James N. Procter II – State Bar No. 96589
Lisa N. Shyer – State Bar No. 195238
Jeffrey Held – State Bar No. 106991
WISOTSKY, PROCTER & SHYER
300 Esplanade Drive, Suite 1500
Oxnard, California 93036
Phone: (805) 278-0920
Facsimile: (805) 278-0289
Email: Jheld@wps-law.net

Attorneys for Defendant
GEOFF DEAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUDY ANNE MIKOVITS,

Plaintiff,

vs.

ADAM GARCIA, JAIME MCGUIRE, RICHARD GAMMICK, GEOFF DEAN, THREE UNIDENTIFIED VENTURA COUNTY SHERIFFS, F. HARVEY WHITTEMORE, ANNETTE F. WHITTEMORE, CARLIE WEST KINNE, WHITTEMORE-PETERSON INSTITUTE, a Nevada Corporation, UNEVX INC., a Nevada Corporation, MICHAEL HILLERBY, KENNETH HUNTER, GREG PARI and VINCENT LOMBARDI,

Defendants.

CASE NO. CV14-08909-SVW (PLA)

NOTICE OF HEARING OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR FOR A MORE DEFINITE STATEMENT; MEMORANDUM OF POINTS AND AUTHORITIES AND 7-3 DECLARATION IN SUPPORT THEREOF

Date: March 24, 2015
Time: 10:00 a.m.
Ctrm: G – 9th Floor, Spring Street

TO: Plaintiff, Judy Anne Mikovits, in pro se:

Please take notice that on March 24, 2015, Defendant Geoff Dean will move the Honorable Paul L. Abrams, United States Magistrate Judge, for an order granting

this motion to dismiss the complaint, or, in the alternative, for a more definite statement. The location of the hearing is 312 N. Spring Street, Los Angeles, California, 90012-4793, Courtroom 934-G, Ninth Floor.

This motion is based upon the attached memorandum of points and authorities and is directed to the complaint filed on November 17, 2014, and served upon moving party on January 23, 2015. This motion also challenges the purported service upon Undersheriff Gary Pentis and Assistant Sheriff Steve De Cesari as ineffective in that they are not named defendants.

This motion is made following the conference of parties pursuant to Central District Local Rule 7-3, which took place on February 2 and 3, 2015. The appended declaration of moving party's counsel, Jeffrey Held, establishes that the exact text of this motion was e-mailed and regular mailed to plaintiff on the earlier date and that moving party's counsel telephoned Plaintiff to discuss the motion on the later date.

DATED: February 10, 2015

WISOTSKY, PROCTER & SHYER

By: _____
Jeffrey Held
Attorneys for Defendant
GEOFF DEAN

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

TABLE OF CONTENTS

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

///

/ / /

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

STATUTES

RULES

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GEOFF DEAN'S MOTION TO DISMISS COMPLAINT, OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

I.

INTRODUCTION

Defendant Geoff Dean, Sheriff of the County of Ventura (Complaint, Paragraph 9), moves the Court for an order of dismissal for failure to state a claim upon which relief can be granted and for a more definite statement on the following grounds:

1. The complaint violates the rule announced in *McHenry, Cafasso* and *Knapp*, in that it is a narrative storytelling format of a wide-ranging government conspiracy with no specification of which defendants are being sued for which wrongs and which facts support which claims. The confusing and unfocused allegations prevent defendant from ascertaining to a proper degree whether any defenses exist or could be presented by facial challenge motion.

2. The complaint violates the Ninth Circuit's requirement in the *Barren* decision prohibiting complaints which do not allege any facts which would implicate the personal involvement of the defendant.

3. To the extent that defendant can understand the nature of the action against him, it appears to be time-barred.

4. There are no facts pled demonstrating the existence of a *Monell* claim.

5. The defendant is qualifiedly immune.

6. The service of the complaint upon non-parties Gary Pentis, the Undersheriff of the County of Ventura, and Steve De Cesari, the Assistant Sheriff, is ineffective because these individuals are not named.

/ / /

/ / /

/ / /

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

II.

