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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)

COMBINED REPLY BY DEFENDANTS ADAM GARCIA, JAIME MCGUIRE, KENNETH HUNTER AND GREG PARI IN SUPPORT OF MOTIONS TO DISMISS AND MOTION TO STRIKE PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES

[Concurrently filed with Request for Judicial Notice]

Date: [Vacated, per order of Feb. 23, 2015 [Dkt. 67])
Time: [Vacated]

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Statutes and Rules

Defendants, Chief Adam Garcia, Detective Jaime McGuire (sued as "Jamie McGuire"), Dr. Kenneth Hunter, and Dr. Greg Pari hereby submit the following combined reply in support of their motions to dismiss and motion to strike as follows:

I. PROCEDURAL BACKGROUND

Each of the defendants named in plaintiff Judy Mikovits' complaint (Dkt. 1) have filed motions to dismiss and/or strike. Relevant to these defendants, Dr. Hunter and Dr. Pari filed a motion to dismiss (Dkt. 60); Chief Garcia and Detective McGuire filed a separate motion to dismiss (Dkt. 63); and all four defendants also filed a motion to strike (Dkt. 64). Mikovits has responded with a single opposition[1] (Dkt. 72) in which she addresses only *portions* of these motions as well as the motions of the other defendants. The magistrate set these motions to be determined without a hearing (Dkt. 67).

This reply is intended to support each of the three motions (Dkt. 60, 63 and 64) filed by Dr. Hunter, Dr. Pari, Chief Garcia and Detective McGuire. For ease of review, the reply will be broken down by motion.

II. ARGUMENT APPLICABLE TO ALL MOTIONS

A. Mikovits' Claims Are Barred by the Statute of Limitations

Mikovits' complaint must be dismissed because the statute of limitations has run as to defendants Garcia, McGuire, Hunter and Pari. Mikovits' complaint is entitled "Civil Rights Complaint Pursuant to 42 USC Sec 1983." In ¶ 22 on page 4 of the complaint, Mikovits states "The core of this Complaint is violation of PLAINTIFF'S federal Constitutional rights under color of law…" Because there is no federal statute of limitations for claims brought under 42 U.S.C. §

[1] Mikovits' opposition contains a curious incorporation by reference to "each of the arguments and factual assertions raised in the other Oppositions to Motions to Dismiss filed in this case." *See* Opposition (Dkt. 72) at 9 (emphasis added). A review of the Court's docket confirms, however, that Mikovits filed only a single, consolidated brief in opposition to the various pending motions.

1983, federal courts must borrow the state personal injury statute of limitations to determine if a § 1983 claim is time-barred. *Wallace v. Kato,* 549 U.S. 384, 387 (2007). *Wilson v. Garcia,* 471 U.S. 261, 280 (1985).

The law is well settled that California's two-year personal injury residual statute of limitations applies to a § 1983 action. *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). The complaint was filed on November 17, 2014, approximately three years after the conduct of which Mikovits complains, and is therefore time-barred.

Mikovits incorrectly argues that the series of events described in her complaint constitute a continuing tort. She apparently tries to link the various events together by alleging a conspiracy among the diverse group of defendants, hoping to invoke later actions by other defendants to revive the expired claims against Chief Garcia, Detective McGuire, Dr. Hunter and Dr. Pari. Initially, it should be noted that a conspiracy to violate civil rights is governed by 42 U.S.C. § 1985 and is also subject to California's personal injury statute of limitations. *McDougal v. County of Imperial,* 942 F.2d 668, 673-674 (9th Cir. 1991) (applying California's prior one-year personal injury statute).

