APPENDIX A

UNITED STATES COURT OF APPEALS

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER AGNES LOPEZ,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; et al.,

Defendants-Appellees,

and

DOES, 1 through 10, inclusive,

Defendant.

No. 22-55352

D.C. No.
2:21-cv-01947-DOC-SP
Central District of California,
Los Angeles

ORDER

Before: BENNETT, SUNG, and H.A. THOMAS, Circuit Judges.

Petitioner's motion to vacate and set aside judgment of district court case 2:21-CV-01947-DOC-SP (Docket Entry No. 40) is DENIED. A district court judge must recuse when "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012). Here, the district court judge's former professional relationship with counsel is not evidence that the district court judge's impartiality might reasonably be questioned.

NOT FOR PUBLICATION

FILED

OCT 20 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER AGNES LOPEZ, Plaintiff-Appellant, v. STATE OF CALIFORNIA; et al., Defendants-Appellees, and DOES, 1 through 10, inclusive, Defendant.	No. 22-55352 D.C. No. 2:21-cv-01947-DOC-SP MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted October 20, 2023**

Before: BENNETT, SUNG, and H.A. THOMAS, Circuit Judges.

Jennifer Lopez De Jongh appeals the district court's dismissal of her 42

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 1983 suit against Gary Miller, the County of Los Angeles (the District Attorney and Sheriff's Department), and the State of California (collectively "Defendants"). Lopez alleges Defendants violated her Fifth, Eighth, and Fourteenth Amendment rights as well as the Civil Rights Act of 1964 by colluding and conspiring to take her children from her. She also alleges that Defendants protected Defendant Gary Miller's son—the children's father—from being incarcerated and registered as a sex offender for sexual abuse of the children. We have jurisdiction under 28 U.S.C. § 1291. We review a dismissal for failure to state a claim de novo and a denial of leave to amend for abuse of discretion. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 572–73 (9th Cir. 2020). We affirm.

1. The district court properly dismissed all but one of Lopez's claims because they were time-barred. Under § 1983, "courts apply the forum state's statute of limitations for personal injury actions, along with the forum state's law regarding tolling, including equitable tolling." *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004). The statute of limitations for each of Lopez's claims is two years. *See* Cal. Civ. Proc. Code § 335.1; *Lockett v. County of Los Angeles*, 977 F.3d 737, 739 (9th Cir. 2020). Here, the alleged facts that gave rise to Claim 1 through Claim 7 and Claim 9 occurred between 2007 and 2015, more than two years before Lopez filed her complaint on March 2, 2023. However, the alleged acts that gave rise to Claim 8 took place on January 14, 2021. Because the allegedly discriminatory acts

are discrete, the continuing violations exception does not apply. *See Bird v. Dep't of Hum. Servs.*, 935 F.3d 738, 746–47 (9th Cir. 2019). Therefore, all of Lopez's claims, except Claim 8, are barred by the statute of limitations.

2. For Claim 8, Lopez alleges that Defendants violated her due process rights by conspiring to prosecute her for a restraining order violation, and she contends they are subject to suit for such violations under § 1983. For the reasons explained below, the district court correctly dismissed Claim 8 with prejudice.

The district court correctly concluded that the State of California and Miller are not subject to suit under § 1983. Regarding the State, the Supreme Court has held that "a State is not a person within the meaning of § 1983," *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989), and explained that § 1983 "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Id.* at 66.

Regarding Miller, he is a private citizen, and a private citizen is not subject to suit under § 1983 unless they "acted under color of state . . . law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). To show that Miller acted under color of state law, Lopez must allege specific facts that are enough to show that Miller "conspired or acted jointly with state actors to deprive [Lopez] of [her] constitutional rights." *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 783 (9th Cir. 2001) (citing *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539,

1540 (9th Cir.1989)). Lopez did not properly plead any specific facts that show a conspiracy or joint action between Miller and a state actor. *See Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989). Lopez only made a conclusory allegation of conspiracy, which is not enough. *Id.* (concluding that "[plaintiff's] claims against all the defendants for a conspiracy to violate his constitutional rights under section 1983 . . . fail because they were supported only by conclusory allegations").

The district court also correctly concluded that Los Angeles County, sued as the Los Angeles County District Attorney and County of Los Angeles Sheriff's Department, is entitled to prosecutorial immunity and qualified immunity.

