[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-12971
Non-Argument Calendar

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D.C. Docket No. 8:18-cv-00494-JSM-AAS

CHRISTINA PAYLAN, Dr.,

Plaintiff-Appellant,

versus

DARRELL DIRKS,
in his individual capacity,
CHRISTINE BROWN,
in her individual capacity, et al.,

Defendants-Appellees.

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No. 19-10859
Non-Argument Calendar

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D.C. Docket No. 8:15-cv-01366-CEH-AEP

CHRISTINA PAYLAN, M.D.,

Plaintiff-Appellant,

versus

PAMELA BONDI, individual capacity,
MARK OBER, individual capacity, et al.,

Defendants-Appellees.

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Appeals from the United States District Court
for the Middle District of Florida

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(February 17, 2021)

Before WILLIAM PRYOR, Chief Judge, LAGOA and ANDERSON, Circuit Judges.

PER CURIAM:

In this consolidated appeal, Christina Paylan appeals *pro se* the partial dismissal of and partial summary judgment against her two complaints that state officials and her fiancee's family violated federal and state law in the events that led to her state convictions for prescription fraud and fraudulent use of personal information. Paylan filed in the district court a complaint against the City of Tampa, Assistant State Attorneys Darrell Dirks and Christine Brown, Deputy Comaneci Devage of the Hillsborough County Sheriff's Office, and eight other officials. 42 U.S.C. § 1983. The district court dismissed the claims against every

official—except for two against Devage—for failure to state a plausible claim for relief, *see* Fed. R. Civ. P. 12(b)(6), and later entered summary judgment in Devage's favor based on qualified immunity. Paylan also filed in state court a similar complaint against Dirks, Brown, and other officials, which they removed to the district court. *See* 28 U.S.C. §§ 1331, 1343. The district court later dismissed as untimely her federal claims against every official except state prosecutors Dirks and Brown, dismissed the claims against the prosecutors as barred by res judicata, and declined to exercise jurisdiction over her state-law claims. Paylan challenges the disposition of her two complaints, the denial of her motions to recuse the judge in the action she commenced in the district court, and the removal of her action against Dirks and Brown. We affirm.

Paylan's two complaints shared a common theme that her wealthy fiancee's family, the Abdos, blamed her for his waning generosity and retaliated by fabricating evidence against her for illegally dispensing and abusing narcotics. Paylan alleged that, while she practiced medicine, the Abdo family falsely reported to state officials that she had acquired large amounts of Demerol and administered it to her fiancee and fabricated evidence that Tampa police officers used to obtain warrants to arrest her and to search her home in June 2011 and to rearrest her in July 2011. Paylan also alleged that officers lacked probable cause to arrest her and to search her home and violated her right to use a toilet in private while executing

the warrant to search her home and that prosecutors acted unlawfully by aiding officers to secure warrants and to collect evidence, by coercing witnesses, by sullying her reputation with her patients and pharmacists, and by pursuing bogus charges against her.

Paylan's federal complaint alleged that Devage, Sheriff David Gee, four Tampa police officers, the Chief of Police, the City of Tampa, State Attorneys Dirks and Brown, their supervisor, and Florida Attorney General Pamela Bondi violated Paylan's civil rights in the events that led to her convictions. *See* 42 U.S.C. § 1983. After the district court identified deficiencies in her pleading and granted her leave to amend, Paylan filed a second amended complaint containing 16 counts for relief. In counts one through eight and count fourteen, Paylan complained that the defendants had violated her federal civil rights and state law in the search of her home, her arrests, and her prosecution. *See* 42 U.S.C. § 1983. In counts nine through twelve, thirteen, fifteen, and sixteen, Paylan alleged municipal liability, supervisory liability, violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)–(d), and a state racketeering law, Fla. Stat. § 772.103(3)–(4), and torts under state law.

The district court did not err in determining that counts one through twelve and fourteen through sixteen failed to state a claim for relief from which the district court could draw a plausible inference that the defendants deprived her of

rights protected by the Constitution and state law in connection with her two arrests and the search of her home. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A three-page criminal report affidavit, which Paylan incorporated by reference in her complaint, *see SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010), provided probable cause to issue a warrant to arrest her for prescription fraud in July 2011. And the warrants to arrest Paylan and to search her home in June 2011 were likewise supported by an affidavit that she attached to her complaint. *See* Fed. R. Civ. P. 10(c). That affidavit stated that the Abdo family had evidence that Abdo and Paylan were abusing Demerol; that Abdo's son had observed evidence of illicit drug use inside Paylan's home; that the affiant heard Paylan's assistant state during a telephone call that Abdo's and Paylan's skin looked yellow and that he had seen her order, take large quantities from her clinic, and write false prescriptions in the name of her patient L.B. for Demerol; and that different officers on three separate occasions discovered in Paylan's trash empty vials of and prescriptions written to L.B. for Demerol and supplies for its injection. The affidavit established a fair probability that Paylan had unlawfully obtained and administered Demerol and that her home contained evidence of those crimes. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Paylan's challenges to the affidavit supporting the search and arrest warrants in June 2011 fail. Paylan argues that the affidavit included false statements from

