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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 SHERIFFS, 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)

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO RULES 8, 12(b)(2), AND 12(b)(6); SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROBERT M. DATO; AFFIDAVIT OF KENNETH HUNTER

Date: February 22, 2016
Time: 1:30 p.m.
Courtroom 6

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on February 22, 2016, at 1:30 p.m. in Courtroom 6 of the above entitled court, defendants Adam Garcia, Jaime McGuire (sued as "Jamie McGuire"), and Kenneth Hunter (collectively "the UNR defendants") will and hereby do move the Court to dismiss plaintiff Judy Anne Mikovits' second amended complaint pursuant to Rules 8, 12(b)(2) and 12(b)(6) of the Federal Rule of Civil Procedure on the following grounds:

1. As to defendant Dr. Hunter, he is a Nevada resident, does not have sufficient minimum contacts with California, and has not purposefully availed himself of the benefits and protections of California. Therefore, Dr. Hunter is not subject to personal jurisdiction in California.

2. As to all three moving defendants, the applicable statutes of limitation bars all of Mikovits' claims in the Second Amended Complaint (SAC).

3. As to all three moving defendants, the second amended complaint fails to state any claim for relief as they are protected by the doctrines of absolute and qualified immunity for any of the conduct alleged against them.

4. The SAC fails to provide a short and plain statement of the claim showing that Mikovits is entitled to relief.

5. The SAC fails to state a claim for false arrest.

6. The SAC fails to state a claim for "Unnecessary Delay in Processing and Releasing."

7. The SAC fails to establish that defendant Hunter was acting under color of law.

8. The purported cause of action for fraud is incurably vague.

The motion is based on this notice, the supporting memorandum of points and authorities, the declarations of Robert M. Dato and Kenneth Hunter, the concurrently-filed request for judicial notice, all other pleadings on file with the Court in this matter and on any oral argument that the Court may consider at the

hearing on the motion. Counsel for defendants Garcia, McGuire, and Hunter sent a "meet and confer" e-mail to Mikovits' counsel pursuant to Local Rule 7-3 on December 22, 2015, but received no response. See Declaration of Robert M. Dato.

DATED: December 29, 2015

BUCHALTER NEMER
A Professional Corporation

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

Attorneys for Defendants
ADAM GARCIA, JAIME MCGUIRE, and
KENNETH HUNTER

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The second amended complaint (SAC) filed by plaintiff Judy Anne Mikovits ("Mikovits") contains less hyperbole than the original or first amended complaints. But there were significant issues concerning the statute of limitations and (as to defendant Dr. Hunter) personal jurisdiction. These problems have not been cured.

The fatal flaw in the SAC is that Mikovits' action is barred by the statute of limitations. Under 42 U.S.C. Section 1983, the applicable statute of limitations is the California personal injury residual provision, which provides for a two-year statute of limitations. Mikovits waited until nearly three years to bring her claims, and as such those claims are time-barred.

Mikovits has also failed to establish any personal jurisdiction over defendant Dr. Hunter. He is a Nevada resident and the SAC contains no allegations showing that he conducted *any* activities in California or directed any actions towards California. Moreover, Dr. Hunter made this exact argument in responding to the original and first amended complaints. The SAC fails to contain any allegations that contradict Dr. Hunter's affidavit, which is offered here in exactly the same form that was submitted in the motions to dismiss the previous complaints.

Moreover, Mikovits fails to state a claim against these moving defendants. First, she cannot overcome the application of the qualified immunity doctrine and the fact that both Chief Garcia and Detective McGuire had probable cause to engage in the conduct complained of. And the SAC fails to state any claim for relief against Dr. Hunter because no actionable conduct is alleged.

Based on any or all of these grounds, this Court should dismiss Garcia, McGuire, and Hunter from this action without further leave to amend. At the very least, this Court should dismiss all of Mikovits' federal claims with prejudice.

II. Allegations in the Second Amended Complaint

Although most of the SAC is focused on other defendants, the alleged facts

pertinent to the present motion are as follows:

Defendant Garcia is the Chief of the Police Services Department at the University of Nevada, Reno (UNR). SAC ¶ 10. Defendant McGuire is an officer at the UNR's Police Services Department. SAC ¶ 11. Hunter is as a Professor of Immunology at "UNR School of Medicine" and "Chairman of the Scientific Advisory Board" of defendant Whittemore Peterson Institute (WPI). SAC ¶ 15.

