UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PATRICIA A. GRANT, Plaintiff, v. CLAUDIO GABRIEL ALPEROVICH, et al., Defendants.	CASE NO. C15-1713JLR ORDER

I. INTRODUCTION

This matter comes before the court on Defendants Triet M. Nguyen and Valley Medical Center's (collectively, "VMC Defendants") motion to dismiss (VMC MTD (Dkt. # 43)); Defendant Michael K. Hori's motion to dismiss (Hori MTD (Dkt. # 45)); Defendants Claudio Gabriel Alperovich and Franciscan Health System's (collectively, "FHS Defendants") motion to dismiss and for sanctions (FHS Mot. (Dkt. # 46)); Defendants Richard C. Thirlby and Virginia Mason Health System's (collectively,

"VMHS Defendants") motion to dismiss (VMHS MTD (Dkt. # 47)); Defendants Shoba Krishnamurthy, Richard Ludwig, Lisa Oswald, Pacific Medical Center, Inc., and U.S. Family Health Plan at Pacific Medical Center's (collectively, "PMC Defendants") motion to dismiss (PMC MTD (Dkt. # 55)); and VMHS Defendants' motion for sanctions (VMHS MFS (Dkt. # 48)) (collectively, "Medical Dft. Mots.").[1]

Plaintiff Patricia A. Grant opposes Medical Defendants' motions.[2] (*See* Resp. to VMC MTD (Dkt. # 49); Resp. to FHS Mot. (Dkt. # 71); Resp. to VMHS MTD (Dkt. # 52); Resp. to VMHS MFS (Dkt. # 53); Resp. to Hori MTD (Dkt. # 54); Resp. to PMC MTD (Dkt. # 58).) Medical Defendants filed reply memoranda to each response, with the exception of Ms. Grant's response to VMHS Defendants' motion for sanctions. (*See* VMC Reply (Dkt. # 64); FHS Reply (Dkt. # 70); VMHS Reply (Dkt. # 65); Hori Reply (Dkt. # 72); PMC Reply (Dkt. # 69).)

Having considered the submissions of the parties, the appropriate portions of the record, and the relevant law, the court GRANTS in part, DENIES in part, and DEFERS in part the various motions, as detailed herein.

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[1] Although defendants University of Washington Medicine and Michele Pulling's (collectively, "UWMED Defendants") motion for summary judgment has been fully briefed as of May 4, 2016 (UWMED MSJ (Dkt. # 91)), the court will rule on that motion in a separate order (*see also* Resp. to UWMED MSJ (Dkt. # 93); UWMED Reply (Dkt. # 99)).

Additionally, Ms. Grant filed a motion that she styled as a motion to compel, which is directed at Ms. Pulling and the University of Washington. (Mot. to Compel (Dkt. # 75).) It is unclear what relief Ms. Grant seeks, but it apparently involves service of process. (*Id.*) Pursuant to the court's order, the United States Marshal served Ms. Pulling and the University of Washington in March 2016. (Dkt. # 82.) The court accordingly denies Ms. Grant's motion as moot.

[2] The court refers to the 14 defendants that remain parties to this case as "Medical Defendants."

II. BACKGROUND

A. Procedural History

The court granted *pro se* Plaintiff Patricia A. Grant leave to proceed *in forma pauperis* on November 16, 2015 (11/16/15 Order (Dkt. # 5)), and she filed her complaint on the same day (*see* Compl. (Dkt. # 6)). In her original complaint Ms. Grant named as defendants five Washington State Supreme Court Justices, seven judges from various levels of the Washington State court system, the Washington State Commission on Judicial Conduct, Washington State Attorney General Bob Ferguson, and Washington State Deputy Solicitor General Jeffery T. Even (collectively, "Judicial and State Defendants"). (Compl. at 1.) She also named Medical Defendants, which consist of 14 medical professionals, health care providers, and insurance carriers in Seattle and Tacoma. (*Id.*)

