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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)

DEFENDANT DEAN'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES [PURSUANT TO ECF 71]

Defendant Geoff Dean submits this Memorandum of Points and Authorities in Support of His Reply to Plaintiff's Opposition to Defendant Dean's Motion to Dismiss for Failure to State a Claim, or, in the Alternative, for a More Definite Statement:

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I.

THE OPPOSITION, LIKE THE COMPLAINT, VIOLATES THE NINTH CIRCUIT PROHIBITION AGAINST SPEECHIFYING

A large body of Ninth Circuit precedent prohibits complaints which are speechifying diatribes, prolix ranting invective. This type of complaint consists of an accusatory rambling narration of interwoven governmental conspiracies. The narrative is complicated, confusing and larded with painful evidentiary detail. It reads more like a novel than a lawsuit. Such complaints often coin hitherto unheard of terms; cf., 51 of the present complaint: "extraordinary and immediate cross-border arrest without colorable criminal charge" and "colorable basis for the extraordinary actions. . . willfully disregarded that lack of basis."

The complaint is challenged on that ground (point heading IV, pages 5-8 of Dean's motion to dismiss). The opposition is the same. The opposition contains no tables, making it more difficult to comprehend the charges against the 16 governmental and private defendants. The reply does not even address this argument raised in the motion to dismiss nor cite the authorities supporting defendant's argument in this regard.

The Ninth Circuit authority establishing this prohibition is:

Schmidt v. Herrmann, 614 F.2d 1221, 1224(9th Cir. 1980)[upholding a Rule 8(a) dismissal of a "confusing, distracting, ambiguous, and unintelligible pleading."];

Nevijel v. North Coast Life, 651 F.2d 671, 674 (9th Cir. 1981)[Rule 8(a) violated by a complaint which is "excessively verbose, confusing and almost entirely conclusory"];

Hatch v. Reliance, 758 F.2d 409, 415 (9th Cir. 1985)[Rule 8(a) mandated dismissal of a complaint which "exceeded 70 pages in length, [and was] confusing and conclusory."];

/ / /

McHenry v. Renne, 84 F.3d 1172, 1177-78(9th Cir. 1996)[Rule 8(a) dismissal affirmed because complaint was "argumentative, prolix, replete with redundancy, and largely irrelevant. . . . It consists largely of immaterial background information."];

Cafasso v. General Dynamics, 637 F.3d 1047, 1058-1059(9th Cir. 2011)["While the proper length and level of clarity for a pleading cannot be defined with any great precision, Rule 8(a) has been held to be violated by a pleading that was needlessly long, or a complaint that was highly repetitious, or confused, or consisted of incomprehensible rambling. . . . Our district courts are busy enough without having to penetrate a tome approaching the magnitude of War and Peace to discern a plaintiff's claims and allegations. . . . Prolix, confusing complaints impose unfair burdens on litigants and judges. . . . ."];

Knapp v. Hogan, 738 F.3d 1106, 1110 (9th Cir. 2013)["We hold that dismissals following the *repeated* violations of Rule 8(a)'s short and plain statement requirement, following leave to amend, are dismissals for failure to state a claim under §1915(g). While past cases have found that this type of strike is accrued by a Rule 12(b)(6) dismissal, they do not hold that this is the only possible way. . . . We find the reasoning of the Seventh Circuit to be persuasive; 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, being irremediably unintelligible gives rise to an inference that the plaintiff could not state a claim. When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply *cannot* state a claim."].

In a standard complaint, and opposition memorandum, the crux of the alleged misconduct is readily apparent, not elusive and mysterious. The motion to dismiss should be granted on this basis.

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II.

THE STATUTE OF LIMITATION ACCRUED AT THE TIME OF THE PLAINTIFF'S ARREST AND THE IMMEDIATELY FOLLOWING SEARCH OF HER HOME

Citing a series of state appellate precedents, opposition memorandum at 10, etc., plaintiff contends that her cause of action was tolled by one of two theories. These are said to be a continuous accrual theory or a continuing violation doctrine. The argument is that the defendants began a chain of events that started in September of 2011 and continued "without differentiation or separation to the present day."