other witnesses, but Paylan never alleged that the warrant affiant included any facts he knew were false. *See Franks v. Delaware*, 438 U.S. at 154, 171–72 (1978). Nor do Paylan's arguments about the affidavit negate the probable cause established by the evidence that officers discovered in her trash during their investigation. *See United States v. Novaton*, 271 F.3d 968, 986–87 (11th Cir. 2001). Paylan complains that the warrant affiant should have conducted a more thorough investigation, but an officer's investigation must only establish a fair probability that the subject of a warrant has committed a crime and that incriminating evidence would be discovered in the location sought to be searched. *See United States v. Martin*, 297 F.3d 1308, 1314 (11th Cir. 2002).

The district court correctly dismissed all the officials in Paylan's second amended complaint except Devage. In counts one and four, Paylan failed to state a plausible claim that Tampa officers and prosecutors Dirks and Brown fabricated evidence to arrest her because the warrant affidavits were valid and provided probable cause to search her home. *See Iqbal*, 556 U.S. at 678. The existence of probable cause also defeated her claims of malicious prosecution against Tampa officers, Dirks, Brown, and State Attorney Mark Ober, *Paez v. Mulvey*, 915 F.3d 1276, 1285 (11th Cir. 2019), and retaliation for her exercising her right to protest her arrests and prosecution, *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1289 (11th Cir. 2019). Because officers executed valid arrest and search warrants,

Paylan failed to state plausible claims against Tampa officers, Dirks, and Brown for false arrests, *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996); *Bolanos v. Metr. Dade. Cnty.*, 677 So. 2d 1005, 1005 (Fla. Dist. Ct. App. 1996), unlawful search, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989), conspiring to falsely arrest and prosecute her, *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1260 (11th Cir. 2010), or racketeering by fabricating evidence to make false arrests, *see Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1263–64 (11th Cir. 2004). And because Paylan failed to state valid claims against the officers and prosecutors, her claims of municipal liability, *Polk Cty. v. Dodson*, 454 U.S. 312, 326 (1981), and supervisory liability, *Paez*, 915 F.3d at 1291, failed too. Paylan also failed to state plausible claims against all officials except Devage for intentional infliction of emotional distress based on the two arrests and ensuing prosecution, *see Kim v. Jung Hyun Chang*, 249 So. 3d 1300, 1305 (Fla. Dist. Ct. App. 2018), or that Tampa officers and State Attorneys Ober, Dirks, and Brown committed an abuse of process by arresting Paylan, seizing incriminating evidence from her home, and prosecuting her for her offenses, *S & I Investments v. Payless Flea Mkt., Inc.*, 36 So. 3d 909, 917 (Fla. Dist. Ct. App. 2010).

The district court did not abuse its discretion by denying Paylan a third opportunity to amend before dismissing all her claims against every official except Devage. A plaintiff should be given an opportunity to amend when "a more

carefully drafted complaint" might state a claim, but the district court need not accept an amendment when "there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed," if "allowing amendment would cause undue prejudice to the opposing party," or if "amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). The district court dismissed Paylan's amended complaint for failure to allege facts that plausibly undermined "the validity of the probable cause for the search of her residence . . . [and] her two arrests." Paylan failed to cure those deficiencies in her second amended complaint despite receiving two extensions before filing the pleading. *See Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014). Nor did she remedy the defect in her proposed third amendment; instead, she sought to add defendants and facts related to the timeliness of her criminal proceedings.