Mikovits held an adjunct faculty appointment in the Department of Immunology at the University of Nevada, Reno. SAC ¶ 26. She was also research director at WPI. SAC ¶ 24. According to Mikovits, WPI "under her direction grew from a small foundation to an internationally recognized center for the study of neuro-immune diseases." SAC ¶ 28.

Mikovits alleges that after she exposed possible scientific fraud at WPI, defendant Whittemore fired her in 2011. SAC ¶ 33. She then moved to California. According to Mikovits, Garcia and Maguire traveled to California to advance the false claim that Mikovits stole materials from the WPI facility. SAC ¶¶ 68- 69. Based on representations made by Garcia and Maguire, which they allegedly knew to be false, they obtained a search warrant and, on November 18, 2011, "placed the Plaintiff under arrest and . . . took her to a detention facility" in Ventura. SAC ¶ 73. Mikovits was released from custody four days later. SAC ¶ 90.

Defendant Hunter is not alleged to have been involved in the events leading up to Mikovits' arrest. However, Mikovits alleges that Hunter was "complicit in the misdirection and cover-up of the use of the Federal Funds." SAC ¶ 55. Mikovits also alleges that Hunter "participated in the Scientific Advisory Board of WPI" and was "in a position to avert the activities of the other Nevada based defendants. [Hunter] could have chosen to team up with Dr. Mikovits and those who were concerned by the newly discovered breaches of scientific integrity when Dr. Mikovits first questioned the validity of their work. Instead, [Hunter] decided to turn a deaf ear on the crucial issues, and joined the conspiracy to cover up the

questionable findings, and to continue to move forward with what amounted to a fraud on the FDA/NIH and the DoD." SAC ¶ 56. Mikovits also alleges that had Hunter "objected to what was transpiring, [he] would have incurred the wrath of the Whittemores, but [he] showed that [he] lacked courage to do that which was right and that they were willing to throw Dr. Mikovits under the bus." SAC ¶ 57.

Various other defendants are alleged to have "filed a fraudulent claim in the Bankruptcy Court asserting a judgment that was false, fraudulent and fictitious against Dr. Mikovits." SAC ¶ 125. Garcia and Hunter are alleged to have conspired with other defendants to force Mikovits "to liquidate all of her property and to turn over the proceeds to the WPI, by order of the US Bankruptcy Court, in March of 2013, all based upon a fraudulent filing." SAC ¶ 127. But there are no allegations as to how moving defendants participated in the "bankruptcy court" conspiracy.

In response to the statute of limitations argument raised in the motions to dismiss the original and first amended complaints, Mikovits alleges that her complaint "does not avail itself to a measurement of a start and stop date of a statute of limitations, and all claims asserted below are timely and ongoing under prevailing California law of 'Continuing Violation.'" SAC ¶ 130.

III. Procedural History

Various defendants filed motions to dismiss the original and first amended complaints. In both instances, this Court dismissed Mikovits' complaint and granted leave to amend. Dkt. 89, 142. In its order dismissing the first amended complaint, this Court stated that it cannot "be expected to 'waste[ ] half a day in chambers preparing the "short and plain statement" which Rule 8 obligated plaintiffs to submit.'" Dkt. 142 at 6. This Court also granted codefendant Dean's motion for summary judgment based on the statute of limitations. *Id.* at 3-5.

IV. There is No Personal Jurisdiction Over Defendant Hunter

Federal Rule of Civil Procedure 12(b)(2) allows a defendant to seek

dismissal for lack of personal jurisdiction. The plaintiff has the burden of demonstrating that personal jurisdiction exists over a defendant by coming "forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Scott v. Breeland,* 792 F.2d 925, 927 (9th Cir. 1986); see also *Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797, 800 (9th Cir. 2004). Plaintiff's "burden must be met by competent evidence in affidavits and authenticated documents; an unverified complaint may not be considered as supplying the necessary facts." *Nobel Farms, Inc. v. Pasero,* 106 Cal.App.4th 654, 657-658 (2003); *Amba Marketing Systems, Inc. v. Jobar International Inc.,* 551 F.2d 784, 787 (9th Cir. 1977) (plaintiff cannot simply rest on the bare allegations of the complaint).

