on July 12, 2018, "to prison for 25 months." *Id.* Plaintiff alleges that DHS, MCDA, ODOJ, and Schlichten "conspired together to send [her] to prison" because she "consistently objected to DHS' involvement with her grandsons" and they wanted "to get her out of the way so they could put [MD and BM] up for adoption." *Id.*

On April 8, 2019, while still incarcerated, plaintiff communicated with DHS, MCDA, ODOJ, and Multnomah County Circuit Court Judge Katheryn Villa-Smith "at a scheduled hearing regarding [MD and BM]." *Id.* at ¶ 16. At that time, "Judge Katheryn Villa-Smith emphatically stated a hearing would be scheduled for September 10, 2019, for the parties to attend before the entry of any judgment related to the adoption." *Id.*

Plaintiff was released approximately one year early and, on August 20, 2019, learned that, without prior notice: "her grandsons were adopted to Adoptive Father and Adoptive Mother, in June 2019"; and the September 2019 hearing had been cancelled. *Id.* at ¶¶ 14-16, 18.

On November 1, 2019, plaintiff was at the store and "saw BM in a cart with an unidentified man," who "confirmed he and his wife had adopted Plaintiff's grandsons and acknowledged that

he was aware of the war between Plaintiff and DHS [and] knew MD was raised by Plaintiff." *Id.* at ¶¶ 20-21. "Adoptive Father [stated further] 'it was not our intent to keep you out of their lives'" and assured plaintiff that he would contact her "as soon as things settled down" but failed to do so. *Id.* at ¶¶ 21-22.

On August 17, 2021, plaintiff filed a complaint in this Court. She subsequently amended her complaint twice to assert claims for: (1) denial of First and Fourth Amendment rights in violation of 42 U.S.C. § 1983 against Schlichten; (2) negligence against all defendants; and (3) intentional infliction of emotional distress ("IIED") against all defendants. As relief, plaintiff seeks $75,000,000 in damages and an apology from all defendants.

On March 14, 2022, defendants filed the present motion to dismiss. Briefing was completed in regard to that motion on May 11, 2022.

STANDARD

Where the plaintiff "fails to state a claim upon which relief can be granted," the court must dismiss the action. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For the purposes for the motion to dismiss, the complaint is liberally construed in favor of the plaintiff and its allegations are taken as true. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983). Regardless, bare assertions that amount to nothing more than a "formulaic recitation of the elements" of a claim "are conclusory and not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009). Rather, to state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Bacca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The court, in many circumstances, instructs the pro se litigant regarding deficiencies in the complaint and grants leave to amend. *Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Cir. 1987). Nevertheless, a pro se plaintiff's claims may be dismissed without leave to amend where it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief. *Barrett v. Belleque*, 544 F.3d 1060, 1061-62 (9th Cir. 2008).

DISCUSSION

Defendants assert that plaintiff's claims fail because: (1) they are time-barred "[t]o the extent [they] are based on the removal of MD from plaintiff's custody on or about February 15, 2015"; (2) "plaintiff lacks standing to vindicate the [rights] of others"; and (3) she neglected "to allege sufficient facts to state a claim." Defs.' Mot. Dismiss 6-16 (doc. 27).

I. Preliminary Matters

Two preliminary issues must be addressed prior to resolving the substantive merits of defendants' motion: plaintiff's requests to amend her pleadings and for an independent investigation; and the proper adjudication period for plaintiff's claims.

A. Amended Pleadings/Investigation

Via her opposition, plaintiff repeatedly "moves for leave to amend" the SAC to "conform with the Court's findings as well as any subsequent evidence found through discovery." Pl.'s Resp. to Mot. Dismiss 5-7 (doc. 33). Plaintiff also contends that, "[s]hould the Court be inclined to agree with any of Defendants' requested Motions to Dismiss[,] this case should be investigated by an independent DA for kidnapping charges against Christina Schlichten, and any workers of DHS who participated in the removal of MD from Plaintiff, and the continued interference in keeping Plaintiff and her grandchildren from contact with one another." *Id.* at 2.

