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9 *Annette Whittemore, Michael Hillerby, Vincent Lombardi,*
10 *Carli W. Kinne, UNEVX, Inc. and the Whittemore-Peterson Institute.*

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 JUDY ANN MIKOVITS

14 Plaintiff,

15 v.

16 ADAM GARCIA, et al.,

17 Defendants.

Case No. CV14-08909-SVU(PLA)

MOTION TO DISMISS

18 COME NOW, Defendants Harvey Whittemore, Annette Whittemore, Michael Hillerby,
19 Carli W. Kinne, Vincent Lombardi, The Whittemore-Peterson Institute ("WPI") and UNEVX,
20 Inc., by and through counsel, Brian Warner Hagen, to hereby move to dismiss Plaintiff Judy
21 Ann Mikovits' Complaint in this matter. Ms. Mikovits' Complaint was filed with this Court
22 November 17, 2014, almost exactly one year beyond the applicable statute of limitations.

I. INTRODUCTION

23 Plaintiff Judy Ann Mikovits ("Plaintiff"), a *pro se* litigant brings this action pursuant to
24 42 U.S.C. § 1983. The events giving rise to this action took place during and shortly after
25 Plaintiff was employed as a research scientist by Defendant Whittemore-Peterson Institute,
26 a non-profit corporation dedicated to researching the various difficult to diagnose neuro-
immune diseases.

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1 **II. LEGAL STANDARDS**

2 **a. DISMISSAL FOR FAILURE TO FILE UNDER THE LIMITATIONS PERIOD**

3 In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), “allegations of
4 material fact are taken as true and construed in the light most favorable to the plaintiff. A
5 complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove
6 no set of facts in support of [the plaintiff’s] claims which would entitle [the plaintiff] to relief.”
7 *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994). Specifically, with respect to the statute
8 of limitations, “A statute of limitation defense may be raised by a motion to dismiss if the
9 running of the limitation period is apparent on the face of the complaint.” *Vaughan v.*
10 *Grijalva*, 927 F.2d 476, 479 (9th Cir. 1991).

11 Because 42 U.S.C. § 1983 contains no limitations provision, federal courts borrow the
12 state statute of limitations for personal injury actions and borrow all applicable provisions for
13 tolling the limitations period found in state law. *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct.
14 1091, 1094 (2007).

15 However, federal law applies to determine “when a cause of action accrues and the
16 statute of limitations begins to run for a § 1983 claim. A federal claim accrues when the
17 plaintiff knows or has reason to know of the injury which is the basis of the action.” *Bagley v.*
18 *CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991). In California, that limitations
19 period is two years. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132-33 (9th Cir. 2007)

20 **b. DISMISSAL FOR FAILURE TO ALLEGE STATE ACTOR CONSPIRACY**

21 42 U.S.C. § 1983 empowers the Plaintiff to seek redress for violations of her
22 constitutional rights by those acting under color of state law. A defendant has acted under
23 color of state law where he or she has “exercised power ‘possessed by virtue of state law
24 and made possible only because the wrongdoer is clothed with the authority of state law.’”
25 *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326
26 (1941)).

1
2 Generally, private parties are not acting under color of state law. *Price v. Hawaii*, 939
3 F.2d 702, 707-08 (9th Cir. 1991); *Simmons v. Sacramento County Superior Court*, 318 F.3d
4 1156, 1161 (9th Cir. 2003) (explaining that a lawyer in private practice does not act under
5 color of state law).

6 Only where a private party conspires with state officials to deprive others of
7 constitutional rights, however, the private party is acting under color of state law. *Tower v.*
8 *Glover*, 467 U.S. 914, 920 (1984); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Franklin v.*
9 *Fox*, 312 F.3d 423, 441 (9th Cir. 2002); *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th
10 Cir. 2000); *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996) (per
11 curiam); *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983).

12 To prove such a conspiracy “the [plaintiff] must show an agreement or meeting of the
13 minds to violate constitutional rights. To be liable, each participant in the conspiracy need
14 not know the exact details of the plan, but each must at least share the common objective of
15 the conspiracy.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41
16 (9th Cir. 1989) (en banc) (citations and internal quotations omitted).

17 For the purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the Plaintiff is
18 subject to heightened pleadings standards requiring her to offer more than mere conclusory
19 allegations of conspiracy, which, as a matter of law, “insufficient to state a claim of
20 conspiracy.” *Simmons*, 318 F.3d at 1161; *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772,
21 783-84 (9th Cir. 2001); *Price*, 939 F.2d at 708-09. “Vague and conclusory allegations of
22 official participation in civil rights violations are not sufficient to withstand a motion to
23 dismiss.” *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982); *Bruns v. Nat’l Credit*
24 *Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997); *Pena v. Gardner*, 976 F.2d 469, 471
25 (9th Cir. 1992) (per curiam).

26 The Ninth Circuit has elaborated on the sort of allegations contained in Plaintiff’s
27 complaint. “[M]erely complaining to the police does not convert a private party into a state
28 actor. Nor is execution by a private party of a sworn complaint which forms the basis of an

1 arrest enough to convert the private party's acts into state action." *Collins v. Womanicare*,
 2 878 F.2d 1145, 1154-55 (9th Cir.1989) (Internal citations omitted.)