The district court correctly concluded that the District Attorney is entitled to prosecutorial immunity. Prosecutors are entitled to prosecutorial immunity from § 1983 actions "when performing functions 'intimately associated with the judicial phase of the criminal process.'" *Garmon v. County of Los Angeles*, 828 F.3d 837, 842–43 (9th Cir. 2016) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Here, the alleged conduct concerns the District Attorney's decision to prosecute Lopez. The district court correctly concluded that Lopez failed to plead facts that show the District Attorney's alleged conduct was not a prosecutorial decision intimately associated with the judicial phase of the criminal process. Lopez does not dispute that determination on appeal.

Monell claim were properly dismissed, the *Monell* claim was also properly dismissed.

3. Because we conclude that all claims were properly dismissed, we do not reach Lopez's arguments about punitive damages.

4. The district court did not abuse its discretion in dismissing Lopez's complaint without leave to amend because amendment would be futile. *See Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009).

AFFIRMED.

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNIFER LOPEZ, Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.	Case No. 2:21-cv-01947-DOC (SP) **JUDGMENT**

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the Complaint and this action are dismissed with prejudice and without leave to amend.

Dated: March 15, 2022

David O. Carter

HONORABLE DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JENNIFER LOPEZ,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. 2:21-cv-01947-DOC (SP)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On March 2, 2021, pro se plaintiff Jennifer Lopez filed a civil rights Complaint in this court under 42 U.S.C. § 1983. In the Complaint, plaintiff alleges that defendants the State of California, County of Los Angeles (sued as Los Angeles County District Attorney and County of Los Angeles Sheriff's

Department), and Gary Miller conspired to and violated her constitutional rights.

On March 26, 2021, County of Los Angeles ("LAC") filed a motion to dismiss on the bases that plaintiff failed to allege *Monell* liability, it is entitled to multiple immunities, the statute of limitations has expired, and plaintiff failed to plead the elements necessary for punitive damages ("LAC MTD"). Plaintiff filed an opposition to the LAC MTD on April 26, 2021 ("Opp. LAC MTD") and LAC filed a reply on May 10, 2021.

Miller filed a motion to dismiss ("Miller MTD") on May 13, 2021 and the State of California filed a motion to dismiss on May 18, 2021 ("State MTD"). Miller and the State of California contend that the Complaint must be dismissed because neither is a person acting under the color of state law, plaintiff failed to state conspiracy claims, the statute of limitations has expired, and plaintiff did not plead a claim for punitive damages. The State of California also contends the Eleventh Amendment bars plaintiff's claims against it. Plaintiff filed oppositions to the Miller MTD ("Opp. Miller MTD") and State MTD ("Opp. State MTD") on June 7 and 9, 2021. Miller and the State of California filed replies on June 21 and 23, 2021.

Liberally construing the Complaint's allegations, the court finds Miller and the State of California are not subject to suit under § 1983; the Eleventh Amendment bars the claims against the State of California and the LAC District Attorney's Office; plaintiff failed to plead *Monell* liability; LAC is entitled to prosecutorial immunity and qualified immunity; plaintiff failed to plead a conspiracy; and the statute of limitations has expired. As such, it is recommended that defendants' motions to dismiss be granted.

II.

ALLEGATIONS OF THE COMPLAINT

Plaintiff had three children with BGM, the son of defendant Gary Miller.

Plaintiff never married or lived with BGM.

On April 25, 2006, BGM filed a paternity suit in Los Angeles County Superior Court in Pomona, CA (case no. KF007458) seeking joint custody and visitation rights. The state court granted BGM visitation rights, ordered a 730 custody evaluation,[1] and transferred the case to Los Angeles. The case involved allegations of sexual abuse against BGM.

On March 27, 2007, the state court awarded plaintiff full legal and physical custody of the children, ordered therapy for the children, and ordered a psychiatric evaluation of BGM. The state court ordered both parties to appear on June 18, 2007.

On June 18, 2007, counsel for BGM and Miller filed a Long Cause Management Statement and Notice and Order Setting Mandatory Settlement Conference. The state court, presided by a different judge, set the settlement conference for October 15, 2007 and trial for October 30, 2007. The state court also appointed Dr. Joseph Kenan to conduct a 733 Custody Evaluation.[2]

BGM did not appear at the settlement conference. Instead, Miller and his wife, Cathleen Miller ("Cathleen"), attended. Plaintiff refused to sign a stipulation that would give permanent custody of two of the children to Miller and his wife.

