UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LALANEA STAR LITTLE, INDIVIDUALLY AND AS NEXT FRIEND OF MINOR CHILD, A. L.

Plaintiffs,

v.

PRESQUE ISLE COUNTY, DEPARTMENT OF CHILD PROTECTIVE SERVICES, DR. TIMOTHY STRAUSS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, JULIE MCALLISTER LEAZIER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY,

Defendants.
_____/

Case No: 20-cv-11857
Hon. Thomas L. Ludington

PLAINTIFFS' RESPONSIVE BRIEF IN OPPOSITION TO DEFENDANT JULIE MCALLISTER LEAZIER'S AMENDED MOTION TO DISMISS (ECF No. 32, PageID.340-375)

INTRODUCTION

Defendant Julie McAllister Leazier's Amended Motion to Dismiss (Def's Brief, ECF No. 32, PageID.340-375) must fail. While the Movant purports to accept the pleadings as true, she too wants to change the facts to suit her pretrial wishes. Likewise, Defendant's attempt to escape Rule 12(b)(6) standards is misplaced. Reframing the questions before the Court as "threshold" matters is not dispositive. Again, "it is generally inappropriate for a district court to grant a 12(b)(6) motion to

dismiss on the basis of qualified immunity. Although an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015) (internal quotation omitted). In this context, "the plaintiff must receive 'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment." *Short v. Oaks Corr. Facility*, 129 Fed.Appx. 278, 281 (6th Cir.2005) (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Nothing within Mrs. McAllister Leazier's brief changes the guiding axiom here: "[a] grant of summary judgment is improper if the non-movant is given an insufficient opportunity for discovery." *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231–32 (6th Cir.1994). The pleadings require discovery even under *Kolley v. Adult Protective Serv.*, 786 F.Supp.2d 1277 (E.D. Mich. 2011) (*See* Def's Br. at PageID. 348). While there is no bar to raising such issues prior to discovery, that is no guarantee of success under Rule 12(b)(6). This truth is immutable—regardless of Defendant's attempt to reframe the questions presented as "threshold" matters. (ECF No. 32, Defendant's Brief at PageID.348-49.)

Plaintiffs' live Amended Complaint state cognizable grounds for relief. (ECF No. 8, Live Complaint at PageID.26-43.) Plaintiffs' case goes forward, because it, in part, "set[s] forth clearly in their pleading that they are suing the state defendants

in their individual capacity for damages, not simply their capacity as state officials." *Shepherd v. Wellman*, 313 F.3d 963, 967 (6th Cir. 2002) (quoting *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989)). In the alternative, Plaintiffs ask this Court to grant them leave to amend the pleadings. *See, e.g., Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1284-85 M.D. Ala. 1999)(Courts typically allow the pleader an extra modicum of leeway where the information supporting the complainant's case is under the exclusive control of the defendant); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983)(same). Accordingly, Defendant's motion to dismiss should be denied, too.

STANDARD OF REVIEW

This Court reviews Rule 12(b)(6) decisions under the *de novo* standard of review. "A claim is facially plausible when the plaintiff 'pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Colely v. Lucas Cty.*, 799 F.3d 530, 537 (6th Cir. 2015)(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[A] judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 228-29 (6th Cir. 1997)(citations omitted). A reviewing court, then, must "construe the complaint in the light most favorable to the plaintiff, accept [her] allegations as true and draw all reasonable inferences in favor of the plaintiff." *Bassett v. National Collegiate*

Athletic Ass'n, 528 F.3d 426, 428 (6th Cir. 2008). A determination that a claim is barred by the applicable statute of limitations is a legal conclusion, subject to *de novo* review. *Tolbert v. State of Ohio Dep't of Transp*., 172 F.3d 934, 938 (6th Cir. 1999).

ARGUMENT

PLAINTIFFS STATE PLAUSIBLE CLAIMS FOR PROSPECTIVE RELIEF AGAINST DEFENDANT MCALLISTER LEAZIER

A. Lalanea Star Little's claims are not barred by the Applicable Statutes of Limitations.

Defendant McAllister Leazier joins (PageID.349-51) Defendants MDHHS and Defendant Presque Isle County argument that the statute of limitations bars Plaintiffs' claims. (Page ID.79-82; Page ID.175-178.) Plaintiffs maintain those claims are not time-barred for the reasons supplied in Plaintiffs' consolidated response to Defendants' Motions to Dismiss (Def's MDHHS'S Brief, ECF No. 14, PageID.62-156; Defendant Presque Isle County's Brief ECF No. 17, PageID.162-237). Plaintiffs rely on their Consolidated Response, to the extent Mrs. McAllister Leazier incorporates those arguments into her Brief.

