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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.
22

Case No. CV14-08909 SVW (PLA)

**COMBINED REPLY TO
PLAINTIFF'S UNTIMELY
OPPOSITION TO ADAM
GARCIA'S, JAIME MCGUIRE'S
AND KENNETH HUNTER'S
MOTION TO DISMISS SECOND
AMENDED COMPLAINT AND
MOTION TO STRIKE PRAYER
FOR PUNITIVE DAMAGES**

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

23
24 **INTRODUCTION**

25 Plaintiff Judy Anne Mikovits' opposition to the various motions to dismiss
26 her second amended complaint (SAC) was due on February 1, 2016. See Local R.

27 BN 20145147V1

28 **UNR DEFENDANTS' COMBINED REPLY TO PLAINTIFF'S
UNTIMELY OPPOSITION TO MOTION TO DISMISS AND TO STRIKE**

1 7-9. Having received no opposition to their motion (or any of the other motions),
 2 defendants Adam Garcia, Jaime McGuire, and Kenneth Hunter (“the UNR
 3 defendants”) filed a notice of non-receipt of opposition on February 8. Dkt. 158.
 4 *The next day*, Mikovits filed a combined opposition to all of the motions, with no
 5 explanation as to why it was filed eight days after it was due. Dkt. 159. Moreover,
 6 much of her rambling opposition is directed at codefendant Geoff Dean, whose
 7 summary judgment motion was granted last November. See Dkt. 142.

8 Pursuant to Local Rule 7-12, the lack of a timely opposition should be
 9 deemed consent to the granting of the UNR defendants’ motion to dismiss and the
 10 dismissal of this action, in its entirety, with prejudice. But even if Mikovits’
 11 opposition is considered, it adds nothing to her fatally-flawed SAC. Both the SAC
 12 and her opposition read like the book Mikovits has written about the alleged
 13 incidents, and this Court has stated that it “is not prepared to read an entire book to
 14 discern Plaintiff’s legal allegations.” Dkt. 142 at 6. Moreover, her belated
 15 opposition fails to rebut the UNR defendants’ contentions, particularly those
 16 dealing with the statute of limitations and lack of personal jurisdiction. The UNR
 17 defendants’ motion to dismiss should be granted with no further leave to amend.

18 ARGUMENT

19 I

20 **This Court Should Not Consider Mikovits’ Untimely Opposition.**

21 As set forth above, Mikovits’ opposition was untimely and it contains no
 22 explanation as to why. The lack of a timely opposition is a concession that the
 23 UNR defendants’ motion to dismiss is meritorious and should be granted.

24 In the event this Court considers Mikovits’ untimely opposition, the UNR
 25 defendants request that this reply likewise be considered. This reply could not have
 26 been timely filed; Mikovits did not file opposition until after the UNR defendants’
 27 reply would have been due.

II

**Mikovits Has Failed to Demonstrate That This Court Has
Personal Jurisdiction Over Defendant Hunter.**

The motion to dismiss the SAC established through admissible evidence that defendant Dr. Hunter has no minimum contacts with California and did purposefully avail himself of the benefits of conducting business in California. See Dkt. 148 at 13-14, 34-35. Moreover, the allegations of the SAC demonstrate that Dr. Hunter’s alleged conduct was not directed to California. E.g., Dkt. 144 at 11-12, ¶ 56 (summarizing Dr. Hunter’s alleged actions *at UNR* and directed there).

In the face of such of showing, Mikovits bears the burden of demonstrating that personal jurisdiction exists. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). If a defendant presents evidence that personal jurisdiction is not present, the plaintiff must come “forward with facts, by affidavit or otherwise, supporting personal jurisdiction.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). Mikovits presents no such evidence. Instead, she asks to conduct discovery. But not “jurisdictional discovery”; rather, she wants discovery to prove her vague allegations of conspiracy: “The key to determining the levels of participation among the co-conspirators is to allow the Plaintiff the opportunity to conduct discovery to establish the existence of the alleged conspiracy.” Dkt. 159 at 6.

