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and KENNETH HUNTER
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **LOS ANGELES DIVISION**

12 JUDY ANNE MIKOVITS,
13 Plaintiff,

14 v.

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

21 Defendants.
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Case No. CV14-08909 SVW (PLA)

**COMBINED REPLY OF “THE UNR
DEFENDANTS” IN SUPPORT OF
MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED
COMPLAINT PURSUANT TO
RULE 12(b)(2) AND 12(b)(6) AND
MOTION TO STRIKE PUNITIVE
DAMAGES PRAYER**

Date: November 16, 2015
Time: 1:30 p.m.
Courtroom 6

1 **I. Introduction.**

2 The opposition filed by plaintiff Judy Anne Mikovits to the motions to
3 dismiss focuses almost entirely on the motion filed by what Mikovits terms “the
4 Whittimore Consortium.” But the few arguments Mikovits makes concerning “the
5 UNR defendants” are unpersuasive. She repeats the discredited contention that the
6 UNR defendants’ actions constitute “a continuing tort” and thus her action is not
7 barred by the statute of limitations. The problem for Mikovits is that all of the
8 alleged conduct of defendants Garcia and McGuire occurred in November 2011 and
9 the harm to Mikovits was immediate; the two-year statute of limitations has clearly
10 run as to them. And she fares no better against defendant Dr. Hunter, whose only
11 apparent misdeed was his “failure to avert” the actions of the other defendants. In
12 addition, Mikovits fails to address Dr. Hunter’s showing that he has had no contacts
13 with the State of California and thus this Court has no personal jurisdictional over
14 him. For these and other reasons to be discussed below, this Court should grant the
15 UNR defendants’ motion to dismiss. At the very least, this Court should grant the
16 UNR defendants’ unopposed motion to strike the punitive damages prayer of the
17 first amended complaint (FAC).

18 **II. By Failing to Address the Issue, Mikovits Concedes That This Court Has**
19 **No Personal Jurisdiction Over Defendant Hunter.**

20 Although Mikovits devotes argument section F of her opposition to
21 defendant Dr. Hunter, she ignores his showing that this Court lacks personal
22 jurisdiction over him. (See Dkt. 128, opp. at 20-21.) She offers no evidence to
23 contradict his showing of no minimum contacts with California. She makes no
24 showing that Dr. Hunter purposefully availed himself of the benefits of conducting
25 business in California. (See Dkt. 113, motion to dismiss at 6-8.) Finally, the
26 allegations of Mikovits’ complaint demonstrate that Dr. Hunter’s alleged conduct
27 was not directed to California. (*Ibid.*)
28

1 The plaintiff bears the burden of demonstrating that personal jurisdiction
2 exists. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). If a
3 defendant presents evidence that personal jurisdiction is not present, the plaintiff
4 must come “forward with facts, by affidavit or otherwise, supporting personal
5 jurisdiction.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986); *see also*
6 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). By
7 her nonopposition, Mikovits has conceded that this Court lacks personal jurisdiction
8 over Dr. Hunter. This Court should therefore dismiss Dr. Hunter from this action.

9 **III. Mikovits’ Claims Are Barred by the Statute of Limitations.**

10 As stated in the UNR defendants’ moving papers, California’s two-year
11 personal injury residual statute of limitations applies to a § 1983 action. *Owens v.*
12 *Okure*, 488 U.S. 235, 236 (1989); *see also Canatella v. Van de Kamp*, 486 F.3d
13 1128, 1132-1133 (9th Cir. 2007). The complaint was filed on November 17, 2014,
14 three years after Mikovits’ arrest.

