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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**LOS ANGELES DIVISION**

JUDY ANNE MIKOVITS,

Plaintiff,

v.

ADAM GARCIA, JAMIE MCGUIRE, RICHARD GAMMICK, GEOFF DEAN, THREE UNIDENTIFIED VENTURA COUNTY DEPUTY SHERRIFFS, F. HARVEY WHITTEMORE, ANNETTE F. WHITTEMORE, CARLI 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)

**KENNETH HUNTER'S AND GREG PARI'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO RULES 12(b)(2) AND 12(b)(6); SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROBERT M. DATO**

(Filed concurrently with affidavits of Kenneth Hunter and Greg Pari)

Date: April 13, 2015 [to be vacated]
Time: 1:30 p.m. [to be vacated]
Judge:Hon. Paul L. Abrams, Magistrate Judge

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**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that Defendants Dr. Kenneth Hunter and Dr. Greg Pari will and hereby do move the Court to dismiss Plaintiff Judy Anne Mikovits's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6) on the following grounds:

1. Dr. Hunter and Dr. Pari are Nevada residents, do not have sufficient minimum contacts with California, and have not purposefully availed themselves of the benefits and protections of California. Therefore, Dr. Hunter and Dr. Pari are not subject to personal jurisdiction in California.

2. The statute of limitations bars all of Plaintiff's claims in the Complaint.

3. The Complaint fails to state any claim for relief against Dr. Hunter or Dr. Pari because no wrongful conduct is alleged as to those defendants.

The Motion is based on this Notice, the Supporting Memorandum, the Declaration of Robert M. Dato, the Affidavits of Kenneth Hunter and Greg Pari, all other pleadings on file with the Court in this matter and on any oral argument that the Court may consider at the hearing on the motion.

Counsel for Dr. Hunter and Dr. Pari attempted to meet and confer with Mikovits pursuant to Local Rule 7-3 on February 11, 2015, but received no response. See Declaration of Robert M. Dato.

Other defendants in this action have filed their own motions to dismiss. (See, e.g., Dock. Nos. 48, 52, 55.) Magistrate Judge Paul L. Abrams has issued orders setting forth the time within which to file opposition and reply papers, and indicating that the Court will take the matter under submission without oral argument. (See, e.g., Dock. Nos. 51, 54, 59.) Dr. Hunter and Dr. Pari bring the present motion and request the Court for a similar order, vacating the hearing date.

DATED: February 18, 2015

BUCHALTER NEMER
A Professional Corporation

By: /s/ Robert M. Dato
Robert M. Dato
Sarah A. Syed

Attorneys for Defendants
KENNETH HUNTER and GREG PARI

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

By her Complaint, Plaintiff Judy Anne Mikovits ("Mikovits") seeks to hold the defendants liable for an alleged unlawful arrest and related false imprisonment pursuant to 42 U.S.C. §1983.

Notwithstanding the lack of merit in Mikovits's allegations, this Court does not have personal jurisdiction over individual Defendants Dr. Kenneth Hunter ("Dr. Hunter") and Dr. Greg Pari ("Dr. Pari"). Neither Dr. Hunter not Dr. Pari have sufficient "minimum contacts" for this Court to have general jurisdiction over them. Nor have Dr. Hunter or Dr. Pari purposely availed themselves of the benefits and protections of the state of California for this Court to have special jurisdiction over him. Accordingly, the exercise of jurisdiction over Dr. Hunter and Dr. Pari would offend the traditional notions of fair play and substantial justice, and they should be dismissed pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(2).

Even if this Court were to exercise jurisdiction over Dr. Hunter and Dr. Pari, Mikovits fails to state a claim for relief against them. None of Mikovits's "Counts" even identify Dr. Hunter or Dr. Pari as engaging in any unlawful conduct. They are only mentioned 4 times each within the 54 paragraphs of allegations in the Complaint. Yet there are no substantiated allegations in the Complaint of any wrongdoing by either one. This warrants dismissal pursuant to FRCP 12(b)(6).

On either of these two bases, the Court should grant this motion and dismiss Dr. Hunter and Dr. Pari from the case with prejudice.

## II. ALLEGATIONS IN THE COMPLAINT REGARDING DR. HUNTER AND DR. PARI

Putting aside the caption and introduction, Mikovits's Complaint mentions Dr. Hunter and Dr. Pari only four times each.