The district court also did not err by granting summary judgment based on qualified immunity in favor of Devage and against Paylan's complaint that the deputy invaded her privacy. Paylan alleged that Devage, a female officer, infringed her right to bodily privacy in violation of the prohibition against an unreasonable search and seizure by requiring her to use the bathroom while leaving the door ajar. *See Los Angeles Cty. v. Rettele*, 550 U.S. 609, 615 (2007); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996); *Fortner v. Thomas*, 983 F.2d 1024, 1026 (11th

Cir. 1993). But Devage's open-door requirement was reasonably limited in scope and in duration. *See Rettele*, 550 U.S. at 615; *Fortner*, 983 F.2d at 1030. Paylan was an arrestee with a diminished expectation of privacy while officers searched her home. *See Riley v. Cal.*, 573 U.S. 373, 391–92 (2014). Devage's open-door requirement served the legitimate purposes of preventing Paylan from interfering with the ongoing search and from harming herself. Although officers of the opposite sex were in adjacent rooms, Paylan offered no evidence that any male officer observed her using the bathroom. Paylan alleged that Devage belittled her, but "verbal taunts. . . . however distressing . . . [without more do not] deprive[] [an arrestee] of [her] constitutional rights," *Edwards v. Gilbert*, 867 F.2d 1271, 1273 n.1 (11th Cir. 1989). Even if Devage acted with "evil intentions[, that would] . . . not make a Fourth Amendment violation out of [her] objectively reasonable [action] . . . ." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

Although we construe *pro se* briefs liberally, a *pro se* litigant who makes no substantive argument on an issue abandons it. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Paylan does not dispute that Devage's open-door requirement and her statements to other officers disparaging Paylan's appearance and candor do not qualify as sufficiently outrageous to inflict severe emotional distress. And she does not dispute that Devage engaged in no misconduct for which Sheriff Gee could be held liable as a supervisor.

The district judge, Charlene Honeywell, also did not abuse her discretion by denying Paylan's motions to disqualify her. Paylan argued that Judge Honeywell's "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and that she harbored "a personal bias or prejudice," *id.* § 455(b)(1), because her *former* husband, Gerald Honeywell, had served earlier as an officer in the Tampa police department. But Paylan offered no evidence that Mr. Honeywell participated in or had personal knowledge about Paylan's criminal investigation. And the judge's adverse rulings were "insufficient to form a basis for recusal." *United States v. Berger*, 375 F.3d 1223, 1228 (11th Cir. 2004). Paylan proved no interest or bias against her that required Judge Honeywell to recuse.

The district court also did not err by denying Paylan's motion to remand the action she commenced in state court. When a defendant removes a civil action based on federal-question jurisdiction, 28 U.S.C. § 1441(a), all defendants properly joined and served must join or consent to the removal. *Id.* § 1446(b)(2)(A). Any defendant who fails to file a notice of removal within 30 days of service of process may consent to a timely removal by a later-served defendant. *Id.* § 1446(b)(2)(B) & (C); *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1209 (11th Cir. 2008). After Paylan filed a third amended complaint that alleged the Abdo family, Dirks, Brown, three Tampa officers, two deputies in the Sheriff's Office, and Gerald Honeywell had deprived her of rights protected by federal and state law, an

officer served last with process timely removed her action based on federal-question jurisdiction. The district court, as it was permitted to do, *sua sponte* inquired whether all the defendants agreed to removal, *see In re Bethesda Mem'l Hosp., Inc.*, 123 F.3d 1407, 1410–11 (11th Cir. 1997), and they did so, which cured any procedural defect, *see* 28 U.S.C. § 1446(b)(2)(C). Although Gerald did not respond, because he had not been served with process, his consent was not required. *See Bailey*, 536 F.3d at 1209.

After removal, the district court correctly dismissed as untimely the federal claims against every defendant except prosecutors Dirks and Brown. Paylan's claims that officials deprived her of rights in violation of federal law in connection with her arrest and prosecution were subject to the four-year statute of limitation in Florida applicable to actions for personal injuries. *See McGroarty v. Swearingen*, 977 F.3d 1302, 1307 (11th Cir. 2020). Her claims accrued when "the facts which would support a cause of action [were] . . . or should [have] be[en] apparent to" Paylan, *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987)—at the latest, July 1, 2011, when officers arrested Paylan a second time. The four-year deadline expired by July 1, 2015, more than two years before Paylan filed an amended complaint in January 2018 that added the Abdo family, Tampa officers, and Honeywell as defendants and before she filed a third amended complaint in March

2018 that added the Sheriff's deputies as parties. The limitation period commenced regardless of Paylan's failure to serve process on Honeywell.

Paylan argues for equitable tolling, but she failed to act diligently. *See Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 971 (11th Cir. 2016) (en banc). She commenced an action in federal court concerning the same incidents against prosecutors Dirks and Brown and Tampa officers several months before the four-year deadline expired. And Paylan waited too long to sue the Abdo family and the Sheriff's deputies for unlawful acts they allegedly committed in 2013. *See McGroarty*, 977 F.3d at 1307.