ENABLING AUTHORITY

A plaintiff's obligation to provide the grounds for his or her entitlement to relief requires more than labels and conclusions. *Bell Atlantic v. Twombley,* 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action will not do. *Id.* In evaluating a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation. Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* The complaint must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action. *Id.*

When a complaint pleads facts which are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. *Id.* Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged- but it has not shown- that the pleader is entitled to relief." *Id.*

Federal Rule of Civil Procedure 12(b)(6) authorizes a facial challenge motion for a complaint's failure to state a claim upon which relief can be granted. Rule 12(e) allows a defendant to make its initial responsive pleading a motion for a more definite statement of complaint which is so vague or ambiguous that the defendant cannot reasonably prepare a response. Federal Rule of Civil Procedure 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief.

/ / /

/ / /

/ / /

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

III.

ALLEGED FACTS

Plaintiff is a research scientist specializing in immunology and virology. She was the principal investigator for a federal grant agency. The grant was from the National Institutes of Health. It was for the detection and explanation of viral etiology of Chronic Fatigue Syndrome. ¶23

Plaintiff was employed as a research director for a Nevada Corporation called the Whittemore-Peterson Institute. ¶¶15 and 24. She supervised students; her supervisor was Mrs. Whittemore. ¶24. Plaintiff held a faculty appointment in the University Department of Immunology. Her faculty supervisors were Defendants Hunter and Pari.

Paragraphs 26 through 30 describe details of plaintiff's presentation of a study purportedly disproving the Institute's study and she was terminated. On November 18, 2011, a University of Nevada detective named Jaime McGuire appeared at plaintiff's residence. ¶¶ 7,31. The detective's supervisor, Chief Adam Garcia, was with her. Three unidentified Ventura deputies forced their way into plaintiff's front door, handcuffed and arrested her. Detective McGuire and the female deputy transported her to the Sheriff's Station, while Chief Garcia and the two male deputies searched plaintiff's residence. They harassed her spouse and confiscated personal and professional items. ¶31.

Plaintiff asked the deputies for a warrant. She was shown an otherwise blank piece of yellow paper containing her name, address and a stamped judge's approval from the Ventura Superior Court. It listed no cause, no search scope or items sought and no arrest authority. ¶33.

Additional allegations appear in the counts. The counts do not have any information about the nature of the claim or a label for the cause of action, nor do they state against whom they are pled.

/ / /

Count 1 alleges that the defective warrant was obtained based upon misrepresentations by the Whittemore principals, Vincent Lombardi, Michael Hillerby and the district attorney of Washoe County, Nevada, Richard Gammick. ¶34. These were in collusion with F. Harvey Whittemore. ¶34. These individuals committed fraud by claiming that plaintiff had removed copies of certain National Institutes of Health grant journals. ¶35. Factual and legal misrepresentations made by the Whittemore principals, Lombardi, and Hillerby, with the active collusion of District Attorney Gammick resulted in the Ventura Superior Court warrant. ¶43 The defective warrant upon which the arrest was made was issued on the basis of knowingly fraudulent statements directly made to the Ventura Superior Court by Chief Adam Garcia, chief of police of the University of Nevada, Detective Maguire, employed by the University of Nevada, in the service of the Whittemore principals.¶48

These misrepresentations were made in order to detain plaintiff in the Ventura County jail on false criminal charges and fraudulent flight risk assertions during the time when she would have been defending herself in Nevada in a recently filed Nevada state court action. ¶38 That action related to "the key materials." That case was scheduled for some sort of hearing on November 22, 2011. That was the fifth day of plaintiff's incarceration. ¶38. No information about the cause or intent of her detention was provided to the plaintiff at the time of her arrest. ¶38

Plaintiff's husband was contacted by Mr. Whittemore. He was informed that if plaintiff provided the "key materials," she might be released by Thanksgiving-November 24. This was the motive for her arrest. ¶39 The Whittemore principals and WPI sought and received a temporary injunction from a Judge Brent Adams in a Nevada state court action against plaintiff. ¶40. She was detained in California and unable to defend her interest, barring her from access to "the key materials." The temporary injunction was made permanent. ¶40

/ / /

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

Plaintiff was released from detention in Ventura County late on November 22-year unspecified, but presumably 2011 (cf. ¶31). ¶53. The allegations against Sheriff Dean appear to be contained in Count V, but he is not actually named in the heading of that or any other count nor is the legal theory of which he is accused stated.