Mikovits first identifies Dr. Hunter as a Professor of Immunology at "UNR School of Medicine" and "Chairman of the Scientific Advisory Board of WPL

[sic]." Complaint ¶16. Mikovits first identifies Dr. Pari as a "Professor of Immunology at UNR," "Chairman of that Department" and "member of the Scientific Advisory Board of WPI." Complaint ¶17. Mikovits then asserts that Dr. Hunter and Dr. Pari were "acting in active conspiracy" with Defendants Adam Garcia, Jaime McGuire and Richard Gammick to "cause the false imprisonment of Plaintiff." Complaint ¶20. The Complaint does not make any allegations as to Dr. Hunter's or Dr. Pari's involvement in the alleged conspiracy or how they conspired with the other defendants. Next, the Complaint alleges that Dr. Hunter and Dr. Pari were Mikovits's supervisors at UNR. Complaint ¶25. Finally, Mikovits alleges that Dr. Hunter and Dr. Pari were "consulted" regarding her termination. Complaint ¶30.

There are the only allegations about Dr. Hunter or Dr. Pari in the Complaint. Neither Dr. Hunter nor Dr. Pari are referenced or discussed in Mikovits's allegations regarding her research at Whittemore-Peterson Institute ("WPI") (Complaint ¶¶ 26-29) or the allegations regarding Mikovits's arrest (Complaint ¶¶ 31-33). Likewise, although Mikovits's Complaint contains six "Counts," none of these "Counts" contain any factual allegations against or seek any relief from Dr. Hunter or Dr. Pari. Complaint ¶¶ 34-54.

## III. MIKOVITS'S COMPLAINT AGAINST DR. HUNTER AND DR. PARI MUST BE DISMISSED BECAUSE CALIFORNIA LACKS PERSONAL JURISDICTION OVER THEM

Federal Rule of Civil Procedure 12(b)(2) allows a defendant to seek dismissal for lack of personal jurisdiction. The plaintiff has the burden of demonstrating that personal jurisdiction exists over a defendant. *Pebble Beach Co. v. Caddy,* 453 F.3d 1151, 1154 (9th Cir. 2006). This includes coming "forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Scott v. Breeland,* 792 F.2d 925, 927 (9th Cir. 1986); see also *Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797, 800 (9th Cir. 2004).

**A. California Does Not Have Personal Jurisdiction Over Dr. Hunter Or Dr. Pari**

The starting point in the analysis of personal jurisdiction issues in federal cases is the "long arm" statute in effect in the state in which the federal court is located. *Aanestad v. Beech Aircraft,* 521 F.2d 1298, 1300 (9th Cir. 1974). California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the constitutions of California and the United States. Cal. Code Civ. Proc. §410.10; *Pavlovich v. Superior Court,* 29 Cal.4th 262, 268 (2002). Accordingly, the California jurisdictional analysis is co-extensive with federal due process requirements. *Id.*

Due process protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." *Vons Cos. Ins. v. Seabeast Foods, Inc.,* 14 Cal.4th 434, 445 (1996) (*citing Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-472 (1985)). In the absence of the traditional bases for personal jurisdiction — namely, presence, domicile or consent — jurisdiction comports with due process only where the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Vons*, 14 Cal.4th at 444-445; see also *Calder v. Jones,* 465 U.S. 783, 788 (1984).

Personal jurisdiction over nonresident defendants may be general or specific. *Vons*, *supra*, 14 Cal.4th at 445; *Burger King*, *supra*, 471 U.S. at 475, 477-478, 487. The precise standards for general and specific jurisdiction are set forth below. Notably, "when a defendant moves to quash out-of-state service for lack of personal jurisdiction, the plaintiff has the burden of establishing jurisdiction by a preponderance of the evidence." *Penn. Health & Life Ins. Guar. Assoc. v. Superior Court,* 22 Cal.App.4th 477, 480 (1994). Moreover, [plaintiff's] burden must be met by competent evidence in affidavits and authenticated documents; an unverified

complaint may not be considered as supplying the necessary facts." *Nobel Farms, Inc. v. Pasero,* 106 Cal.App.4th 654, 657-658 (2003) (emphasis added); *Amba Marketing Systems, Inc. v. Jobar International Inc.,* 551 F.2d 784, 787 (9th Cir. 1977) (plaintiff has the burden of establishing the existence of personal jurisdiction and cannot "simply rest on the bare allegations of the complaint, but rather [is obliged] to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction).