Mikovits' argument that the two-year statute of limitations is extended by the continuing violations doctrine is misplaced. She cites *Aryeh v. Canon Business Solutions, Inc.,* 55 Cal.4th 1185, 292 P.3d 871, 875-876 (2014) for the proposition that the continuing violations doctrine aggregates a series of wrongs for the purpose of determining the accrual of the statute of limitations. However, *Aryeh* involved a very different set of facts. In *Aryeh*, a copy service leased copiers from Canon. The copy service paid monthly rent subject to a maximum monthly allowance, and copies in excess of the allowance required payment of additional per-copy charges. The copy service incurred significant overage charges, and determined Canon was billing for thousands of "test copies" that its

employees ran during service visits. The copy service filed suit in January 2008 under the state's unfair competition law (four-year limitations period). Canon asserted that the four-year limitations period was triggered when the violation first arose in February 2002, and expired before the copy service filed suit in 2008. The California Supreme Court held that the continuous accrual theory applied because Canon had a continuing or recurring obligation not to overcharge: "By its nature, the duty Canon owed – the duty not to impose unfair charges in monthly bills – was a continuing one, susceptible to recurring breaches. Accordingly, each alleged breach must be treated as triggering a new statute of limitations." *Id.* at 1200. This is a far cry from the facts alleged here, which involve a single instance of an allegedly improper arrest.

Moreover, the cases cited in the *Aryeh* opinion demonstrate that the continuing violations theory does not apply to the facts of this case. For example, the *Aryeh* court cited *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 29 P.3d 175 (2001) to explain the continuing violation theory. Plaintiff Richards resigned from her position at CH2M Hill after suffering repeated acts of disability discrimination by her employer over a year period. The employer's statute of limitations defense was rejected despite the fact that some of the discriminatory acts had occurred beyond the one-year limitations period. The *Richards* court stated:

> "We hold that an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind--recognizing, as this case illustrates, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [internal citation omitted] (2) have occurred with reasonable frequency; (3) and

have not acquired a degree of permanence." *Richards, supra,* at 823.

The second explanatory case cited by *Aryeh* is *Amtrak [National Railroad Passenger Corp.] v. Morgan,* 536 U.S. 101 (2002), which involved the time limitation for filing an employment discrimination charge under 42 U.S.C. § 2000e. In that case, a racial discrimination charge included acts that had occurred outside the 300-day time limit for filing the charge, while other acts had occurred within the 300-day limit. Although the Ninth Circuit applied the continuing violations doctrine to acts outside the time limit, the United States Supreme Court reversed that portion of the Ninth Circuit's ruling as applied to "discrete discriminatory acts," which were held to be time-barred. "Each discrete discriminatory act starts a new clock for filing such charges alleging that act." *Id.* at 113. The U.S. Supreme Court also rejected the Ninth Circuit's application of the continuing violations doctrine to "serial violations," reversing the appellate court's holding that "so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability." *Id.* at 114.

The *Amtrak* decision distinguished between discrete acts of discrimination, such as "termination, failure to promote, denial of transfer or refusal to hire" (*id.* at 114) and a hostile work environment claim, which is "comprised of a series of separate acts that collectively constitute one 'unlawful employment practice'" (*id.* at 117). While holding that discrete acts of discrimination are subject to individual clocks for the purposes of a limitation period, the Court found that an employer may be liable for all acts that are part of a hostile work environment because such separate acts constitute a single claim. *Id.* at 118.

These cases do not support the application of the continuing violations doctrine in the instant case. Mikovits' complaint does not allege facts to suggest that the three elements required in the *Richards* case can be met. Moreover, the *Amtrak* case actually compels dismissal because the conduct described in

Mikovits' complaint is comprised of separate, discrete acts rather than a series of similar acts that might constitute continuing violations.

Mikovits cites *Virginia Hospital Association v. Baliles,* 868 F.2d 653, 663 (4th Cir. 1989), for the proposition that "until the notebooks and reputation are restored to Dr. Mikovits, the violation of her civil rights cannot end," contending that this brings her case under the continuing violations doctrine and saves her stale claims. However, the argument is misplaced. Virginia Hospital Association brought a § 1983 action against the Commonwealth of Virginia challenging the statutory procedures Virginia followed to determine the rate of reimbursement for care of Medicaid patients treated by VHA member health care providers. Because the procedures Virginia followed were consistently followed over a period of years, the statute of limitations defense was rejected because the alleged unconstitutional conduct was an ongoing pattern of statutory enforcement. Accordingly, the court rejected the argument that the statute of limitations began to run on the date the statute was implemented, as enforcement was an ongoing process that continued through the date on which suit was filed. *Virginia Hospital Association* is factually distinct from the instant case and was a clear instance of an ongoing constitutional violation. It does not support the argument that the continuing violations doctrine applies to the present case.

