

1 WASHOE COUNTY
DISTRICT ATTORNEY'S OFFICE

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6 ATTORNEY FOR RICHARD GAMMICK

7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**

9 * * *

10 JUDY ANN MIKOVITS,)

11 Plaintiff,)

12 vs.)

13 ADAM GARCIA, JAMIE MCGUIRE,)
14 RICHARD GAMMICK, GEOFF)
DEAN, THREE UNIDENTIFIED)
15 VENTURA COUNTY DEPUTY)
SHERIFFS, F. HARVEY)
16 WHITTEMORE, ANNETTE F.)
WHITTEMORE, CARLIE WEST)
17 KINNE, WHITTEMORE-PETERSON)
INSTITUTE, a Nevada Corporation,)
18 UNEVX INC., a Nevada Corporation,)
MICHAEL HILLERBY, KENNETH)
19 HUNTER, GREG PARI, and)
VINCENT LOMBARDI,)

20 Defendants.)

Case No. 2:14-CV-08909-SVW-PLA

**DEFENDANT GAMMICK'S
REPLY TO MOTION TO
DISMISS COMPLAINT**

21 Defendant Richard Gammick, District Attorney of Washoe County, Reno,
22 Nevada, by and through counsel Mary Kandaras, Deputy District Attorney, replies
23 to Plaintiff's Opposition (#72)¹ to his Motion to Dismiss the Complaint (#48)
24 based upon its failure to state a claim upon which relief can be granted. In the
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¹ Refers to the Court's docket numbers.

1 alternative, defendant District Attorney Gammick seeks transfer of venue to the
2 District of Nevada because there is no personal jurisdiction over him.

3 This reply is based on the following Memorandum of Points and Authorities
4 and all pleadings and papers on file herein.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. CASE BACKGROUND**

7 Plaintiff Judy Anne Mikovits, (“plaintiff”), *pro se*, brings this action
8 pursuant to 42 U.S.C. §1983.

9 In Count 1, plaintiff alleged that a “defective warrant was obtained and
10 issued based on misrepresentations made by the Whittemore Principals, Lombardi
11 and Hillerby and the active collusion of D.A. Gammick in conspiracy with Mr.
12 Whittemore.” (#1 ¶34). Plaintiff alleged she was arrested on November 18, 2011
13 and detained until a hearing on November 22, 2011. (#1 ¶31, ¶38).

14 In Count 2, plaintiff alleged that a warrant issued out of the Ventura
15 Superior Court was the result of “the factual and legal misrepresentations made by
16 the Whittemore Principals, Lombardi, and Hillerby with the active collusion of
17 D.A. Gammick.” (Id. ¶43). Plaintiff further alleged that D.A. Gammick “conspired
18 with the Whittemore principals by failing to inquire and failing to exercise good
19 judgment, as a law enforcement official regarding the basis for the enforcement
20 actions sought, for purposes of retaliation rather than justice; or he willfully
21 disregarded it on the basis of his relationship with Mr. Whittemore.” (#1, ¶43).

22 In Count 3, plaintiff alleged that D.A. Gammick conspired to defraud
23 plaintiff by “relying on fraudulent forged documentation, which was facially
24 apparent from a cursory examination of the document.” Plaintiff alleged that D.A.
25 Gammick failed to inquire or exercise good judgment, as a law enforcement
26 official, regarding the evidence of any colorable claim. (#1, ¶45 and 47).

1 D.A. Gammick filed a Motion to Dismiss (#48). Gammick contended that
 2 the complaint failed to state a claim. Gammick also urged the application of the
 3 statute of limitations and doctrine of prosecutorial immunity as a bar the Complaint
 4 (Id.). In support of his position, Gammick provided a copy of the criminal
 5 complaint (#48-1), affidavit in support of arrest (#48-2) and dismissal of action
 6 (#48-4). The criminal case was dismissed on June 11, 2011 (#48-4). In the
 7 alternative, Gammick argued that the venue be changed to the District of Nevada.

8 Plaintiff opposed the motion (#72). In support of the claim that D.A.
 9 Gammick ‘participated in the conspiracy,’ plaintiff offered a new allegation that a
 10 witness “was subjected to such a high level of harassment by D.A. Gammick, that
 11 he (the witness) fled the country! The D.A. forced him to have periodic telephone
 12 contact and threatened that if he fell out of touch, he would be arrested and jailed”
 13 (#72 at 16). In response to the statute of limitations argument, plaintiff claimed that
 14 her injury constitutes a “continuing violation” or “continuous accrual” (#72 at 9).
 15 Plaintiff contended that prosecutorial immunity does not apply because of D.A.
 16 Gammick’s “willful scheme to deprive a citizen of their civil rights” (#72 at 16).