These allegations appear in paragraphs 50 – 52. The defective Ventura State Court warrant on which her arrest was made contained no indicia of cause, scope or harm. It was "fatally vague and invalid." This would allegedly have been apparent to any arresting officer asked to honor an arrest or a search from another jurisdiction.

Sheriff Dean and the three unspecified deputies were in a position to assess the circumstances of the University of Nevada Police Department's request for evidence justifying "extraordinary and immediate cross-border arrest without a colorable criminal charge." ¶51. They were allegedly in a position to review the alleged warrant, as well. ¶51. They failed to exercise good judgment regarding any colorable basis for the extraordinary actions sought by Chief Garcia and Detective Maguire or willfully disregarded that "lack of basis."

IV.

THE ALLEGATIONS ARE A CONFUSINGLY COMPLICATED NARRATIVE OF A WIDE RANGING CONSPIRACY IN STORY TELLING FORM

This type of complaint - a meandering narrative larded with largely irrelevant painful evidentiary detail - is prohibited by Ninth Circuit precedent: *McHenry v. Renne,* 84 F.3d 1172 (9th Cir. 1996); *Cafasso v. General Dynamics,* 637 F.3d 1047 (9th Cir. 2011)[and cases cited therein at page 1058-59); *Knapp v. Hogan,* 738 F.3d 1106 (9th Cir. 2013). Although the complaint contains a great deal of useless information, it is short of relevant detail.

The so-called counts have no description of the nature of the claim or the defendants sued in that claim. There is no date of arraignment or having been bound

over for trial, making the potential for a delayed accrual of a false arrest claim impossible to ascertain.

It is unclear whether there was a search or arrest warrant, or both, and which is being attacked. Neither is appended nor is any warrant affidavit attached. The content of the warrant or warrants and the supporting affidavit or affidavits is not attached nor quoted or paraphrased. Plaintiff is so sure the warrant affidavit representations were fabricated or exaggerated- paragraphs 34, 43 and 48- that she must have these documents or at least have seen them.

It appears from the allegations in paragraphs 34, 43 and 48 that other defendants from Nevada law enforcement agencies were responsible for obtaining the warrant so it remains unclear why the Ventura Sheriff's Office is being sued. No allegations of misconduct are directed against it or its sheriff. Paragraph 53 alleges that "defendants" escorted plaintiff to a "located"[sic - location] where members of the news media were stationed and forced, at the request of the press, to undergo "mugshot" photographs, but it is not stated which defendants did so or why that was a violation of some legal right.

Many of the allegations are so enigmatic as to defy comprehension. For example, paragraph 46 alleges that some unspecified forged evidence was put into evidence again in 2013. What evidence? Who forged it? What about it was forged? Paragraph 46 alleges that this occurred in a bankruptcy proceeding; what does that action have to do with anything that Sheriff Dean did wrong or was even involved in? The paragraph makes oblique references to a proof of claim submitted for WPI by defendant Kinne reasserting the forged contract - what contract?

This type of complaint is what the Ninth Circuit had in mind in the precedents just cited. In *McHenry,* the Court noted that the District Judge wrote a thorough and careful order. 84 F.3d at 1175. It noted the impossibility of figuring out which defendants were allegedly liable for which wrongs. The complaint made sweeping allegations against various government employees, but did not make clear

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

connections between specific allegations and individual defendants. This made it excessively difficult for individual defendants to formulate proper defenses and subjected them to unnecessary discovery. Many of them might have been able to assert absolute or qualified immunity but the complaint did not provide enough relevant detail for the court to determine the propriety of these defenses.

The next version of the complaint was identically argumentative and prolix. It still did not provide the defendants with a fair opportunity to frame a responsive pleading. The 12(e) motion was granted. The Ninth Circuit noted that the complaint was mostly narrative ramblings, storytelling and political griping. 84 F.3d at 1176. The *McHenry* court stated that "The complaint in the case at bar is argumentative, prolix, replete with redundancy and largely irrelevant." 84 F.3d at 1177. "It consists largely of immaterial background information." *Id.* "None of this material has any resemblance to the sample pleadings in the official Appendix of Forms. Rather than set out the basis for a lawsuit, the pleading seems designed to provide quotations for newspaper stories." 84 F.3d at 1178.