It is federal law which controls the accrual of a cause of action. *Elliot v. City of Union City,* 25 F.3d 800, 801-802 (9th Cir. 1994); *Maldonado v. Harris,* 370 F.3d 945, 955 (9th Cir. 2004); *Knox v. Davis,* 260 F.3d 1009, 1013 (9th Cir. 2001); *Boag v. Chief of Police,* 669 F.2d 587, 588 (9th Cir. 1982); *Cabrera v. City of Huntington Park,* 159 F.3d 374, 379 (9th Cir. 1998). The issue in this motion proceeding is when a cause of action for allegedly wrongful arrest and search accrues.

This issue has been the source of confusion in the precedents. The law in the Ninth Circuit provided that a false arrest claim began to accrue on the date of the allegedly false arrest. *Matthews v. Macanas,* 990 F.2d 467, 469 (9th Cir. 1993): "Where false arrest or illegal search and seizure is alleged, the claim accrues from the date of the wrongful arrest." In *Venegas v. Wagner,* 704 F.2d 1144, 1146 (9th Cir. 1983): "Where false arrest or illegal search 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."

Based upon an intervening Supreme Court decision (*Heck v. Humphrey,* 512 U.S. 477(1994)), however, the Ninth Circuit changed course and held that a cause of action for an unreasonable search or seizure did not accrue until the criminal charges had been dismissed or the conviction overturned. *Harvey v. Waldron,* 201 F.3d 1008,

1015 (9th Cir. 2000). This was the rule adopted by the district courts, e.g., *Pascual v. Matsumura,* 165 F.Supp.2d 1149, 1153 (D. Hi. 2001), cited with approval by the Ninth Circuit, *Papa v. United States,* 281 F.3d 1004, n.12 (9th Cir. 2002). At that point, *Matthews and Venegas* were no longer considered valid authority.

But the law changed again in 2007, when the Supreme Court refused to embrace what it termed this "bizarre extension of *Heck.*" *Wallace v. Kato,* 549 U.S. 384, 393 (2007). The district courts recognized that *Wallace* effectively overruled *Harvey. Kamar v. Krolczyk,* 2008 WL 2880414, *6 (E.D. Cal. 2008); unpublished cases after January 1, 2007 are citable as persuasive authority. Fed.R.App.Proc. 32.1(a).

In *Wallace,* the Supreme Court overruled those circuits that had applied *Heck* to bar §1983 claims when criminal charges were only pending. The *Heck* Rule of deferred accrual is called into play only when there exists a conviction or sentence that has not been invalidated, that is to say, an outstanding criminal judgment. To avoid a concurrent §1983 action and criminal action, the Supreme Court held that if a plaintiff files a false arrest claim or any other claim related to rulings that will likely be made in a pending or anticipated criminal trial, it is within the power of the district court , and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.

In light of *Wallace,* the pendency of criminal charges does not prohibit a plaintiff from filing a §1983 action challenging a search or seizure until the criminal charges against him or her are dismissed. Because *Harvey* has been overruled, and the *Heck* bar does not apply to the filing of a civil action, this action accrued at the time of the search and arrest and plaintiff is not entitled to a later accrual date. *Kamar,* supra, at *7.

Nothing in *Wallace* appears to limit it to certain types of civil rights actions. If the *Heck* bar did apply to Fourth Amendment claims while charges were pending, the Supreme Court would hardly have stated that applying *Heck* to pending charges was

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a bizarre extension of *Heck.* In addition, when fashioning a remedy to avoid concurrent civil rights and criminal trials, the Supreme Court stated specifically that "If a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accordance with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Wallace*, *supra,* at 393-394.

If *Wallace* meant that *Harvey* would apply to other claims, such as Fourth Amendment claims, the Supreme Court would not have suggested staying any civil action that is related to a ruling that will likely be made in a pending criminal trial. Therefore, neither the *Heck* bar nor the later accrual date set forth in *Harvey* apply to determine the accrual date and statute of limitation in this action.

As a result of the Supreme Court holding in *Wallace,* 594 U.S. at 396, a cause of action for false arrest under §1983, in cases in which the search or seizure 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. Otherwise, the *Matthews-Venegas* principle controls, i.e., the date of the search or seizure. This bifurcated analysis was foreseen by the Ninth Circuit even before *Wallace;* each case must be examined on its own facts and notwithstanding *Heck,* a false arrest claim, for example, could still accrue at the time of a person's arrest, under some circumstances. *Cabrera, supra,* 159 F.3d at 380, n.7.