Here, Mikovits cannot establish any basis for this Court to exercise personal jurisdiction over Dr. Hunter or Dr. Pari. Even the bare allegations of the Complaint reveal no contact or action by Dr. Hunter or Dr. Pari either in or toward California. None of the traditional bases for personal jurisdiction apply and both of these defendants lack sufficient continuous and systematic contacts with California for this Court to exercise general jurisdiction. Finally, neither Dr. Hunter nor Dr. Pari have acted in such a way as to create specific jurisdiction. Accordingly, the exercise of jurisdiction would offend the traditional notions of fair play and substantial justice, and Mikovits's action against Dr. Hunter and Dr. Pari should be dismissed for lack of personal jurisdiction.

1. No Traditional Bases For Jurisdiction Exist

The three traditional bases for personal jurisdiction are: (i) personal service within the forum state; (ii) domicile; and (iii) consent. *In re Fitzgerald,* 39 Cal.App.4th 1419, 1420 (1995). None of these apply here.

First, neither Dr. Hunter not Dr. Pari were served with process in California.

Second, both Dr. Hunter and Dr. Pari are domiciled in Nevada. Declaration of Kenneth Hunter ("Hunter Decl.") ¶ 2; Declaration of Greg Pari ("Pari Decl.") ¶ 2.

Third, neither Dr. Hunter nor Dr. Pari consented to jurisdiction in California.

2. No General Jurisdiction Exists

To prove general jurisdiction, Mikovits must show that Dr. Hunter and Dr.

Pari engaged in "continuous and systematic business contacts that approximate physical presence in the forum state." *Elkman v. National States Ins. Co.*, 173 Cal.App.4th 1305, 1315 (2009); *Schwarzenegger*, *supra*, 374 F.3d at 801. This "exacting standard" requires extremely significant forum contacts. *Id.*; *see also Burger King*, *supra*, 471 U.S. at 475, 487 (the non-resident's contacts with California must be "substantial, continuous and systematic"). Factors to consider include whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated in the state. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

a. Neither Dr. Hunter Nor Dr. Pari Have Continuous And Systematic Contacts With California

In her Complaint, Mikovits makes no additional allegations to show that either Dr. Hunter or Dr. Pari has continuous and systemic contacts with California. Indeed, they do not.

- Both Dr. Hunter and Dr. Pari are residents of Nevada. Hunter Decl. at ¶2; Pari Decl. at ¶2.
- Both Dr. Hunter and Dr. Pari are employed by the University of Nevada School of Medicine in Reno. Hunter Decl. at ¶2; Pari Decl. at ¶2.
- Neither Dr. Hunter nor Dr. Pari own any property in California. Hunter Decl. at ¶3; Pari Decl. at ¶3.
- Neither Dr. Hunter nor Dr. Pari regularly conduct business or hold a business or professional license in California. Hunter Decl. at ¶4; Pari Decl. at ¶4.
- Neither Dr. Hunter nor Dr. Pari has appointed an agent for service of process in California. Hunter Decl. at ¶5; Pari Decl. at ¶5.

Given the limited allegations against Dr. Hunter and Dr. Pari in the

Complaint and the facts established in their declarations, Mikovits has not demonstrated that Dr. Hunter or Dr. Pari have contacts with California so substantial, or continuous and systematic, to establish general jurisdiction.

3. No Specific Jurisdiction Exists

Mikovits cannot establish specific jurisdiction over Dr. Hunter or Dr. Pari either. California courts apply a three-part test to assess whether the exercise of specific jurisdiction is appropriate: (1) the non-resident defendant has purposefully availed herself of forum benefits; (2) the controversy arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice, i.e. it must be reasonable. *Pavlovich*, *supra*, 29 Ca1.4th at 269; *Boschetto v. Hansing,* 539 F.3d 1011, 1016 (9th Cir. 2008); *Burger King*, *supra*, 471 U.S. at 477-478. The plaintiff has the burden of "demonstrating facts justifying the existence of jurisdiction." *Vons*, *supra*, 14 Cal.4th at 449. Only if the plaintiff meets its burden under the minimum contacts test does the burden then shift to the defendant to show that the exercise of jurisdiction would be unreasonable. *Id.*

a. Neither Dr. Hunter Nor Dr. Pari Purposefully Availed Themselves Of The Benefits of Conducting Business In California

To purposefully avail oneself of the privilege of conducting activities in the forum, a defendant must have "performed some type of affirmative conduct which allows or promotes the transaction of business with the forum state." *Goehring v. Superior Court,* 62 Cal.App.4th, 894, 907 (1998). The requirement of affirmative conduct is designed to safeguard the defendant against being "hauled into court as a result of random, fortuitous or attenuated contacts." *Gray & Co. v. Firestenberg Machinery Co.,* 913 F.2d 758, 760 (9th Cir. 1990).