B. Mrs. McAllister Leazier is a State Actor Because Her Reckless Administrative and Investigative Decisions Are Entangled With the Government's Wrongful Acts Leading up to the Seizure of Ms. Little's Children.

Defendant McAllister Leazier's argument that she somehow was not acting under the color of state law, is incorrect. (Def's Brief, ECF No. 32, PageID.351 The

Complaint is viable here, because it "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610, 616 (6th Cir. 2003) (quoting Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)) (alteration in original). Mrs. McAllister Leazier's arguments regarding state action must fail. (ECF No. 32, McAllister Leazier Br. at PageID. 351-354.) "The Supreme Court has found state action based on 'pervasive entwinement' between a private actor and the state." *Kolley v. Adult Protective Serv.*, 786 F.Supp.2d 1277 (E.D. Mich. 2011) *citing Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001). The four corners of the Complaint plausibly allege a sufficient nexus—or pervasive entwinement—between the government and Mrs. McAllister Leazier. It is axiomatic "an official causes a constitutional violation if [s]he sets in motion a series of events that defendant knew or reasonably should have known would cause others to deprive plaintiff's constitutional rights." *Morris v. Dearborne*, 181 F.3d 657, 672 (5th Cir. 1999); *see also Young v. Vega,* 574 F. App'x 684, 689 (6th Cir. 2014)(immunity cannot bar claims state actor wrongfully procured an unreasonable search or seizure). Thus, the Complaint "adequately alleges the commission of acts that violated clearly established law." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011). Indeed, section 1983 allows for claims against private individuals and entities

who act under the color of state law—but there must be substantial nexus, or strong "joint activity" between McAllister and the government. *Filarsky v. Delia*, 566 U.S. 377, 383, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012)("Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights 'under color' of state law."). But a private actor acts under color of state law only when his or her actions are "fairly attributable to the state." *Filarsky,* 566 US at 383; *see also Abdullahi v Pfizer, Inc,* 562 F3d 163, 188 (2d Cir. 2009) ("Under § 1983, state action may be found when there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." (quoting *Brentwood Acad v Tenn. Secondary Schl Athletic Ass'n,* 531 U.S. 288, 295 (2001)) (internal quotation marks omitted)). Likewise, a private individual can be found to have acted under the color of law if the private actor "is a willful participant in joint activity with the State or its agents." *Ciambriello v County of Nassau,* 292 F3d 307, 324 (2d Cir 2002) (citations omitted).

There is no dispute that the Complaint alleges that Mrs. McAllister Leazier's action's were "fairly attributable to the state." *See, e.g., Lugar v. Edmondson Oil Co*., 457 U.S. 922, 947, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *Chapman v. Higbee Co*., 319 F.3d 825 (6th Cir. 2003). Thus Defendant's motion to dismiss cannot prevail, as discovery is needed on this question, alone. *See Burton v. Wilmington Parking Auth*., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)(nexus cases require

a "fact-specific inquiry" and decided on a "case-by-case" basis); *Chapman v. Higbee Co*., 319 F.3d 825 (6th Cir. 2003)(finding genuine material fact questions on state action existed for trial). As *Layne v. Sampley,* advises, "it is possible to determine ... whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." 627 F.2d 12, 13 (6th Cir.1980) (internal citations and quotations omitted). Defendant's motion fails to meet the mark. Plaintiffs' case is entitled to proceed.

C. Mrs. McAllister Leazier's Reckless Actions Are Not Shielded From Suit.

Defendant McAllister Leazier is not immune from suit, because her alleged administrative decisions are entangled with the Government's taking of Plaintiffs' children; these are real, and continuing violations. *See Achterhof v. Selvaggio*, 886 F.2d 826, 830 (6th Cir. 1989) (holding that social workers are not entitled to absolute immunity when deciding whether to open or continue an investigation, or when deciding to enter a parent's name in a central register of abusers, all of which are administrative or investigative by nature rather than prosecutorial). Her "absolute immunity" arguments do not change the situation at bar.