Concerning the former, pursuant to the Court's local rules, "[m]otions may not be combined with any response, reply, or other pleading." LR 7-1(b). And, to the extent plaintiff maintains that discovery should proceed even if dismissal is proper, her argument is unavailing. The Court is mindful that plaintiff is proceeding pro se and may not have access to all the facts underlying her claims. Nevertheless, "it is abundantly clear that the Supreme Court precludes the use of even limited discovery to overcome a pleading insufficiency." *Vacaflor v. PA State Univ.*, 2014 WL 3573593, *6 (M.D. Pa. July 21, 2014) (citation and internal quotations and brackets omitted). In other words, the dispositive pleading must state a viable claim in order for discovery to proceed. *Iqbal*, 556 U.S. at 685-86.

Regarding the latter, the Court lacks jurisdiction, in the course of this civil action, to preside over issues pertaining to Schlichten's or DHS's allegedly criminal conduct, or to otherwise engage in or order any independent investigation relating thereto. Plaintiff's requests are therefore denied.

B. Relevant Timeframe

Negligence, IIED, and 42 U.S.C. § 1983 claims are subject to a two year statute of limitations in Oregon. *See Sain v. City of Bend*, 309 F.3d 1134, 1139 (9th Cir. 2004) (citing Or. Rev. Stat. § 12.110). The limitations period begins to accrue when the plaintiff has "a complete and present cause of action," which means the "plaintiff can file suit and obtain relief." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). A claim is "discovered" under federal law "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *TwoRivers v. Lewis*, 174 F.3d 987, 991-92 (9th Cir. 1999).

Although plaintiff asserts that "her claims arise out of the adoption of her grandsons," which occurred in 2019, both the complaint and her response brief make clear that she is challenging DHS's decision to remove MD from her custody in 2015 via these proceedings.

Compare Pl.'s Resp. to Mot. Dismiss 1 (doc. 33), *with id.* at 2, 5. As such, plaintiff's real argument appears to be that these events are sufficiently related to her discovery of the 2019 adoption to be timely.

However, it is well-established that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *see also Bird v. Dep't of Human Servs.*, 935 F.3d 738, 746-48 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 899 (2020) (discussing the continuing violations doctrine in the wake of *Morgan*, noting that it applies "to bar § 1983 claims predicated on discrete time-barred acts, not-withstanding that those acts are related to timely-filed claims") (citations and internal quotations omitted).

While plaintiff's timeline is somewhat vague, the allegedly wrongful acts – i.e., MD's removal from her care in 2015, plaintiff's sentencing in 2018, and MD and BM's adoption in 2019 – are separated by months or years, and the complaint does not contain facts demonstrating that plaintiff was otherwise subject to a systemic unlawful policy or practice. Stated differently, MD's removal from plaintiff's custody is a discrete act, separately actionable from MD and BM's adoption, such that the continuing violations doctrine is inapplicable here, and the regular discovery rule of accrual applies.

Because plaintiff knew or should have known of MD's removal from her care the moment that it occurred in February 2015, the fact that she may not have realized the full extent of her injury until a later date is irrelevant. *See Dolman v. Willamette Univ.*, 2001 WL 34043744, *10-12 (D. Or. Apr. 18, 2001) (discussing the continuing tort theory under Oregon law and concluding plaintiff's claims accrued on the date she discovered the injury because she "suffered immediate distress, anguish, and embarrassment"); *Weems v. Or. Univ. Sys.*, 2012 WL 4093539, *6 (D. Or.

Sept. 17, 2012), *aff'd*, 569 Fed.Appx. 494 (9th Cir. 2014) (rejecting the plaintiff's contention that his claim was not time-barred because the full extent of his injury had yet to be discovered); *see also Stanley v. Tr. of Cal. State Univ.*, 433 F.3d 1129, 1134 (9th Cir. 2006) ("[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful") (citation and internal quotations omitted).

Accordingly, the statute of limitations precludes consideration of the alleged wrongfulness of defendants' actions in removing MD from plaintiff's care in February 2015. Defendants' motion should be granted in this regard.

II. 42 U.S.C. § 1983 Claims

To state a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that: (1) the conduct complained of deprived him or her of an existing federal constitutional or statutory right; and (2) the conduct was committed by a state actor or a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988) (citations omitted).