The district court also did not err by dismissing Paylan's federal law claims against prosecutors Dirks and Brown in the removed action. We need not consider whether the claims are barred by res judicata because we can affirm on the alternative ground identified by the district court. Paylan failed to state a plausible claim for relief against Dirks or Brown based on fabricated evidence because the warrant affidavits were valid and provided probable cause to obtain the warrants to search her home and to arrest her twice. *See Iqbal*, 556 U.S. at 678; Fed. R. Civ. P. 12(b). And the existence of probable cause defeated Paylan's complaint of a retaliatory prosecution by Dirks and Brown. *See DeMartini*, 942 F.3d at 1289.

The district court also did not abuse its discretion when it denied Paylan's motion to amend the complaint in the removed action. Paylan amended her

complaint several times in the state court. After removal of the action, the officials moved to dismiss Paylan's complaint for failure to state a claim and identified deficiencies in her pleading. Paylan obtained leave to amend, but instead of curing the deficiencies, she simply added defendants to her complaint. The district court reasonably determined that it would be futile to give Paylan another opportunity to amend. *See Campbell*, 760 F.3d at 1168–69.

**AFFIRMED.**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

**DR. CHRISTINA PAYLAN,**

**Plaintiff,**

**v.** **Case No. 8:18-cv-494-T-30AAS**

**DARRELL DIRKS, in his individual capacity, CHRISTINE BROWN, in her individual capacity, BRIAN BISHOP, RUSSELL MARCOTRIGIANO, KENNETH MORMAN, GERALD HONEYWELL, KHALIL ABDO, MARIE SILVA, MICHAEL QUILL, NADA ABDO QUILL, TIMOTHY ALLEN, and KYLE ROBINSON,**

**Defendants.**
_____/

**ORDER**

THIS CAUSE comes before the Court upon Defendants' Motions to Dismiss filed at Dkts. 54, 58, 59, and 96 and Plaintiff's Responses thereto. After careful review of the motions, Plaintiff's responses, and all other related filings, including the detailed record in this case, the Court concludes that the motions should be granted to the extent that all the federal claims in this case are subject to dismissal with prejudice.

Specifically, the federal claims against Defendants Brian Bishop, Russell Marcotrigiano, Kenneth Morman, Gerald Honeywell, Khalil Abdo, Marie Silva, Michael Quill, Nada Abdo Quill, Timothy Allen, and Kyle Robinson ("the ten newly added Defendants") are dismissed with prejudice because they are barred by the statute of

limitations. The federal claims against original Defendants Darrell Dirks and Christine Brown are dismissed with prejudice pursuant to *res judicata* and failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Court declines to retain supplemental jurisdiction over the state law claims. Accordingly, the state law claims will be remanded to state court, which is the court best equipped to research and rule on matters of state law. This is especially true in light of this case's protracted history, which began in 2014, in the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, and which would have remained there but for Plaintiff's recent addition of the ten newly added Defendants.

## BACKGROUND

The Court begins with this case's procedural history, which began more than four years ago in a Florida state court. On or about April 14, 2014, *pro se* Plaintiff Dr. Christina Paylan filed her first complaint in the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, alleging a malicious prosecution claim against Defendants Darrel Dirks and Christine Shiver Brown. The first complaint alleged that Dirks and Brown, who were Assistant State Attorneys during the relevant time, maliciously prosecuted her "for over two years when the speedy trial time had expired" in a criminal case. In a nutshell, the criminal case related to Plaintiff's arrests on June 9, 2011 and July 1, 2011 for narcotics violations. On June 25, 2014, the state court dismissed the first complaint on Defendants' motion.

On July 15, 2014, Plaintiff filed an amended complaint (the "second complaint"). The second complaint added Defendant Mark Ober and added several additional causes of action. On June 3, 2015, the state court dismissed the second complaint on Defendants' motion.

On June 23, 2015, Plaintiff filed another amended complaint (the "third complaint"). The third complaint was against Dirks, Brown, and Ober and again alleged claims related to her June 9, 2011 and July 1, 2011 arrests. The claims included violations of the Fourth, Fifth, and Fourteenth Amendments, tortious interference with an advantageous business relationship, defamation, and defamation by implication. On November 9, 2015, the state court dismissed the third complaint with prejudice on Defendants' motion. Plaintiff appealed the dismissal to Florida's Second District Court of Appeal (the "Second DCA").

On October 11, 2017, the Second DCA affirmed without comment the trial court's dismissals with prejudice except for the dismissal of the Fourth Amendment and tortious interference with a business relationship claims alleged against Dirks and Brown. The Second DCA concluded that: "Paylan sufficiently alleged deprivation of her civil rights under the Fourth Amendment and tortious interference with her business relationships. Although she did not sufficiently attribute specific improper conduct to a specific ASA in every instance, she did raise some specific allegations against both ASA Dirks and ASA Brown." *Paylan v. Dirks*, 228 So. 3d 679, 680 (Fla. 2d DCA 2017).