The purposeful direction test is satisfied only if a plaintiff can prove the defendant: (1) committed an intentional act; (2) that was expressly aimed at the

forum state; and (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Pavlovich*, *supra*, 29 Cal.4th at 270-271; *Schwarzenegger*, *supra*, 374 F.3d at 805. Notably, mere foreseeability of injury in the forum state is insufficient to justify a finding of purposeful direction. *Pavlovich*, *supra*, 29 Cal.4th at 269-277.

Here, the Complaint is devoid of any allegations of intentional activity by Dr. Hunter or Dr. Pari directed to California. None of the six "Counts" asserted by Mikovits mention any activity by Dr. Hunter or Dr. Pari in California. Complaint ¶¶34-54. Neither Dr. Hunter nor Dr. Pari is identified in any paragraph asserting or alleging conduct that damaged Mikovits. Complaint ¶¶ 42, 44, 57, 49, 52 & 54. Taking the allegations in the Complaint and the declarations of Dr. Hunter and Dr. Pari together, Mikovits cannot demonstrate that either of these defendants committed intentional and damage-causing acts expressly aimed at California.

b. This Controversy Does Not Arise Out Of Any Forum Related Activity By DR. Hunter Or Dr. Pari

As set forth in the declarations of Dr. Hunter and Dr. Pari, and based on the allegations in the Complaint, it is clear that the controversy at issue does not arise out of any conduct by these defendants individually, let alone any forum-related conduct.

With respect to the vague allegations that do mention Dr. Hunter or Dr. Pari, neither arise out of any forum related activity by them. Mikovits's allegation that Defendant Whittemore "consulted with" Dr. Hunter and Dr. Pari regarding the termination of Mikovits's employment, does not allege any conduct *in California*. Complaint ¶30.[1]

Similarly, Mikovits's assertion that Dr. Hunter and Dr. Pari acted in

[1] Even assuming for the sake of this Motion that such consultation occurred, it presumably took place in Nevada as Plaintiff was employed by Whittemore-Peterson Institute in Nevada (Complaint ¶¶23-24) and both Dr. Hunter and Dr. Pari were employed at University of Nevada in Reno, Nevada (Complaint ¶16; Hunter Decl. at ¶2; Pari Decl. at ¶2).

conspiracy with other defendants does not establish personal jurisdiction over Dr. Hunter or Dr. Pari. Complaint ¶20. Despite the allegation of conspiracy, the Complaint is devoid of any allegations regarding these defendants' alleged role in conspiracy or how they conspired with the other defendants, let alone whether the alleged conspiracy took place in California.

c. The Exercise Of Jurisdiction Over Dr. Hunter And Dr. Pari Would Not Comport With "Fair Play And Substantial Justice"

The Court need not reach the issue of whether jurisdiction would be reasonable because Mikovits cannot satisfy the other prerequisites for jurisdiction. However, even if it did so, the applicable fairness factors weigh decidedly against jurisdiction. Five factors affect the fairness of jurisdiction: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Vons*, *supra*, 14 Cal. at 476; see also *Panavision International, L.P. v. Toeppen,* 141 F.3d 1316, 1323 (9th Cir. 1998); *Burger King*, *supra*, 471 U.S. at 477 (including two additional factors: the extent of conflict with the sovereignty of the defendant's state and the existence of an alternative forum). An analysis of these factors compels the conclusion that an exercise of jurisdiction over Dr. Hunter or Dr. Pari would offend traditional notions of "fair play and substantial justice."

First, it is not reasonable to drag Dr. Hunter or Dr. Pari across state lines to defend this action in a forum in which they have no contacts. As explained above, neither of these defendants has consistent and systematic contacts with nor purposefully availed themselves of California. As such, the burden on Dr. Hunter and Dr. Pari is substantial.

Second, California has no particular interest in an action regarding the

alleged actions of two professors from the University of Nevada School of Medicine who are Nevada residents.