On November 20, 2015, the court dismissed Ms. Grant's complaint as to Judicial and State Defendants for failure to state a claim upon which relief can be granted and gave Ms. Grant leave to amend. (*See* 11/20/15 Order (Dkt. # 8) at 5.) Ms. Grant filed a document entitled "Plaintiff's Reply to Court Ordered Amended Complaint" on December 19, 2015, which the court "liberally construe[d] . . . as an amended complaint." (Am. Compl. (Dkt. # 9); 12/13/15 Order (Dkt. # 10) at 2-3.) The court dismissed the amended complaint with leave to amend, but cautioned Ms. Grant that "if she fail[ed] to state a claim in a future pleading, the court [would] treat that failure as an indication that further amendment would be futile, which can constitute grounds to dismiss without leave to amend." (12/13/15 Order at 6.)

Ms. Grant filed a second amended complaint on January 11, 2016. (SAC (Dkt. # 11).) On January 15, the court dismissed Ms. Grant's claims against Judicial and State Defendants without leave to amend. (*See* 1/15/16 Order (Dkt. # 13) at 7.) However, the court determined that Ms. Grant "pled sufficient facts to avoid *sua sponte* dismissal" with regard to Medical Defendants. (*Id.* at 6.) On April 19, 2016, the court granted Medical Defendants' request to stay discovery pending the court's resolution of Medical Defendants' dispositive motions. (4/19/16 Order (Dkt. # 96) at 1-2.)

B. Ms. Grant's Allegations Against Medical Defendants

In view of Ms. Grant's *pro se* status, the court liberally construes her allegations against Medical Defendants. *See Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012)) ("[*Pro se*] complaints are construed 'liberally.'"). The following background is based on a liberal construction of Ms. Grant's second amended complaint.

Ms. Grant's allegations against Medical Defendants arise out of a series of events that began with a gastric bypass surgery sometime in 2009 and continued for a period of approximately nine months.[3] (*See* SAC at 8-11.) Ms. Grant alleges that a number of health care and insurance professionals failed to correctly diagnose, treat, and pay for post-surgery complications, failed to disclose Ms. Grant's medical records, and attempted to "placate" her through mental illness diagnoses and treatment. (*See id.* at 7-14.) Ms.

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[3] Ms. Grant's second amended complaint does not list precise dates for many of her allegations. However, she refers multiple times to "[n]ine months of denied corrective surgical relief." (*See* SAC at 8-11.)

Grant's allegations against Medical Defendants appear to be limited to the period prior to a corrective surgery that she received on February 10, 2010, in New York, New York. (*See* Compl. Ex. 7 ("Goodman Letter") at 4.)[4]

1. Allegations Against FHS Defendants

Mr. Alperovich performed Ms. Grant's original gastric bypass surgery. (SAC at 7.) Ms. Grant claims that on July 13-14, 2009, Mr. Alperovich concealed from her a hernia diagnosis, failed to render corrective surgery, and provided her treatment for thrush. (*Id.* at 7-8.) Ms. Grant further claims that in August 2009, Mr. Alperovich improperly fed her intravenously, and "implement[ed] a psychiatrist placation medical treatment." (*Id.* at 8.) Finally, Ms. Grant alleges that Mr. Alperovich defamed her and caused "permanent oral damage." (*Id.*) The court understands Ms. Grant to allege that Mr. Alperovich caused "oral damage" and then falsely diagnosed the damage as a separate condition—thrush. (*Id.*)

Franciscan Health System is a health care organization that employs Mr. Alperovich and includes St. Francis Hospital. (*Id.* at 14.) Ms. Grant makes no direct allegations against Franciscan Health System. (*Id.*) Instead she states that she was a patient at St. Francis Hospital under Mr. Alperovich's care and asks the court for discovery to determine Franciscan Health System's "contractual liabilities." (*Id.*) Given

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[4] The exhibits that Ms. Grant attached to her original complaint were not attached to her second amended complaint, but Ms. Grant references the contents of those exhibits in her second amended complaint. In light of Ms. Grant's *pro se* status, the court considers the second amended complaint as if those exhibits were attached. *See McGuire v. Clackamas Cty. Counsel*, No. 08-CV-1098-AC, 2009 WL 4456310, at *2 n.2 (D. Or. Nov. 24, 2009).

that Franciscan Health System employs Mr. Alperovich, the court interprets Ms. Grant's case against Franciscan Health System to be based on a theory of vicarious liability.