California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the constitutions of California and the United States. Cal. Code Civ. Proc. § 410.10; *Pavlovich v. Superior Court,* 29 Cal.4th 262, 268 (2002). Accordingly, the California jurisdictional analysis is co-extensive with federal due process requirements. *Id.*

In the absence of the traditional bases for personal jurisdiction — namely, presence, domicile or consent —due process requires that a defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Vons Cos. Ins. v. Seabeast Foods, Inc.,* 14 Cal.4th 434, 444-445 (1996). As set forth below, Mikovits has not and cannot establish any basis for this Court to exercise personal jurisdiction over Dr. Hunter.

A. No Traditional Bases for Jurisdiction Exist

The three traditional bases for personal jurisdiction are: (i) personal service within the forum state; (ii) domicile; and (iii) consent. *In re Fitzgerald,* 39 Cal.App.4th 1419, 1420 (1995). None of these apply here. First, Dr. Hunter was not served with process in California. Second, Dr. Hunter is domiciled in Nevada. Declaration of Kenneth Hunter ("Hunter Decl.") ¶ 2. Third, Dr. Hunter did not

consent to jurisdiction in California.

B. No General Jurisdiction Exists Because Dr. Hunter Does Not Have Continuous and Systematic Contacts With California

To prove general jurisdiction, Mikovits must show that Dr. Hunter engaged in "continuous and systematic business contacts that approximate physical presence in the forum state." *Elkman v. National States Ins. Co.*, 173 Cal.App.4th 1305, 1315 (2009); *Schwarzenegger*, *supra*, 374 F.3d at 801. This "exacting standard" requires significant forum contacts. *Id.*; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 487 (1985) (nonresident's contacts with forum must be "substantial, continuous and systematic"). Factors to consider include whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated in the state. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

In her second amended complaint, Mikovits makes no additional allegations to show that Dr. Hunter has continuous and systemic contacts with California. Indeed, he does not.

- Dr. Hunter is a Nevada resident. Hunter Decl. at ¶2.
- Dr. Hunter is employed by the University of Nevada School of Medicine in Reno. Hunter Decl. at ¶2.
- Dr. Hunter does not own any property in California. Hunter Decl. at ¶3.
- Dr. Hunter does not regularly conduct business or hold a business or professional license in California. Hunter Decl. at ¶4.
- Dr. Hunter has not appointed an agent for service of process in California. Hunter Decl. at ¶5.

Given the limited allegations against Dr. Hunter and the facts established in his declaration, Mikovits has not demonstrated that Dr. Hunter has substantial, or

continuous and systematic contacts with California to establish general jurisdiction.

C. No Specific Jurisdiction Exists

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

1. *Dr. Hunter Did Not Purposefully Avail Himself of the Benefits of Conducting Business in California*

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

The purposeful direction test is satisfied only if a plaintiff can prove the defendant: (1) committed an intentional act; (2) that was expressly aimed at the forum state; and (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Pavlovich*, *supra*, 29 Cal.4th at 270-271; *Schwarzenegger*, *supra*, 374 F.3d at 805. Mere foreseeability of injury in the forum state is insufficient to justify a finding of purposeful direction. *Pavlovich*, *supra*, 29

Cal.4th at 269-277.

Here, the second amended complaint is devoid of any allegations of intentional activity by Dr. Hunter *directed to California*. For example, Hunter is alleged to have taken Mikovits' research and misused grant money to sell her work to defendant UNEVX, *but not in California*. (SAC ¶ 63; see also ¶ 9 (UNEVX a Nevada corporation.) Hunter was allegedly "also complicit in the misdirection and cover-up of the use of the Federal Funds" (SAC ¶ 55), but again this is not alleged to have occurred in or been directed at California. Mikovits also alleges that Dr. Hunter was "in a position to avert the activities of the other Nevada based defendants" (SAC ¶ 56) but did not do so; again, this did not occur in California and was not directed there. (See also SAC at ¶ 57 [allegation of "throwing Mikovits under the bus" did not occur in California].)

Taking the allegations in the SAC and the declaration of Dr. Hunter together, Mikovits cannot demonstrate that Dr. Hunter committed intentional and damage-causing acts expressly aimed at California.

2. *This Controversy Does Not Arise Out of Any Forum Related Activity by Dr. Hunter*

For the reasons set forth above, it is likewise clear that the controversy at issue does not arise out of any conduct by Dr. Hunter individually, let alone any forum-related conduct. Similarly, Mikovits' assertion that Dr. Hunter acted in conspiracy with other defendants does not establish personal jurisdiction over Dr. Hunter. Despite the allegation of conspiracy, the second amended complaint is devoid of any allegations regarding how Dr. Hunter's alleged role in conspiracy took place in California.