Mikovits briefly touches on the continuous accrual doctrine, apparently offering it as an additional basis to avoid the expired statute of limitations. Like the continuing violations theory, it has no application here. Mikovits again cites *Aryeh,* which relied upon *Howard Jarvis Taxpayers Assn. v. City of La Habra,* 25 Cal.4th 809, 23 P.3d 601 (2001) to explain the continuous accrual doctrine. In that case, the plaintiffs challenged a utility users' tax that had not been submitted for voter approval as required by Proposition 62. Because the suit was filed more than three years after the tax was implemented, the City of La Habra defended on the basis of the statute of limitations. The City contended that the

statute of limitations accrued on the date the tax was first implemented such that the suit was time-barred. The California Supreme Court found that the continued imposition of the tax, if illegal, was an ongoing violation, with each collection triggering a new limitations period. Although the court refused to apply this "continuous accrual" theory to tax collections that occurred outside the limitations period, the doctrine saved those collections that took place within the period.

This is not the situation here. Further, Mikovits' complaint is devoid of any allegations of continuing conduct by Chief Garcia, Detective McGuire, Dr. Hunter or Dr. Pari. The allegations against these four defendants are sparse. It is alleged in generalized, conclusory fashion that all defendants were acting in a conspiracy. Complaint, ¶ 20. As to defendants Hunter and Pari, Mikovits contends, *upon information and belief*, that the Whittemore defendants consulted Dr. Hunter and Dr. Pari before terminating her employment on September 29, 2011. Complaint ¶ 30. Dr. Hunter and Dr. Pari are not mentioned again in the complaint, not even in any of the six causes of action for which Mikovits seeks redress.

Mikovits alleges that Chief Garcia and Detective McGuire arrested and detained her on November 18, 2011. Complaint, ¶¶ 31 and 32. There are no other factual allegations against them in the complaint. In Count IV, Mikovits alleges that Chief Garcia and Detective McGuire "conspired with the Whittemore Principals" and "committed false imprisonment and wrongful denial of due process." Complaint, ¶¶ 48 and 49. In Count VI, Mikovits alleges that Chief Garcia and Detective McGuire conspired with the Whittemore Principals to commit "false imprisonment and wrongful defamation." Complaint, ¶¶ 53 and 54. There are no allegations whatsoever that any of these four defendants took additional actions after 2011.

There are no continuing violations by Chief Garcia, Detective McGuire,

Dr. Hunter or Dr. Pari. Even had Mikovits alleged multiple acts by these defendants over an expanse of time, neither the continuing violations doctrine nor the continuous accrual doctrine would apply so as to extend the statute of limitations as to those alleged separate and discreet actions that occurred in 2011. Therefore, the two-year statute of limitations that must be applied to Mikovits' complaint expired in 2013, a year before she filed suit. Accordingly, the complaint must be dismissed as to Chief Garcia, Detective McGuire, Dr. Hunter and Dr. Pari.

B. The Additional "Allegations" in Mikovits' Opposition are Improper.

Mikovits' complaint is fatally defective for the reasons set forth in the initial motions filed by Dr. Hunter, Dr. Pari, Chief Garcia and Detective McGuire. In an effort to salvage the defective complaint, Mikovits' opposition makes numerous conclusory "allegations" (referred to in this reply as "contentions") that do not appear in her complaint. However, a plaintiff cannot avoid dismissal by "alleging" new facts in opposition to a motion to dismiss. *See Tietsworth v. Sears*, 720 F.Supp.2d 1123, 1145 (N.D. Cal. 2010) ("It is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss"); *see also Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("The 'new' allegations contained in the [plaintiffs'] opposition . . . are irrelevant for Rule 12(b)(6) purposes, even if they were more than merely conclusory. In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss"). Accordingly, all "allegations" contained in Mikovits' opposition that do not appear in the complaint must be disregarded during consideration of the motions to dismiss and the motion to strike.