2. Allegations Against PMC Defendants

Ms. Oswald was Ms. Grant's primary care provider, and Ms. Krishnamurthy and Ms. Pulling were Ms. Grant's gastroenterologists. (*Id.* at 8-10.) Ms. Grant alleges that Ms. Oswald denied Ms. Grant follow-up visits, failed to disclose "medical referral findings," was indifferent to her corrective surgical needs, and failed to request or read her medical records. (*Id.* at 8-9.) Ms. Grant alleges that Ms. Krishnamurthy and Ms. Pulling denied her requests for medical information, failed to inform her of a 2009 hernia diagnosis, and prescribed antidepressants as medication for "smooth throat muscles." (*Id.* at 9-10.) Additionally, Ms. Grant alleges that all three assisted in and failed to inform her of "placation treatment." (*Id.*)

Ms. Grant alleges that U.S. Family Health Plan and its Chief Medical Officer, Mr. Ludwig, failed to disclose a post-surgery hernia diagnosis and refused to pay for surgery to correct her hernia and her angulated intestines. (*Id.* at 11.)

3. Allegations Against VMC Defendants

Mr. Nguyen is a psychiatrist and an employee of Valley Medical Center who evaluated Ms. Grant. (*Id.* at 11-12.) Mr. Nguyen diagnosed Ms. Grant in a manner that Ms. Grant considers to be "placation treatment." (*Id.* at 12.) Ms. Grant further alleges that the diagnosis Mr. Nguyen provided constitutes medical fraud and defamation. (*Id.*) Given that Valley Medical Center employs Mr. Nguyen, the court construes Ms. Grant's case against Valley Medical Center to be based on a theory of vicarious liability.

4. Allegations Against VMHS Defendants

Mr. Thirlby is a bariatric surgeon at one of Virginia Mason Health System's medical centers. (*Id.* at 13.) Ms. Grant alleges that Mr. Thirlby ignored her medical records, which indicated a hernia diagnosis, and falsified medical information in support of Mr. Alperovich's "psychiatric placation" treatment. (*Id.*) Given that Mr. Thirlby performs surgeries for Virginia Mason Health System, the court construes Ms. Grant's case against Virginia Mason Health System to be based on a theory of vicarious liability.

5. Allegations Against Mr. Hori

Ms. Grant alleges that Mr. Hori failed to physically examine her and wrote "false mental health conversations" in her medical record "in support of Mr. Alperovich's fraudulent psychiatric placation medical treatment." (*Id.* at 14.)

6. Allegations Against UWMED Defendants

Ms. Grant does not list any specific allegations against UWMED Defendants.[5] (*Id.*) Instead, she requests discovery to determine "legal liabilities." (*Id.*)

III. ANALYSIS

A. Legal Standards Under Federal Rule of Civil Procedure 12(b)(6)

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable

[5] Ms. Grant again lists Ms. Pulling in the section of her second amended complaint pertaining to UWMED Defendants, but Ms. Grant does not add additional allegations to those presented on pages 9-10 of her second amended complaint. (*See* SAC at 14); *supra* § II.B.2.

inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 677-78. Dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

The court may consider *res judicata* when evaluating a Rule 12(b)(6) motion. *See Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1983). Additionally, the court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)).

B. Claim Preclusion

Medical Defendants argue that Ms. Grant's prior lawsuits—one in federal court and one in state court—preclude her from pursuing this one. (*See generally* Medical Dft. Mots.); *see also Grant v. Alperovich* ("*Alperovich I*"), No. C12-01045RSL (W.D. Wash. 2014) (Dkt. ## 149-50, 169, 180-81, 221-24) (dismissing with prejudice Ms. Grant's federal claims against Medical Defendants and dismissing without prejudice her state

claims for lack of jurisdiction), *appeal docketed*, No. 14-35288 (9th Cir. 2014); *Grant v. Alperovich* ("*Alperovich II*"), No. 69643-2 (Wash. Ct. App. 2014) (affirming dismissal of Ms. Grant's claims against Medical Defendants), *cert. denied*, No. 90429-4 (Wash. 2014).