Finally, the interest of Dr. Hunter and Dr. Pari in not being sued in California far outweighs Mikovits's interest in obtaining relief against them. Neither Dr. Hunter nor Dr. Pari engaged in any of the conduct of which Mikovits complains and should not have been sued in the first place.

Accordingly, Dr. Hunter and Dr. Pari should be dismissed for lack of personal jurisdiction.

## IV. MIKOVITS'S COMPLAINT AGAINST DR. HUNTER AND DR. PARI MUST BE DISMISSED BECAUSE SHE FAILED TO STATE A CLAIM AGAINST EITHER OF THEM

### A. Legal Standard On Motion to Dismiss

A motion to dismiss for failure to state a claim may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) where it appears that plaintiff can prove no set of facts in support of his or her claim which would entitled him or her to relief. *Fidelity Financial Corp. v. Fed. Home Loan Bank of San Francisco,* 792 F.2d 1432, 1435 (9th Cir. 1986). Dismissal can be based on a lack of cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. *In re U.S. Aggregates, Inc. Securities Litigation,* 235 F.Supp.2d 1063, 1068 (N.D. Cal. 2002).

Although a complaint need only provide a short and plain statement for relief, a plaintiff is obligated to provide more than "labels and conclusions" or a formulaic recitation of elements of a claim. See *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007); *Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation,* 524 F.3d 1090, 1096 (9th Cir. 2008) (affirming dismissal of complaint where complaint failed to state a claim to relief that was plausible on its face). 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). Thus, factual allegations must be enough to raise a right to relief that rises above a "speculative level." *Twombly*, 550 U.S. at 555.

Furthermore, courts are not required to cull a "tangled web" of allegations to determine whether a plaintiff has articulated a meritorious claim. See, e.g., *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991). Nor is it the court's duty to rewrite a plaintiff's complaint. *Peterson v. Atlanta Housing Authority,* 998 F.2d 904, 912 (11th Cir. 1993) (complaint devoid of reference to any injury inflicted on plaintiff by defendant, which fails to give "fair notice" of claim and grounds on which it rests) (*quoting Conley v. Gibson,* 355 U.S. 41, 47 (1957)).

**B. Mikovits's Claims Are Barred By The Statute Of Limitations**

There is no federal statute of limitation for claims brought under 42 U.S.C. § 1983. As such, federal courts must borrow the state personal injury statute of limitation to determine if a Section 1983 claim is time barred. *Wallace v. Kato,* 549 U.S. 384, 387 (2007); *Wilson v. Garcia,* 471 U.S. 261, 280 (1985). For purposes of the present case, California's two-year personal injury residual statute of limitations applies. *Owens v. Okure,* 488 U.S. 235, 236 (1989); see also *Canatella v. Van De Kamp,* 486 F.3d 1128, 1132-1133 (9th Cir. 2007).[2]

The crux of Mikovits's claims are that she was unlawfully arrested and detained on November 18, 2011. Complaint ¶¶ 31 and 32. The Complaint contains no allegations of any conduct occurring after November 2011. However, Mikovits did not file her complaint until November 17, 2014, approximately three years after the alleged events occurred. This is one year too late, making Mikovits's claims time-barred.

[2] The Nevada residual statute of limitation under N.R.S. 11.190(4)(e) is also two years. For that reason, Mikovits's Section 1983 suit would also be barred, were Nevada law deemed applicable, and subject to dismissal under F.R.C.P. 12(b)(6).

### C. The Complaint Fails To State A Claim Against Dr. Hunter And Dr. Pari

Dr. Hunter and Dr. Pari must be dismissed because the Complaint contains no allegations of wrongful conduct by either of them. Although Mikovits's Complaint contains six "Counts," none of these "Counts" contain any factual allegations against or seek any relief from Dr. Hunter or Dr. Pari. Complaint ¶¶ 34-54.

As explained above, the Complaint mentions Dr. Hunter and Dr. Pari only four times each:

- Paragraph 16 states that Dr. Hunter is a Professor of Immunology at "UNR School of Medicine" and was "Chairman of the Scientific Advisory Board of WPL [sic]."
- Paragraph 17 states that Dr. Pari is a "Professor of Immunology at UNR," "Chairman of that Department" and was "member of the Scientific Advisory Board of WPI."
- Paragraph 20 asserts that Dr. Hunter and Dr. Pari were "acting in active conspiracy" with Defendants Garcia, McGuire and Gammick to "cause the false imprisonment of Plaintiff."
- Paragraph 25 of the Complaint alleges that Dr. Hunter and Dr. Pari were Mikovits's supervisors at UNR.
- Paragraph 30 alleges that Dr. Hunter and Dr. Pari were "consulted" regarding Mikovits's termination.