15 In response to this obvious statute of limitations issue, Mikovits argues (as
16 she has in the past) that the series of events described in her complaint are sufficient
17 to invoke the “continuing violation doctrine” and the “continuous accrual theory.”
18 Dkt. 128, opp. at 11. In the only argument specifically addressing the UNR
19 defendants, Mikovits asserts:

20 “While the arrest may have occurred on November 18, 2011, the seizure of
21 her property by UNR and the various law enforcement defendants that
22 occurred roughly simultaneously, continues and has not been broken
23 temporally since that day. Similarly, the destruction of Dr. Mikovits’
24 reputation and the harm has not subsided, and is getting worse, if anything.
25 Because of these false charges, Dr. Mikovits is still barred from carrying out
26 any government sponsored research to this day.”

27 Dkt. 128, opp. at 12-13.

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1 Mikovits does not argue – nor could she – that the alleged events occurring in
2 November 2011 did not cause immediate harm. Instead, her theory is the statute of
3 limitations is somehow tolled because the alleged actions of the UNR defendants
4 are still causing harm now. That is not the law in California and never has been.

5 Forty years ago, the California Supreme Court held: “[T]he infliction of
6 appreciable and actual harm . . . will commence the statutory period.” *Davies v.*
7 *Krasna*, 14 Cal.3d 502, 514 (1975). *Davies* has been consistently followed. See,
8 e.g., *Barton v. New United Motor Manufacturing, Inc.*, 43 Cal.App.4th 1200, 1209.
9 Mikovits alleges she suffered immediate harm in November 2011. For example,
10 she alleges that Garcia and McGuire “stalked Plaintiff for several days in an
11 obvious manner intended to harass and scare her.” Dkt. 92, FAC at ¶ 72. She
12 alleges that she was never shown an arrest warrant, never informed of the charges
13 against her, and was denied access to counsel until five days after her arrest. *Id.* at
14 ¶¶ 75, 76. She further alleges that her husband “was forced to watch as the UNRPD
15 completely ransacked their home, finally taking all of their personal electronic
16 items, . . .” *Id.* at ¶ 78. She alleges in her first count that the above allegations
17 deprived her of constitutional rights secured by the United States Constitution (*id.* at
18 ¶ 128); she repeats this argument in her opposition papers. Dkt. 128, opp. at 19.
19 These alleged harms were *immediate*. Mikovits was required to bring suit against
20 Garcia and McGuire no later than two years from her arrest and incarceration in
21 November 2011. She failed to do so and the action is time barred as to them.

22 Mikovits fares no better with Dr. Hunter. Although Dr. Hunter is not alleged
23 to have been involved in the events leading up to Mikovits’ arrest, he was allegedly
24 “complicit in the misdirection and cover-up of the use of the Federal Funds.” Dkt.
25 92, FAC at ¶ 63. But that “misdirection” is likewise alleged to have occurred “in
26 the Fall of 2011.” *Id.* at ¶ 61. Mikovits alleges that the alleged “conspiracy” began
27 then, in the Fall of 2011. *Id.* at ¶ 66. Thus, any claims against Dr. Hunter are also
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1 barred by the statute of limitations. A conspiracy to violate civil rights is governed
2 by 42 U.S.C. § 1985 and is also subject to California’s personal injury statute of
3 limitations. *McDougal v. County of Imperial*, 942 F.2d 668, 673-674 (9th Cir.
4 1991) (applying California’s prior one-year personal injury statute).

5 There are no continuing violations by the UNR defendants. Even had
6 Mikovits alleged multiple acts by these defendants over an expanse of time,
7 neither the continuing violations doctrine nor the continuous accrual doctrine
8 would apply so as to extend the statute of limitations as to those alleged separate
9 and discreet actions that occurred in 2011. Therefore, the two-year statute of
10 limitations that must be applied to Mikovits’ complaint expired in 2013, a year
11 before she filed suit. Accordingly, the complaint must be dismissed as to the
12 UNR defendants.