3 **c. MISCELLANEOUS CLAIMS AND JURISDICTION**

4 Throughout her complaint, the Plaintiff uses the titles of various other torts, which
 5 merit brief discussion. For instance, in Count III, she claims that Whittemores, WPI,
 6 Lombardi, Hillerby and Gammick conspired to "defraud" her. Complaint at ¶ 47. Although
 7 she uses the term "defraud," she does not state a cause of action for fraud. "The elements
 8 of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4)
 9 justifiable reliance; and (5) resulting damage." *Doe v. Gangland Productions, Inc.*, 730 F. 3d
 10 946, 960 (9th Cir. 2013)

11 Particularly, the Plaintiff does not claim that she in any way justifiably relied to her
 12 detriment on the "fraudulent" representations of the Defendants. Rather, she uses "defraud"
 13 as a synonym for "lie" in support of her allegation that private-actor Defendants conspired
 14 with the state-actor Defendants to violate her civil rights. Further, she does not make any
 15 allegation of fraud with the particularity required by Fed. R. Civ. P. 9(b). "Averments of fraud
 16 must be accompanied by the who, what, when, where, and how' of the misconduct charged."
 17 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)

18 Similarly, at the conclusion of each of her allegations, the Plaintiff claims "grave
 19 defamation" amongst the other harms she has suffered as a result of her allegedly wrongful
 20 arrests. She does not truly state a cause of action for defamation, but appears to simply
 21 alleging reputation damage as a result of the alleged violation of her civil rights under 42
 22 U.S.C. §1983.

23 However, to the extent that the Court does, for the purposes of this Motion, find that
 24 Plaintiff has stated allegations beyond those that arise under 42 U.S.C. §1983, the only
 25 basis for jurisdiction over those claims would be Supplemental Jurisdiction under 28 U.S.
 26 Code § 1367. Neither defamation nor fraud, as common law torts, arise under federal
 27 statute, and Plaintiff has not alleged sufficient damages to invoke diversity jurisdiction under
 28 28 U.S. Code § 1332. Complaint at ¶ 2.

1 **III. ARGUMENT**

2 **a. Plaintiff's Claims are Barred by the Statute of Limitations.**

3 The Plaintiff's allegations, construed in the light most favorable to Plaintiff,
 4 nevertheless mandate dismissal of her complaint, as each and every fact alleged in the
 5 complaint to support her allegations that her constitutional rights were violated under 42
 6 U.S.C. § 1983 took place in the Autumn of 2011, while Plaintiff did not file her Complaint in
 7 this matter until November 17, 2014. Complaint, ¶ 23 – 33. Specifically, she alleges the
 8 Whittemores terminated her employed on September 29, 2011 (*Id. at* ¶ 30), that on
 9 November 18, 2011, Defendants McGuire, Garcia and the three Ventura Deputies arrested
 10 her in her home and transported her to the Ventura County Courthouse (*Id. at* ¶ 31). She
 11 further alleges that she was released on November 22nd, 2011 (*Id. at* ¶ 53) and was
 12 required to "travel to Reno to appear in the Nevada State Court Action, under threat of re-
 13 arrest." *Id.*

14 The Plaintiff divides the alleged civil rights violations found in these events over five
 15 counts, some of which overlap with one another. Because she does not allege specific
 16 dates within these Counts, the Court must refer back to her general allegations to establish
 17 the timeline for the purposes of this Motion. For instance, In Count I, she alleges a violation
 18 of her constitutional rights under 42 U.S.C. § 1983 and false imprisonment via-a-vis her
 19 arrest on a warrant which she claims was issued as a result of misrepresentations by
 20 Defendants Whittemore, WPI, Lombardi and Hillerby in "collusion" with Washoe County
 21 District Attorney Dick Gammick. Complaint at ¶ 42. This clearly refers to the arrest
 22 described in her general allegations at ¶ 31 as having taken place on November 18, 2011.

23 In Count II, she repeats her allegations that her due process was denied by the
 24 Whittemores, Lombardi and Hillerby, but more specifically alleges that Gammick violated her
 25 due process rights by issuing the warrant on which she was arrested. Complaint at ¶ 43,44.
 26 Naturally the harm of this warrant was the arrest it affected, which took place on November
 27 18, 2011. Complaint at ¶ 31.

28 In Count III, the Plaintiff repeats the same allegation of "collusion," adding a reference

1 to an allegedly “forged” confidentiality agreement. She asserts that the forged document
 2 was also used against her in a 2013 bankruptcy proceeding, by Defendant Kinne and
 3 concludes her allegation by stating that the Whittemores, WPI, Lombardi, Hillerby and
 4 Gammick conspired to “defraud” her. Plaintiff does not allege any dates that this conspiracy
 5 took place, but as she alleges that it led to her arrest on November 18, 2011, it must have
 6 taken place before that time. Complaint at ¶ 31.