III. ARGUMENT APPLICABLE TO MOTION TO DISMISS DR. HUNTER AND DR. PARI (DKT. 60)

A. There is No Personal Jurisdiction Over Hunter or Pari.

The plaintiff bears the burden of demonstrating that personal jurisdiction exists. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006); *see also Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). If the defendants present evidence that personal jurisdiction is not present, the plaintiff must come "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).

In this case, Mikovits presents no facts, either by the allegations in her complaint or by affidavit, to demonstrate that personal jurisdiction exists over defendants Hunter and Pari. As set forth in their motion to dismiss, the complaint is devoid of any allegations of specific and purposeful activity by Dr. Hunter or Dr. Pari in California. Both Drs. Hunter and Pari established through affidavit that they do not have contacts with California that are so substantial or continuous and systematic to establish general jurisdiction. *See* Mot. to Dismiss at pp. 4-5. Mikovits has not presented any evidence to contradict these affidavits.

Likewise, none of the six "counts" asserted by Mikovits mentions Drs. Hunter or Pari and their alleged contacts with California (Compl. at ¶¶ 34-54). Further, Mikovits' opposition contains no affidavit or other evidence that would establish specific jurisdiction over Drs. Hunter and Pari. Indeed, the opposition does not even include any allegations regarding the activities of Dr. Hunter or Dr. Pari in California. Rather, the opposition states that Drs. Hunter and Pari are "professors at UNR" and "were in a position to avert the activities of the other Nevada based defendants." Opp. at p. 19. Even if these statements were accepted as true, they do not establish personal jurisdiction over Drs. Hunter or Pari in California.

Mikovits has failed to 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. Similarly, Mikovits has not shown that Dr. Hunter or Dr. Pari purposefully availed themselves of the benefits of acting in California or that Mikovits' claims against Drs. Hunter and Pari arises out of or relates to the their activities in California. *Boschetto v. Hansing,* 539 F.3d 1011, 1016 (9th Cir. 2008). In fact, no California activates are even alleged against Drs. Hunter and Pari. Therefore, neither general nor specific personal jurisdiction exists over Drs. Hunter and Pari in California. Accordingly, Drs. Hunter and Pari should be dismissed for lack of personal jurisdiction.

B. Mikovits Fails to State a Claim

1. Failure to State Sufficient Facts

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). Thus, "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).

Mikovits' opposition spends little more than half of a page explaining why Drs. Hunter and Pari should not be dismissed from this case. Her contention, which was not included in her complaint, is that Drs. Hunter and Pari "were in a position to avert the activities of the other Nevada based Defendants," turned a "deaf ear on the crucial issues," and "lacked courage to do what was right." Opp. at p. 19. Much like her complaint, Mikovits' opposition does not identify any

specific act which would give rise to liability for Drs. Hunter or Pari. Moreover, she does not state that either Dr. Hunter or Dr. Pari participated in any conspiracy, but rather that they failed to prevent the alleged conspirators from damaging her. Even if pleaded, this would not meet the standards for conspiracy under California law. *Kidron v. Movie Acquisition Corp.*, 40 Cal.App.4th 1571, 1581-1582, 47 Cal.Rptr.2d 752 (1995) (knowledge of an alleged tort without intent to aid its commission is insufficient to establish a claim for conspiracy); *Davis v. Superior Court*, 175 Cal.App.2d 8, 23, 345 P.2d 513, 522-23 (1959) (mere association does not make a conspiracy; it must be accompanied by evidence of some participation in the commission of the underlying tort).

Mikovits has failed to allege sufficient facts to state a claim against Drs. Hunter and Pari. Therefore, they should be dismissed.