3. *The Exercise of Jurisdiction Over Dr. Hunter Would Not Comport With "Fair Play and Substantial Justice"*

This Court need not reach the issue of whether jurisdiction would be reasonable because Mikovits cannot satisfy the other prerequisites for jurisdiction.

However, even if it did so, the applicable fairness factors under *Vons* and *Panavision International, L.P. v. Toeppen,* 141 F.3d 1316, 1323 (9th Cir. 1998) weigh decidedly against jurisdiction. First, it is not reasonable to drag Dr. Hunter across state lines to defend this action in a forum in which he has no contacts. Second, California has no particular interest in an action regarding the alleged actions of a professors from the University of Nevada School of Medicine who is a Nevada resident. Finally, the interest of Dr. Hunter in not being sued in California far outweighs Mikovits' interest in obtaining relief against him. Dr. Hunter did not engage in any of the conduct of which Mikovits complains and should not have been sued in the first place. Accordingly, Dr. Hunter should be dismissed for lack of personal jurisdiction.

V. Mikovits' Second Amended Complaint Against All Three Moving Defendants is Barred by the Applicable Statutes of Limitations

A. Legal Standard on Motion to Dismiss

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

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

1. *Mikovits' Section 1983 Claims Are Time Barred*

Count 1 of the SAC, and arguably Counts 2-5 and 9, are civil rights claims under 42 U.S.C. § 1983.[1] Mikovits does not dispute that the applicable limitations period for her § 1983 claims is two years. Dkt. 120 at 16-18; *Jackson v. Barnes,*

[1] Count 6 is as well, but it is not asserted against these moving defendants.

749 F.3d 755, 761 (9th Cir. 2014; see also Dkt. 142 at 3. Under federal law, a civil rights claim accrues when the plaintiff knows or has reason to know of the injury that forms the basis of the claim. *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004).

The crux of Mikovits' claims are that she was unlawfully arrested and detained on November 18, 2011. Other than the contention that she is the victim of an "ongoing tort," the SAC contains no allegations of any conduct occurring after November of 2011. She knew of her injury then. However, Mikovits did not file her complaint until November 17, 2014, three years after the alleged events occurred. This is one year too late, making Mikovits' claims time-barred.

Mikovits has contended in opposition to the motions to dismiss the original and first amended complaints that the two-year statute of limitations is extended by the "continuing violations doctrine" is misplaced. An analysis of the leading case applying that doctrine, *Aryeh v. Canon Business Solutions, Inc.,* 55 Cal.4th 1185 (2014) reveals why. 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. And Mikovits' allegation that defendants "failed to retract" allegedly defamatory statements (SAC ¶¶ 128-129) likewise does not extend the statute of limitations. See *Amtrak [National Railroad Passenger Corp.] v. Morgan,* 536 U.S. 101, 118 (2002) (multiple acts that are part of a hostile work environment constitute a single claim).

A plaintiff cannot defeat the statute of limitation by arguing that each separate wrongful act in furtherance of a conspiracy restarts the statute of limitations. The continuing effects of past harm do not bring a claim within the continuing violation doctrine. *Lorance v. AT&T Technologies*, 490 U.S. 900, 907, (1981). "The proper focus is upon the time of the [allegedly wrongful] acts, not upon the time at which the consequences of the acts became most painful." *Id.*; see also *Samuel v. Michaud*, 980 F.Supp. 1381, 1411 (D. Idaho 1996) (to permit a plaintiff to toll the statute "simply by asserting that a series of separate wrongs were committed . . . would . . . defeat the purpose of the time-bar").

There are no continuing violations by defendants Garcia, McGuire, or Hunter. 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 discrete actions that occurred in 2011. Therefore, the two-year statute of limitations that must be applied to the SAC expired in 2013, a year before she filed suit. Accordingly, the Section 1983 claims must be dismissed as to these moving defendants. Moreover, the same two-year limitations period bars Mikovits' state law claims for intentional infliction of emotional distress and defamation under either California or Nevada law.

2. *Mikovits' Remaining Claims Other Than Fraud Are Also Time Barred*

Even assuming that only Count 1 of the SAC can be considered a Section

1983 claim, all but one of the other counts in the SAC are likewise time barred under the applicable one- and two-year statutes of limitation of California and Nevada.