Mikovits cites no case law giving her the right to conduct “merits” discovery absent a showing of personal jurisdiction. There is no such law. Moreover, “where a plaintiff’s claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery” *Pebble Beach, supra*, 453 F.3d at 1160. Mikovits does not even identify what discovery she wishes to conduct, much less how that would impact Dr. Hunter’s uncontested showing. This Court has no personal jurisdiction over Dr. Hunter and he should be dismissed from this action.

1 III

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

3 As stated in the UNR defendants’ moving papers, California’s two-year
4 personal injury residual statute of limitations applies to a § 1983 action. *Owens v.*
5 *Okure*, 488 U.S. 235, 236 (1989); see also *Canatella v. Van de Kamp*, 486 F.3d
6 1128, 1132-1133 (9th Cir. 2007). The complaint was filed on November 17, 2014,
7 three years after Mikovits’ arrest.

8 In response to this obvious statute of limitations issue, Mikovits argues (as
9 she has in the past) that the series of events described in her complaint are sufficient
10 to invoke the “continuing violation doctrine” and the “continuous accrual theory.”
11 Dkt. 159 at 6. In the only argument specifically addressing the UNR defendants,
12 Mikovits asserts:

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

20 Dkt. 159 at 8.

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

25 Forty years ago, the California Supreme Court held: “[T]he infliction of
26 appreciable and actual harm . . . will commence the statutory period.” *Davies v.*
27 *Krasna*, 14 Cal.3d 502, 514 (1975). *Davies* has been consistently followed. See,
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1 e.g., *Barton v. New United Motor Manufacturing, Inc.*, 43 Cal.App.4th 1200, 1209.
2 Mikovits alleges she suffered immediate harm in November 2011. For example,
3 she alleges that Garcia and McGuire “stalked Plaintiff for several days in an
4 obvious manner intended to harass and scare her.” Dkt. 144 [SAC] at 14, ¶ 71. She
5 alleges that she was never shown an arrest warrant, never informed of the charges
6 against her, and was denied access to counsel until five days after her arrest. *Id.* at
7 ¶¶ 74, 75. She further alleges that her husband “was forced to watch as the UNRPD
8 completely ransacked their home, finally taking all of their personal electronic
9 items, . . .” *Id.* at ¶ 76. She alleges in her first count that the above allegations
10 deprived her of constitutional rights secured by the United States Constitution *Id.*
11 at ¶ 133. These alleged harms were *immediate*. Mikovits was required to bring suit
12 against Garcia and McGuire no later than two years from her arrest and
13 incarceration in November 2011. She failed to do so and the action is time barred
14 as to them.

15 Mikovits fares no better with Dr. Hunter. Although Dr. Hunter is not alleged
16 to have been involved in the events leading up to Mikovits’ arrest, he was allegedly
17 “complicit in the misdirection and cover-up of the use of the Federal Funds.” Dkt.
18 144 [SAC] at 11, ¶ 55. But that “misdirection” is likewise alleged to have occurred
19 “in the Fall of 2011.” *Id.* at ¶ 53. Mikovits alleges that the “conspiracy” began
20 then, in the Fall of 2011. *Id.* at 12, ¶ 58. Thus, any claims against Dr. Hunter are
21 also barred by the statute of limitations. A conspiracy to violate civil rights is
22 governed by 42 U.S.C. § 1985 and is also subject to California’s personal injury
23 statute of limitations. *McDougal v. County of Imperial*, 942 F.2d 668, 673-674 (9th
24 Cir. 1991) (applying California’s prior one-year personal injury statute).

25 There are no continuing violations by the UNR defendants. Even had
26 Mikovits alleged multiple acts by these defendants over an expanse of time,
27 neither the continuing violations doctrine nor the continuous accrual doctrine
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1 would apply so as to extend the statute of limitations as to those alleged separate
2 and discrete actions that occurred in 2011. Therefore, the SAC establishes that
3 the applicable two-year statute of limitations expired in 2013, a year before
4 Mikovits filed suit. Accordingly, the SAC must be dismissed as to the UNR
5 defendants.

