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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JORY A. JOVAAG,	)	Case No.: 12-cv-003316 RMW
	)	
Plaintiff,	)	ORDER GRANTING MOTIONS TO
v.	)	DISMISS WITHOUT LEAVE TO
	)	AMEND
DONALD R. OTT, THE LAW OFFICE OF	)	
DANIEL JENSEN, and CAROL DIAZ	)	
FERRERA,	)	
	)	
Defendants.	)	
	)	

Plaintiff Jory Jovaag ("plaintiff"), proceeding *pro se*, brings this action seeking to set aside or modify a judgment issued in 2008 in Santa Clara County Superior Court. Because the court lacks jurisdiction over plaintiff's claims, and since a federal court is generally prohibited from interfering with a state court proceeding, the court dismisses plaintiff's complaint without leave to amend.

**I. BACKGROUND**

On June 27, 2012, plaintiff filed a complaint asserting claims for fraud against her ex-boyfriend Donald Ott ("Ott") and his lawyers, Daniel Jensen and Carol Diaz Ferrera (collectively "defendants"), arising from a 2008 partition action in Santa Clara County Superior Court (the "partition action"). Plaintiff alleges that defendants submitted fraudulent evidence in the partition action, resulting in a "skewed" judgment and the inequitable seizure of a significant portion of her assets. Dkt. No. 1 (Compl.) ¶ 13. She further asserts that defendants made false

1 statements before the state court that "sabotage[ed]" her ability to appeal the judgment. *Id.* ¶ 16.  
2 She seeks the return of her "fraudulently seized assets," as well as compensatory damages. *See*  
3 *id.* ¶ 1.

4 Before being properly served,<sup>1</sup> defendants filed motions to dismiss under Fed. R. Civ. P.  
5 12(b)(1) and 12(b)(6), setting a motion hearing for August 24, 2012. Plaintiff submitted an  
6 opposition motion. She later requested a continuance of the August 24, 2012 hearing, arguing  
7 that the court should not consider defendants' motions because they had been filed before service  
8 had been effected, and that a continuance was necessary in order to "achieve due process." *See*  
9 Dkt. No. 43 at 4.

## 10 II. DISCUSSION

### 11 A. Service of Process

12 As a threshold matter, the fact that defendants were not properly served does not preclude  
13 the court from considering the merits plaintiff's allegations. "Rule 4 is a flexible rule that should  
14 be liberally construed so long as a party receives sufficient notice of the complaint." *United*  
15 *Food & Commercial Workers Union, Locals 197, 373, 428, 588, 775, 839, 870, 1119, 1179, and*  
16 *1532 v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Absent a showing of prejudice, "a  
17 defendant's answer and appearance in an action should be enough to prevent any technical error  
18 in form from invalidating the process." *Id.* (citation omitted). Here, defendants' submission of  
19 responsive pleadings shows that they received notice of the complaint and intend to defend the  
20 suit. *See Wilson v. Moore and Associates, Inc.*, 564 F.2d 366, 368-69 (9th Cir. 1977) (informal  
21 contact between parties constitutes appearance when defendant shows "clear purpose to defend  
22 the suit"). Plaintiff filed a thorough opposition as well as numerous other papers, and does not  
23 explain how she will be prejudiced by consideration of her claims—which she elected to bring  
24 before the court—at this time. Accordingly, the court proceeds to examine whether plaintiff's  
25 case can properly proceed in federal court.

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26 <sup>1</sup> Defendants were not served because plaintiff filed an application to proceed *in forma*  
27 *pauperis* along with her complaint, and the court had not yet ruled on the application at the time  
28 defendants filed their motion. It is unclear how defendants received notice of plaintiff's  
complaint.

1 **B. Subject Matter Jurisdiction**

2 Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of*  
3 *Am.*, 511 U.S. 375, 377 (1994). "The party seeking to invoke the court's jurisdiction bears the  
4 burden of establishing that jurisdiction exists." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir.  
5 1986). There are two bases for federal subject matter jurisdiction: (1) federal question  
6 jurisdiction under 28 U.S.C. § 1331, and (2) diversity jurisdiction under 28 U.S.C. § 1332. A  
7 federal court has federal question jurisdiction in "all civil actions arising under the Constitution,  
8 laws, or treaties of the United States." 28 U.S.C. § 1331. A federal court has diversity  
9 jurisdiction where the matter in controversy exceeds the sum of \$75,000, and is between, *inter*  
10 *alia*, citizens of different states. 28 U.S.C. § 1332. A federal court may dismiss an action on its  
11 own motion if it finds that it lacks subject matter jurisdiction over the action. *Fiedler v. Clark*,  
12 714 F.2d 77, 78-79 (9th Cir. 1983) (noting that "a federal court may dismiss sua sponte if  
13 jurisdiction is lacking"); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time  
14 that it lacks subject-matter jurisdiction, the court must dismiss the action.").