While a Complaint is not required to have "detailed factual allegations," there must be enough facts alleged to support a claim that is "plausible on its face." *Iqbal*, *supra*, 556 U.S. at 678. Indeed, a Complaint must offer "more than an unadorned, the –defendant-unlawfully-harmed-me accusation." *Id.*

Here, except for the allegation of conspiracy, Mikovits does not allege any wrongdoing by Dr. Hunter or Dr. Pari whatsoever. And the mere allegation that

these two defendants participated in a conspiracy, without any detail on their role in such conspiracy, falls short of what is required of a complaint under the Federal Rules. *Id.* at 678-79; *Twombly*, *supra*, 550 U.S. at 544. A single unsupported allegation that Dr. Hunter or Dr. Pari participated in a conspiracy is exactly the type of pleading that the Supreme Court rejected in deciding *Iqbal*.

Absent any factual allegations of wrongdoing by or seeking any relief from Dr. Hunter or Dr. Pari, the Complaint does not state a claim for relief against these defendants.

**D. Neither Dr. Hunter Nor Dr. Pari Were Acting Under Color Of State Law**

Even if the Court were to find that the allegations against Dr. Hunter and Dr. Pari are sufficient, they are certainly insufficient to state a Section 1983 claim against them.

Under 42 U.S.C. §1983, Mikovits can only seek relief against a defendant who has acted under the color of state law, i.e. where he or she has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins,* 487 U.S. 42, 49 (1988). Generally, the mere existence of an employment relationship between the state and an individual is an insufficient basis upon which to transform any and all employee acts into "state action" for the purposes of section 1983. *Johnson v. Knowles*, 113 F.3d 1114, 1117-18 (9th Cir. 1997); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991)("[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law").

While Dr. Hunter and Dr. Pari are professors at the University of Nevada School of Medicine in Reno, the alleged wrongful actions were not taken under color of state law because Mikovits does not allege that those actions were in any way related to the performance of Dr. Hunter and Dr. Pari's duties as public

employees. Notably, Mikovits does not even allege that they were acting within the course and scope of their employment at all relevant times. That they were her supervisors or that they were consulted regarding her termination from WPI (and not from the University of Nevada School of Medicine) are not actions taken under the "pretense of law." *Screws v. United States*, 325 U.S. 91, 111 (1945).

With respect to Mikovits's conspiracy claim, when a private party (as Dr. Hunter and Dr. Pari must be considered here given the allegations) conspires with state officials to deprive others of constitutional rights, the private party can be deemed to be acting under color of state law. *Tower v. Glover,* 467 U.S. 914, 920 (1984); *Franklin v. Fox.* 312 F.3d 423, 441 (9th Cir. 2002). To prove such a conspiracy, "the [plaintiff] must show an agreement or meeting of the minds to violate constitutional rights. To be liable, each participant in the conspiracy need not know the exact details of the plan, but each must at least share the common objective of the conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1540-1541 (9th Cir. 1989). Furthermore, for the purposes of a FRCP 12(b)(6) motion to dismiss, Mikovits is subject to heightened pleadings standards requiring her to offer more than mere conclusory allegations of conspiracy, which, as a matter of law, are "insufficient to state a claim of conspiracy." *Simmons*, *supra*, 318 F.3d at 1161; *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 783-784 (9th Cir. 2001); *Price*, *supra*, 939 F.2d at 708-709. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Ivey v. Bd. of Regents,* 673 F.2d 266, 268 (9th Cir. 1982); accord, *Bruns v. Nat'l Credit Union Admin.,* 122 F.3d 1251, 1257 (9th Cir. 1997); *Pena v. Gardner,* 976 F.2d 469, 471 (9th Cir. 1992).

Here, none of the allegations in the Complaint are sufficient to convert Dr. Hunter or Dr. Pari into conspirators under color of law for purposes of a section 1983 claim. The Complaint contains only the scant conclusion that Dr. Hunter and Dr. Pari engaged in an "active conspiracy" with Defendants Garcia, McGuire and

Gammick. Complaint ¶20. There are no facts demonstrating a meeting of the minds or a shared common objective. This is nothing more than "vague and conclusory allegations of official participation in civil rights violations," which, as a matter of law, "are not sufficient to withstand a motion to dismiss." *Ivey*, *supra*, 673 F.2d at 268.