After the remand, the state court instructed Plaintiff to file an amended complaint with respect to the Fourth Amendment and tortious interference claims against Dirks and Brown.

The state court noted that Plaintiff should clearly identify the particular defendant to which she attributed a particular improper act.

On January 5, 2018, Plaintiff amended her complaint (the "fourth complaint"). The fourth complaint amended the two claims against Dirks and Brown. But it also added additional claims and eight new defendants. On March 1, 2018, one of those newly added defendants, Defendant Kenneth Morman, removed the action to this Court based on federal question jurisdiction. The Notice of Removal noted that Plaintiff alleged, in relevant part, claims of violations of her constitutional rights pursuant to 42 U.S.C. §1983. The other served defendants consented to the removal.

Subsequently, all of the served defendants moved to dismiss the fourth complaint on various grounds and Plaintiff requested that she be permitted further amendment. This Court allowed Plaintiff to file another amended complaint.

On April 6, 2018, Plaintiff filed her "First Amended Complaint," which is really Plaintiff's fifth complaint. The fifth complaint added two additional defendants and four additional claims for a total of twelve defendants and seven claims. The fifth complaint lumps most of the defendants together and is not particular as to which defendant committed what act. In sum, the fifth complaint alleges the following claims related to Plaintiff's June 9, 2011 and July 1, 2011 arrests:

- Count I - 42 U.S.C. §1983 violation against Defendants Dirks, Brown, Bishop, Honeywell, Abdo, Silva, Quill, and Abdo Quill related to the June 9, 2011 arrest

- Count II - 42 U.S.C. §1983 violation against Defendants Dirks, Brown, Bishop, Marcotrigiano, Abdo, Silva, Quill, Abdo Quill, Robinson, and Allen related to the July 1, 2011 arrest
- Count III - Fabrication of Evidence against Defendants Abdo, Silva, Quill, and Abdo Quill
- Count IV - Fraudulent Concealment related to the June and July 2011 arrests against all Defendants
- Count V - Tortious Interference with an Advantageous Business Relationship against Defendants Dirks, Brown, Bishop, Abdo, Silva, Quill, and Abdo Quill
- Count VI - 42 U.S.C. §1983 violation (Retaliatory Arrest and Prosecution) against Dirks, Brown, and Bishop
- Count VII - conspiracy (state law) against all Defendants.

(Dkt. 53).

Now all Defendants move to dismiss.[1] The ten newly added Defendants argue that all claims against them are barred by the statute of limitations. The Court agrees based on a review of the face of the fifth complaint and dismisses the federal claims against the ten newly added Defendants with prejudice. Defendants Dirks and Brown argue that the claims against them are barred by *res judicata* and otherwise fail to state a claim. The Court agrees that both of these reasons subject the federal claims to dismissal with prejudice. As explained further below, the Court declines to exercise supplemental jurisdiction over the

[1] To date, Plaintiff has not perfected service on Defendant Gerald Honeywell and has filed a motion (Dkt. 99) requesting that the Court deem service effective because Plaintiff believes Honeywell is evading service. Because all of the federal claims against Honeywell are barred by the statute of limitations, this motion will be denied as moot. Plaintiff may seek relief from the state court regarding this issue after the remand of the state law claims.

Florida claims. The state court and, if necessary, Second DCA are better equipped to address the merits of these claims, especially in light of their knowledge of this litigation.

## STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows a complaint to be dismissed for failure to state a claim on which relief can be granted. When reviewing a motion to dismiss, courts must limit their consideration to the well-pleaded allegations, documents central to or referred to in the complaint, and matters judicially noticed. *See La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal citations omitted); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). Furthermore, they must accept all factual allegations contained in the complaint as true, and view the facts in a light most favorable to the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007).

Legal conclusions, though, "are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). In fact, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003). To survive a motion to dismiss, a complaint must instead contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation marks and citations omitted). This plausibility standard is met when the plaintiff pleads enough factual content to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (internal citations omitted).

Because the Plaintiff is proceeding *pro se*, the Court reads her pleadings liberally and adopts a less stringent standard than for one drafted by an attorney. *Jones v. Fla. Parole Comm'n*, 787 F.3d 1105, 1107 (11th Cir. 2015). "This liberal construction, however, does

not give a court license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action." *Hickman v. Hickman*, 563 Fed.Appx. 742, 743 (11th Cir. 2014) (internal quotation marks and citations omitted).