Because defendants Garcia and McGuire are police officers, any claims against them are governed by Nevada Revised Statutes (NRS) 11.190(4)(a), which applies to any action against a police officer "upon liability incurred by acting in his or her official capacity and in virtue of his or her office, or by the omission of an official duty, . . ." The limitations period is two years, just as with a Section 1983 claim. The same statute applies to Dr. Hunter to the extent that Mikovits is alleging he acted under color of law. See SAC ¶ 15 ("Hunter was acting under color of the law").

Even broken down by individual count, the result is the same. Counts 2-5 (unreasonable search and seizure, false arrest, unnecessary delay in prosecution, and another false arrest claim) are governed by a one-year statute of limitations in California (Cal. Code Civ. Proc., § 340, subd. (c)) and a two-year statute in Nevada (NRS 11.190(4)(c)). Civil conspiracy (count 9) is not a separate and distinct cause of action under California law. Instead, it is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510-511 (1994). Mikovits' conspiracy claim is predicated on her claims of false arrest and imprisonment. If these claims are barred by the statute of limitations, so is the conspiracy claim, which in any event is governed by the two-year 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).

Count 10, for infliction of emotional distress, is governed by the two-year personal injury statute of limitations in California. Cal. Code Civ. Proc. § 335.1.

Count 11, for defamation, is governed by the one-year statute of limitations.

Cal. Code Civ. Proc. § 340, subd. (c).

All of these claims are time barred.

VI. All Moving Defendants Are Immune From the Section 1983 Claims

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

In the context of an unlawful arrest or false imprisonment,[2] as alleged here against Garcia and McGuire, the two prongs of the qualified immunity that must be satisfied are (1) whether there was probable cause for the arrest; and (2) whether it is reasonably arguable that there was probable cause for arrest. *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1076 (9th Cir. 2011). The answers are both yes. Further, although for different reasons, all defendants (including Hunter) should be dismissed on the basis of qualified immunity.

A. Garcia and McGuire Had Probable Cause to Have Mikovits Arrested, Which is an Absolute Defense

The Ninth Circuit has recognized that the existence of probable cause for an arrest is a complete defense to claims for false arrest under section 1983. See, e.g., *Smith v. Almada*, 640 F.3d 931, 944 (9th Cir. 2011); *Beauregard v. Wingard*, 362 F.2d 901, 903 (9th Cir. 1966) ("where probable cause does exist civil rights are not violated by an arrest even though innocence may subsequently be established.

[2] False arrest is a form of false imprisonment (or a warrantless arrest). "Under the Fourth Amendment, a warrantless arrest requires probable cause." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007).

A police officer has probable cause to effect an arrest if "at the moment the arrest was made . . . the facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the suspect had violated a criminal law. *Orin v. Barclay*, 272 F.3d 1207, 1218 (9th Cir. 2001) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

The SAC demonstrates that probable cause existed for the arrest. Mikovits acknowledges that the WPI defendants accused Mikovits "of stealing materials from the WPI facility including various computer hardware, software and her laboratory notebooks." SAC ¶ 40. Although Mikovits alleges that these claims were false, probable cause does not turn on the truth of the victim's allegations, but rather whether the officer had reasonably trustworthy information at the time such that a prudent person would believe a crime had been committed. See *Orin*, 272 F.3d at 1218; 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"). The SAC is devoid of any non-generic or non-conclusory allegations demonstrating that either Garcia or McGuire knew or should have known that the information supplied by the WPI defendants was not reasonably trustworthy at the time of Mikovits' arrest. Thus, Mikovits has failed to provide sufficient factual allegations to cross the line from possibility into plausibility concerning the alleged lack of probable cause for her arrest, and her claim under Section 1983 fails. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. At a Minimum, Garcia and McGuire Had Qualified Immunity Because They Had "Arguable Probable Cause"

"Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502

U.S. 224, 227 (1991). Thus, where an arrest was made without probable cause, "the officer may still be immune from suit if it was objectively reasonable for him to believe that he had probable cause." *Rosenbaum*, *supra*, 663 F.3d at 1078 (citing *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009)). In determining whether there is arguable probable cause, the court must determine "whether all reasonable officers would agree that there was no probable cause in [the subject] instance." *Id.* (citing *Ashcroft v. al–Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2083 (2011).