The Ninth Circuit returned to the issue in *Cafasso* at 1058-1059. Reviewing Ninth Circuit precedent on the subject, the court stated that complaints cannot be confusing and conclusory. They cannot be excessively verbose, confusing and almost entirely conclusory. They cannot be confusing, distracting, ambiguous, and unintelligible. While the content of a complaint cannot be defined with any great precision, Rule 8(a) is violated by complaints which are needlessly long, highly repetitious, confused or "consisted of incomprehensible rambling." 637 F.3d at 1059. The very prolixity of the complaint made it difficult to determine just what circumstances were supposed to have given rise to the various causes of action. *Id.* The plaintiff must straightforwardly state the claims and the allegations supporting them. *Id.*

The Ninth Circuit addressed the problem in the context of in forma pauperis strikes in *Knapp*. At 738 F.3d 1111, the court stated: "Complaints that are filed in

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

repeated and knowing violation of Federal Rule 8's pleading requirements are a great drain on the court system, and the reviewing court cannot be expected to fish a gold coin from a bucket of mud." Confusing complaints impose unfair burdens on litigants and judges. 738 F.3d at 1109. After an incomprehensible complaint is dismissed under Rule 8 and the plaintiff is given but fails to take advantage of the leave to amend, the judge is left with a complaint that is irremediably unintelligible and presents an inability to state a claim.

V.

THERE ARE NO ALLEGATIONS OF MISCONDUCT BY DEFENDANT SHERIFF DEAN

The Ninth Circuit decision is *Barren v. Harrington,* 152 F.3d 1193 (9th Cir. 1998), requires that "A plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights." 152 F.3d at 1194. "Liability under §1983 must be based on the personal involvement of the defendant." *Id.* That plaintiff failed to meet this standard by omitting to allege any facts which would support his allegations that the employees of the Nevada law enforcement community had conspired to violate his constitutional rights or any proceedings in which his rights were violated. But the plaintiff offered no more than conclusory accusations that the defendants were involved in a conspiracy to deprive him of his rights. Consequently, the district court acted properly in dismissing the third amended complaint. *Id.* at 1195.

A public official is entitled to qualified immunity if he had no role in the preparation of a warrant affidavit or its execution. *KRl v. Moore,* 384 F.3d 1105, 1118 (9th Cir. 2004). No §1983 liability exists absent personal participation. *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989). The allegations of paragraphs 34, 43 and 48 clarify that the defendants who allegedly made deceptive judicial representations were not Sheriff Dean or his employees.

/ / /

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

On the other hand, if the inclusion of the Sheriff, per se, is simply an allegation that his agency committed misconduct, then he is an unnecessary and improper party. The *Monell* decision rendered official capacity suits against local officers unnecessary. Unless there is known, actual involvement of the highest ranking members of a law enforcement agency, the local government entity, not the official, should be named. There is no longer a need to bring official capacity actions against local government officials because local government units can be sued directly for damages. *Kentucky v. Graham,* 473 U.S. 159, 167, n. 14 (1985). When the allegations demonstrate that the plaintiff is seeking to sue the official in his or her official capacity, the local government entity and not the individual official is the real party in interest. *Rosa R. v. Connelly,* 889 F.2d 435, 437 (7th Cir. 1989), relying upon *Kentucky v. Graham* at 165-166.

VI.

THE ACTION IS TIME-BARRED

The meager allegations enable the conclusion that the action is time-barred. The affirmative defense that an action is barred by the statute of limitation may be raised in a motion to dismiss, pursuant to Rule 12(b)(6), if the expiration of the statute is apparent on the face of the complaint. *Jablon v. Dean Witter,* 614 F.2d 677, 682 (9th Cir. 1980). Paragraph 31 pleads that the Nevada officials, Adam Garcia and Jaime McGuire, employees of the University of Nevada at Reno (¶¶6-7), accompanied by three unknown County of Ventura sheriff's deputies, forced entry through the front door of plaintiff's residence. They then handcuffed, arrested and detained her. They took her to the Ventura County jail. Others of them searched her residence and effects (¶ 32) pursuant to a defective warrant (¶33). These events took place on November 18, 2011, according to paragraph 31 of the complaint.