Preclusion rules differ based on whether a federal or state court entered the prior judgment. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985). However, the fundamental principle of claim preclusion is the same: "[A] losing litigant deserves no rematch after a defeat fairly suffered." *B & B Hardware, Inc. v. Hargis Indus.*, --- U.S. ---, 135 S. Ct. 1293, 1303 (2015) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991)). "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Parties cannot relitigate the same claims even if they believe "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.* If a party believes the court made the wrong decision, it "can be corrected only by a direct review [on appeal] and not by bringing another action upon the same cause [of action]." *Id.*

1. Claim Preclusion Based on *Alperovich I*

In federal court, federal procedural common law governs the preclusive effects of a prior federal court judgment decided on federal question grounds. *See, e.g., Stewart v. U.S. Bancorp*, 297 F.3d 953, 955 (9th Cir. 2002) (affirming application of federal preclusion rules to a prior federal court judgment). Under federal common law, a final

judgment on the merits precludes a future suit if the judgment was rendered by a court of competent jurisdiction, the parties are identical or in privity, and the cause of action is the same. *See Littlejohn v. United States*, 321 F.3d 915, 920 (9th Cir. 2003). To determine if the cause of action is the same, courts consider

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two actions involve infringement of the same right; and (4) whether the two actions arise out of the same transactional nucleus of facts.

Id.

Federal courts also "regularly turn[] to the Restatement (Second) of Judgments" for assistance in evaluating preclusion. *B & B Hardware*, 135 S. Ct. at 1303. What constitutes a "claim" or "action" is "determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24. In addition to actual claims a party asserted in the previous action, claim preclusion also "prohibits lawsuits on any claims that . . . could have been raised in a prior action." *Stewart*, 297 F.3d at 956.

Dismissal with prejudice constitutes a final judgment on the merits. *Id.* "Unless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b). Accordingly, a prior judgment does not preclude a future suit "[w]hen the [prior]

judgment is one of dismissal for lack of jurisdiction." Restatement (Second) of Judgments § 20(b).

Alperovich I precludes Ms. Grant's federal claims in this case. The federal district court for the Western District of Washington properly exercised federal question jurisdiction over Ms. Grant's lawsuit. The court's judgment against Ms. Grant on her federal claims was on the merits because the court granted summary judgment for Medical Defendants and dismissed Ms. Grant's claims with prejudice. *Alperovich I*, Dkt. ## 149-50, 169, 180-81, 221-24. Medical Defendants are the same defendants that Ms. Grant sued in *Alperovich I*.

Moreover, Ms. Grant's claim in this case is the same as in *Alperovich I* for preclusion purposes because it arises out of the "same transactional nucleus of facts" and "the facts are related in time, space, origin, or motivation." *Littlejohn*, 321 F.3d at 920; *see also* Restatement (Second) of Judgments § 24. In *Alperovich I*, Ms. Grant alleged that:

- Medical Defendants caused her injury for nine months after her gastric bypass surgery, *Alperovich I*, Plaintiff's Third Amended Complaint (Dkt. # 62) at 1-5;
- Ms. Grant only obtained relief once she received corrective surgery in New York, New York in February 2010, *id.* at 5-10;
- Medical Defendants "implemented a treatment plan of [p]lacating" Ms. Grant, *id.* at 6;
- Medical Defendants improperly diagnosed Ms. Grant with thrush, *id.* at 7;
- Medical Defendants failed to review Ms. Grant's records that would have revealed

a gastric hernia, *id.* at 8; and

- Medical Defendants discriminated against Ms. Grant based on her age and race, *id.* at 9.