## DISCUSSION

### I. The Statute of Limitations Bars the Federal Claims against the Ten Newly Added Defendants

A complaint may be dismissed when the existence of an affirmative defense "clearly appears on the face of the complaint." *Quiller v. Baraclays Am./Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984). *See also La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) ("[A] Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is 'apparent from the face of the complaint' that the claim is time-barred" (quoting *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246, 1251 (11th Cir. 2003)); *Douglas v. Yates*, 535 F.3d 1316, 1321 (11th Cir. 2008) (same). "At the motion-to-dismiss stage, a complaint may be dismissed on the basis of a statute-of-limitations defense only if it appears beyond a doubt that Plaintiffs can prove no set of facts that toll the statute." *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1288 n.13 (11th Cir. 2005).

The federal claims against the ten newly added Defendants arise under section 1983. The accrual date for an action under section 1983 is "governed by federal rules conforming in general to common-law tort principles." *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 1095, 166 L.Ed.2d 973 (2007). "Under those principles, it is 'the standard rule that accrual occurs when the plaintiff has a complete and present cause of action[,] that is, when the plaintiff can file suit and obtain relief.'" *Id.* (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201, 118 S.Ct. 542, 549, 139

L.Ed.2d 553 (1997)) (internal quotation marks omitted). State law governs the limitations period in section 1983 actions, which are best characterized as personal injury actions. *Erick v. Border Patrol of Fla. State*, 154 F. App'x 193, 194 (11th Cir. 2005). Personal injury actions in Florida have a four-year statute of limitations. *See* Fla. Stat. § 95.11(3). The statute of limitations begins to run from the date "the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996) (quotations omitted).

The fifth complaint makes clear that the section 1983 claims related to the fabrication and withholding of evidence and alleged false arrests accrued on or about the time when Plaintiff was arrested in June and July of 2011. Accepting the July 2011 arrest as the latest date, Plaintiff should have filed these claims by July 2015. Plaintiff waited until January 2018 (for Defendants Bishop, Marcotrigiano, Morman, Honeywell, Khalil Abdo, Silva, Michael Quill, Nada Abdo Quill) and April 2018 (for Defendants Robinson and Allen) to file these claims.[2] Accordingly, none of the federal claims against the ten newly added Defendants survive.

To warrant equitable tolling, Plaintiff must show that she pursued her rights diligently and that extraordinary circumstances prevented her from filing a timely complaint. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 971 (11th Cir. 2016) (en banc). Plaintiff has not met this burden because she has failed to explain how she was prevented from filing a timely complaint against the ten newly added Defendants, whose alleged misconduct occurred in 2011. *See Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004)

[2] With respect to only Defendant Bishop, the fifth complaint alleges conduct on his part that occurred in 2013. Even if the Court were to assume that these allegations state a section 1983 claim, the claim accrued in 2017, which is still untimely.

("Equitable tolling 'is an extraordinary remedy which should be extended only sparingly.'").

Moreover, the relation-back doctrine contained within Rule 15(c) of the Federal Rules of Civil Procedure is inapplicable here. Plaintiff attempted to join entirely new defendants more than four years after this action commenced, which is well after the statute of limitations expired. *See Powers v. Graff*, 148 F.3d 1223, 1228 (11th Cir. 1998) (noting that the relation-back doctrine does not apply in instances where a plaintiff attempts to join entirely new defendants that were known to the plaintiff before the running of the statute of limitations). And the allegations of the fifth complaint reflect that Plaintiff knew about these defendants prior to the running of the statute of limitations. In other words, this is not a case of mistake on Plaintiff's part.

Finally, Plaintiff's argument that the statute of limitations for her causes of action did not begin to run until she was acquitted and released from custody are inapplicable to the section 1983 claims she has pled in the fifth complaint. Plaintiff relies on *Heck v. Humphrey*, 512 U.S. 477 (1994). Plaintiff's reliance is misplaced because the claim at issue in *Heck* was synonymous to a claim for malicious prosecution, *id.* at 489-90, and the Supreme Court in *Wallace* declined to extend *Heck* to section 1983 claims of false arrest, which are the section 1983 claims pled here. *See Wallace*, 549 U.S. at 397.

In sum, the motions to dismiss filed by the ten newly added Defendants will be granted to the extent that the statute of limitations bars the federal claims against them. Those claims are dismissed with prejudice.