Applying these precedents to the present case, we know that the plaintiff's arrest and the search of her home immediately following her arrest, occurred on November 18, 2011. Paragraph 31 pleads that the Nevada officials, Adam Garcia and Jaime McGuire, employees of the University of Nevada at Reno(paragraphs 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. She was transported to jail and her home was searched pursuant to a

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warrant. Paragraphs 31-33 of the complaint. Plaintiff was released from custody in the Ventura County jail late on November 22, 2011. Paragraph 53.

No confinement due to legal process is alleged. Assuming that the plaintiff did not discover the search of her residence from her husband, who had been contacted about the materials which were the subject of the search (paragraphs 38-39), until her release five days later, her claim for false arrest against moving defendants accrued on November 18, 2011 and her search claim accrued on November 23, 2011.

The state's personal injury statute of limitation determines the length of the federal statute of limitation. *Owens v. Okure,* 488 U.S. 235, 240-41 (1989). In California at this time that is a two year statute of limitation. *Jackson v. Barnes,* 749 F.3d 755, 761 (9th Cir. 2014).

The statute of limitation for the arrest claim expired on November 18, 2013, and for the search claim on November 23, 2013. The suit was thus filed approximately a year late, on November 17, 2014. The tolling analysis does not change the result. There are four potential tolling doctrines.

For actions under §1983, the court applies the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law. *Canatella v. Van De Kamp,* 486 F.3d 1128, 1132 (9th Cir. 2007). California law allows equitable tolling if there was a previous, timely claim or action substantially related to the same subject matter against the same defendant. Where the first proceeding does not seek relief against the defendant in the second proceeding, equitable tolling does not apply. *Apple Valley Unified v. Vavrinek,* 98 Cal. App. 4th 934, 954 (2002). A workers' compensation claim against an employer would not toll the statute of limitation against a third party who might also be liable for the injury. *Collier v. City of Pasadena,* 142 Cal. App. 3d 917, 924-25 (1983). In *Garabedian v. Skochko,* 232 Cal. App. 3d 836, 847 (1991), the court held that the doctrine of equitable tolling does not save an untimely claim merely because the later defendant obtained timely knowledge within the statute of limitation

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of a claim against another defendant for which the second defendant knows or believes he may share liability.

In the present case, there is no allegation of an earlier claim of any sort. There is no allegation that Geoff Dean was a party defendant to an earlier claim, suit or action. Therefore, the doctrine of California equitable tolling does not apply.

Federal equitable tolling applies when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time. *Stoll v. Runyon,* 165 F.3d 1238, 1242 (9th Cir. 1999). For example, in the *Kamar* case, *12, the Court rejected federal equitable tolling based upon an argument that plaintiff was trying to avoid antagonizing the people investigating him by filing a federal civil rights action. That circumstance arguably made not filing a logical option or less desirable, but it did not create impossibility.

A third tolling doctrine could be incarceration. That can be, under certain limited circumstances, a tolling disability. Code of Civil Procedure §352.1 (a)- (c) provides that there is a tolling period of up to two years for incarceration if the injury occurred during incarceration and the claim is not against a public entity or its employees. Subdivision (b) provides that the statute does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented; all claims for money or damages require the presentation of a government tort claim (with 15 exceptions, none of which are applicable here). Government Code Section 905. Subdivision (c) renders the tolling provision inapplicable to actions requesting an alteration of the conditions of confinement, but makes it applicable to damages actions relating to the conditions of confinement.

Plaintiff's injury did not occur during the time of her incarceration. Even if it did, that tolling would only apply to private parties, not public entity defendants, unless the claim seeks to redress the conditions of plaintiff's confinement. But plaintiff's claim does not implicate the conditions of her confinement. Therefore, disability by reason of incarceration does not trigger tolling in this action.

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The fourth potential tolling doctrine would be Government Code Section 945.3. That statute prohibits filing suit against law enforcement officials during the pendency of a criminal action. The Ninth Circuit, however, has invalidated that aspect of the statute and allowed such suits to be filed even though criminal charges are pending and, additionally, has ruled that because someone wishing to file such a suit might be deterred by the statute, it also functioned to toll the statute of limitation. *Harding v. Galceran,* 889 F.2d 906 (9th Cir. 1989); *Torres v. City of Santa Ana,* 108 F.3d 224, 226 (9th Cir. 1997).