6 IV

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

8 As argued in the original moving papers, the existence of probable cause for
9 an arrest is a *complete defense* to claims for false arrest under section 1983. See,
10 e.g., *Smith v. Almada*, 640 F.3d 931, 944 (9th Cir. 2011). Mikovits does not
11 address the argument that, on its face, the SAC demonstrates that probable cause
12 existed for the arrest. Instead, Mikovits argues that a court “may defer its decision
13 on the immunity question, allow limited discovery to achieve the requisite factual
14 development and decide the issue on summary judgment.” Dkt. 159 at 17. But
15 there is no reason to delay such a ruling in this case. As stated in the moving
16 papers, probable cause does not turn on the truth of the victim’s allegations, but
17 rather whether the officer had reasonably trustworthy information at the time such
18 that a prudent person would believe a crime had been committed. See *Orin v.*
19 *Barclay*, 272 F.3d 1207, 1218 (9th Cir. 2001). The SAC is devoid of any non-
20 generic or non-conclusory allegations demonstrating that either Garcia or McGuire
21 knew or should have known that the information supplied by the Whittemore
22 defendants was not reasonably trustworthy at the time of Mikovits’ arrest. In
23 addition, for the reasons set forth in the original moving papers, the SAC fails to
24 allege sufficient facts to demonstrate that Chief Garcia and Detective McGuire
25 lacked at least arguable probable cause. Dkt. 148 at 24.

26 Likewise, Mikovits fails to address Dr. Hunter’s argument that, under the
27 allegations of the SAC, he violated Mikovits’ clearly established rights because he
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1 “was in a position to avert the activities of the other Nevada based defendants” but
 2 did not do so.” See Dkt. 144 [SAC] at 11, ¶ 56. Such vague allegations do not
 3 identify any violation of a Mikovits’ clearly established rights. *See C.B. v. City of*
 4 *Sonora*, 730 F.3d 816, 825 (9th Cir. 2013) (“Qualified immunity analysis consists
 5 of two steps,” the first of which asks “whether the facts the plaintiff alleges make
 6 out a violation of a constitutional right”). Mikovits’ allegation that Dr. Hunter
 7 engaged in active conspiracy with the other defendants is devoid of any factual
 8 support that would warrant a finding that Dr. Hunter violated Mikovits’
 9 constitutional or statutory rights.

V

Mikovits Fails to Address the UNR Defendants’ Remaining Arguments and Thus Admits They Have Merit.

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

- 18 • The SAC fails to state a claim for “judicial deception.” Dkt. 148 at 25-
 19 26.
- 20 • Mikovits’ “warrantless” arrest allegations fail to state a claim. *Id.* at
 21 27-28.
- 22 • Mikovits’ “unlawful delay” allegations are also insufficient. *Id.* at 28.
- 23 • Hunter was not acting under color of law. *Id.* at 28-29.
- 24 • Mikovits’ fraud claim is incurably vague. *Id.* at 30.

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

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VI

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

Mikovits has failed to respond to the motion to strike the punitive damages prayer filed by the UNR defendants (Dkt. 147). Accordingly, she has waived this claim and the prayer for punitive damages must be stricken.

CONCLUSION

Mikovits has failed to heed this Court’s warnings about how to go about prosecuting this case. Her complaints and her opposition papers continue to read like novels, replete with unsubstantiated factual and legal theories.

As baseball’s spring training approaches, we are again reminded that “three strikes and you’re out.” Mikovits has tried three times to plead around obvious problems like the statute of limitations and personal jurisdiction. And this time she has added insult to injury by failing to timely oppose the pending motions. Enough is enough. The UNR defendants respectfully request that the Court grant this motion and dismiss them from this action with prejudice. At a minimum, this Court should dismiss all federal claims and remand all remaining claims to state court. Finally, the punitive damages prayer must be stricken.

Dated: February 10, 2016

BUCHALTER NEMER
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By: /s/ Robert M. Dato
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