2. Mikovits Fails to Demonstrate That Drs. Hunter and Pari Were Acting Under Color of State Law

As detailed in the motion to dismiss filed by Dr. Hunter and Dr. Pari (Dkt. 60), Mikovits has failed to state a claim for relief under Section 1983 because her complaint is devoid of any non-conclusory factual allegations plausibly suggesting that either defendant was acting under color of state law. *See West v. Atkins,* 487 U.S. 42, 49 (1988) (defendant must have "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'"). First, the complaint lacks sufficient factual allegations demonstrating that either Dr. Hunter or Dr. Pari were acting in their official capacity as professors at the University of Nevada School of Medicine in performing any alleged acts or omissions attributed to them. *See Dang Vang v. Vang Xiong X. Toyed,* 944 F.2d 476, 479 (9th Cir. 1991) (" a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law"); *Johnson v. Knowles,* 113 F.3d 1114, 1117-18 (9th Cir. 1997) (mere existence of an

employment relationship between the state and an individual does not make any and all employee acts into "state action" for the purposes of Section 1983). Second, the single vague and conclusory allegation in Paragraph 20 the complaint, that Dr. Hunter and Dr. Pari were allegedly "acting in active conspiracy" with state actors, is insufficient to establish that they were acting under color of state law for purposes of Section 1983. *See Simmons v. Sacramento Cnty. Sup. Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003); *see also Ivey v. Bd. of Regents,* 673 F.2d 266, 268 (9th Cir. 1982) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss"). Mikovits' opposition does not cite any allegations in the complaint, and again does not specifically respond to these defendants' arguments for dismissal.

Moreover, even if the Court were to consider Mikovits' improper attempt to supplement her complaint with new allegations in the opposition (*see supra*), none of the new allegations remedy the above deficiencies. Mikovits now asserts that Dr. Hunter and Dr. Pari were allegedly "in a position to avert the activities of the other Nevada based defendants," but rather than "team up with" Mikovits, they instead "decided to turn a deaf ear on the crucial issues, and joined the conspiracy" against her. *See* Opposition at 19. However, Mikovits does not provide any non-conclusory factual allegations suggesting (1) how these defendants allegedly could have "averted" the supposed acts of others, (2) that they were under any legal duty to do so or otherwise "team up with" her, (3) to what "crucial issues" the allegedly "decided to turn a deaf ear", or (4) what alleged acts or omissions these defendants undertook evidencing that they shared the supposed common objective of the alleged conspiracy against Mikovits. *See United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1540-1541 (9th Cir. 1989) ("To be liable, each participant in the conspiracy . . . must at least share the common objective of the conspiracy"). In short, even the most liberal

reading of Mikovits' new contentions fails to plausibly demonstrate that Dr. Hunter or Dr. Pari were acting under color of state law to deprive Mikovits of her rights. As such, her Section 1983 claim fails against these defendants. *See Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).

3. Mikovits Has Ignored Defendants' Alternative Qualified Immunity Defense

Mikovits has failed to respond in any meaningful way to the alternative argument of Drs. Hunter and Pari that, if they are deemed to have acted under color of state law due to their employment at the University of Nevada School of Medicine, they are entitled to qualified immunity. *See* Motion to Dismiss (Dkt. 60) at 14-16. Mikovits' complaint and her opposition are devoid of any non-conclusory factual allegations plausibly establishing that either of these Defendants violated or conspired to violate her constitutional or statutory rights. *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"). Further, Mikovits has failed to establish that the supposed right violated was so clearly established that no reasonable official in Dr. Hunter's or Dr. Pari's position could have believed that their alleged conduct was lawful. *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991) ("*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).

The Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Mikovits has failed to put forth any substantive reason why, if they are state actors, Dr. Hunter and Dr. Pari would not be entitled to qualified immunity. As such, they should not be forced to

endure further participation in this litigation, and their motion to dismiss should be granted.