But in the present case, there is no allegation that criminal charges were ever pending. The rule only functions to toll the statute while criminal charges are pending. Here there are no such charges alleged. Therefore, the doctrine does not toll the statute, either. The action is time-barred.

III.

THE HIGHEST RANKING LAW ENFORCEMENT OFFICIAL OF AN AGENCY CANNOT BE SUED PERSONALLY; THE PROPER DEFENDANT, IF THE MONELL ALLEGATIONS ARE FACTUALLY PLED, IS THE ENTITY

If the inclusion of the Sheriff (paragraph 9) is just another way of alleging that his agency committed misconduct, he is entitled to dismissal. The *Monell* decision rendered official capacity suits against local officers unnecessary. 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); *Rosa R. v. Connelly,* 889 F.2d 435, 437 (7th Cir. 1989).

The Ninth Circuit has clarified that a plaintiff must plead both the *Monell* elements and facts supporting them. Otherwise, "the complaint does not state a plausible cause of action for either municipal or supervisory liability." *Dougherty v. City of Covina,* 654 F.3d 892, 900 (9th Cir. 2011). Under *Bell Atlantic v. Twombly,*

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550 U.S. 544, 555 (2007), said the *Dougherty* Court, "mere legal conclusions are not entitled to a presumption of truth." The complaint must contain more than a formulaic recitation of the elements of a cause of action. It must plead enough facts to state a claim to relief that is plausible on its face. *Dougherty* at 897.

A government entity may not be held liable under 42 U.S.C. §1983 unless a policy, practice or custom of the entity can be shown to be a moving force behind a violation of constitutional rights. *Dougherty* at 900. In order to establish liability for governmental entities under *Monell,* a plaintiff must prove that the plaintiff possessed a constitutional right of which he was deprived, that 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.

The *Dougherty* court concluded that "Here, Dougherty's *Monell* and supervisory liability claims lack any factual allegations which would separate them from 'the formulaic recitation of a cause of action's elements' deemed insufficient by *Twombly.*" 654 F.3d at 900. Dougherty alleged only negligent hiring and training but "pointed to no instances of deliberate indifference. Dougherty failed to plead enough facts to state a claim to relief that is plausible on its face." *Dougherty* at 901. Therefore, the Court affirmed the dismissal of the claims. *Id.*

In the present case, there are no *Monell* allegations. There are no facts supporting them. Therefore, under *Twombly* and *Dougherty,* the complaint must be dismissed.

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IV.

THE OPPOSITION'S FAILURE TO ADDRESS QUALIFIED IMMUNITY OR CITE CLOSELY CORRESPONDING ANTECEDENT APPELLATE AUTHORITY PROHIBITNG THE CONDUCT INVOLVED IN THE PRESENT ACTION MAKES DEFENDANT DEAN QUALIFIEDLY IMMUNE

A qualified immunity assertion forces the plaintiff to cite closely corresponding appellate authority preexisting and prohibiting the challenged conduct, for the reason that the defendant could never prove a negative. A public official defending a civil rights suit could never prove that there was no appellate authority which prohibited his conduct. *Davis v. Scherer,* 468 U.S. 183, 197 (1984); *Trevino v. Gates,* 99 F.3d 911, 916-917 (9th Cir. 1996) ["The plaintiff has the burden of proving that the rights he claims are clearly established."]; *Brewster v. Board of Education,* 149 F.3d 971, 977 (9th Cir. 1998)["The plaintiff shoulders the burden of proving that the rights he claims are clearly established."]; *Alston v. Read,* 663 F.3d 1094, 1098 (9th Cir. 2011).

Plaintiff has not discussed the qualified immunity nor cited prohibitory appellate precedent in her opposition memorandum. This omission is fatal to the inclusion of defendant Sheriff Dean.

In *Stanton v. Sims,* 134 S.Ct. 3 (2013), the Ninth Circuit erroneously determined that dismissal on qualified immunity grounds was improper. An occupant of a home was injured when the officer kicked down her front gate while pursuing a suspect; her suit challenged the warrantless entry into her yard and sought damages for her physical harm.

