

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

**POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

Hearing Date: November 16, 2015

Time: 1:30 p.m.

Judge: Stephen V. Wilson

21 Defendant Richard Gammick, retired District Attorney of Washoe County,
22 Nevada, by and through counsel Mary Kandaras, Deputy District Attorney, moves
23 this Court to dismiss the First Amended Complaint (92)¹ based upon its failure to

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26 ¹ Refers to the Court's docket numbers.

1 state a claim upon which relief can be granted. In the alternative, defendant
 2 District Attorney Gammick seeks transfer of venue to the District of Nevada.

3 This motion is made pursuant to the Federal Rules of Civil Procedure, and is
 4 based on the following Memorandum of Points and Authorities and all pleadings
 5 and papers on file herein.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. CASE BACKGROUND**

8 Plaintiff Judy Anne Mikovits, (“plaintiff”), *pro se*, brings this action
 9 pursuant to 42 U.S.C. §1983 and 42 U.S.C §1981 alleging that the Washoe County
 10 District Attorney (“Gammick”) violated her First, Fourth, Fifth, Sixth, Seventh and
 11 Eighth Amendment rights under the Constitution (92, Count 1). Plaintiff alleged
 12 “unreasonable search and seizure without a warrant” (92, Count 2). Plaintiff
 13 alleged false arrest with a warrant, unnecessary delay in processing and releasing,
 14 false arrest without a warrant by a peace officer and private citizen (92, Counts 3-
 15 6). Plaintiff alleged state law claims of fraud, civil conspiracy, intentional infliction
 16 of emotional distress and defamation (92, Counts 8-11).

17 **A. Plaintiff’s Factual Allegations**

18 Plaintiff’s allegations arise from her termination as a researcher with the
 19 Whittemore-Peterson Institute (WPI), located in Reno, Nevada, and subsequent
 20 arrest (92 ¶54, ¶74). Plaintiff alleged that she was falsely accused of stealing
 21 documents from WPI (92 ¶58). The only specific allegations against Gammick
 22 are that WPI personnel “brought their political influence to the District Attorney
 23 Richard Gammick, who allowed the charade to be given face value with no due
 24 diligence to ascertain the veracity of the information. Gammick allowed Garcia
 25 and Maguire to travel to California and advance a false case that would never have
 26 been allowed had Gammick looked into the full circumstances prior to complying

1 with the wishes of Garcia and Maguire...” (92 ¶59). Plaintiff was arrested on
 2 November 18, 2011 and detained until a hearing on November 22, 2011 (92 ¶103,
 3 ¶106, ¶107).

4 The remaining allegations against Gammick are that his actions were in
 5 furtherance a conspiracy (92 ¶135). It is alleged that he “controlled” activities of
 6 law enforcement officers (92 ¶138, 139, 141, 144, 147, 149, 151, 153, 155).
 7 Gammick allegedly “caused” Plaintiff to be arrested without a warrant (92 ¶157).

8 **B. Facts of which the Court may take Judicial Notice**

9 On November 17, 2011, plaintiff was charged with the crimes of possession
 10 of stolen property and unlawful taking of computer data, both felonies, by way of
 11 criminal complaint filed in the Reno Justice Court, Washoe County, Nevada
 12 (Exhibit 1). These crimes occurred in Reno, Nevada (Exhibit 1). University of
 13 Nevada Reno Police Department officer James McGuire swore out an affidavit in
 14 support of complaint and warrant of arrest, which was signed by the justice of the
 15 peace (Exhibit 2). On June 11, 2012, the criminal case was dismissed without
 16 prejudice (Exhibit 3).