Ms. Grant makes the same allegations in the case at bar. (*See* SAC at 7-14); *see also supra* § II.B.[6]

Finally, Medical Defendants' rights will be impaired if Ms. Grant's claims are allowed to go forward. Medical Defendants have obtained final and valid judgments that would be rendered meaningless if Ms. Grant were allowed to relitigate her federal claims.

The *Alperovich I* court granted summary judgment to Medical Defendants on all of Ms. Grant's federal claims and dismissed those claims with prejudice, which constitutes a final judgment on the merits.[7] *See Alperovich I*, Dkt. ## 149-50, 169, 180-81, 221-24. Ms. Grant's federal claims in the present case are the same as her claims in *Alperovich I*, and therefore she cannot relitigate the same federal claims in this court.

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[6] The *Alperovich I* court construed Ms. Grant's federal claims to fall under Titles II, VI, and XI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000c, 2000h; the Age Discrimination Act of 1975, 42 U.S.C. § 6101; civil rights statutes, 42 U.S.C. §§ 1983, 1985; Titles II and III of the Americans with Disabilities Act, 42 U.S.C. §§ 12132, 12182; the Health Insurance Portability and Accountability Act of 1986, Pub. L. 104-191, 110 Stat. 1936; and a health care fraud statute, 18 U.S.C. § 1349. *See Alperovich I*, 4/2/14 Order (Dkt. # 224). The court also construed Ms. Grant's allegations to include state law defamation, libel, and slander claims. *Id.* Ms. Grant lists several of the same sources of law in her second amended complaint. (SAC at 4.) This overlap further indicates that Ms. Grant has re-filed a nearly identical lawsuit with respect to Medical Defendants.

[7] *Alperovich I* is currently on appeal in the Ninth Circuit, No. 14-35288, which is the proper venue for Ms. Grant to pursue her objections to *Alperovich I*. *See Tripati v. G.L. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4433 (1981)) ("The established rule in the federal courts is that a final judgment retains all of its [*res judicata*] consequences pending decision of the appeal . . . .").

2. Claim Preclusion Based on *Alperovich II*

The *Alperovich I* court dismissed Ms. Grant's state law claims for lack of subject matter jurisdiction. *See Alperovich I*, Dkt. ## 149-50, 169, 180-81, 221-24. Because dismissal on jurisdictional grounds is not "on the merits," the judgment in *Alperovich I* does not bar Ms. Grant's state law claims. However, a state trial court dismissed with prejudice Ms. Grant's claims against Medical Defendants except for UWMED Defendants and VMC Defendants, and the *Alperovich II* court upheld that dismissal.[8] *Alperovich II* at 3. The superior court dismissed UWMED Defendants and VMC Defendants on jurisdictional grounds. *Id.* at 4.

The Full Faith and Credit Act "requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment." *Marrese*, 470 U.S. at 381; *see also* 28 U.S.C. § 1738. "The concerns of comity reflected in § 1738 generally allow States to determine the preclusive scope of their own courts' judgments." *Marrese*, 470 U.S. at 385. Under Washington State law, claim preclusion requires a final judgment on the merits and the same "(1) subject matter; (2) cause of action; (3) persons and parties; and (4) . . . quality of the persons for or against whom the claim is made." *Schoeman v. N.Y. Life Ins. Co.*, 726 P.2d 1, 3 (Wash. 1986). Washington courts determine whether the cause of action is the same by analyzing

> (1) [w]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether

[8] The court refers to the appellate decision rather than the trial court's orders because the appellate court's decision compiles the relevant facts and issues particularly clearly and concisely.

the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Norco Constr., Inc. v. King Cty., 721 P.2d 511, 513 (Wash. 1986). These factors are identical to the factors the Ninth Circuit applies. *See Littlejohn*, 321 F.3d at 920.