13 **IV. The UNR Defendants Are Immune From the Section 1983 Claims.**

14 As argued in the original moving papers, the existence of probable cause for
15 an arrest is a *complete defense* to claims for false arrest under section 1983. See,
16 e.g., *Smith v. Almada*, 640 F.3d 931, 944 (9th Cir. 2011). Mikovits does not
17 address the argument that, on its face, the FAC demonstrates that probable cause
18 existed for the arrest. Instead, Mikovits argues that a court “may defer its decision
19 on the immunity question, allow limited discovery to achieve the requisite factual
20 development and decide the issue on summary judgment.” Dkt. 128, opp. at 20.
21 But there is no reason to delay such a ruling in this case. As stated in the moving
22 papers, probable cause does not turn on the truth of the victim’s allegations, but
23 rather whether the officer had reasonably trustworthy information at the time such
24 that a prudent person would believe a crime had been committed. See *Orin v.*
25 *Barclay*, 272 F.3d 1207, 1218 (9th Cir. 2001). The FAC is devoid of any non-
26 generic or non-conclusory allegations demonstrating that either Garcia or McGuire
27 knew or should have known that the information supplied by the Whittemore
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1 defendants was not reasonably trustworthy at the time of Mikovits’ arrest. In
2 addition, for the reasons set forth in the original moving papers, the FAC fails to
3 allege sufficient facts to demonstrate that Chief Garcia and Detective McGuire
4 lacked at least arguable probable cause. Dkt. 113, motion to dismiss at 14.

5 Likewise, Mikovits fails to address Dr. Hunter’s argument that, under the
6 allegations of the FAC, he was in a position to stop the activities of the Whittemore
7 defendants but did not do so. FAC ¶¶ 64-65. Such allegations do not identify any
8 violation of a Mikovits’ clearly established rights. *See C.B. v. City of Sonora*, 730
9 F.3d 816, 825 (9th Cir. 2013) (“Qualified immunity analysis consists of two steps,”
10 the first of which asks “whether the facts the plaintiff alleges make out a violation
11 of a constitutional right”). Mikovits’ allegation that Dr. Hunter engaged in active
12 conspiracy with the other defendants is devoid of any factual support that would
13 warrant a finding that Dr. Hunter violated Mikovits’ constitutional or statutory
14 rights.

15 **V. Mikovits Fails to Address the Remaining Arguments of the UNR**
16 **Defendants and Thus Admits They Have Merit.**

17 Local Rule 7-9 requires that an opposition to a motion must “contain a
18 statement of *all the reasons in opposition thereto* and the points and authorities
19 upon which the opposing party will rely, . . .” L.R. 7-9 (italics added). By her
20 failure to submit any opposition to the following points raised in the moving papers,
21 the UNR defendants submit that Mikovits has conceded the merits of them:

- 22 • The FAC fails to state a claim for “judicial deception.” Dkt. 113,
23 motion to dismiss at 16.
- 24 • Mikovits’ “warrantless” arrest allegations fail to state a claim. *Id.* at
25 17.
- 26 • Mikovits’ “unlawful delay” allegations are also insufficient. *Id.* at 18.
- 27 • Hunter was not acting under color of law. *Id.* at 18.

1 • Mikovits’ fraud claim is incurably vague. *Id.* at 20.

2 By failing to address *any* of these arguments made by the UNR defendants,
3 Mikovits has conceded that they have merit. For the reasons expressed in the
4 original moving papers, these further grounds warrant dismissal of this action.

5 **VI. Mikovits’ Failure to Oppose the Motion to Strike Warrants That the**
6 **Punitive Damages Prayer be Stricken.**

7 Mikovits has failed to respond to the motion to strike the punitive damages
8 prayer filed by the UNR defendants (Dkt. 114). Accordingly, she has waived this
9 claim and the prayer for punitive damages must be stricken.

10 **VII. Conclusion.**

11 Based on the foregoing, the UNR defendants respectfully request that the
12 Court grant this motion and dismiss them from this action with prejudice. At a
13 minimum, this Court should dismiss all federal claims and remand all remaining
14 claims to state court. Finally, the punitive damages prayer must be stricken.

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16 DATED: October 30, 2015

BUCHALTER NEMER
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