15 Plaintiff first asserts that federal jurisdiction is proper under Fed. R. Civ. P. 60(d), which  
16 allows a federal court to entertain an "independent action" to relieve a party from a judgment  
17 procured by fraud. However, "[w]hen the prior judgment attacked in the 'independent action' is  
18 that of a different court, the new court must be one having 'independent and substantive equity  
19 jurisdiction.'" *Carney v. United States*, 462 F.2d 1142, 1144 (Ct. Cl. 1972); *Bankers Mortg. Co.*  
20 *v. United States*, 423 F.2d 73, 79 (5th Cir. 1970). In other words, plaintiff cannot use Rule 60(d)  
21 to attack a judgment entered in a different court unless her claims would give rise to federal  
22 jurisdiction *on their own*. Because plaintiff does not assert that defendants violated any federal  
23 law or constitutional principle, and explicitly alleges that all parties are California residents, *see*  
24 Compl. ¶¶ 4-7, this court does not have "independent" jurisdiction to entertain her complaint.

25 In her opposition motion, plaintiff claims federal jurisdiction is proper because two  
26 federal laws form "ingredients" of this action: (1) the False Claims Act ("FCA"); and (2) Rule  
27 10b-5 of the Federal Securities Exchange Act of 1934. Plaintiff's argument fails for several  
28 reasons. First, "[a] suit 'arises under' federal law 'only when the plaintiff's statement of [her]

1 own cause of action shows that it is based upon [federal law]."<sup>1</sup> *Vaden v. Discover Bank*, 556  
2 U.S. 49, 59-60 (2009) (citation omitted). Plaintiff does not reference either statute in her  
3 complaint, but simply asserts claims for "fraud," "fraud upon the court" and "conspiracy to  
4 commit fraud," which are based in state law. Further, it does not appear that "some substantial,  
5 disputed question of federal law is a necessary element of one of the well-pleaded state claims,"  
6 which focus solely on defendants' allegedly fraudulent representations to the state court during  
7 the partition action. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986).

8 In addition, neither Rule 10b-5 nor the FCA appears to apply to the instant case. The  
9 Securities Act is intended to protect the "investing public" from "fraudulent activities in  
10 connection with the *purchase or sale* of any security." *McGann v. Ernst & Young*, 102 F.3d 390,  
11 392 (9th Cir. 1996) (emphasis added). Thus, plaintiff's assertion that defendants misled the state  
12 court into awarding Ott securities that she rightfully *owned*, even if true, would not give rise to a  
13 claim under Rule 10b-5. With respect to the FCA, plaintiff contends that she has knowledge of  
14 Ott's "past frauds" on the government and is assisting the government in prosecuting Ott in a  
15 separate action. These allegations appear to have little, if any, relationship to the claims in  
16 plaintiff's complaint, and thus cannot form the basis for federal jurisdiction in *this* action.  
17 Moreover, the FCA allows individuals to sue for fraud that causes "injury to the federal  
18 treasury," not injury to private plaintiffs. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743,  
19 748 (9th Cir. 1993). Accordingly, the court finds that it lacks subject matter jurisdiction over  
20 plaintiff's complaint under Rule 60(d), 28 U.S.C. § 1331, and the other statutes referenced in her  
21 various filings.<sup>2</sup>