**E. Alternatively, Dr. Hunter And Dr. Pari Are Entitled To Qualified Immunity**

Even if Dr. Hunter and Dr. Pari were considered to be acting under color of law, they are nonetheless protected by qualified immunity. In *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 816, the United States Supreme Court held "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." As reiterated by the Ninth Circuit, "regardless of whether [a] constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991).

Importantly, the entitlement recognized in *Harlow* "is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mueller v. Auker,* 576 F.3d 979, 992 (9th Cir. 2009); *see also Iqbal*, *supra*, 556 U.S. at 685 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); *Hunter v. Bryant,* 502 U.S. 224, 227 (1991) ("we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation").

As discussed below, Mikovits's Complaint should further be dismissed as to Dr. Hunter and Dr. Pari because they are entitled to qualified immunity.

1. Mikovits Has Failed To Identify Any Alleged Constitutional Or Statutory Right Purportedly Violated By Dr. Hunter Or Dr. Pari

Mikovits's Complaint is devoid of non-conclusory factual allegations sufficient to state a valid claim for relief against Dr. Hunter or Dr. Pari. The few specific references to either of these defendants merely allege that (i) they were purportedly Mikovits's "supervisor" to the extent she was considered an "adjunct professor" at UNR, and (ii) that Defendant Annette Whittemore "actively consulted with" them, among others, regarding Mikovits's termination from WPI. Complaint ¶¶ 25, 30. Neither of these allegations identify any violation of a clearly established right belonging to Mikovits. *See C.B. v. City of Sonora*, 730 F.3d 816, 825 (9th Cir. 2013) ("Qualified immunity analysis consists of two steps," the first of which asks "whether the facts the plaintiff alleges make out a violation of a constitutional right.").[3] With regards to Mikovits's allegation that Dr. Hunter and Dr. Pari engaged in active conspiracy with Defendants, Garcia, McGuire and Gammick (Complaint ¶20), as previously explained, this allegation is devoid of any factual support that would warrant a finding that Dr. Hunter or Dr. Pari violated a constitutional or statutory right belonging to Mikovits.

2. Mikovits Has Failed To Allege That No Reasonable Official Would Have Believed That The Purported "Active Consultation" Was Lawful

Dr. Hunter and Dr. Pari are further entitled to qualified immunity, and dismissal from this case, because Mikovits has failed to allege that the supposed

[3] Even if Mikovits's Complaint could be stretched to somehow suggest that the alleged "active consultation" concerning WPI's decision to terminate Mikovits's employment was wrongful—which is not alleged—Mikovits has not alleged, nor can she likely demonstrate, that any clearly established constitutional or statutory right to continued employment existed or was violated. "All employees in Nevada are presumed to be at-will employees." *Am. Bank Stationary v. Farmer,* 106 Nev. 698, 701 (1990).

right violated was so clearly established that no reasonable official could have believed that Dr. Pari's alleged "active consultation" with WPI was lawful. *See Romero*, *supra*, 931 F.2d at 627 ("*regardless of whether [a] constitutional violation occurred*, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful.") (emphasis added). In this regard, the Ninth Circuit has stated that in order "to attach liability '[t]he contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right.'" *Mueller*, *supra*, 576 F.3d at 993.[4] However, Mikovits's Complaint is devoid of any suggestion that it would or should have been apparent to a reasonable official that the alleged "active consultation" regarding WPI's decision to terminate Mikovits's employment was unlawful. *See Anderson v. Creighton* (1987) 483 U.S. 635, 640 ("in light of pre-existing law the unlawfulness [of the alleged conduct] must be apparent."). Accordingly, based upon the allegations contained in the Complaint, Dr. Hunter and Dr. Pari are entitled to qualified immunity.

## V. CONCLUSION

Based on the foregoing, Dr. Hunter and Dr. Pari respectfully request that the Court grant this motion and dismiss the Complaint in its entirety with prejudice as to these defendants.

DATED: February 18, 2015

BUCHALTER NEMER
A Professional Corporation

By: /s/ Robert M. Dato
Robert M. Dato
Sarah A. Syed

Attorneys for Defendants
KENNETH HUNTER and GREG PARI

[4] See also *id.* at 992, 994 (noting that courts apply an objective standard in considering this prong of the qualified immunity analysis, and that "the inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'") (Citation omitted.)