IV. ARGUMENT APPLICABLE TO MOTION TO DISMISS BY CHIEF GARCIA AND DETECTIVE MCGUIRE (DKT. 63)

A. Mikovits Has Failed to State a Claim Against Chief Garcia and Detective McGuire

Given Mikovits' practice of lumping together her allegations and arguments concerning the various defendants in this matter, it still remains unclear what claim Mikovits is asserting against Chief Garcia and Detective McGuire or the alleged conduct supporting such a claim. As stated in the motion to dismiss (Dkt. 63), Mikovits' claim against Chief Garcia and Detective McGuire appears to be one for judicial deception. *See e.g., KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004) (recognizing and defining the elements of judicial deception claim under Section 1983). However, the opposition also makes reference to an alleged unlawful arrest without a warrant [*see* Opposition at 7], (b) "unlawful and unnecessary delay in releasing" Mikovits from custody in California [*id.* at 13], and (c) "facially invalid Search Warrant." *Id.* at 18. To the extent the Court elects to consider these new contentions not contained in the complaint, and to the extent such contentions relate to these defendants, none of the new contentions, or the original allegations, are sufficient to state a claim for relief against Chief Garcia or Detective McGuire.

1. Mikovits Fails to State a Claim for Judicial Deception

As detailed in the motion to dismiss (Dkt. 63), to state a valid claim for judicial deception under Section 1983 Mikovits "must establish both [(1)] a substantial showing of the deliberate falsity or reckless disregard of the truth of the statements in the affidavit and [(2)] the materiality of those statements to the ultimate determination of probable cause." *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995); *see also Smith v. Almada*, 640 F.3d 931, 937 (9th Cir. 2011)

(materiality "requires the plaintiff to demonstrate that the magistrate would not have issued the warrant with false information redacted, or omitted information restored.") (quotation marks and citation omitted). As with all averments of fraud, Federal Rule of Civil Procedure 9(b) requires Mikovits to plead with particularity "what information [in the affidavit to secure the warrant] was fraudulent, why it was fraudulent, [and] that [the officer] knew or should have known that it was fraudulent". *See Wise v. Nordell,* No. 12-CV-1209 IEG (BGS), 2012 WL 3959263, *9 (S.D. Cal. Sept. 10, 2012) (dismissing judicial deception claim for failure to plead fraud with specificity); *Howard v. Dalisay,* No. 10-5655 LB, 2014 WL 186304, *10 (N.D. Cal. Jan. 16, 2014) (same); *see also Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003) (in pleading the "who, what, when, where, and how" of fraud a "plaintiff must set forth what is false or misleading about a statement, and why it is false").

Mikovits' complaint merely alleges that "[o]n information and belief" Chief Garcia and Detective McGuire allegedly made "fraudulent statements directly to the Ventura Superior Court," and that such alleged fraudulent statements resulted in the issuance of the purportedly defective warrant. *See* Complaint ¶ 48. Conversely, Mikovits now contends in her opposition that these two defendants "gav[e] false information to Geoff Dean, Ventura County Sheriff, upon which Dean illegally seized and detained" her. *See* Opposition at 13. Neither of these conclusory allegations, however, contain any of the required particularity concerning what, when, where, or how Chief Garcia and Detective McGuire made allegedly false statements, nor does Mikovits allege how or why the purported statements were false. *See Wise, supra*, 2012 WL 3959263 at *9; *Vess, supra*, 317 F.3d at 1106. Because Mikovits' conclusory and contradictory allegations are insufficient to state a valid claim for relief for judicial deception, Chief Garcia and Detective McGuire should be dismissed.

2. Mikovits' "Warrantless" Arrest Allegations Fail to State a Claim

To the extent Mikovits contends that Chief Garcia and Detective McGuire are liable under Section 1983 because she was allegedly arrested without a warrant [*see* Opposition at 7], she has failed to state a valid claim for relief because (a) the Court can take judicial notice of the fact that there was indeed a warrant issued for her arrest, and (b) the complaint demonstrates that there was probable cause, or at least arguable probable cause, for her arrest.

Mikovits acknowledges that when she asked the Ventura County Sheriff's Department why she had been arrested, "she was told that she was a fugitive from justice." *See* Opposition at 17. On November 16, 2011, two days before Mikovits' arrest in California, Reno Justice of the Peace Hon. Patricia A. Lynch issued an arrest warrant for Mikovits. *See* **Exhibit 1**, attached hereto.[2] The following day, amended criminal charges were filed against Mikovits in Reno, alleging violations of NRS 205.275 (possession of stolen property valued in excess of $650.00) and NRS 205.4765 (unlawful taking of computer data, equipment, supplies valued in excess of $500.00). *See* **Exhibit 2**, attached hereto. Under Nevada law, each charged crime is punishable by imprisonment for a term exceeding one year. *See* NRS 205.275(2)(b); NRS 205.4765(6); 193.130(2)(c).