## II. *Res Judicata* Bars the Federal Claims against Dirks and Brown

Dirks and Brown argue, in relevant part, that the federal claims against them are barred under the doctrine of *res judicata* because Plaintiff alleged similar claims against them

in a nearly identical lawsuit and the district court dismissed those claims with prejudice *before* Plaintiff alleged the claims in this case. Before the Court analyzes the applicable law, the Court will provide a brief summary of the similar case.[3]

**A. The Similar Case**

On June 9, 2015, Plaintiff filed *Paylan v. Bondi, et al.*, Case 8:15-cv-1366-CEH-AEP, in the Middle District of Florida, Tampa Division. On February 28, 2017, Magistrate Judge Anthony E. Porcelli entered a fifty-nine-page report and recommendation (the "R&R") that, in relevant part, granted the motion to dismiss filed by Dirks and Brown (Dkt. 264 in Case 8:15-cv-1366) and recommended that they be dismissed from the action with prejudice. (Dkt. 419 in Case 8:15-cv-1366).[4] The R&R noted that Plaintiff had previously amended her complaint to cure earlier deficiencies identified by the court. The operable complaint was Plaintiff's Second Amended Complaint, filed on April 22, 2016. (Dkt. 232 in Case 8:15-cv-1366). The Second Amended Complaint was filed *after* this case had been dismissed with

[3] The Court may take judicial notice of the filings in this other case without converting the motion to dismiss into a motion for summary judgment. Rule 201(b) of the Federal Rules of Evidence allows a court to take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Notably, courts may take judicial notice of documents from a prior proceeding because they are matters of public record and "capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned." *Horne v. Potter*, 392 Fed.Appx. 800, 802 (11th Cir. 2010). However, a "'court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)). As such, "a court may take judicial notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." *Jones*, 29 F.3d at 1553.

[4] Plaintiff had sued approximately sixteen defendants. The R&R recommended the dismissal of all of the defendants with prejudice, with the exception of Defendant Comaneci Devage, who is not a defendant in the instant case.

prejudice by the state court and during the pendency of Plaintiff's appeal to the Second DCA.

The Second Amended Complaint included the following federal claims against Dirks and Brown: Count I - 42 U.S.C. § 1983, fabrication/concealment of evidence for the June 9, 2011 false arrest; Count II - 42 U.S.C. § 1983, June 9, 2011 false arrest; Counts III - 42 U.S.C. § 1983, Fourth Amendment violation; Count IV - 42 U.S.C. § 1983, fabrication of charges and fraudulent criminal report affidavit; Count V - 42 U.S.C. § 1983, malicious prosecution for the June 9, 2011 false arrest; Count VI - 42 U.S.C. § 1983, malicious prosecution for the July 1, 2011 false arrest; Count VII - 42 U.S.C. § 1983, conspiracy to deprive constitutional rights; and Count VIII - 42 U.S.C. § 1983, First Amendment retaliation. *Id.*

The federal claims against Dirks and Brown related to "a search warrant executed at Paylan's residence on June 9, 2011; Paylan's arrest on June 9, 2011; and Paylan's second arrest on July 1, 2011." (Dkt. 419 in Case 8:15-cv-1366). The R&R concluded that the record reflected probable cause for Paylan's arrests, which was fatal to her section 1983 claims. Specifically: "because Paylan's allegations do not disturb probable cause in support of her two arrests and the search of her residence, she cannot plausibly assert any claims connected to a deprivation of rights in connection with her arrests and the search." *Id.* at 40.

The R&R further concluded that prosecutorial immunity was applicable so that "all counts against Dirks (Counts I-VIII, XI-XIII, and XIV-XVI) and Brown (Counts I-VIII, XI-XII, and XIV-XVI) should also be dismissed for this additional reason." *Id.* at 46.

On March 28, 2017, the district court adopted the R&R, dismissed all claims against Dirks and Brown with prejudice, and terminated them as defendants to the action. (Dkt. 438 in Case 8:15-cv-1366). The Court underscores that this dismissal with prejudice occurred

after this case had been dismissed by the state court and *before* Plaintiff subsequently amended her complaint post-remand from the Second DCA.

**B. Analysis**

As the Eleventh Circuit aptly noted: "We may use the tools of preclusion and res judicata to further the public interests of preventing inconsistent results, tamping down the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication." *Borrero v. United Healthcare of New York, Inc.*, 610 F.3d 1296, 1307-08 (11th. Cir. 2010). *Res judicata* will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same. *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1187 (11th Cir. 2003). The similarity of two causes of action is evaluated by looking to the broad "nucleus of operative facts" of the actions. *Borrero*, 610 F.3d at 1308.