Likewise, Mrs. McAllister Leazier's reliance on *Martin v. Children's Aid Society*, 215 Mich. App. 88; 544 N.W.2d 651 (1996) is misplaced. In that case, the Michigan Court of appeals held that social workers are absolutely immune from civil

lawsuits arising out of the initiation and monitoring of "child placement proceedings and placements." *Martin v. Children's Aid Society*, 215 Mich. App. at 95-99. But that does not apply here. The law remains that "an investigator may be held liable under § 1983 for making material false statements either knowingly or in reckless disregard for the truth to establish probable cause for an arrest." *See Ahlers v. Schebil*, 188 F.3d 365, 373 (6th Cir. 1999); *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985); *see also Snell v. Tunnell*, 920 F.2d 673 (10th Cir), *cert denied,* 499 U.S. 976 (1993)(no qualified immunity for social workers who obtained a court order to seize children by deliberately providing false information). Defendant's argument that she has immunity fails to follow Rule 12(b)(6)'s rubric and evades the issue. *See, e.g., In re Jackson Lockdown/MCO*, 568 F. Supp. 869 (E.D. Mich. 1989)(noting qualified immunity is affirmative defense which may require factual findings and is therefore not proper subject for Rule 12(b)(6) motion); *Liffiton v. Keuker*, 850 F.2d 73 (2d Cir. 1988)(defense of qualified immunity cannot ordinarily support dismissal under Rule 12(b)(6)); *Thomas v. St. Vincent & Sarah Fisher Ctr*., No. 03–73002, 2006 WL 2418974, at *6 (E.D.Mich. Aug. 21, 2006) (unpublished) (social worker not immune for supervision of child that was "part of routine monitoring to assure that the state was upholding its duty to provide a safe environment for him" and not part of a "judicial function" "to assist the court in deciding the best interests of [the child]"). The argument rests on a fallacy and should fail.

Wygant v. Strand is no bar to Plaintiffs' action (ECF No. 32, PageID. 355). The Complaint shows a plausible constitutional claim, when viewed in a light most favorable to the Little Family. *See Malik v. Arapahoe County Dept. of Social Services*, 191 F.3d, 1315 (10th Cir. 1999)(government official procurement of a court to remove children based on information they knew was founded on distortion, misrepresented and omission, violated the Fourth Amendment); *see also Heartland Academy Community Church v. Waddle*, 317 F. Supp. 2d 984 (E.D. Mo. 2004); *Stephens v. Hamilton County Jobs & Family Services*, 46 F. Supp. 3d 754, 762 (S.D. Ohio 2014); *Morris,* 181 F.3d at 668 ("It is beyond purview that any rational [person] could believe that governmental destruction of a family based on fabricated evidence is constitutionally allowed.").

Martin, Spikes v. Banks, and similar cases do not apply here. (*See* ECF No. 32, Def's Brief at PageID. 356). The pleadings do not allege that Mrs. McAllister Leazier negligently placed and monitored Ms. Little's children. It alleges, instead, a reckless constitutional violation. None of Defendant's cases refute that Plaintiff states a cognizable claim against her under 1983.

D. The *Rocker-Feldman* Doctrine Is No Bar To This Justiciable Case Against Mrs. McAllister Leazier.

Like the previous Defendants here, Mrs. McAllister Leazier's reliance on the *Rocker-Feldman* Doctrine and its progeny is misplaced. (ECF No. 32, Br. at 13-16, PageID.357-360.) Again, Ms. Little's source of injury is not the state court's

decisions—but the Defendants' actions that "led up to" the state court's decisions involving Ms. Little and her children. *See, e.g., Mccormick v. Braverman*, 451 F.3d 382, 383 (6th Cir. 2006); *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Services*, 606 F.3d 301 (2010), *cert. denied sub nom., Campbell-Ponstingle v. Kovacic*, 134 S. Ct, 2696 (2014). This is why Mrs. McAllister's reliance on *Firestone v. Cleveland Trust Company*, 654 F.2d 1212 (6th Cir. 1981), and its progeny, do not apply here. (See ECF No. 32, Def's Brief at 14, PageID. 358.) Here, as in *Stephens v. Hamilton County Jobs & Family Services*, 46 F. Supp. 3d 754, 759 (S.D. Ohio 2014), Ms. Little is "challenging the conduct" of Defendants "that led up to" the Circuit Court's decision, and not the state decision itself.

Moreover, *McCormick v. Braverman*, 451 F.3d 382 (6th Cir.2006), is instructive here. In *McCormick*, the state courts had issued judgments concerning the McCormick's divorce—and a piece of disputed marital real property. See *id*. at 385–87. The wife McCormick's daughter subsequently sued in federal court; she alleged, *inter alia*, that the defendants had fraudulently, maliciously, and recklessly seized the McCormick's property. *Id*. at 388. The Sixth Circuit reversed the lower court's decision that the *Rocker-Feldman* barred the federal case:

> None of these claims assert an injury caused by the state court judgments; Plaintiff does not claim that the state court judgments themselves are unconstitutional or in violation of federal law. Instead, Plaintiff asserts independent claims that those state court judgments were procured by certain Defendants through fraud, misrepresentation, or other improper means[.]