On October 24, 2007, plaintiff, the children, plaintiff's parents, BGM, Miller, and Cathleen attended a meeting at Dr. Kenan's office. None of the parties was represented by counsel at the meeting. Plaintiff refused to consent to the transfer of custody of two of the children to Miller and Cathleen.

On November 13, 2007, during or after the trial, plaintiff entered into a

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[1] Section 730 of the California Evidence Code allows a court to appoint an expert to investigate and render a report on a particular matter.

[2] Section 733 of the California Evidence Code allows a party challenging a 730 evaluation to retain an expert to challenge a 730 evaluation.

stipulation where she would retain sole physical custody of the children, share legal custody with BGM, and bring the children to visit BGM, Miller, and Cathleen. Fearing for her children, plaintiff moved to Mexico with her children and husband rather than taking them to Miller's house as stipulated.

On November 14, 2007, the state court awarded BGM sole custody of the children and placed a $500,000 bail amount on plaintiff. BGM subsequently transferred his custodial rights to Miller and Cathleen on December 3, 2007.

On August 11, 2011, plaintiff, her husband, and her children returned to the United States. Plaintiff and her husband were arrested and charged with three counts of deprivation of custody (Cal. Penal Code § 278.5(a)). The children were put in Miller's custody.

On August 18, 2011, the state court granted Miller temporary restraining orders against plaintiff, plaintiff's husband, and plaintiff's parents (case no. KS015622). The restraining orders were then consolidated with the paternity case (case no. KF007458).

Miller, Cathleen, and plaintiff's parents petitioned for temporary guardianship (case no. KP014388). On September 21, 2011, the state court granted the Millers temporary guardianship with limited visitation rights for plaintiff and consolidated the case with the paternity and restraining order cases.

On July 2, 2013, the state court granted Miller and Cathleen a permanent restraining order against plaintiff.

On October 26, 2015, plaintiff reported to the Los Angeles County Sheriff's Department ("Sheriff's Department") that Miller violated plaintiff's court ordered visitation rights. The Sheriff's Department informed plaintiff that it did not forward the report to the Los Angeles County District Attorney's Office ("DA") because the DA "does not file family matters."

On November 10, 2015, the state court granted the Millers permanent

The district court also correctly concluded that the District Attorney and the Sheriff's Department are entitled to qualified immunity for Claim 8. To determine whether a defendant is entitled to qualified immunity, we apply a two-step test: (1) did "the officer's conduct violate[] a constitutional right," and (2) was "the right in question . . . clearly established at the time of the officer's actions, such that any reasonably well-trained officer would have known that his conduct was unlawful." *Orn v. City of Tacoma*, 949 F.3d 1167, 1174 (9th Cir. 2020). The district court correctly concluded that Lopez failed to plead facts that show a constitutional violation. The District Attorney did not violate Lopez's constitutional right to due process because the District Attorney's decision to prosecute Lopez was not based on an unjustifiable standard. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364–365 (1978) (absent reliance on an unjustifiable standard, such as race, religion, or other arbitrary classification, a prosecutor's decision to prosecute does not violate due process). The Sherriff could not violate Lopez's constitutional right by prosecuting her for violating the restraining order because the Sherriff had no authority to decide whether to prosecute Lopez. Lopez does not dispute these facts on appeal.

The district court also correctly concluded that Lopez did not state a *Monell* claim against the County. A *Monell* claim cannot survive without an underlying constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam). Because the constitutional claims upon which Lopez premises her

guardianship of the children. The state court subsequently renewed the restraining order on March 19, 2016. Plaintiff appealed the guardianship (case no. KP014388) and restraining order (case no. KS015622) cases, but the California Court of Appeal affirmed the judgments. The California Supreme Court denied plaintiff's petitions for review.

On January 14, 2021, the DA informed plaintiff that a complaint had been filed against her for violating the restraining order in November 2020 (Cal. Penal Code § 273.6).