As discussed above, the SAC fails to allege sufficient facts to demonstrate that Chief Garcia and Detective McGuire lacked at least arguable probable cause. The WPI defendants told Chief Garcia and Detective McGuire that Mikovits took proprietary and confidential property of WPI. Mikovits has not set forth any factual allegations from which the Court could conclude that "every reasonable official" presented with such information would have understood that seeking a warrant for Mikovits' arrest based upon such information would be unlawful. The same is true of Mikovits' claim for false imprisonment against Chief Garcia. Thus, again, Mikovits has failed to state a viable Section 1983 claim against Chief Garcia and Detective McGuire, because each of those officers are entitled to qualified immunity from such claims.

C. Mikovits Has Failed to Identify Any Alleged Constitutional or Statutory Right That Dr. Hunter Purportedly Violated

The SAC alleges that Dr. Hunter was in a position to stop the activities of the WPI defendants but did not do so. SAC ¶¶ 56-57. Such allegations do not identify any violation of a clearly established right belonging to Mikovits. *See C.B. v. City of Sonora*, 730 F.3d 816, 825 (9th Cir. 2013) ("Qualified immunity analysis consists of two steps," the first of which asks "whether the facts the plaintiff alleges make out a violation of a constitutional right.").[3] Mikovits' allegation that

[3] Even if the SAC could be stretched to somehow suggest that the alleged "active

Dr. Hunter engaged in active conspiracy with the other defendants is devoid of any factual support that would warrant a finding that Dr. Hunter violated Mikovits' constitutional or statutory rights. Simply stated, the SAC fails to allege any actionable conduct against Dr. Hunter.

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

Dr. Hunter is also entitled to qualified immunity because Mikovits has failed to allege that the supposed right violated was so clearly established that no reasonable official could have believed Dr. Hunter's alleged "active consultation" with WPI was lawful. *See Romero*, *supra*, 931 F.2d at 627 ("regardless of whether [a] constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful.") In this regard, the Ninth Circuit has stated that in order "to attach liability '[t]he contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right.'" *Mueller v. Auker*, 576 F.3d 979, 993 (9th Cir. 2009). However, the SAC is devoid of any suggestion that it would or should have been apparent to a reasonable official that the alleged "active consultation" regarding WPI's decision to terminate Mikovits' employment was unlawful. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("in light of pre-existing law the unlawfulness [of the alleged conduct] must be apparent"). Accordingly, Dr. Hunter is entitled to qualified immunity.

VII. The SAC Fails to State a Claim for "Judicial Deception"

In Count 3 of the SAC, Mikovits alleges that Garcia and McGuire (and others) had her arrested based on a fraudulently-obtained warrant. SAC ¶ 150.

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consultation" concerning WPI's decision to terminate Mikovits' employment was wrongful—which is not alleged—Mikovits has not alleged that any clearly established constitutional or statutory right to continued employment existed or was violated. "All employees in Nevada are presumed to be at-will employees." *Am. Bank Stationary v. Farmer,* 106 Nev. 698, 701 (1990).

Although not titled as such, Count 3 is essentially one for "judicial deception" under Section 1983. See SAC ¶ 72 (alleging that the Ventura Superior Court warrant was "based upon representations made by Garcia and Maguire, which representations Defendants knew to be false").

Although liability may exist under Section 1983 where an arrest warrant was issued based upon allegedly false information supplied by a police officer, a plaintiff "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 (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").

The SAC fails to state a valid claim for judicial deception under Section 1983 because it lacks the required specificity under FRCP 9(b). To satisfy Rule 9(b), a plaintiff must allege "the who, what, when, where, and how" of the alleged fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). The SAC's vague allegations here regarding the alleged "fraudulent statements" by Garcia and McGuire fall well short of the Rule 9(b) standard—there are no assertions as to precisely what false statements were made, when they were made, nor does Mikovits allege why the purported statements were false. Mikovits' failure to satisfy Rule 9(b)'s pleading requirements warrants dismissal of this claim. See *Wise v. Nordell*, No. 12-CV-1209 IEG (BGS), 2012 WL 3959263, *9 (S.D. Cal. Sept. 10, 2012) (dismissing judicial deception claim where the plaintiffs failed to "allege what information was fraudulent [or] why it was fraudulent"); see also *Howard v. Dalisay*, No. 10-5655 LB, 2014 WL 186304, *10 (N.D. Cal. Jan. 16, 2014) (failure to allege sufficient facts to demonstrate that the officer "committed deliberate falsity or acted with reckless disregard of the truth" in arrest warrant

affidavit necessitated dismissal).