A. Counts 1 and 3: First Amendment Violation[1]

Plaintiff alleges that Schlichten violated her First Amendment rights by: "causing the adoption of Plaintiff's grandsons without notice"; "interfering in the relationship between Plaintiff and her grandsons, including but not limited to prohibiting contact by telephone, any electronic means, in-person visitation, and prevented all communications that a grandmother would normally share with her grandsons, culminating with the adoption of Plaintiff's grandsons"; "falsifying information and documents in the juvenile dependency case, and perjurying [sic] herself before the court when she made written and verbal statements that there were no family members

[1] Plaintiff does not specify which constitutional right was violated in regard to her first count; however, it appears to sound in First Amendment jurisprudence as it emanates from her familial relationships with BM and MD.

qualified to raise Plaintiff's grandsons"; "failing to perform her duties as a caseworker that would assist the natural parents in a return-to-parent"; and "unlawfully involv[ing] herself in Plaintiff's criminal case mentioned above, and with the influence of [ODOJ and MCDA, making] sure Plaintiff when to jail to get her out of the way." SAC ¶¶ 24, 27-31 (doc. 26).

The First Amendment protects against "unwarranted interference with the right to familial association." *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018). "[R]elationships involving marriage, child-rearing, or cohabitation are protected by the First Amendment, and other relationships, including family relationships, may also be protected to the extent that the objective characteristics of the relationship (i.e. factors such as size, purpose, selectivity, and exclusivity) demonstrate that it is sufficiently personal or private to warrant constitutional protection." *Mann v. City of Sacramento*, 748 Fed.Appx. 112, 114-15 (9th Cir. 2018) (citation and internal quotations, ellipses, and brackets omitted).

Thus, outside of parental relationships, biological relatedness alone does not create protected familial associations.[2] *See Mullens v. Oregon*, 57 F.3d 789, 794, 797 (9th Cir. 1995) (grandparents who had only sporadic contact with their grandchildren did not have an interest protected by the Due Process Clause); *see also Sanchez v. Cnty. of Santa Clara*, 2018 WL 3956427,

[2] Under Oregon law, "relatives have no 'right' to the adoption of children in [state] custody." *Mullens*, 57 F.3d at 791. Rather, relatives will be given "first consideration in the adoption of a child if the relative has established a parent-child relationship with the child." *Id.* (citation and internal quotations omitted). A "parent-child relationship" exists "if the relative has provided for the physical and psychological care of the child for at least six months prior to the filing of the adoption petition." *Id.*; *see also* Or. Rev. Stat. § 109.119(10)(a) ("'[c]hild-parent relationship' means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of [the custody petition], and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs").

*8 (N.D. Cal. Aug. 17, 2018) ("there is no question that parents have a constitutionally protected liberty interest in making decisions about the care, custody, and control of their children [but] the Ninth Circuit has never held that any such right extends to grandparents") (citation and internal quotations and brackets omitted).

Further, an interference with familial association claim requires the actual loss of custody. *See Dees v. Cnty. of San Diego*, 960 F.3d 1145, 1153 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 1501 (2021) (even for natural parents, a due process claim for interference with familial association "does not lie where the social worker is accused of seizing a child and the parent has not 'actually lost control over the child'").

Here, other than alleging that plaintiff is the paternal grandparent of MD and BD, and that MD lived with her until February 2015, the complaint does not contain any facts about plaintiff's relationship with her grandchildren. Critically, the SAC does not assert that plaintiff resided with MD or otherwise cared for him any time after February 2015, and plaintiff never alleges having physical custody of BM. *Cf. Sanchez*, 2018 WL 3956427 at *8-9 (N.D. Cal. Aug. 17, 2018) ("grandparents who have a long-standing custodial relationship with their grandchildren such that together they constitute an existing family unit do possess a liberty interest in familial integrity and association") (citation and internal quotations omitted). It is further unclear from the SAC whether plaintiff had any contact with her grandchildren (and if so, to what extent) prior to being incarcerated in July 2018. As such, contrary to the conclusory allegations in the complaint, plaintiff has not alleged facts sufficient to establish the existence of a parent-child or constitutionally protected relationship with either MD or BM.

In addition, as defendants denote, Or. Rev. Stat. § 109.119, "by its terms, does not apply to proceedings under Oregon's Juvenile Dependency Code, ORS chapter 419B." Defs.' Mot.

Dismiss 11 (doc. 27) (citing Or. Rev. Stat. § 109.119(9)); *see also In re Marriage of O'Donnell-Lamont*, 337 Or. 86, 97, 91 P.2d 721 (2004) (a third-party custody dispute between grandparents and a parent "involves a less significant interference with parental rights than does a juvenile dependency proceeding in which the court determines that a child is within the jurisdiction of the court based on a finding that a parent has, among other things, abandoned the child or failed to provide 'care, guidance and protection necessary for the physical, mental or emotional well-being' of the child, ORS 419B.100(A), (D))").