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established rights. It gives government officials "breathing room" to make reasonable but mistaken judgments and protects all but the plainly incompetent and those who knowingly

violate the law. *Id.* at 5. The Ninth Circuit's determination that the officer was plainly incompetent was at variance with the absence of factually specific controlling precedent.

The Ninth Circuit's one paragraph analysis of the hot pursuit issue, the key consideration, was flawed. The two cases cited did not clearly hold that the officer violated the plaintiff's rights. The Ninth Circuit read these cases too broadly. *Id.* at 6. Both cases relied upon a 1976 United States Supreme Court decision which approved an officer's warrantless entry while in hot pursuit. *Id.* at 6. Although that case involved a felony suspect, the Court did not "expressly limit" the holding to that status. *Id.* Further, neither case involved hot pursuit. *Id.*

In *Carroll v. Carman,* 135 S.Ct. 348 (2014), no previous appellate precedent clearly established that police violate property owners' Fourth Amendment rights by entering their back yard without a warrant, standing on a deck or porch, and conducting a "knock and talk," without first having tried the front door. The contours of the right must be sufficiently clear. *Id. at 350.* Existing precedent must have placed the question "beyond debate." *Id.* This doctrine gives government officials "breathing room" to make reasonable but mistaken judgments. *Id.* It protects all but the plainly incompetent or those who knowingly violate the law. *Id.*

In *Wilson v. Layne,* 526 U.S. 603 (1999), it was held that bringing reporters into a home during an attempted execution of a warrant violated the Fourth Amendment, but the officers were entitled to qualified immunity. "The right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." 526 U.S. at 615. Qualified immunity is forfeited only if "the constitutional question presented by [the] case is . . . open and shut." *Id.* Where a warrant exists, it is much less probable that the exact contours of the right will have been defined for qualified immunity purposes. *Id.* at 615. "Given such an underdeveloped state of the law, the officers in this case cannot have been expected to predict the future course of constitutional law." *Id.* at 617.

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Messerschmidt v. Millender, 132 S.Ct. 1235 (2012) involved nighttime service of a search warrant. 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 and substance with the requirements of the Fourth Amendment. *Id.* It is a sound presumption that that magistrate is more qualified than the police officer to make a probable cause determination and 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.* He is qualifiedly immune.

In the present case, there was undeniably a warrant. Paragraphs 33 and 51. The charge against Sheriff Dean is in paragraph 51: He was in a position to independently assess the circumstances and gravity of the University of Nevada at Reno's Police Department's request for evidence justifying extraordinary and immediate cross-border arrest without a colorable criminal charge. He failed to exercise good judgment.

Whatever these newly minted vague terms may mean, neither the complaint nor the opposition cites any appellate precedent making it plain that the execution of the warrant violated clearly established law. The defendant, Geoff Dean, is therefore entitled to qualified immunity and on that basis requests the dismissal of the complaint against him.

On page 17 of the opposition, plaintiff contends that the sheriff's deputies hid in bushes while the University officers posed as plaintiff's patients. The deputies

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came rushing out of the bushes to place plaintiff under arrest. No appellate authority is cited clearly establishing the impropriety of these actions nor is any appellate authority cited at all.

In the next paragraph on page 17, the opposition argues that plaintiff was never processed as an incoming inmate. She was not photographed, fingerprinted, informed of the charges, granted counsel or taken before a judge. Again, no closely corresponding appellate authority clearly establishing the impropriety of these charges is provided. As it is plaintiff's burden to do so, defendant Dean is qualifiedly immune from these allegations.

There is then a lengthy discussion of several phone calls, on pages 17 and 18. A Mr. Whittemore called her husband and a collaborating colleague of hers demanding that she sign an apology letter. He demanded she provide Dr. Lipkin's scientific study samples. To the extent that any of these comments are comprehensible or implicate the Sheriff, there is, again, no closely corresponding appellate authority prohibiting such conduct under the specific circumstances which existed here.

V.

CONCLUSION

Based upon the preceding reasons and authorities, it is respectfully requested that the Court grant defendant Geoff Dean's motion to dismiss.

DATED: April 29, 2015 WISOTSKY, PROCTER & SHYER

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