**DECLARATION OF ROBERT M. DATO**

I, the undersigned Robert M. Dato, declare as follows:

1. I am an attorney at law admitted to this Court. I am employed by Buchalter Nemer, PC, counsel of record for defendants Adam Garcia, Jaime McGuire, Kenneth Hunter, and Greg Pari in this action. I have personal knowledge of the facts contained in this declaration and am competent to testify about them.

2. On February 11, 2015, I sent the following e-mail to Plaintiff Judy Mikovits at the e-mail address she listed on her Complaint, jamikovits@me.com:

"Ms. Mikovits:

"This email serves as meet and confer efforts with you pursuant to Central District Local Rule 7-3 as to defendants Garcia, McGuire, Hunter and Pari We have reviewed your complaint and have found various issues that warrant dismissal of these defendants in this action. If these defendants are not dismissed from this action, they will move to dismiss your claims pursuant to Federal Rule of Civil Procedure 12(b)(2) and/or 12(b)(6) as follows:

"1. The Central District of California does not have personal jurisdiction over defendants Hunter or Pari. Neither Hunter nor Pari have the minimum contacts sufficient to establish general jurisdiction nor have they purposefully availed themselves of California for purposes of special jurisdiction.

"2. None of the complaint's six counts identify Hunter or Pari in any wrongful conduct. In fact, other than being identified as party defendants, the only two allegations against them are that they were consulted regarding termination and a vague, unsupported assertion that they engaged in active conspiracy with other defendants. These two allegations are insufficient to state a claim.

"3. The statute of limitations bars all your claims against all of these defendants. With respect to a section 1983 claim, the state personal injury statute of limitations, which in California is two years, applies. All of the alleged

events occurred on November 18, 2011. The complaint was not filed until November 17, 2014, three years later, and one year too late.

"4. Neither Hunter nor Pari were acting under color of state law for purposes of a section 1983 claim. The allegations of a conspiracy are conclusory and do not satisfy pleading requirements. Even if Hunter and Pari were somehow acting under color of state law, they along with Garcia and McGuire are all protected by the qualified immunity doctrine. The complaint does not contain any allegations that Hunter or Pari violated any constitutional or statutory right or that no reasonable official would have believed that the purported conduct was lawful. As to Garcia and McGuire, probable cause, and even arguable probable cause, is a defense to liability for an alleged unlawful arrest.

"5. The complaint does not comply with the heightened pleading standards set forth in Rule 9 of the Federal Rules of Civil Procedure regarding allegations of fraud, particularly with respect to count IV, which is essentially a judicial deception claim.

"Finally, Defendants Garcia, McGuire, Hunter and Pari also intend to move to strike the complaint's punitive damages claim as it is not pleaded with the requisite specificity demanded by both the United States and California Supreme Courts.

"If you have any questions regarding the above issues or would like to discuss these matters further, please let me know and we can arrange a time to discuss. In the alternative, if you intend to oppose these defendants' motions to dismiss, you may so state in a return e-mail."

3. As of the filing of my clients' motions to dismiss and to strike, I have received no response to my e-mail.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Irvine, California on February 18, 2015.

/s/Robert M. Dato
Robert M. Dato

**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is at BUCHALTER NEMER, A Professional Corporation, 18400 Von Karman Avenue, Suite 800, Irvine, California 92612-0514.

On the date set forth below, I served the foregoing document described as:

**KENNETH HUNTER'S AND GREG PARI'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO RULES 12(b)(2) AND 12(b)(6); SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROBERT M. DATO**

on all other parties and/or their attorney(s) of record to this action as follows:

**SEE ATTACHED SERVICE LIST**

☒ **BY CM/ECF SYSTEM** I certify that I caused a copy of the above document to be served upon the following counsel via the court CM/ECF System on February 18, 2015.

☒ **BY MAIL** I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. The address(es) shown above is(are) the same as shown on the envelope. The envelope was placed for deposit in the United States Postal Service at Buchalter Nemer in Irvine, California on February 18, 2015. The envelope was sealed and placed for collection and mailing with first-class prepaid postage on this date following ordinary business practices.

☒ 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 18, 2015 at Irvine, California.

Susie Lamarr

Susie Lamarr
(Signature)

**UNITED STATES DISTRICT COURT – LOS ANGELES DIVISION**
**JUDY ANNE MIKOVITS vs. ADAM GARCIA, et al.**
**CASE NO. CV14-08909 SVW (PLA)**

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