Plaintiff's citations to Or. Rev. Stat. § 109.119 and Or. Rev. Stat. § 107.137 therefore do not aid her case.[3] Moreover, because plaintiff has not had custody of MD since 2015, and she never had custody of BM, the 2019 adoption cannot be characterized as the requisite loss of control over the minor children. *See Scanlon v. Los Angeles*, 495 F.Supp.3d 894, 901 (C.D. Cal. 2020) ("a violation of the fundamental rights to familial association and due process does not occur when the plaintiffs failed to allege that the parent actually lost custody of his children as a result of Defendants' alleged misconduct") (citation and internal quotations omitted).

Plaintiff's remaining allegations concerning Schlichten – i.e., that she "unlawfully involved herself in Plaintiff's criminal case" by conspiring to obtain a sentence of incarceration rather than probation, acted with retaliatory animus because plaintiff "had held [her] accountable for her deception," and acted with "discriminatory intent based on age, disability, gender and single

[3] As referenced herein, § 109.119 governs "third-party custody and visitation claims." *O'Donnell-Lamont*, 337 Or. at 101. And § 107.137 specifies that, in determining the custody of a minor child during the dissolution of a marriage, "[t]he preference for the primary caregiver of the child, if the caregiver is deemed fit by the court" should be given consideration, amongst other elements. Or. Rev. Stat. § 107.137(1). Even assuming this statute was applicable, the SAC does not allege that either grandchild expressed a preference for residing with plaintiff, or that plaintiff was their primary caregiver within the limitations period.

status" – are vague and conclusory and thus not entitled to the presumption of truth. SAC ¶ 31 (doc. 26). That plaintiff received a sentence departing from the MCDA recommendation is commonplace such that it does not plausibly suggest a conspiracy, at least without additional supporting facts. Likewise, the fact that a person opposes DHS's involvement with her family is so common and ordinary that it does not, without more, support an inference of retaliation. And plaintiff alleges no facts about her age, disability, gender, or marital status, nor how those considerations relate to the underlying events. Defendants' motion should be granted as to plaintiff's First Amendment claims.

B. Count 2: Fourth Amendment Violation

Plaintiff alleges that Schlichten violated her Fourth Amendment rights by "unlawfully remov[ing] Plaintiff's grandsons from her life." *Id.* at ¶ 25. Plaintiff also asserts that Schlichten "made an unreasonable seizure when she abused her power by concocting rules for Plaintiff that would not allow telephone calls, video chats, physical visitation or any type of contact all culminating to the adoption of Plaintiff's grandsons, which led to the permanent alienation of the relationship between her grandsons and Plaintiff in June 2019, and for which Plaintiff could not have reasonably known until on or about August 20, 2019 because Defendant Schlichten deceptively and intentionally failed to notify Plaintiff of the impending adoption." *Id.* at ¶ 26.

"As a general rule, a third-party does not have standing to bring a claim asserting a violation of someone else's rights." *Martin v. Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1050 (9th Cir.2009) (citation omitted). And "a guardian or parent may not bring suit in federal court on behalf of a minor without first retaining an attorney." *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008). Because the complaint in this case was not filed by a guardian ad litem or duly authorized attorney, plaintiff's claims should be dismissed to the extent they are premised on MD

or BM's Fourth Amendment rights. *See DeMartino v. Marion Cnty.*, 2013 WL 504603, *3-4 (D. Or. Feb. 5, 2013) (dismissing the plaintiff's claims predicated on the violation of his minor child's "right to be free from unreasonable seizures").

Additionally, plaintiff does not allege that either she or her grandchildren were "seized" within the meaning of the Fourth Amendment. *Dees*, 960 F.3d at 1154 (observing that the Fourth Amendment "protects a child's right to be free from unreasonable seizure by a social worker," which "occurs only when government actors have, by means of physical force or show of authority in some way restrained the liberty of a citizen") (citations and internal quotations and ellipses omitted). Rather, the complaint merely points to the lack of contact between plaintiff and MD and BM, and Schlichten's failure to provide notice of the adoption.