7 In Count IV, the Plaintiff alleges that Defendants McGuire and Garcia of the University
 8 of Nevada Police Department “conspired” with the Whittemores by failing to “exercise good
 9 judgment” as law enforcement officials, all of which contributed to her arrest and denial of
 10 due process. Liberally construed, this appears to extend the allegation of false imprisonment
 11 and the § 1983 due process claim to Defendants McGuire and Garcia. Referring again back
 12 to her general allegations, the arrest and false imprisonment took place from November 18-
 13 22, 2011. Complaint at ¶ 31, 53.

14 In Count V, she alleges that Defendants Dean and three unidentified “Ventura
 15 Deputies,” also committed the torts of false imprisonment and denial of due process under §
 16 1983 by executing the arrest warrant issued in Washoe County. Again, this took place on
 17 November 18, 2011. Complaint at ¶ 31.

18 Lastly, In Count VI, she alleges that the Whittemores and Garcia again committed
 19 false imprisonment and defamation by “demanding” that she travel to Reno, Nevada to
 20 appear in a non-specific judicial proceeding in Nevada under threat of re-arrest. In her
 21 general allegations, Plaintiff claims these events took place on November 22, 2011.
 22 Complaint at ¶ 53.

23 **a. Plaintiff Fails to Allege a Conspiracy Sufficient to Subject Private**
 24 **Actors to Liability under § 1983.**

25 Plaintiff’s complaint contains only naked allegations of conspiracy between the private
 26 actor Defendants (the Whittemores, the WPI, UNEVX, Kinne, Hillerby, Lombardi, Hunter and
 27 Pari) and the state actor defendants (Gammick, Garcia, McGuire, the Ventura County Sheriff
 28 and the Ventura Deputies). She repeats several times that Defendant Gammick, the District

1 Attorney of Washoe County, Nevada, was in “active collusion” with various of the private
 2 actor Defendants. Complaint at ¶ 34, 43, 45. She also States that various of the private
 3 actor Defendants “conspired” with the Garcia, McGuire and Gammic. Complaint at ¶ 34, 45,
 4 48.

5 Even construed in the light most favorable to Plaintiff, these allegations are nothing
 6 more than “vague and conclusory allegations of official participation in civil rights violations,”
 7 and, as a matter of law, “are not sufficient to withstand a motion to dismiss.” *Ivey* at 268 (9th
 8 Cir. 1982). Further, although Plaintiff does not specifically allege that the private-actor
 9 Defendants swore a complaint which caused Gammick to issue a warrant for her arrest, her
 10 allegations seem to vaguely indicate that course of action. As a matter of law, execution by a
 11 private party of a sworn complaint which forms the basis of an arrest is not enough to
 12 convert the private party's acts into state action. *Collins* at 1154-55 (9th Cir.1989).

13 Lastly, in something of a rogue allegation unrelated to her arrest and detention,
 14 Plaintiff claims in Count III that Defendant Kinne introduced “forged” in a bankruptcy
 15 proceeding in 2013. Liberally construed, this appears to be an allegation of “false oath”
 16 before a bankruptcy court, potentially within the meaning 18 U.S.C. § 152. But the allegation
 17 is so hopelessly vague that it fails to state a claim here. It fails to establish a basis for
 18 jurisdiction, as it does not indicate where the Bankruptcy took place and thus which federal
 19 district has original jurisdiction over the bankruptcy action. It also appears to establish, on its
 20 face, the affirmative defense of *res judicata*, as whichever Bankruptcy court in which this
 21 alleged fraud upon the Court took place would retain jurisdiction over that claim. But for the
 22 purposes of this motion, it suffices that Plaintiff does not even attempt to allege that Kinne
 23 conspired with any state actors in bringing this alleged forgery before the bankruptcy court,
 24 and thus cannot possibly be construed as a violation of Plaintiff's civil rights under 42 U.S.C.
 25 § 1983.

26 **IV. CONCLUSION**

27 Under the statute of limitations that applies to actions arising under 42 U.S.C. § 1983,
 28 Plaintiff's complaint is tardy by a full year, and accordingly should be DISMISSED WITH

1 PREJUDICE as to all Defendants. As an independent basis for dismissal, Plaintiff fails state
2 more than mere naked allegations of "conspiracy" with state actors against Defendants
3 Harvey Whittemore, Annette Whittemore, Michael Hillerby, Carli W. Kinne, Vincent
4 Lombardi, the WPI, UNEVX, Inc., Kenneth Hunter and Greg Pari, entitling those defendants
5 to be DISMISSED from the Complaint.

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8 Dated this 4th Day of February, 2015.

9
10 By: 

BRIAN WARNER HAGEN

11 *Attorney for Defendants Harvey Whittemore,*
12 *Annette Whittemore, Michael Hillerby, Carli W.*
13 *Kinne, Vincent Lombardi, the WPI, and UNEVX,*
14 *Inc.*
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CERTIFICATE OF SERVICE

I certify that I have on this 4th day of February, 2015 I caused a second, duplicate copy of the foregoing **MOTION TO DISMISS**, to be served by mailing a true copy to the following:

JUDY ANN MIKOVITS
140 Acacia Ave. #5
Carlsbad, CA 92008


BRIAN W. HAGEN