Paragraph 38 alleges that November 22, 2011, was plaintiff's fifth day of incarceration. Paragraph 39 alleges that defendant Whittemore contacted plaintiff's husband to say that plaintiff might be released before Thanksgiving, parenthetically

noted to be November 24 of an unspecified year, if "key materials" were found. Paragraph 53 alleges that plaintiff was released from detention in Ventura County late on November 22 of an unspecified year. In conjunction with the other allegations just mentioned, it is a logical deduction that the year was also 2011.

The complaint does not allege confinement pursuant to lawful process. Plaintiff does not plead that she was arraigned nor bound over for trial/held to answer.

From these allegations, the statute of limitation lapsed on November 19, 2013. This action was filed on November 17, 2014. It was therefore filed two years and 364 days after the events in question. This action was therefore filed 364 days late and is barred by the expiration of the statute of limitation.

A number of unpublished district court opinions are helpful to the statute of limitation analysis. It is proper to cite unpublished federal judicial opinions issued after January 1, 2007, even if they are designated non-precedential, not for publication or not for citation. Federal Rule of Appellate Procedure 32.1.

For actions under 42 U.S.C. 1983, which the complaint's title claims as its basis, courts apply the forum state's statute of limitation for personal injury actions, along with the forum state's law regarding tolling to the extent not inconsistent with federal law. *Fink v. Shedler,* 192 F.3d 911, 914 (9th Cir. 1999); Accord, *Jones v. Blanas,* 393 F.3d 918, 927 (9th Cir. 2004). Federal Civil rights claims are subject to the forum state's residual or general statute of limitation applicable to personal injury claims. *Wilson v. Garcia,* 471 U.S. 261, 279-280 (1985); *Owens v. Okure,* 488 U.S. 235, 249-250 (1989). While §1983 provides a federal cause of action, the court looks to the law of the state in which the cause of action arose for the length of the statute of limitation and typically courts use that state's applicable period for personal injury torts. *Lindsey v. Myer,* 2012 WL 1114181, *5 (D. Ore. 2012).

Effective January 1, 2003, the California statute of limitation for assault, battery and other personal injury claims became two years. Code of Civil Procedure

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

Section 335.1. A §1983 action filed in California is clearly governed by California's two year statute of limitation for personal injury actions. *Jones* at 927; accord, *Maldonado v. Harris,* 370 F.3d 945,954 (9th Cir. 2004); *Jackson v. Barnes,* 749 F.3d 755, 761 (9th Cir. 2014): "The length of the limitations period for §1983 is governed by state law. . . . The parties agree, as they must, that the applicable statute of limitations under California law is two years."

Federal law determines when a cause of action accrues and when the statute of limitation begins to run for a Section 1983 action. *Elliot v. City of Union City,* 25 F.3d 800, 801-802 (9th Cir. 1994); *Maldonado, Id.* When the limitations period begins to accrue on a §1983 claim has been expressly determined by the Supreme Court to be governed by federal law and is not resolved by reference to state law. *Wallace v. Kato,* 549 U.S. 384, 388 (2007). In such instances, the court must look to the federal rules conforming in general to common law tort principles. *Id.* A claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Maldonado, id.*

A cause of action for wrongful search accrues at the time of the search and plaintiff is not entitled to a later accrual date. The same is true of false arrest and malicious prosecution claims. Nothing in *Wallace* appears to limit it to certain types of civil rights violations. *Kamar v. Krolczyk,* 2008 WL 2880414, *7 (E.D. Cal. 2008). Accord, *Lindsey* at *6.

A Fourth Amendment cause of action accrues on the date of the illegal search and seizure. *Venegas v. Wagner,* 704 F.2d 1144, 1146 (9th Cir. 1983). Where illegal search and seizure is alleged, the conduct and asserted injury are discrete and complete upon occurrence; the cause of action can reasonably be deemed to have accrued when the wrongful act occurs. *Id.*

A Section 1983 claim accrues, and the statute of limitation begins to run, when the plaintiff knows, or should know, of the injury that is the basis for her claims. *Maldonado, supra,* 370 F.3d at 955; accord, *RK Ventures v. City of Seattle,* 307 F.3d