Plaintiff's response is silent as to her Fourth Amendment claim or defendants' arguments related to dismissal. *See Justice v. Rockwell Collins. Inc.*, 117 F.Supp.3d 1119, 1134 (D. Or. 2015), *aff'd*, 720 Fed.Appx. 365 (9th Cir. 2017) ("if a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded") (citation and internal quotations and brackets omitted); *see also* Defs.' Mot. Dismiss 14 (doc. 27) (defendants "are aware of no case law supporting the proposition that a caseworker, acting as a child's legal custodian pursuant to the commitment of a juvenile court, seizes the child either by refusing to allow the child to have contact with an incarcerated biological relative or by consenting to the legal adoption of that child"). Defendants' motion should be granted as to plaintiff's claim under the Fourth Amendment.

III. Negligence Claim

Plaintiff asserts that, "[a]s a direct result of the inexcusable actions of finalizing the adoption of [her] grandsons in June 2019," she has suffered "the loss of the special relationship

that is shared between a grandmother and grandchildren"; "the loss of time, specifically related to family time, birthdays, holidays, school events, and special events"; and "severe emotional sickness . . . that has impacted Plaintiff physically." SAC ¶ 37 (doc. 26). Plaintiff alleges Schlichten "disregarded [her] rights when she violated Article l Section 9 of the Oregon Constitution [by seizing] Plaintiff's grandsons from Plaintiff's custody, specifically MD, whom Plaintiff had legal custody of at the time DHS received temporary custody by lying to the Court that they had cause and jurisdiction over MD." *Id.* at ¶ 38.

To state a negligence claim, the plaintiff must establish "(1) a duty that runs from the defendant to the plaintiff; (2) a breach of that duty; (3) a resulting harm to the plaintiff measurable in damages; and (4) causation, i.e., a causal link between the breach of duty and the harm." *Swanson v. Coos Cnty.*, 2009 WL 5149265, *5 (D. Or. Dec. 22, 2009) (citing *Stevens v. Bispham*, 316 Or. 221, 227 851 P.2d 556 (1993)). "[U]nless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Fazzolari v. Portland Sch. Dist. No. IJ*, 303 Or. 1, 18, 734 P.2d 1326 (1987).

Plaintiff's negligence claim fails for three reasons. First, as addressed in Section I(B), any claims premised on defendants' 2015 actions are time-barred. Second, plaintiff's claim appears to be based on intentional misconduct – namely, Schlichten seizing MD and lying to the juvenile court. But "allegations of intentional conduct do not support a claim for negligence." *Rodrigues v. Jackson Cnty.*, 2015 WL 404577, *4 (D. Or. Jan. 29, 2015); *see also Kasnick v. Cooke*, 116 Or.App. 580, 583, 842 P.2d 440 (1992) (denying recovery under negligence theory based on a fight during a soccer game, explaining "there is no such thing as a negligent fist fight").

Third, plaintiff's reliance on Article 1, Section 9 of the Oregon Constitution – which protects individuals from, among other things, unreasonable searches and seizures – is misplaced. As discussed above, plaintiff cannot maintain a claim based on BM or MD's right to be free from unreasonable seizures. Relatedly, plaintiff cannot rely on the existence of a special relationship between Schlichten and plaintiff's grandchildren or child, as that relationship does not inhere to plaintiff. *See, e.g.*, Pl.'s Resp. to Mot. Dismiss 6 (doc. 33). Indeed, plaintiff has not cited to, and the Court is not aware of, any authority articulating a special relationship between a caseworker and the grandparent of a child in DHS custody. Defendants' motion should be granted as to plaintiff's negligence claim.

IV. IIED Claim

Plaintiff's final claim alleges that defendants "intended to inflict severe emotional distress on Plaintiff causing her to experience mental suffering, mental anguish, and mental shock when the conspired together to take Plaintiff's grandsons out of her life using deception, lying to the court, interfering in Plaintiff's criminal matter and having Plaintiff sent to prison, and falsifying information and documents."[4] SAC ¶ 39 (doc. 26).