Given the foregoing, California Penal Code Section 1551.1, which provides for extradition of a fugitive from justice found within California, expressly authorized Mikovits' arrest without the necessity of obtaining a second arrest warrant in California:

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[2] *See also Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (Federal Rule of Evidence 201 allows the court to take judicial notice of certain items without converting the motion to dismiss into one for summary judgment); *Gressett v. Contra Costa Cnty.*, No. C-12-3798 EMC, 2013 WL 2156278, *8 (N.D. Cal. May 17, 2013) (taking judicial notice of warrants as a matter of public record).

> The arrest of a person may also be lawfully made by any peace officer, without a warrant, upon reasonable information that the accused stands charged in the courts of any other state with a crime punishable by death or imprisonment for a term exceeding one year[.] . . . When so arrested the accused shall be taken before a magistrate with all practicable speed and complaint shall be made against him or her under oath setting forth the ground for the arrest as in Section 1551.

Cal.Pen.Code § 1551.1; *see also* **Exhibit 3** attached hereto, Docket for Superior Court of California, County of Ventura Case No. 2011040771 (showing that a fugitive complaint pursuant to Cal. Pen. Code 1551.1 was filed on Monday, November 21, 2011, following Mikovits' arrest on the afternoon of Friday, November 18, 2011). Thus, and because as discussed below the complaint demonstrates that probable cause existed for her arrest, Mikovits' fails to state a valid false arrest claim against these defendants.

3. Mikovits' "Unlawful Delay" Allegations Are Also Insufficient to State a Claim

Mikovits contends for the first time that there was an "unlawful and unnecessary delay" from the time she was arrested on the afternoon of Friday, November 18, 2011, until she appeared for arraignment on Tuesday, November 22, 2011. *See* Opposition at 14-15. Mikovits claims the alleged delay in processing violates California Penal Code Section 825(a), which she asserts required such arraignment to have been held within 48 hours of her arrest. *See id.* Mikovits further asserts that this supposed delay by the Ventura County authorities forms "part of the basis of liability against UNR Chief Adam Garcia and Detective Jaime McGuire". *Id.* at 13. However, Mikovits provides absolutely no explanation or supporting, non-conclusory factual allegations as to how Chief Garcia or Detective McGuire caused, contributed to, or otherwise could be held liable for this supposed delay. *See generally, id.* Thus, even if the

Court considers the new contentions, they are insufficient to state a claim for relief against these defendants.

4. Mikovits' "Facially Invalid" Search Warrant Allegations Fail to State a Claim

Mikovits asserts that the document she attached to her Opposition as Exhibit 5 is the search warrant obtained and served in Ventura County. *See* Opposition at 18. Mikovits then argues that the document is "facially invalid" because it was not signed by the affiant or a Superior Court Judge. *See id.*[3] Notably, Mikovits' assertion that Exhibit 5 is a copy of the search warrant served on her in California contradicts the allegations in her complaint describing that search warrant as "an otherwise-blank yellow piece of paper, with her name and residential address, and a rubber stamp judge's approval imprint from the Ventura Superior Court, listing no cause, listing no search scope or items sought, and indicating no arrest authority." *See* Complaint ¶ 33; *cf.* Opposition, Ex. 5. In any event, Mikovits does not explain how Chief Garcia or Detective McGuire are responsible for the supposed failure of the affiant or the Superior Court to sign the California search warrant. Therefore, Mikovits' new allegations are again insufficient to state a claim for relief against these defendants.