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

1045, 1058 (9th Cir. 2002); *Johnson v. California,* 207 F.3d 650, 653 (9th Cir. 2000). An excessive force claim typically accrues at the time the force is used. *Cabrera v. City of Huntington Park,* 159 F.3d 374, 381 (9th Cir. 1998). Similarly, a §1983 claim challenging the validity of a search and seizure generally accrues on the date of the search. *Matthew v. Macanas,* 990 F.2d 467, 469 (9th Cir. 1993); *Venegas v. Wagner,* 704 F.2d 1144, 1146 (9th Cir. 1983) ["Where false arrest or illegal search and seizure is alleged, the conduct and asserted injury are discrete and complete upon occurrence and the cause of action can reasonably be deemed to have accrued when the wrongful act occurs."]

As a result of the Supreme Court decision in *Wallace v. Kato,* 549 U.S. at 396, a cause of action for false arrest under §1983, in cases in which the arrest is followed by initiation of criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process, such as arraignment or being bound over for trial. *Henry v. San Francisco,* 2014 WL 5494840 (N.D. Cal. 2014). Otherwise, the rule announced by the Ninth Circuit in *Venegas* controls.

Ms. Mikovits' causes of action accrued on November 18, 2011. That is when the acts complained of occurred. ¶ 31. That date is when the statute of limitation accrued. *Venegas,* 704 F.2d at 1146. Since she was not allegedly confined pursuant to lawful process, there was no delayed accrual for the false arrest contention. There would be no tolling during plaintiff's incarceration; Code of Civil Procedure Section 352.1 (a) – (c) provides that while there is a tolling period of up to two years for actions based upon injuries occurring during incarceration it does not apply to actions against public entities and their employees.

VII.

THERE ARE NO MONELL ALLEGATIONS

The Ninth Circuit addressed complaints bereft of *Monell* allegations in *Dougherty v. City of Covina,* 654 F.3d 892, 900 (9th Cir. 2011). A government entity may not be held liable under §1983 unless a custom, practice or policy is shown to be

a moving force behind a violation of constitutional rights. In order to establish liability for governmental entities under *Monell,* a plaintiff's burden is to plead and prove four elements. These are that the plaintiff was deprived of a constitutional right, the municipality had a policy, that this policy amounts to deliberate indifference to the plaintiff's constitutional right and that the policy is the moving force behind the violation.

Mere negligence in training or supervision does not give rise to a *Monell* claim. The *Dougherty* plaintiff's claims lacked any factual allegations which would separate them from the formulaic recitation of a cause of action's elements which is insufficient. The complaint lacked any factual allegations regarding key elements of the *Monell* claims. There were no alleged facts demonstrating that the constitutional violation was the result of a custom or practice of the City.

It is crucial to actually plead what the custom, practice or policy consists of- adequate factual description of the allegedly violative policy must be pled. In *Erdman v. Cochise County,* 926 F.2d 877, 882 (9th Cir. 1991), the court wrote: "His attempts to elevate the County attorney and Sheriff to the status of policymakers miss the mark, since he must first establish the policy they are alleged to have made."

Another Ninth Circuit decision articulated the principle slightly differently. A plaintiff cannot demonstrate the existence of a municipal policy or custom based solely upon a single occurrence of unconstitutional action by a non-policymaking employee. Only if a plaintiff shows that his injury resulted from a permanent and well settled practice may liability attach for injury resulting from a local governmental custom. The plaintiff must show that the agency could have foreseen the misconduct after being informed of some of the predicate facts. The agency must have been able to draw a logical connection between the predicate facts and the action complained of. The agency must have made a deliberate or conscious choice leading to a custom, practice or policy which actually caused the deprivation of the plaintiff's federally protected civil rights in a manner which was deliberately

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

indifferent. Municipalities cannot be liable simply because they employ a tortfeasor. *McDade v. West,* 223 F.3d 1135, 1141-42 (9th Cir. 2000).

It is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged. A plaintiff must show that the governmental action was "taken with the requisite degree of culpability and must demonstrate that a direct causal link between the municipal action and the deprivation of federal rights." *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997). "Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior." *Id.* at 415.