Unless a court specifies, dismissal for lack of jurisdiction is without prejudice and is not a final judgment on the merits. *See Scott v. Goldman*, 917 P.2d 131, 135 (Wash. Ct. App. 1996) (quoting Wash. Super. Ct. Civ. R. 41(b)(3)) ("'Unless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits.'"). "Proper service of process 'is essential to invoke personal jurisdiction over a party.'" *In re Estate of Kordon*, 137 P.3d 16, 18 (Wash. 2006), as amended (July 24, 2006) (quoting *In re Marriage of Markowski*, 749 P.2d 754, 755 (Wash. Ct. App. 1988)).

The *Alperovich II* court affirmed summary judgment for Mr. Hori, FHS Defendants, VMHS Defendants, and PMC Defendants. *Alperovich II* at 3. These defendants are entitled to prevail on the basis of claim preclusion here because the defendants are the same, they received a final judgment on the merits, and the subject matter of the two suits is nearly identical.[9] (*Compare* SAC at 7-14 *with* Appellant's Brief, *Alperovich II* (Dkt. # 1-3) at 13); *supra* § III.B.1. VMC Defendants argue that

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[9] Some Medical Defendants argue that statutes of limitations further bar Ms. Grant's state law claims. (*See* VMHS MTD at 8-9); *see also* RCW 4.26.350 (three-year limitation on medical tort claims); RCW 4.16.100(1) (two-year limitation on libel and slander claims). The majority of Ms. Grant's claims appear to originate in 2009, although some claims potentially originate in 2010. (*See* SAC at 7-14.) However, given that claim preclusion bars Ms. Grant's state law claims against the parties that raised statute of limitation defenses, the court declines to express an opinion on the defendants' statute of limitations defenses.

claim preclusion bars Ms. Grant's state law claims against them as well, because those claims "could have been raised in a prior action" and because the claims "received a final adjudication on the merits." (VMC MTD at 5.) However, Ms. Grant's state law claims did not receive a final adjudication on the merits with regard to VMC Defendants because the *Alperovich II* court dismissed VMC Defendants without prejudice for lack of jurisdiction. *Alperovich II* at 4. For that reason, claim preclusion does not bar Ms. Grant's state law claims against VMC Defendants.

C. Supplemental Jurisdiction Over Remaining State Law Claims

"The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

In this order, the court dismisses Ms. Grant's federal claims against FHS Defendants, VMC Defendants, VMHS Defendants, PMC Defendants, and Mr. Hori. Additionally, the court dismisses Ms. Grant's state law claims against FHS Defendants, VMHS Defendants, PMC Defendants, and Mr. Hori. Of Ms. Grant's claims against moving defendants, the only claims that remain are Ms. Grant's state law claims against

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VMC Defendants.[10] The court therefore exercises its discretion under 28 U.S.C. § 1367(c)(3) and dismisses Ms. Grant's state law claims against VMC Defendants.[11]

D. Leave to Amend

When a court dismisses a *pro se* plaintiff's complaint, leave to amend is mandatory unless it is absolutely clear that amendment could not cure the defects in the complaint. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). "A district court, however, does not abuse its discretion in denying leave to amend where amendment would be futile," *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002), or when it dismisses under 28 U.S.C. § 1915(d) a complaint "that merely repeats pending or previously litigated claims," *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995).

The information before the court indicates that Ms. Grant's second amended complaint is nothing more than a re-filing of her previous lawsuits. Ms. Grant alleges facts that are nearly identical to the facts in *Alperovich I* and *Alperovich II*. (*See* SAC at 7-14); *supra* §§ III.B.1, III.B.2. Additionally, Ms. Grant appears to acknowledge that her

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[10] VMC Defendants did not raise a statute of limitations defense in their motion, so the court does not consider whether a statute of limitations bars Ms. Grant's state law claims against VMC Defendants. (*See generally* VMC MTD); *see also Clark-Kunzl Co. v. Williams*, 469 P.2d 874, 878 (Wash. 1970) (explaining that a statute of limitations is an affirmative defense); *O'Connell v. Fernandez-Pol*, 542 F. App'x 546, 547 (9th Cir. 2013) (citing Fed. R. Civ. P. 8(c)) ("[T]he statute of limitations is an affirmative defense that must be pled and proved by the party asserting it.")