Id. at 39; *see also Pittman v. Cuyahoga County Dept. of Children and Family Servs*., 241 Fed.Appx. 285, 287 (6th Cir.2007) (unpublished) (Sixth Circuit held *McCormick* allowed case that arose out of a custody matter to proceed, where plaintiff-father, who lost custody of his daughter at the state level, contended that defendants "acted wantonly, recklessly, in bad faith, and with a malicious purpose by falsely representing information to the juvenile court."); *see also Kolley v. Adult Protective Serv.*, 786 F.Supp.2d 1277 (E.D. Mich. 2011). The Rocker-Feldman doctrine does not work the way Mrs. McAllister Leazier suggests. Thus, her motion to dismiss on this basis is incorrect and should also be denied.

E. The Pleadings Give Mrs. McAllister Sufficient Notice That Her Reckless Actions Violated The Littles' Rights.

Finally, Defendant's Rule 9(b) "group pleading" argument cannot stand. (See Def's Br. at 16-17, PageID.360-361.) It is axiomatic that "Rule 9(b) is not to be read in isolation, but is to be interpreted in conjunction with Federal Rule of Civil Procedure 8." *United States ex rel. Bledsoe v. Community Health Systems, Inc*., 501 F.3d 493, 503 (6th Cir. 2007) (internal citations omitted). Moreover, "[w]hen read against the backdrop of Rule 8, it is clear that the purpose of Rule 9 is not to reintroduce formalities to pleading, but is instead to provide defendants with a more specific form of notice as to the particulars of their alleged misconduct." *Id*. "The threshold test is whether the complaint places the defendant on sufficient notice of the misrepresentation allowing the defendants to answer, addressing in an informed

way plaintiff[']s claim of fraud." *Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir. 1993) (quotation marks omitted).

Defendant McAllister Leazier is well aware of what cause the Little Family seeks to redress here. There is no real dispute Ms. Little has plead facts which tie the specific individuals she sues to the constitutional violations alleged. *Heyerman v. Cnty of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012) (quoting *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006)). There is no dispute Plaintiffs allege that Defendants recklessly initiated an investigation and caused a traumatic removal of the Plaintiff children from their family and home. *See Malik v. Arapahoe County Dept. of Social Services*, 191 F.3d, 1315 (10th Cir. 1999)(government official procurement of a court to remove children based on information they knew was founded on distortion, misrepresented and omission, violated the Fourth Amendment); *see also Heartland Academy Community Church v. Waddle*, 317 F. Supp. 2d 984 (E.D. Mo. 2004); *Stephens v. Hamilton County Jobs & Family Services*, 46 F. Supp. 3d 754, 762 (S.D. Ohio 2014); *Morris,* 181 F.3d at 668 ("It is beyond purview that any rational [person] could believe that governmental destruction of a family based on fabricated evidence is constitutionally allowed."). Plaintiffs pray that the motion fails on this issue. In the alternative, Plaintiffs ask this Court to grant them leave to amend the pleadings. *See, e.g., Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1284-85 M.D. Ala. 1999)(Courts typically allow the

pleader an extra modicum of leeway where the information supporting the complainant's case is under the exclusive control of the defendant); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983)(same). Accordingly, the Defendant's motion should be denied, in all respects. Plaintiffs incorporate by reference its previous Opposition brief, arguments, and exhibits attached thereto, to this Response.

CONCLUSION

For the reasons articulated above, Plaintiffs ask this Court to DENY Defendants' respective Motions to Dismiss, and allow this matter to proceed, under the applicable Rules of Procedure and Orders of this Court.

Respectfully submitted,

LAW OFFICE OF ALLISON FOLMAR, ESQ.

BY: /s/Allison Folmar
Allison Folmar (P60236)
Attorney for Plaintiffs
24901 Northwestern Hwy, Suite 612
Southfield, MI 48075
(313) 926-7220
allisonfolmargiv@aol.com

Dated: Aapril 12, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing paper with the Clerk of the Court using the Court's ECF system, which will send notification of such filing to all counsels of record.

/s/ Allison Folmar
Allison Folmar (P60236)

Dated: April 12, 2021