In its most recent pronouncement on the subject, the high court explained that plaintiffs who seek to impose liability upon local governments under §1983 must prove that action pursuant to official municipal policy caused their injury. A municipality's culpability for a deprivation of rights is at its most tenuous when a claim turns upon a failure to train. The failure to train in a relevant respect must amount to deliberate indifference to the rights of persons with whom the untrained employees come into contact. Deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for failure to train purposes. Policymakers' continued adherence to an approach which they know or should know has failed to prevent tortuous misconduct by employees establishes the conscious disregard for the consequences of their actions- the deliberate indifference necessary to establish municipal liability. Without notice that a course of conduct is deficient in a particular respect, decision-makers can hardly be said to have deliberately chosen a training program which will cause violations of constitutional rights. *Connick v. Thompson,* 131 S.Ct. 1350, 1359-60 (2011).

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

The present complaint makes no *Monell* allegations at all, not even the formulaic recitation held insufficient in *Dougherty*. It is also for this reason that the complaint is not viable.

VIII.

DEFENDANT POSSESSES QUALIFIED IMMUNITY

Messerschmidt v. Millender, 132 S.Ct. 1235 (2012) addresses a public official's qualified immunity. Residential occupants who were subjected to a nighttime search and seizure pursuant to a search warrant brought a §1983 action against deputies and the sheriff's department. The doctrine of qualified immunity protects government officials from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id. at* 1244. Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law. *Id.*

Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant "is the clearest indication that the officers acted in an objectively reasonable manner. *Id.* at 1245. The threshold for establishing an exception to this presumption "is a high one and it should be" *Id.* In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination because it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. *Id.* It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination; it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence, the officer who requested the warrant cannot be held liable. *Id.*

/ / /

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

It is the plaintiff who shoulders the burden to establish that his or her rights were clearly established by binding appellate precedent decided before the challenged actions in extremely similar circumstances as those which confronted the defendants. "The plaintiff shoulders the burden of proving that the rights he claims are clearly established. . . . The Supreme Court has made clear that qualified immunity provides a protection to government officers that is quite far reaching." *Brewster v. Board of Education,* 149 F.3d 971, 977 (9th Cir. 1998).

Before being charged with monetary liability, public officials must be "given clear notice" that their conduct is unlawful. In assessing claims of qualified immunity, courts must not view constitutional rights in the abstract but rather in a more particularized sense. *Id.* In order to ensure that government officials receive necessary guidance, courts focus the inquiry at the level of implementation. The right referenced is not a general constitutional guarantee, but its application in a particular context. Broad rights must be particularized before they are subjected to the clearly established test. *Id.*

Because it would be impossible for a defendant to cite law not prohibiting actions in a certain context- it is impossible to prove a negative- the burden of citing closely corresponding antecedent binding precedent is wholly that of the plaintiff. *Davis v. Scherer,* 468 U.S. 183, 197 (1984); *Alston v. Read,* 663 F.3d 1094, 1098 (9th Cir. 2011). To the extent the allegations are comprehensible, the assertion of the present complaint seems to be that the Sheriff's civil unit had an obligation under controlling precedent to carefully read a warrant application prepared by another law enforcement agency, and perhaps a private party, considered and approved by a judge, and then weigh in on the warrant's legal viability and refuse to enforce it. ¶51: "Sheriff Dean and the three unidentified Ventura deputies under his direct supervision were in a position to independently assess the circumstances and gravity of the UNR Police Department's request for evidence justifying extraordinary and immediate cross-border arrest without a colorable criminal charge. They were in a

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

position to review the alleged warrant as well."

The allegations concerning some unspecified opportunity to assess "the circumstances and gravity" of an extraordinary cross-border arrest are unclear. What was the nature of this opportunity? Is this an attempt to posit an obligation to conduct an independent investigation into every warrant application prepared by others and approved by a judge?