Based on these allegations, plaintiff asserts ten civil rights claims: (1) due process violation against Miller and the State of California for conspiring to obtain a new trial in front of a different judge in order to gain custody of the children; (2) due process violation against Miller and the State of California for conspiring to obtain and maintain restraining orders against plaintiff; (3) due process violation against Miller and the State of California for conspiring to ensure Miller obtained guardianship; (4) due process violation against the State of California for the Court of Appeal's failure to read plaintiff's briefs; (5) double jeopardy violation against the State of California for imposing multiple punishments; (6a) Eighth Amendment violation against Miller and the State of California for conspiring to impose an excessive bail; (6b) cruel and unusual punishment violation against Miller and the State of California for restricting plaintiff's visitations with her children; (7) due process violation against LAC and Miller for conspiring to not prosecute Carmen Lopez in order to obtain her testimony against plaintiff; (8) due process violation against all defendants for conspiring to prosecute plaintiff for a restraining order violation; and (9) violation of the Civil Rights Act of 1964 against the State of California for discriminating against plaintiff due to her race.[3]

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[3] Plaintiff numbered two claims as "Claim Six." The court refers to the excessive bail claim as "Claim Six(a)" and the cruel and unusual punishment claim

III.

STANDARD OF REVIEW

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (as amended). Dismissal for failure to state a claim "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A court may not dismiss a complaint under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994).

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. This plausibility standard does not amount to a probability requirement, "but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The complaint must both "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party

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as "Claim Six(b)."

to defend itself effectively . . . [and] must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Where a plaintiff appears pro se in a civil rights case, the court must construe the pleadings liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). Nonetheless, in giving liberal interpretation to a pro se civil rights complaint, courts may not "supply essential elements of claims that were not initially pled." *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Id.*; *see also Jones v. Cmty. Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (finding conclusory allegations unsupported by facts insufficient to state a claim under § 1983). "The plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that support the plaintiff's claim." *Jones*, 733 F.2d at 649 (internal quotation and citation omitted).

IV.

DISCUSSION

A. Only Persons Acting Under the Color of State Law Are Subject to Suit Under § 1983

Miller and the State of California contend the claims against them should be dismissed because neither is subject to suit under 42 U.S.C. § 1983. Miller MTD at 6-7; State MTD at 4. Specifically, neither defendant is a person acting under color of state law. Miller MTD at 6-7; State MTD at 4.

Section 1983 provides:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law . . .

42 U.S.C. § 1983. To state a § 1983 claim, a plaintiff must plead that a defendant acting under color of state law deprived plaintiff of rights secured by the federal Constitution or statutes. *Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir. 1986).

With respect to the State of California, the Supreme Court has held that "a State is not a person within the meaning of § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Id.* at 66. As such, the State of California cannot be sued under § 1983.

As for Miller, he is a private citizen and "'§ 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrong.'" *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999)). "The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly attributable to the State?" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982) (quotation marks and citation omitted); *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020) (the color of law inquiry is equivalent to the Fourteenth Amendment state action inquiry). "When addressing whether a private party acted under color of law, we therefore start with the

presumption that private conduct does not constitute governmental action." *Sutton*, 192 F.3d at 835. In order for private conduct to constitute state action, the facts and circumstances of each case must indicate "something more" is present. *Id.*

The Supreme Court developed four tests to aid in identifying state action: (1) public function; (2) joint action; (3) government compulsion or coercion; and (4) governmental nexus. *Pasadena Republican Club v. Western Justice Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021); *Rawson*, 975 F.3d at 747. The satisfaction of any one of the tests is sufficient to find state action. *Pasadena Republican Club*, 985 F.3d at 1167; *Rawson*, 974 F.3d at 747.

Plaintiff relies on the joint action test. Opp. Miller MTD at 9-10; *see generally* Complaint. "The test asks whether the government has so far insinuated itself into a position of interdependence with a private entity that the private entity must be recognized as a joint participant in the challenged activity." *Pasadena Republican Club*, 985 F.3d at 1167 (quotation marks and citation omitted). "This occurs when the state knowingly accepts the benefits derived from unconstitutional behavior." *Parks Sch. of Bus., Inc. v. Symington*, 41 F.3d 1480, 1486 (9th Cir. 1995). "A person may become a state actor by conspiring with a state official." *Price v. State of Hawaii*, 939 F.2d 702, 708 (9th Cir. 1991); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (a "private party involved in [] a conspiracy, even though not an official of the State, can be liable under [§] 1983 ").

Here, plaintiff alleges no facts indicating any agreement, connection, or coordination between Miller and the State of California. Nor has plaintiff alleged what benefits the State of California or its courts derived from the alleged unconstitutional behavior. Instead, the sole basis of plaintiff's joint action arguments rest on conclusory allegations of conspiracy, which, as discussed below, are insufficient. *See Price*, 939 F.2d at 708 (conclusory allegations, unsupported

by facts, are insufficient to state a claim).