Here, it is undisputed that the prior dismissal with prejudice of Dirks and Brown was rendered by a court of competent jurisdiction. Plaintiff argues that the action was not a prior action because technically this case was filed first, in 2014. The Court has not found case law on point that addresses this procedural quagmire. But the Court concludes that the similar case still constitutes a *prior action* because—although it was filed after this case had been closed by the state court—the R&R (and adoption of same) which dismissed Dirks and Brown with prejudice were entered before Plaintiff filed her amended complaint against Dirks and Brown. In other words, at the time that Plaintiff amended her complaint against Dirks and Brown, which was on January 5, 2018, a court of competent jurisdiction had already issued a final ruling on the merits with respect to the same parties and causes of action.

Plaintiff also argues that the district court's dismissal with prejudice of Dirks and Brown from the similar lawsuit did not constitute a final judgment because the case remains pending against Defendant Devage and the district court declined to enter final judgment until the conclusion of the case. The Court acknowledges that this is yet another procedural quagmire. And, like the last issue, the Court has not found any case law directly on point with respect to this unique procedural posture. Nonetheless, the Court is guided by the Eleventh Circuit's general principle that a dismissal for failure to state a claim is a judgment on the merits. *See Nat'l Ass'n for the Advancement of Colored People (NAACP) v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) ("the Supreme Court has clearly stated that '[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'") (quoting *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n. 3, 101 S.Ct. at 2428 n. 3); *see also Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (noting that *res judica* applies even if an appeal of the earlier judgment is likely). Accordingly, the district court's dismissal of Dirks and Brown with prejudice operated as a final judgment on the merits for *res judicata* purposes.

Finally, the similar case and present case indisputably involve the same causes of action. Although the complaints may look different because Plaintiff added new factual allegations and altered her legal claims,"[r]es judicata applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts." *Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir.1993). "[I]f a case arises out of the same nucleus of operative facts, or is based upon the same factual predicate, as a former action, ... the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Griswold v. County of Hillsborough*, 598 F.3d 1289, 1293 (11th Cir. 2010).

In sum, the federal claims against Brown and Dirks here arise from the same nucleus of operative fact as the similar case that previously dismissed those claims with prejudice. While the allegations here may be more detailed, the operable complaints in both cases contain nearly identical factual allegations concerning the June 9, 2011 and July 1, 2011 arrests. Both cases were based on the "same causes of action" for purposes of *res judicata.* Accordingly, the federal claims alleged against Dirks and Brown are dismissed with prejudice.

## III. The Federal Claims against Dirks and Brown Are Insufficient under Rule 12(b)(6) and Plaintiff Does Not Get a Sixth Bite of the Apple

Even if the federal claims against Dirks and Brown were not barred, they remain insufficiently pled and therefore fail to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For example, rather than simplify the claims, the complaint's fifth iteration makes them more complicated through the addition of more defendants, which Plaintiff has lumped together without attributing sufficient facts to Dirks and Brown. In light of the five prior attempts to amend, the Court concludes that any further opportunity to amend these claims would be futile.

## IV. The Court Declines to Exercise Supplemental Jurisdiction

Having dismissed all of the federal claims in this case with prejudice, the Court declines to exercise supplemental jurisdiction over the state law claims. The decision to exercise or decline supplemental jurisdiction includes considerations of judicial economy, convenience, fairness to litigants, and comity. *Baggett v. First Nat. Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir. 1997). Further, "[s]tate courts, not federal courts, should be the final arbiters of state law." *Id.* "Thus, where a court has dismissed all federal claims in a

given case, it is often justified in dismissing the state claims as well." *Betts v. Hall*, 679 F. App'x 810, 814 (11th Cir. 2017). If the federal claims are dismissed prior to trial, the Eleventh Circuit strongly encourages dismissal of the supplemental state law claims. *Id.* (citing *Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999)).

This action was pending in state court for approximately four years. It was only recently removed to this Court and the federal claims that prompted the removal are now dismissed with prejudice. The Court sees no compelling reason to retain jurisdiction over the state law claims under these circumstances.

It is therefore **ORDERED AND ADJUDGED** that:

1. Defendants' Motions to Dismiss filed at Dkts. 54, 58, 59, and 96 are granted to the extent stated herein.
2. The federal claims alleged against all Defendants are hereby dismissed with prejudice.
3. The Clerk of Court is directed to remand this case to the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, and provide that court with a copy of this Order.
4. The Clerk of Court is directed to close this case and terminate any pending motions as moot.

**DONE** and **ORDERED** in Tampa, Florida on July 11, 2018.

**JAMES S. MOODY, JR.**
**UNITED STATES DISTRICT JUDGE**

Copies furnished to:
Counsel/Parties of Record