[4] Plaintiff also appears to allege negligent infliction of emotional distress. SAC ¶¶ 40-41 (doc. 26). **Error! Main Document Only.Error! Main Document Only.**Under Oregon law, a plaintiff can recover "for emotional distress caused by ordinary negligence, but only if the distress is accompanied by physical impact." *Lowe v. Philip Morris USA, Inc.*, 207 Or.App. 532, 551, 142 P.3d 1079 (2006), *aff'd*, 344 Or. 403, 183 P.3d 181 (2008). Stated differently, "the plaintiff must plead some form of direct physical injury or direct physical contact as a prerequisite to recovering emotional distress damages under a negligence theory." *Gartner v. United States*, 2017 WL 658855, *7 (D. Or. Feb. 15), *adopted by* 2017 WL 1731693 (D. Or. May 1, 2017) (collecting cases); *see also Hammond v. Cent. Lane Commc'ns Ctr.*, 312 Or. 17, 22-23, 816 P.2d 593 (1991) (outlining three narrow exceptions to the physical impact rules). Because the SAC does not allege the existence of a direct physical injury or impact due to defendants' actions, any purported negligent infliction of emotional distress claim fails at the pleadings level. *See Andersen v. Atl. Recording Corp.*, 2010 WL 4791728, *6-7 (D. Or. Nov. 18, 2010) (dismissing a negligent infliction of emotional distress claim under analogous circumstances).

To state a cognizable IIED claim, the plaintiff must show that: (1) the defendants "intended to cause plaintiff severe emotional distress or knew with substantial certainty that their conduct would cause such distress"; (2) the defendants "engaged in outrageous conduct, i.e., conduct extraordinarily beyond the bounds of socially tolerable behavior"; and (3) such "conduct in fact caused plaintiff severe emotional distress." *House v. Hicks*, 218 Or.App. 348, 357-58, 179 P.3d 730, *rev. denied,* 345 Or. 381, 195 P.3d 911 (2008) (citation omitted). In regard to the second element, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 358 (citation and internal quotations omitted). While "the inquiry is fact-specific, the question of whether the defendant's conduct exceeded the farthest reaches of socially tolerable behavior" is, initially, "a question of law" for the court. *Gordon v. Kleinfelder W., Inc.*, 2012 WL 844200, *14 (D. Or. Mar. 12, 2012) (citation and internal quotations omitted).

The complaint in this case fails to allege facts that rise to the level of socially-intolerable behavior. Plaintiff's allegations concerning the existence of conspiracy to deprive her of contact with her grandsons are conclusory. In other words, the complaint does not contain enough facts about the juvenile case and adoption, or defendants' specific conduct related thereto, to allow a plausible inference of intentional and outrageous conduct. The well-pleaded factual allegations merely evince that, while plaintiff was incarcerated, Schlichten stated in the juvenile dependency case that there were no family members currently qualified to raise BM and MD, and that BM and MD were ultimately adopted in June 2019 without additional notice to plaintiff. Significantly, beyond stating that MD was removed from her custody in February 2015, and that she opposed the removal, plaintiff does not provide any facts regarding her relationship with either grandson or defendants until her 2018 criminal proceedings relating to theft.

Even if Schlichten acted intentionally, and her conduct caused plaintiff to suffer extreme stress, "[t]he key focus in IIED cases is not on the result, but on the purpose and the means used to achieve it." *Meagher v. Lamb-Weston*, 839 F.Supp. 1403, 1408 (D. Or. 1993). That is, the legal standard is unconcerned with the effects of the conduct and focuses solely on the conduct itself. And here the SAC's factual content does not plausibly permit the inference that defendants' conduct was outrageous. *See Hetfeld v. Bostwick*, 136 Or.App. 305, 308-10, 901 P.2d 986 (1995) (failure to state an IIED claim where the defendant – i.e., the mother – and her new husband allegedly engaged in course of conduct designed to cause estrangement of the plaintiff – i.e., the father – from his children); *see also Keates*, 883 F.3d at 1240-41 (in order to state a claim for judicial deception in a juvenile dependency case, the complaint must allege facts showing that the state official submitted evidence that was deliberately false or contained statements that were proffered in reckless disregard for the truth). Defendants' motion should be granted as to plaintiff's IIED claim.

Finally, in light of plaintiff's pro se status and the fact that defendants do not seek prejudicial dismissal, coupled with the gravity of plaintiff's allegations, the Court sua sponte appoints pro bono counsel for a limited purpose. Specifically, plaintiff should be conditionally appointed counsel for the purpose of providing a 3-hour consultation to assist in the preparation of any motion for leave to amend the complaint.

RECOMMENDATION

For the foregoing reasons, defendants' Motion to Dismiss (doc. 27) should be granted. Plaintiff's request for oral argument is denied as unnecessary. A limited purpose pro bono appointment should be issued as stated herein. Any motion to amend the complaint must conform

with this Findings and Recommendation and Fed. R. Civ. P. 8(a), and be filed within 30 days of the District Judge's order.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 16th day of May, 2022.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge