

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  
WHITTEMORE, ANNETTE F.  
16 WHITTEMORE, CARLIE WEST  
KINNE, WHITTEMORE-PETERSON  
17 INSTITUTE, a Nevada Corporation,  
UNEVX INC., a Nevada Corporation,  
18 MICHAEL HILLERBY, KENNETH  
HUNTER, GREG PARI, and  
19 VINCENT LOMBARDI,

20 Defendants.

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

**NOTICE OF MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT AND POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

**Hearing Date: February 22, 2016**

**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 Second Amended Complaint (144)<sup>1</sup> based upon its failure  
24  
25  
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<sup>1</sup> Refers to the Court's docket numbers.

1 to 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 This is Judy Anne Mikovits' ("Plaintiff") Second Amended Complaint  
 9 (144). Despite this Court's Order that the complaint be organized, readable and  
 10 without irrelevant narrative details (142), the Second Amended Complaint is  
 11 virtually identical to the previous complaints (92, 1). Plaintiff brings this action  
 12 pursuant to 42 U.S.C. §1983 and 42 U.S.C §1981 alleging that the Washoe County  
 13 District Attorney ("Gammick") violated her First, Fourth, Fifth, Sixth, Seventh and  
 14 Eighth Amendment rights under the Constitution (144, Count 1). Plaintiff alleged  
 15 "unreasonable search and seizure without a warrant" (144, Count 2). Plaintiff  
 16 alleged false arrest with a warrant, unnecessary delay in processing and releasing,  
 17 false arrest without a warrant by a peace officer and private citizen (144, Counts 3-  
 18 6). Plaintiff alleged state law claims of fraud, civil conspiracy, intentional infliction  
 19 of emotional distress and defamation (144, Counts 8-11).

#### 20 **A. Plaintiff's Contention that Gammick Failed to Investigate Criminal** 21 **Activity does not State a Claim Since it is not the Duty of a Prosecutor to** 22 **Investigate Crimes.**

23 Plaintiff's allegations arise from her termination as a researcher with the  
 24 Whittemore-Peterson Institute (WPI), located in Reno, Nevada, and subsequent  
 25 arrest (144 ¶1, ¶24, ¶73). Plaintiff alleged that she was falsely accused of stealing  
 26 documents from WPI (144 ¶36).

1 Plaintiff alleged that Gammick caused her to be arrested because he listened  
 2 to the fabricated evidence of the Whittemore Principals and the UNR police and  
 3 did not investigate the veracity of the information (144 ¶¶66, ¶¶67). Plaintiff also  
 4 alleged that Gammick sent UNR police to California to arrest her as a “fugitive  
 5 from justice” (144 ¶¶68). Plaintiff alleged that Gammick advanced a false case  
 6 because he failed to look into the full circumstances of the matter (144 ¶¶69).

7 The remaining allegations against Gammick are that his actions were in  
 8 furtherance a conspiracy that caused Plaintiff to file bankruptcy and have her  
 9 character besmirched (92 ¶¶127, 128).

10 **B. Judicially Noticeable Facts Show that a Criminal Case was Properly**  
 11 **Filed.**

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

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

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

23 A complaint may be dismissed as a matter of law for failure to state a claim  
 24 for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under  
 25 a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696,  
 26 699 (9th Cir.1990). Further, with respect to plaintiff's pleading burden, the

1 Supreme Court recently held that: “a plaintiff’s obligation to provide the ‘grounds’  
 2 of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a  
 3 formulaic recitation of the elements of a cause of action will not do.... Factual  
 4 allegations must be enough to raise a right to relief above the speculative level.”  
 5 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations  
 6 omitted, alteration in original); *see also Lazy Y Ranch LTD. v. Behrens*, 546 F.3d  
 7 580, 588 (9th Cir.2008) (“To survive a motion to dismiss for failure to state a  
 8 claim, the plaintiff must allege ‘enough facts to state a claim to relief that is  
 9 plausible on its face.’ ” (citing *Twombly*, 550 U.S. at 570)).

10 Plaintiff’s complaint fails to provide sufficient facts under a cognizable legal  
 11 theory. The allegations against D.A. Gammick are conclusory and speculative.  
 12 Plaintiff alleged that D.A. Gammick “controlled” officers or “conspired” with  
 13 other defendants. Plaintiff does not allege specific misconduct or facts with  
 14 respect to conspiracy or controlling law enforcement officers.

15 Plaintiff’s only specific allegation is that Gammick advanced a false case  
 16 that would never have been allowed had Gammick looked into the full  
 17 circumstances prior to complying with the wishes of officers Garcia and Maguire.  
 18 Accepted as true, this allegation does not rise to actionable conduct and is entitled  
 19 to immunity.

## 20 **B. Judicial Notice of Certain Facts**

21 Pursuant to Federal Rules of Evidence, Rule 201, the Court may take  
 22 judicial notice of an “adjudicative fact” that is “not subject to reasonable dispute in  
 23 that it is either (1) generally known within the territorial jurisdiction of the trial  
 24 court or (2) capable of accurate and ready determination by resort to sources whose  
 25 accuracy cannot reasonably be questioned.” Further, in deciding a motion to  
 26 dismiss, this Court may take judicial notice of matters of public record without

1 converting a motion made pursuant to Rule 12(b)(6) into one for summary  
 2 judgment. *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir.2001) (on a  
 3 motion to dismiss, a court may take judicial notice of undisputed matters of public  
 4 record); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir.1988) (for  
 5 purposes of a motion to dismiss, it is proper for a district court to “take judicial  
 6 notice of matters of public record outside the pleadings”); *Mack v. South Bay Beer*  
 7 *Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986) (“on a motion to dismiss a  
 8 court may properly look beyond the complaint to matters of public record”).

9 Plaintiff’s allegations are disproved by the court records in her criminal case,  
 10 which show that required legal process was followed. On November 17, 2011,  
 11 plaintiff was charged with the crimes of possession of stolen property and unlawful  
 12 taking of computer data, both felonies, by way of criminal complaint filed in the  
 13 Reno Justice Court, Washoe County, Nevada (Exhibit 1). University of Nevada  
 14 Reno Police Department officer James McGuire swore out an affidavit in support  
 15 of complaint and warrant of arrest (Exhibit 2). The affidavit in support of  
 16 complaint and warrant of arrest was signed by the Reno Justice of the Peace  
 17 (Exhibit 2). On June 11, 2012, the criminal case was dismissed without prejudice  
 18 (Exhibit 3). These records show that plaintiff’s case is barred by the statute of  
 19 limitations and support the application of immunity.

## 20 **C. Applicable Defenses Preclude Claims against District Attorney** 21 **Gammick.**

### 22 **1. Statute of Limitations**

23 The United States Supreme Court has held that the applicable state statute of  
 24 limitations for Section 1983 claims is the state limitations period for personal  
 25 injury claims. *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985); *Owens v. Okure*,  
 26 488 U.S. 235, 249 (1989). See also, *Karim-Panahi v. Los Angeles Police*

1 *Department*, 839 F.2d 621, 627 (9<sup>th</sup> Cir. 1988). Effective January 1, 2003,  
 2 California enacted a two-year statute of limitations for personal injury claims. *See*  
 3 Cal.Civ.Proc.Code § 335.1. It states that the periods prescribed for the  
 4 commencement of actions is “[w]ithin 2 years [for] ... an action for assault, battery  
 5 or injury to, or for the death of, an individual caused by the wrongful act or neglect  
 6 of another.”

7 According to California’s two-year statute of limitations, any claims that  
 8 accrued prior to November 17, 2012, are time barred. Plaintiff alleged that her  
 9 unlawful arrest occurred and false imprisonment began on November 18, 2011 and  
 10 ended November 22, 2011. The case should have been filed prior to November 22,  
 11 2013. The civil rights complaint was not filed until November 17, 2014.  
 12 Therefore, claims against Gammick are barred by the statute of limitations.<sup>2</sup>

## 13 **2. Prosecutorial Immunity**

14 Gammick is protected from liability by absolute immunity because the  
 15 actions attributed to him squarely fall within the prosecutorial function and are  
 16 intimately related to the judicial process. In *Imbler v. Pachtman*, 424 U.S. 409  
 17 (1976), the United States Supreme Court held that a state prosecutor was entitled to  
 18 absolute immunity under 42 U.S.C. §1983 from a suit by a former criminal  
 19 defendant alleging that the prosecutor had knowingly used false testimony and had  
 20 allowed a defense expert to suppress exculpatory evidence. *Imbler*, 424 U.S. at  
 21 427. The Court observed that under American common law, prosecutors were  
 22 immune from liability for malicious prosecution based on considerations of public  
 23 policy stemming from the fear that the availability of a potential tort claim arising  
 24 from any unsuccessful prosecution might deter prosecutors in the independent and  
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26 <sup>2</sup>Gammick incorporates the arguments presented by Defendant Dean in his motion for summary judgment (100 pages 10-14).

1 vigorous performance of their duties. *Id.* at 423. The Court concluded that the  
2 “same considerations of public policy that underlie the common-law rule”  
3 similarly supported absolute immunity for prosecutorial actions under §1983. *Id.*  
4 at 423 - 425.

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

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

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1 a check on prosecutorial actions at a probable-cause hearing and such ““safeguards  
2 built into the judicial system tend to reduce the need for private damages actions as  
3 a means of controlling unconstitutional conduct.”” *Id.* at 492 (quoting *Butz v.*  
4 *Economou*, 438 U.S. 478, 512 (1978)).

5 In this case, plaintiff alleged that Gammick failed to “ascertain the veracity  
6 of the information” (92 ¶59) in bringing criminal charges and having plaintiff  
7 arrested pursuant to a warrant. A decision to prosecute falls squarely within the  
8 prosecutorial function because it is “intimately associated” with the judicial phase  
9 of the criminal process. *See Burns v. Reed*, 500 U.S. 478, 486 (1991); *Miller v.*  
10 *Gammie*, 335 F.3d 889, 897 (9th Cir.2003) (en banc) (“[T]o enjoy absolute  
11 immunity for a particular action, the official must be performing a duty  
12 functionally comparable to one for which officials were rendered immune at  
13 common law.”). “It is well established that a prosecutor has absolute immunity for  
14 the decision to prosecute a particular case and for the decision not to prosecute a  
15 particular case or group of cases. In addition, a prosecutor's professional  
16 evaluation of a witness is entitled to absolute immunity “even if that judgment is  
17 harsh, unfair or clouded by personal animus.” *Botello v. Gammick*, 413 F.3d 971,  
18 976 (9<sup>th</sup> Cir. 2005)(internal citations omitted). Gammick’s decision to prosecute  
19 Mikovits is entitled to immunity from suit.

### 20 **III. COMPLAINT SHOULD BE TRANSFERRED TO THE DISTRICT OF** 21 **NEVADA**

22 A complaint may be dismissed due to lack of personal jurisdiction over the  
23 defendant. Fed.R.Civ.P. 12(b)(2). It is plaintiff’s burden to show that jurisdiction is  
24 appropriate when a defendant moves to dismiss a complaint for lack of personal  
25 jurisdiction. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir.1990). In this case,  
26



1 there are no specific allegations that Gammick performed any actions within the  
 2 state of California. There are no allegations that Gammick has sufficient contacts  
 3 with California to warrant an exercise of general or specific jurisdiction. *See*  
 4 *Schwarznegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004).

5 Moreover, plaintiff did not bring this action in the proper venue. Fed.R.Civ.  
 6 P. 12(b)(3); see also 28 U.S.C. § 1391(b). In this case, a substantial part of the  
 7 events giving rise to the claims occurred in Reno, Nevada. Specifically, a majority  
 8 of defendants reside or do business in Nevada. Defendants from Ventura County  
 9 were dismissed from the action, leaving only Nevada defendants (142).

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

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

21 The plaintiff alleged state law claims of fraud, civil conspiracy, infliction of  
 22 emotional distress and defamation. Assuming, but not conceding, that these claims  
 23 state causes of action, they should be dismissed because there are no viable federal  
 24 claims against Gammick. The Supreme Court has stated that, when federal claims  
 25 have been resolved prior to trial, in the usual case the balance of factors will weigh  
 26 toward remanding any remaining pendent state claims to state court. *Carnegie-*

1 *Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988); see 28 U.S.C. § 1367(c)(3)  
2 (the district court may decline to exercise supplemental jurisdiction over a claim if  
3 the court has dismissed all claims over which it has original jurisdiction).

4 **V. CONCLUSION**

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

8 Dated: December 29, 2015.

9 WASHOE COUNTY  
10 DISTRICT ATTORNEY'S OFFICE

11 By /s/ Mary Kandaras  
12 MARY KANDARAS  
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17 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 29th day December, 2015.

\_\_\_\_\_  
/s/ Tina Galli  
Tina Galli