Accordingly, Miller and the State of California are not subject to suit under § 1983 and the claims against them should be dismissed with prejudice.

B. The Eleventh Amendment Bars Claims Against the State

The State of California and LAC argue that all or some of the claims against them are barred by the Eleventh Amendment. State MTD at 4-5; LAC MTD at 13.

The Eleventh Amendment provides that the "judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state." U.S. Const. amend. XI. The Eleventh Amendment bars federal jurisdiction over suits by individuals against a state and its instrumentalities, unless either the state unequivocally consents to waive its sovereign immunity or Congress abrogates it. *Will*, 491 U.S. at 66; *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250 (9th Cir. 1992). The Ninth Circuit has held that, under California law, "a county district attorney acts as a state official when deciding whether to prosecute an individual." *Weiner v. San Diego Cnty.*, 210 F.3d 1025, 1028 (9th Cir. 2000).

LAC is a defendant in this case based on plaintiff's allegations against both the LAC DA and the LAC Sheriff's Department. The Eleventh Amendment does not bar claims against the Sheriff's Department. But the claims against the State of California, and Claims Seven and Eight against LAC to the extent the allegations concern the DA's prosecutorial decisions, are barred by the Eleventh Amendment and should be dismissed with prejudice.[4]

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[4] Miller contends he, as a private citizen, cannot be held liable for conspiracy with public officials who are themselves immune. Miller MTD at 8-12. To the contrary, the Supreme Court stated that under allegations of a corrupt conspiracy between a private citizen and judge, "the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability." *Dennis v. Sparks*, 449 U.S.

C. **Plaintiff Fails to State a *Monell* Claim**

A local government entity such as LAC "may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Thus, LAC may not be held liable for the alleged actions of its officers or other employees unless "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers," or if the alleged constitutional deprivation was "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *See id.* at 690-91; *accord Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1443-44 (9th Cir. 1991).

Plaintiff alleges two claims against LAC. In Claim Seven, plaintiff alleges the Sheriff's Department and DA violated her due process rights by deciding not to prosecute Carmen Lopez, leading Carmen Lopez to testify against plaintiff in the restraining order and guardianship cases. Complaint at 33. In Claim Eight, plaintiff alleges all of the defendants violated her due process rights by deciding to prosecute her for violating the restraining order in November 2020. Complaint at 34-36.

Plaintiff does not allege in the Complaint that any of the purported violations

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24, 28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980). In other words, "an immune judge's private coconspirators do not enjoy derivative immunity." *Rankin v. Howard*, 633 F.2d 844, 850 (1980). Nevertheless, *Dennis* is inapplicable here because, as discussed below, plaintiff fails to make any plausible allegation that the State of California or LAC acted corruptly.

arose from LAC's policies, regulations, or customs. Nor does plaintiff identify any policy, regulation, or custom of LAC, the execution of which by LAC's agents or employees allegedly inflicted the injuries about which she is complaining. Indeed, in the opposition to the LAC MTD, plaintiff concedes LAC does not have official policies violating her constitutional rights. Opp. LAC MTD at 7. Instead, plaintiff contends, in conclusory fashion, that LAC has a custom of granting favors to individuals such as Miller. *Id.* at 7-8. But plaintiff has failed to allege any facts for the court to "draw the reasonable inference" that LAC has an informal governmental custom of granting such favors. The wholly conclusory allegations in the opposition that there was such a custom and it would be "naive to think otherwise" are insufficient to state a *Monell* claim against LAC. *See id.* at 8.

Accordingly, Claims Seven and Eight do not state a claim against LAC.

D. LAC Is Entitled to Prosecutorial Immunity

Section 1983 claims for monetary damages against prosecutors are barred by absolute prosecutorial immunity, provided the claimed violations are based on their activities as legal advocates in criminal proceedings. *Van de Kamp v. Goldstein*, 555 U.S. 335, 341-44, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009); *see Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (prosecutorial immunity applies to conduct "intimately associated with the judicial phase of the criminal process," protecting prosecutors when performing traditional activities related to the initiation and presentation of criminal prosecutions). "This immunity covers the knowing use of false testimony at trial, the suppression of exculpatory evidence, and malicious prosecution." *Milstein v. Cooley*, 257 F.3d 1004, 1008 (9th Cir. 2001). "Likewise, absolute immunity extends to prosecutorial acts that involve malice, bad faith, or conspiracy." *Ismail v. Cnty. of Orange*, 917 F. Supp. 2d 1060, 1068 (C.D. Cal. 2012). "To foreclose immunity upon allegations that . . . prosecutorial decisions were conditioned upon a conspiracy . . .

serves to defeat" the policies underlying prosecutorial immunity. *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986).