This proposition would create chaos; it is the responsibility of the sheriff to implement warrants and other judicial orders, not to act as a self-appointed appellate court. Code of Civil Procedure Section 262.1 provides that sheriffs are justified in the execution of, and shall execute, all process and orders regular on their face, "whatever may be the defect in the proceedings upon which they were issued." Ninth Circuit authority contradicts a clearly established obligation to seek out and correct underlying errors leading to court orders: *Alston v. Read, supra,* no clearly established responsibility to seek out court records in response to a prisoner's assertion of over-detention; *Cousins v. Lockyer,* 568 F.3d 1063 (9th Cir. 2009), no violation of clearly established law in the failure of prison officials to modify the sentence of inmate affected by appellate decision invalidating the statute under which he was incarcerated; *Stein v. Ryan,* 662 F.3d 1114 (9th Cir. 2011), law enforcement officials do not have the authority, much less the duty, to discover that a court imposed an illegal sentence and ensure that judicial orders comply with the law; *Engebretson v. Mahoney,* 724 F.3d 1034 (9th Cir. 2013), officials charged with executing facially valid court orders enjoy absolute immunity from §1983 liability for conduct prescribed by those orders.

The plaintiff was shown the warrant, according to paragraph 33. It contained her name and residential address. It contained the judge's stamped signature conveying the "approval imprint from the Ventura Superior Court." ¶33. Whether these allegations are meant to describe a search or arrest warrant is not alleged. There is no cited precedent clearly establishing the invalidity of such a warrant or

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

prohibiting its enforcement.

IX.

PENTIS AND DE CESARI ARE NOT DEFENDANTS SO THE PURPORTED SERVICE UPON THEM IS NOT VALID

On January 26, 2015, plaintiff served Undersheriff Gary Pentis and Assistant Sheriff Steve De Cesari. The summonses identify these individuals as unknown officers one and two, respectively. But the two men are not identified in the complaint either by name or fictitiously. Therefore, the purported service upon them is ineffective to bring them before this Court.

However, if this Court disagrees, the same grounds advanced in this motion in support of Sheriff Geoff Dean likewise inure to their benefit. They stand in the same legal position and are protected by the same legal authorities as herein cited.

X.

CONCLUSION

Based upon the foregoing authorities and arguments, it is respectfully requested that the Court enter an order dismissing the complaint.

DATED: February 10, 2015

WISOTSKY, PROCTER & SHYER

By: _____
Jeffrey Held
Attorneys for Defendant
GEOFF DEAN

WISOTSKY, PROCTER & SHYER
ATTORNEYS AT LAW
300 ESPLANADE DRIVE, SUITE 1500
OXNARD, CALIFORNIA 93036
TELEPHONE (805) 278-0920

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 Esplanade Drive, Suite 1500, Oxnard, California 93036.

On February 11, 2015, I served the foregoing document(s) described as: **NOTICE OF HEARING OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR FOR A MORE DEFINITE STATEMENT; MEMORANDUM OF POINTS AND AUTHORITIES; AND 7-3 DECLARATION IN SUPPORT THEREOF** on the interested parties in this action, by placing _____ the original X a true copy thereof enclosed in a sealed envelope addressed as follows: SEE ATTACHED SERVICE LIST

__X__ **(BY FIRST CLASS MAIL)** _____ **(BY EXPRESS MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Oxnard, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

____**(BY FACSIMILE TRANSMISSION)** On this date, I transmitted from a facsimile transmission machine in Oxnard, California, whose number is (805) 278-0289, the above-named document was transmitted to the interested parties herein whose facsimile transmission telephone numbers are included in the attached Service List. The above-described transmission was reported as complete without error by a transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission. A true and correct copy of the said transmission report is attached hereto and incorporated herein by this reference.

_____ **(BY OVERNIGHT CARRIER)** I placed the above-named document in an envelope or package designated by [Overnight Express/Carrier/UPS/Federal Express/other carrier] ("express service carrier") addressed to the parties listed on the service list herein, and caused such envelope with delivery fees paid or provided for to be deposited in a box maintained by the express service carrier. I am "readily familiar" with the firm's practice of collection and processing of correspondence and other documents for delivery by the express service carrier. It is deposited in a box maintained by the express service carrier on that same day in the ordinary course of business.

_____ **(BY PERSONAL SERVICE)** I delivered such envelope by hand to the office of the addressee.

X **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_ **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 11, 2015, at Oxnard, California.

Kyle Robson

SERVICE LIST

Mikovits v. Garcia, et al.
United States District Court Case No. CV14-08909-SVU(PLA)

PLAINTIFF IN PRO PER

Judy Anne Mikovits
140 Arcadia Avenue, #5
Carlsbad, California 92008

Phone: (805) 797-6967
Email: jamikovits@mc.com