17 D.A. Gammick reiterates the arguments presented in the motion to dismiss.
 18 Plaintiff has failed to present a colorable claim. She has not overcome the statute of
 19 limitations and prosecutorial immunity arguments

20 **II. COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE**
 21 **A CLAIM**

22 Plaintiff’s complaint fails to provide sufficient facts under a cognizable legal
 23 theory. The allegations against D.A. Gammick are conclusory and speculative.
 24 Plaintiff does not allege specific misconduct or facts, other than a new allegation in
 25 the opposition that refers to a witness, not the complainant.

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1 **III. APPLICABLE DEFENSES PRECLUDE CLAIMS AGAINST**
 2 **DISTRICT ATTORNEY GAMMICK**

3 **A. Statute of Limitations**

4 The Court may take judicial notice that the Washoe County District
 5 Attorney's office dismissed the criminal complaint on June 11, 2012 (#48-4). This
 6 shows that plaintiff's case is barred by the statute of limitations. Defendant
 7 Gammick incorporates the arguments presented by defendant Geoff Dean in his
 8 reply papers (#78).

9 There is no equitable doctrine that tolls the statute of limitations as to the
 10 alleged actions of D.A. Gammick. "The continuing violation doctrine aggregates a
 11 series of wrongs or injuries for purposes of the statute of limitations, treating the
 12 limitations period as accruing for all of them upon commission or sufferance of the
 13 last of them. Finally, under the theory of continuous accrual, a series of wrongs or
 14 injuries may be viewed as each triggering its own limitations period, such that a
 15 suit for relief may be partially time-barred as to older events but timely as to those
 16 within the applicable limitations period." *Aryeh v. Canon Business Solutions, Inc.*,
 17 55 Cal.4th 1185, 1192 (2013).

18 To justify application of a "continuing violation" theory, the complaint must
 19 identify a series of discrete, independently actionable alleged wrongs or a wrongful
 20 course of conduct became apparent only through the accumulation of a series of
 21 harms. *Aryeh* at 1198. This is not alleged with respect to D.A. Gammick, whose
 22 last alleged contact with the plaintiff was on June 11, 2012.

23 To justify application of a "continuing accrual" theory, the complaint must
 24 allege that there is a continuing or recurring obligation. The theory of continuous
 25 accrual supports recovery only for damages arising from those breaches falling

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1 within the limitations period. *Aryeh* at 1199. In this case, the complaint is silent on
2 any actions of Gammick after June 11, 2012.

3 Plaintiff claims that the “defendants began a chain of events that started in
4 September of 2011 and has continued without differentiation or separation to the
5 present day.” Plaintiff alleges that she feels the “effects” of defendants’ conduct
6 even today because her name is not cleared and the defendants have her notebooks
7 (#72 at 11). However, that is not the standard by which accrual is judged. The
8 alleged conduct of D.A. Gammick ended with the dismissal of her criminal
9 complaint on June 11, 2012. At that time she had knowledge of “misuse of legal
10 process” as to Gammick and the action had accrued. Plaintiff provided no legal
11 basis as to why the settled common law rules of accrual do not apply to her case.

12 **B. Prosecutorial Immunity**

13 The plaintiff provides no argument as to why the actions attributed to
14 Gammick do not fall squarely within the prosecutorial function and are intimately
15 related to the judicial process. *See Imbler v. Pachtman*, 424 U.S. 409 (1976).

16 Plaintiff contended that prosecutorial immunity does not apply because of
17 D.A. Gammick’s “willful scheme to deprive a citizen of their civil rights” (#72 at
18 16). However, this allegation does not deprive Gammick of the application of the
19 defense. *See Burns v. Reed*, 500 U.S. 478 (1991)(prosecutor’s actions in appearing
20 before a judge and presenting evidence in support of a motion for a search warrant
21 clearly involved the prosecutor’s role as advocate for the State, rather than his role
22 as administrator or investigative officer).

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1 **V. CONCLUSION**

2 Based upon the foregoing, District Attorney Gammick respectfully requests
3 that the case be dismissed in its entirety.

4 Dated: May 6, 2015.

5 WASHOE COUNTY
6 DISTRICT ATTORNEY'S OFFICE

7 By /s/ Mary Kandaras
8 MARY KANDARAS
9 Deputy District Attorney
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the Office of the District Attorney of Washoe County, over the age of 21 years and not a party to nor interested in the within action. I certify that on this date, the foregoing was electronically filed with the United States District Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Brian Warner Hagen, Esq.

Jeffrey Held, Esq.

Robert J Liskey, Esq.

Robert M Dato, Esq.

Sarah A Syed, Esq.

Dated this 6th day May, 2015.

/s/ C. Mendoza
C. Mendoza