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

In Count 5, Mikovits contends that Chief Garcia and Detective McGuire are liable under Section 1983 because she was allegedly arrested without a warrant. However, she has failed to state a valid claim 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.

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 to Request for Judicial Notice. 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 to RJN. 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:

> "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."

See also Exhibit 3 to RJN, Docket for Ventura County Superior Court 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.

IX. Mikovits' "Unlawful Delay" Allegations Are Also Insufficient

In Count 4 of the SAC, Mikovits alleges that there was an "unreasonable and unnecessary delay in taking the Plaintiff before a judge or in releasing the Plaintiff from custody." Mikovits apparently claims the alleged delay in processing violates California Penal Code Section 825(a), which requires such arraignment to have been held within 48 hours of her arrest. However, Mikovits provides no allegations explaining how Chief Garcia or Detective McGuire caused, contributed to, or otherwise could be held liable for this supposed delay. Thus, she has failed to state a valid claim for relief.

X. Hunter Was Not Acting Under Color of Law

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

While Dr. Hunter is a professor at the UNR School of Medicine, Mikovits does not allege that his conduct was in any way related to the performance of his duties as a public employee. Notably, Mikovits does not even allege that Hunter

was acting in the course and scope of his employment. The mere fact that Dr. Hunter was her supervisor or that he was consulted regarding her termination from WPI (and not from the University of Nevada School of Medicine) are not actions taken under the "pretense of law." *Screws v. United States*, 325 U.S. 91, 111 (1945).

Although a private party such as Dr. Hunter can be deemed to be acting under color of state law if he "conspires" with state officials to deprive others of constitutional rights (*Franklin v. Fox,* 312 F.3d 423, 441 (9th Cir. 2002)) a plaintiff must plead and prove "an agreement or meeting of the minds to violate constitutional rights. . . . [E]ach participant . . . must at least share the common objective of the conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1540-1541 (9th Cir. 1989). Furthermore, for the purposes of a FRCP 12(b)(6) motion to dismiss, Mikovits is subject to heightened pleadings standards requiring her to offer more than mere conclusory allegations of conspiracy, which, as a matter of law, are "insufficient to state a claim of conspiracy." *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 783-784 (9th Cir. 2001); *Price v. Hawaii*, 939 F.2d 702, 708-709 (9th Cir. 1991). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Ivey v. Bd. of Regents,* 673 F.2d 266, 268 (9th Cir. 1982); accord, *Bruns v. Nat'l Credit Union Admin.,* 122 F.3d 1251, 1257 (9th Cir. 1997); *Pena v. Gardner,* 976 F.2d 469, 471 (9th Cir. 1992).

Here, none of the allegations in the SAC is sufficient to convert Dr. Hunter into a conspirator under color of law. The SAC contains only the scant conclusion that Dr. Hunter engaged in an "active conspiracy" with other defendants. There are no facts demonstrating a meeting of the minds or a shared common objective. This is nothing more than "vague and conclusory allegations of official participation in civil rights violations," which, as a matter of law, "are not sufficient to withstand a

motion to dismiss." *Ivey*, *supra*, 673 F.2d at 268.

XI. Mikovits' Fraud Claim is Incurably Vague

It is unclear what "fraud" is the basis of Count 8 of the FAC. To the extent it is based on the alleged fraud in obtaining an arrest warrant, that claim fails for the reasons set forth above. To the extent it is based on some other theory, Mikovits has again run afoul of the requirements of FRCP Rule 9(b), which obligates a plaintiff to plead a cause of action for fraud with particularity.

This Court allowed Mikovits to file a two amended complaints because her original complaint was hopelessly vague. Especially with regard to the purported fraud claim, the SAC is no better. Under these circumstances, the motion to dismiss this cause of action should be granted without leave to amend.

XII. Conclusion

Based on the foregoing, the UNR defendants respectfully request that the Court grant this motion to dismiss without leave to amend. At the very least, this Court should dismiss all federal claims against the UNR defendants and remand any remaining claims to state court.