17 **II. COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE** 18 **A CLAIM**

19 **A. Legal Standard for Failure to State a Claim**

20 A complaint may be dismissed as a matter of law for failure to state a claim
 21 for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under
 22 a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696,
 23 699 (9th Cir.1990). Further, with respect to plaintiff's pleading burden, the
 24 Supreme Court recently held that: “a plaintiff's obligation to provide the ‘grounds’
 25 of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
 26 formulaic recitation of the elements of a cause of action will not do.... Factual

1 allegations must be enough to raise a right to relief above the speculative level.”
2 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations
3 omitted, alteration in original); *see also Lazy Y Ranch LTD. v. Behrens*, 546 F.3d
4 580, 588 (9th Cir.2008) (“To survive a motion to dismiss for failure to state a
5 claim, the plaintiff must allege ‘enough facts to state a claim to relief that is
6 plausible on its face.’ ” (citing *Twombly*, 550 U.S. at 570)).

7 Plaintiff’s complaint fails to provide sufficient facts under a cognizable legal
8 theory. The allegations against D.A. Gammick are conclusory and speculative.
9 Plaintiff alleged that D.A. Gammick “controlled” officers or “conspired” with
10 other defendants (92 ¶135, ¶138). Plaintiff does not allege specific misconduct or
11 facts with respect to conspiracy or controlling law enforcement officers.

12 Plaintiff’s only specific allegation is that Gammick advanced “a false case
13 that would never have been allowed had Gammick looked into the full
14 circumstances prior to complying with the wishes of officers Garcia and Maguire”
15 (92 ¶59). Accepted as true, this allegation does not rise to actionable conduct and
16 is entitled to immunity.

17 **B. Judicial Notice of Certain Facts**

18 Pursuant to Federal Rules of Evidence, Rule 201, the Court may take
19 judicial notice of an “adjudicative fact” that is “not subject to reasonable dispute in
20 that it is either (1) generally known within the territorial jurisdiction of the trial
21 court or (2) capable of accurate and ready determination by resort to sources whose
22 accuracy cannot reasonably be questioned.” Further, in deciding a motion to
23 dismiss, this Court may take judicial notice of matters of public record without
24 converting a motion made pursuant to Rule 12(b)(6) into one for summary
25 judgment. *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir.2001) (on a
26 motion to dismiss, a court may take judicial notice of undisputed matters of public

record); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir.1988) (for purposes of a motion to dismiss, it is proper for a district court to “take judicial notice of matters of public record outside the pleadings”); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986) (“on a motion to dismiss a court may properly look beyond the complaint to matters of public record”).

Plaintiff’s allegations are disproved by the court records in her criminal case, which show that required legal process was followed. On November 17, 2011, plaintiff was charged with the crimes of possession of stolen property and unlawful taking of computer data, both felonies, by way of criminal complaint filed in the Reno Justice Court, Washoe County, Nevada (Exhibit 1). University of Nevada Reno Police Department officer James McGuire swore out an affidavit in support of complaint and warrant of arrest (Exhibit 2). The affidavit in support of complaint and warrant of arrest was signed by the Reno Justice of the Peace (Exhibit 2). On June 11, 2012, the criminal case was dismissed without prejudice (Exhibit 4). These records show that plaintiff’s case is barred by the statute of limitations and support the application of immunity.

C. Applicable Defenses Preclude Claims against District Attorney Gammick.

1. Statute of Limitations

The United States Supreme Court has held that the applicable state statute of limitations for Section 1983 claims is the state limitations period for personal injury claims. *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985); *Owens v. Okure*, 488 U.S. 235, 249 (1989). See also, *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 627 (9th Cir. 1988). Effective January 1, 2003, California enacted a two-year statute of limitations for personal injury claims. See Cal.Civ.Proc.Code § 335.1. It states that the periods prescribed for the

1 commencement of actions is “[w]ithin 2 years [for] ... an action for assault, battery
2 or injury to, or for the death of, an individual caused by the wrongful act or neglect
3 of another.”