5. Mikovits Fails to Respond to Defendants' Immunity Arguments

In their motion to dismiss (Dkt. 63), Chief Garcia and Detective McGuire demonstrated that they are entitled to immunity from Mikovits' Section 1983 claims because her complaint demonstrates (1) there was probable cause for her arrest, and, alternatively, (2) there was, at a minimum, reasonably arguable probable cause for her arrest. *See* Motion to Dismiss at 5-9; *see also Rosenbaum*

[3] Mikovits also claims that "there is no name of an affiant" [*see id.*], however, the first sentence on the first page of the document she attaches clearly lists the affiant as "Todd Hourigan". *See* Opposition, Ex. 5 at 1.

v. Washoe Cnty., 663 F.3d 1071, 1076 (9th Cir. 2011) (identifying "the two prongs of the qualified immunity analysis" in the context of unlawful arrest/false imprisonment). Mikovits does not respond to this argument in any manner, and more importantly, fails to cite any contrary factual allegations, whether within or outside of the complaint. Mikovits' failure is fatal because the existence of probable cause is a complete defense to claims brought under Section 1983. *See e.g., Smith v. Almada, supra,* 640 F.3d at 944; *Beauregard v. Wingard*, 362 F.2d 901, 903 (9th Cir. 1966); *see also Mustafa v. City of Chicago*, 442 F.3d 544, 547 (7th Cir. 2006).

Mikovits acknowledges that the Whittemore Defendants claimed she stole various notebooks and a laptop from WPI. *See e.g.,* Complaint ¶ 35; *see also* Opposition at 11-12. The mere fact that Mikovits claims the Whittemore Defendants "lied to the UNR police about the whereabouts of those notebooks", and further "lied to the UNR police about [the stolen laptop], also", does not change the fact that Chief Garcia and Detective McGuire, as well as the Ventura County authorities, had reasonably credible information indicating that Mikovits had committed a crime, and thus probable cause to arrest Mikovits. *See Orin v. Barclay*, 272 F.3d 1207, 1218 (9th Cir. 2001); *see also Spiegel v. Cortese,* 196 F.3d 717, 723 (7th Cir. 1999) ("as long as a reasonably credible witness or victim informs the police that someone has committed, or is committing, a crime, the officers have probable cause to place the alleged culprit under arrest, and their actions will be cloaked with qualified immunity if the arrestee is later found innocent."). Mikovits does not cite any non-conclusory, factual allegations suggesting that Chief Garcia or Detective McGuire knew or should have known that the Whittemore Defendants' accusations were false. In fact, Mikovits admits that Max Pfost, her former lab assistant at WPI, "was the only person that knew that the Whittemores had already taken the notebooks when they lied to Reno law enforcement and UNR employees claiming that Mikovits had them."

Opposition at 16 (emphasis added). Therefore, Mikovits has conceded that Chief Garcia and Detective McGuire had probable cause, or at least arguable probable cause, and therefore they are immune from her claims and should be dismissed.

V. ARGUMENT APPLICABLE TO GARCIA, MCGUIRE, HUNTER AND PARI'S MOTION TO STRIKE (DKT. 64)

Mikovits has failed to respond to the motion to strike filed by defendants Garcia, McGuire, Hunter, and Pari. Accordingly, she has waived this claim and the prayer for punitive damages must be stricken.

VI. CONCLUSION

Based on the foregoing, defendants respectfully request that the Court grant these motions and dismiss this action. At the very least, the Court should strike Mikovits' request for punitive damages from the complaint.

DATED: May 6, 2015

BUCHALTER NEMER
A Professional Corporation

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

Attorneys for Defendants
ADAM GARCIA, JAIME MCGUIRE,
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CERTIFICATE 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:

COMBINED REPLY BY DEFENDANTS ADAM GARCIA, JAIME MCGUIRE, KENNETH HUNTER AND GREG PARI IN SUPPORT OF MOTIONS TO DISMISS AND MOTION TO STRIKE PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES

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 May 6, 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 May 6, 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 May 6, 2015 at Irvine, California.

Geri K. Tooley

G K. Tooley
(Signature)

SERVICE LIST

JUDY ANNE MIKOVITS v. ADAM GARCIA, et al.
USDC CASE NO. CV14-08909 SVW (PLA)

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