DATED: December 29, 2015

BUCHALTER NEMER
A Professional Corporation

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

Attorneys for Defendants
ADAM GARCIA, JAIME MCGUIRE, and
KENNETH HUNTER

DECLARATION OF ROBERT M. DATO

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

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

2. On December 22, 2015, I sent the following e-mail to Mike Hugo and Rob Liskey, counsel for Plaintiff Judy Mikovits:

"Gentlemen:

"This email serves as meet and confer efforts with you pursuant to Central District Local Rule 7-3 as to defendants Garcia, McGuire, and Hunter.

"I sent a similar e-mail to both of you regarding the first amended complaint. And although the second amended complaint has eliminated much of the hyperbole of the prior versions, there are still various issues that warrant dismissal of these defendants in this action. All of these issues are also discussed in the motions to dismiss the original and first amended complaints. If these defendants are not dismissed from this action, they will move to dismiss your client's second amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(2) and/or 12(b)(6) as follows:

"1. The Central District of California does not have personal jurisdiction over defendant Hunter. He does not have, nor does the second amended complaint allege, the minimum contacts sufficient to establish general jurisdiction nor has he purposefully availed himself of California for purposes of special jurisdiction. His declarations in support of the motion to dismiss the original and first amended complaints were not contradicted in any way.

"2. The statute of limitations bars at least all your client's federal claims against these defendants. With respect to a section 1983 claim (counts 1-5, liberally construed), the state personal injury statute of limitations, which in California is

two years, applies. All of the alleged events occurred on November 18, 2011. The complaint was not filed until November 17, 2014, three years later, and one year after the statute of limitations expired. Although we realize you have pleaded a "continuing violation" theory, none of the authorities relied on in opposition to the motion to dismiss the first amended complaint is on point. If there are additional authorities not cited in that opposition, please forward them to me; I am unaware of any such authority. I am also unaware of authority supporting the theory of a 'duty to retract.' If there were such authority, there would never be a statute of limitations on a cause of action such as defamation.

"3. Defendant Hunter was not acting under color of state law for purposes of a section 1983 claim. The allegations of a conspiracy are still conclusory and do not satisfy pleading requirements. Even if Hunter was somehow acting under color of state law, he along with Garcia and McGuire are all protected by the qualified immunity doctrine. The amended complaint does not contain any allegations that Hunter violated any constitutional or statutory right or that no reasonable official would have believed that the purported conduct was lawful. As to Garcia and McGuire, probable cause, and even arguable probable cause, is a defense to liability for an alleged unlawful arrest.

"4. The amended complaint still does not comply with the heightened pleading standards set forth in Rule 9 of the Federal Rules of Civil Procedure regarding allegations of fraud (count 8).

"Finally, these defendants also intend to move once again to strike the complaint's punitive damages claim (no. 6 in the prayer) as it is not pleaded with the requisite specificity demanded by both the United States and California Supreme Courts.

"If you would like to discuss these matters further, please let me know and we can arrange a time to discuss. In the alternative, if (as I suspect) you intend to oppose these defendants' motion to dismiss and to strike, you may so state in a

return e-mail."

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

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

Executed at Irvine, California on December 29, 2015.

/s/Robert M. Dato
Robert M. Dato

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUDY ANNE MIKOVITS, Plaintiff, vs. ADAM GARCIA, et al Defendants.	Case No.: CV 14-08989-SVW-PLA **AFFIDAVIT**

AFFIDAVIT OF KENNETH HUNTER
IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDCITION

I, KENNETH HUNTER, do hereby swear under penalty of perjury that the assertions of this affidavit are true, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true:

1. I am named as a defendant in the above-captioned matter and am personally familiar with the matters set forth in this Affidavit and am competent to testify to these matters if called upon to do so.

2. I work at the University of Nevada School of Medicine in Reno, Nevada and reside in Nevada.

3. I do not own property in California.

4. I do not regularly conduct business or hold a business or professional license in California.

///

5. I have not appointed an agent for service of process in California.

Dated this 17 day of February, 2015.

KENNETH HUNTER

SUBSCRIBED and SWORN to before me this 17th day of February, 2015

NOTARY PUBLIC

JEANNIE L. HUDSON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 13-11626-2 - Expires September 6, 2017

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:

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO RULE 12(b)(2) AND 12(b)(6); SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROBERT M. DATO; AFFIDAVIT OF KENNETH HUNTER

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 December 29, 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 December 29, 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 December 29, 2015 at Irvine, California.

Susie Lamarr — Susie Lamarr (Signature)

SERVICE LIST

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

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