4 According to California’s two-year statute of limitations, any claims that
5 accrued prior to November 17, 2012, are time barred. Plaintiff alleged that her
6 unlawful arrest occurred and false imprisonment began on November 18, 2011 and
7 ended November 22, 2011 (92 ¶103, ¶106, ¶107). The case should have been filed
8 prior to November 22, 2013. The civil rights complaint was not filed until
9 November 17, 2014. Therefore, claims against Gammick are barred by the statute
10 of limitations.²

11 **2. Prosecutorial Immunity**

12 Gammick is protected from liability by absolute immunity because the
13 actions attributed to him squarely fall within the prosecutorial function and are
14 intimately related to the judicial process. In *Imbler v. Pachtman*, 424 U.S. 409
15 (1976), the United States Supreme Court held that a state prosecutor was entitled to
16 absolute immunity under 42 U.S.C. §1983 from a suit by a former criminal
17 defendant alleging that the prosecutor had knowingly used false testimony and had
18 allowed a defense expert to suppress exculpatory evidence. *Imbler*, 424 U.S. at
19 427. The Court observed that under American common law, prosecutors were
20 immune from liability for malicious prosecution based on considerations of public
21 policy stemming from the fear that the availability of a potential tort claim arising
22 from any unsuccessful prosecution might deter prosecutors in the independent and
23 vigorous performance of their duties. *Id.* at 423. The Court concluded that the
24 “same considerations of public policy that underlie the common-law rule”

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26 ²Gammick incorporates the arguments presented by Defendant Dean in his motion for summary judgment (100 pages 10-14).

1 similarly supported absolute immunity for prosecutorial actions under §1983. *Id.*
2 at 423 - 425.

3 The Court found that qualified immunity would not afford sufficient
4 protection in the context of claims arising from the prosecutorial process. This is
5 because the number and complexity of potential issues that arise in a typical
6 criminal proceeding such as “possible knowledge of a witness’ falsehoods, the
7 materiality of evidence not revealed to the defense, the propriety of a closing
8 argument and — ultimately in every case — the likelihood that prosecutorial
9 misconduct so infected a trial as to deny due process” would necessarily “require a
10 virtual retrial of the criminal offense in a new forum, and the resolution of some
11 technical issues by the lay jury.” *Id.* at 425 (citations omitted). The result is that
12 the honest prosecutor would face greater difficulty in meeting the standards of
13 qualified immunity than other executive or administrative officials. *Id.*

14 In *Burns v. Reed*, 500 U.S. 478 (1991), the Court held that a State
15 prosecutor’s actions in appearing before a judge and presenting evidence in support
16 of a motion for a search warrant clearly involved the prosecutor’s role as advocate
17 for the State, rather than his role as administrator or investigative officer. *Id.* at
18 491. These sorts of pretrial court appearances by the prosecutor in support of
19 taking criminal action against a suspect present a substantial likelihood of
20 vexatious litigation that might have an untoward effect on the independence of the
21 prosecutor. *Id.* at 492. Hence, absolute immunity for this function serves the
22 policy of protecting the judicial process, which underlies much of the Court’s
23 decision in *Imbler*. *Id.* Moreover, as in *Imbler*, the judicial process is available as
24 a check on prosecutorial actions at a probable-cause hearing and such ““safeguards
25 built into the judicial system tend to reduce the need for private damages actions as

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1 a means of controlling unconstitutional conduct.” *Id.* at 492 (quoting *Butz v.*
 2 *Economou*, 438 U.S. 478, 512 (1978)).

3 In this case, plaintiff alleged that Gammick failed to “ascertain the veracity
 4 of the information” (92 ¶59) in bringing criminal charges and having plaintiff
 5 arrested pursuant to a warrant. A decision to prosecute falls squarely within the
 6 prosecutorial function because it is “intimately associated” with the judicial phase
 7 of the criminal process. *See Burns v. Reed*, 500 U.S. 478, 486 (1991); *Miller v.*
 8 *Gammie*, 335 F.3d 889, 897 (9th Cir.2003) (en banc) (“[T]o enjoy absolute
 9 immunity for a particular action, the official must be performing a duty
 10 functionally comparable to one for which officials were rendered immune at
 11 common law.”). “It is well established that a prosecutor has absolute immunity for
 12 the decision to prosecute a particular case and for the decision not to prosecute a
 13 particular case or group of cases. In addition, a prosecutor’s professional
 14 evaluation of a witness is entitled to absolute immunity “even if that judgment is
 15 harsh, unfair or clouded by personal animus.” *Botello v. Gammick*, 413 F.3d 971,
 16 976 (9th Cir. 2005)(internal citations omitted). Gammick’s decision to prosecute
 17 Mikovits is entitled to immunity from suit.