22  
23 <sup>2</sup> For example, jurisdiction is not appropriate under Fed. R. Civ. P. 60(b)(3) because  
24 that rule generally allows a party to challenge a judgment only in the court where it was  
25 rendered. *See* 12-60 Moore's Federal Practice - Civil § 60.60. The Declaratory Judgment  
26 Act (the "DJA"), 28 U.S.C. § 2201, merely provides for a remedy in certain kinds of  
27 disputes; without another basis for jurisdiction, it cannot justify bringing a case in federal  
28 court. *See Countrywide Home Loans, Inc. v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849, 853  
(9th Cir. 2011) ("[T]he DJA gave district courts the discretion to provide a type of relief  
that was previously unavailable, but did not impliedly repeal or modify the general  
conditions necessary for federal adjudication (e.g., a federal question or diversity of  
citizenship).") (citation and brackets omitted). Finally, plaintiff's invocation of 28 U.S.C.  
§ 1343 is without merit because that statute is intended only allow for the vindication of  
constitutional rights, which are not at issue here. *See Brown v. Board of Bar Examiners*,  
623 F.2d 605, 609 (9th Cir. 1980).

1           Finally, even if it were possible to assert federal jurisdiction, this court would decline to  
2 entertain claims that, in essence, seek to set aside or modify a state court judgment.<sup>3</sup> As a  
3 general rule, federal courts do not interfere in state court proceedings. *See Burford v. Sun Oil*  
4 *Co.*, 319 U.S. 315, 334 (1943) ("[A] sound respect for the independence of state action requires  
5 the federal equity court to stay its hand."). While the court has found no controlling precedent on  
6 point, the Fifth Circuit has considered facts very similar to those present here and determined  
7 that even where a plaintiff asserted federal claims, the exercise of federal jurisdiction was  
8 inappropriate. *See DuBroff v. DuBroff*, 833 F.2d 557 (5th Cir. 1987). In *Dubroff*, an ex-wife  
9 sued her husband, his lawyers, and his business partners for federal securities and RICO  
10 violations in connection with the division of a corporation in a Texas divorce proceeding.  
11 Although styled as a federal case, the Fifth Circuit recognized the action as an attempt to set  
12 aside the Texas divorce decree on the basis of an alleged fraud. The court first noted that the  
13 case presented novel issues of state law, including (1) how to handle certain distinctions between  
14 "intrinsic" fraud (fraudulent actions in the prior suit itself, including perjury and the presentation  
15 of false evidence) which could not support a collateral attack on a judgment, and "extrinsic"  
16 fraud, which could; and (2) whether *res judicata* should bar a second action brought against  
17 lawyers who represented a party to the first action. *See id.* at 559-61. Further explaining that  
18 "there is perhaps no state administrative scheme in which federal court intrusions are less  
19 appropriate than domestic relations law," the Fifth Circuit held that the case should be heard by a  
20 state court, not a federal court. *Id.* at 561; *see also Thompson v. Thompson*, 798 F.2d 1547, 1558  
21 (9th Cir. 1986) ("Even when a federal question is presented, federal courts decline to hear  
22 disputes which would deeply involve them in adjudicating domestic matters.").

23           The same concerns addressed by *DuBroff* are present here. Plaintiff's claims arise out of  
24 a domestic dispute and challenge the state court's division of alleged community property.  
25 Defendants have already raised *res judicata* as a defense, and California law recognizes the

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27 <sup>3</sup> Plaintiff filed a separate Rule 60(d) motion specifically seeking relief from the  
28 state court judgment and including essentially the same allegations contained in the  
complaint. *See* Dkt. No 6.

1 distinction between intrinsic and extrinsic fraud in determining whether a judgment can be set  
2 aside. *See, e.g., Kuehn v. Kuehn*, 85 Cal. App. 4th 824, 833 (Cal. Ct. App. 2000) ("[T]o the  
3 extent Laraine alleged she was defrauded by Garrett's misrepresentation to her of the value of his  
4 pension plan, she merely alleged intrinsic fraud, which is not grounds for vacating a judgment.  
5 However, Laraine's further allegation that Garrett concealed community assets from her raised a  
6 claim of extrinsic fraud, which is a ground for equitable relief.").

7 Thus, regardless of whether plaintiff could state a colorable federal claim, this court will  
8 not entertain a federal action used as a vehicle to attack the state court judgment. Instead, the  
9 court strongly suggests that plaintiff bring her claims before the appropriate California tribunal.  
10 Because it is clear that plaintiff's claims cannot be saved by amendment, the court dismisses her  
11 complaint with prejudice.

12 **III. ORDER**

13 For the foregoing reasons, defendants' motions to dismiss are granted without leave to  
14 amend.

15  
16 Dated: 8/24/12



17 RONALD M. WHYTE  
18 United States District Judge