[11] Several Medical Defendants requested monetary sanctions under Federal Rule of Civil Procedure 11. (*See* FHS Mot. at 3-4; VMHS MFS.) FHS Defendants also seek "an order that prevents the plaintiff from filing additional lawsuits without prior permission of the [c]ourt." (FHS Mot. at 4.) The court denies the defendants' requests for sanctions but cautions Ms. Grant that repeatedly filing the same lawsuit after it has been dismissed may result in sanctions.

claims are based on the same set of facts she alleged in her previous lawsuits. (*See* Resp. to UWMED MSJ at 2 ("Was the claim decided in the prior suit the same claim being presented in the action [in] question? Yes."); SAC at 4 ("Ms. Grant's legal cause of action, before this said court, arose out of her superior court complaint . . . ."), 3 (devoting an entire page to "previous lawsuits" against the same defendants); Resp. to Hori MTD at 2 ("As of March 14, 2016, her civil rights case against medical defendants remains pending before the 9th Circuit."); *id.* ("Defendant Hori's medical duties owed to Plaintiff, according to Washington States ('WA') standards of care; as an Infectious Disease doctor in his care w[ere] raised in State court and are now before this said court.").)

Amendment would be futile if Ms. Grant's claims cannot survive Medical Defendants' claim preclusion defense, which appears to be the case. However, the court cannot deny leave to amend unless it is "absolutely clear that no amendment can cure the defect." *Lucas*, 66 F.3d at 248. Accordingly, the court defers ruling on whether to allow Ms. Grant leave to amend and orders Ms. Grant to show cause why the court should not dismiss her claims without leave to amend.[12] In her filing, Ms. Grant should address (1) what claims Ms. Grant included in this action that she did not include in *Alperovich I* and *Alperovich II*; (2) why the claims in this action are not barred by claim preclusion due to *Alperovich I* and *Alperovich II*; and (3) whether Ms. Grant can amend the complaint to state a valid claim. *See Miljkovic v. Winter*, No. CIV 08-00515 JMS/LEK, 2008 WL

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[12] In light of the analysis herein, the court stays Ms. Grant's motion for summary judgment (Grant MSJ (Dkt. # 98)) until Ms. Grant responds to the court's order to show cause.

5231798, at *3 (D. Haw. Dec. 8, 2008) (ordering a *pro se* plaintiff to show cause that his claims were not barred by claim preclusion before deciding whether to grant leave to amend). Ms. Grant must submit this information within 20 days of the date of this order. If Ms. Grant does not timely comply with this order, the court will deny leave to amend.

IV. CONCLUSION

The court GRANTS the following motions: Mr. Hori's motion to dismiss (Dkt. # 45); Mr. Thirlby and Virginia Mason Health System's motion to dismiss (Dkt. # 47); and Ms. Krishnamurthy, Mr. Ludwig, Ms. Oswald, Pacific Medical Center, Inc., and U.S. Family Health Plan at Pacific Medical Center's motion to dismiss (Dkt. # 55). The court GRANTS IN PART and DENIES IN PART Mr. Alperovich and Franciscan Health System's motion (Dkt. # 46) and Mr. Nguyen and Valley Medical Center's motion to dismiss (Dkt. # 43). The court DENIES Mr. Thirlby and Virginia Mason Health System's motion for sanctions (Dkt. # 48). The court DENIES Ms. Grant's motion to compel (Dkt. # 75). The court DEFERS ruling on the University of Washington and Ms. Pulling's motion for summary judgment (Dkt. # 91). The court STAYS Ms. Grant's motion for summary judgment (Dkt. # 98). The court DISMISSES Ms. Grant's second amended complaint as to all Medical Defendants except University of Washington and Ms. Pulling (Dkt. # 11). The court ORDERS Ms. Grant to show cause within 20 days of

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the date of this order why amendment would not be futile.

Dated this 9th day of May, 2016.

JAMES L. ROBART
United States District Judge