18 **III. COMPLAINT SHOULD BE TRANSFERRED TO THE DISTRICT OF** 19 **NEVADA**

20 A complaint may be dismissed due to lack of personal jurisdiction over the
 21 defendant. Fed.R.Civ.P. 12(b)(2). It is plaintiff’s burden to show that jurisdiction is
 22 appropriate when a defendant moves to dismiss a complaint for lack of personal
 23 jurisdiction. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir.1990). In this case,
 24 there are no specific allegations that Gammick performed any actions within the
 25 state of California. There are no allegations that Gammick has sufficient contacts

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1 with California to warrant an exercise of general or specific jurisdiction. *See*
 2 *Schwarznegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004).

3 Moreover, plaintiff did not bring this action in the proper venue. Fed.R.Civ.
 4 P. 12(b)(3); see also 28 U.S.C. § 1391(b). In this case, a substantial part of the
 5 events giving rise to the claims occurred in Reno, Nevada. Specifically, a majority
 6 of defendants reside or do business in Nevada. Defendants from Ventura County
 7 recently filed a motion for summary judgment that may result in their dismissal
 8 from the action, leaving only Nevada defendants (100).

9 In *Zeta-Jones v. Spice House*, 372 F.Supp.2d 568 (C.D. Cal., Western Dist.
 10 2005), the district court recognized that it was proper to first consider the issue of
 11 venue because a substantial dispute concerning the proper exercise of personal
 12 jurisdiction would be avoided by the recommendation that the interests of justice
 13 would best be served by transferring the case to the District of Nevada. *See Fort*
 14 *Knox Music, Inc. v. Baptiste*, 257 F.3d 108, 111 (2d Cir.2001) (“The district court
 15 has this power to transfer venue even if it lacks personal jurisdiction over the
 16 defendants.”). The United States District Court, District of Nevada is the proper
 17 forum for this lawsuit.

18 **IV. SUPPLEMENTAL JURISDICTION SHOULD BE DECLINED OVER** 19 **PLAINTIFF’S STATE-LAW CLAIMS**

20 The plaintiff alleged state law claims of fraud, civil conspiracy, infliction of
 21 emotional distress and defamation. Assuming, but not conceding, that these claims
 22 state causes of action, they should be dismissed because there are no viable federal
 23 claims against Gammick. The Supreme Court has stated that, when federal claims
 24 have been resolved prior to trial, in the usual case the balance of factors will weigh
 25 toward remanding any remaining pendent state claims to state court. *Carnegie-*
 26 *Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988); see 28 U.S.C. § 1367(c)(3)

1 (the district court may decline to exercise supplemental jurisdiction over a claim if
2 the court has dismissed all claims over which it has original jurisdiction).

3 **V. CONCLUSION**

4 Based upon the foregoing, District Attorney Gammick respectfully requests
5 that the case be dismissed in its entirety. In the alternative, defendant requests that
6 venue be transferred to the U.S. District Court in the District of Nevada.

7 Dated: August 28, 2015.

8 WASHOE COUNTY
9 DISTRICT ATTORNEY'S OFFICE

10 By /s/ Mary Kandaras
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16 ATTORNEY FOR RICHARD GAMMICK
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Exhibit Index

- Exhibit 1 Second Criminal Complaint filed November 17, 2011
- Exhibit 2 Affidavit in Support of Second Complaint and Warrant of Arrest
Filed November 17, 2011
- Exhibit 3 Notice of Dismissal filed on June 11, 2012

Exhibit Index

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 for the Central District of California. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Brian Warner Hagen, Esq.

James N. Procter, II, Esq.

Jeffrey Held, Esq.

Lisa Noel Shyer, Esq.

Robert J Liskey, Esq.

Robert M. Dato, Esq.

Sarah A. Syed, Esq.

Michael R. Hugo, Esq.

Dated this 28th day August, 2015.

/s/ C. Mendoza
C. Mendoza