Here, the allegations concerning the DA center on its decisions not to prosecute Carmen Lopez, who testified against plaintiff, and to prosecute plaintiff for violating her restraining order. These prosecutorial decisions fall squarely within conduct protected by absolute prosecutorial immunity. *See Roe v. City and Cnty. of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997). As such, to the extent Claims Seven and Eight against LAC concern the DA's prosecutorial decisions, LAC is protected by prosecutorial immunity.

E. LAC Is Entitled to Qualified Immunity

LAC contends it is entitled to qualified immunity against Claims Seven and Eight because the claims do not adequately allege a constitutional violation. LAC MTD at 14-15.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citation omitted). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). When a qualified immunity defense is raised in a motion to dismiss, the court must decide "whether the facts alleged in the complaint, assumed to be true, yield the conclusion that the defendant is entitled to immunity." *Butler v. San Diego Dist. Attorney's Off.*, 370 F.3d 956, 963-64 (9th Cir. 2004).

When determining if a defendant is entitled to qualified immunity, the court must conduct a two-step test as pronounced by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled in*

part on other grounds by Pearson, 555 U.S. at 236. The prongs may be analyzed in the order selected by the court. *Pearson*, 555 U.S. at 236. To survive a claim of qualified immunity, a plaintiff must show that the official's actions violated a constitutional right, and that the right was "clearly established" at the time of the conduct at issue. *Nelson v. City of Davis*, 685 F.3d 867, 875 (9th Cir. 2012). If the official's actions did not violate a constitutional right, there is no constitutional violation and qualified immunity is not implicated. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 915 (9th Cir. 2012). If the official violates a constitutional right, but that right was not "clearly established," then the official is protected by qualified immunity. *Id.* "Only when an officer's conduct violates a clearly established constitutional right – when the officer should have known he was violating the Constitution – does he forfeit qualified immunity." *Id.*

Here, plaintiff fails to plead facts establishing a constitutional violation. Both Claims Seven and Eight concern a prosecutor's discretion to prosecute. In Claim Seven, plaintiff alleges the DA and Sheriff's Department conspired with Miller not to prosecute Carmen Lopez so that she would testify against plaintiff. Complaint at 33. In Claim Eight, plaintiff alleges that all defendants conspired to prosecute her for violating a restraining order. *Id.* at 34-36. The DA has "wide discretion in deciding whether or not to prosecute" *U.S. v. Pitts*, 908 F.2d 458, 460 (9th Cir. 1990). So long as the decision is not based on an unjustifiable standard such as race or religion, the prosecutor's decision whether or not to prosecute does not violate due process. *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978). Plaintiff does not allege the prosecutor's decisions were based on an unjustifiable standard. As for the Sheriff's Department, it has no decision making power over whether to prosecute.

Claims Seven and Eight against LAC should therefore also be dismissed on the ground that LAC has qualified immunity.

F. Plaintiff Fails to Allege a Conspiracy

Miller and the State of California contend plaintiff failed to allege a conspiracy claim. Miller MTD at 7-8; State MTD at 5-9.

"Conspiracy is not itself a constitutional tort under § 1983 . . . there must always be an underlying constitutional violation." *Lacey*, 693 F.3d at 935. As discussed above, a "[c]onspiracy in § 1983 actions is usually alleged by plaintiffs to draw in private parties who would otherwise not be susceptible to a § 1983 action because of the state action doctrine." *Id.* "The defining characteristic of a conspiracy is an agreement to commit wrongful acts." *Rebel Van Lines v. City of Compton*, 663 F. Supp. 786, 792 (C.D. Cal. 1987); *see also Caldeira v. Cnty. of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989) ("[T]o prove a section 1985 conspiracy between a private party and the government under section 1983, the plaintiff must show an agreement or 'meeting of the minds' by the defendants to violate his constitutional rights."). A plaintiff must also show the conspiring parties took some concerted action in furtherance of the agreement. *Gilbrook v. City of Westminster* 177 F.3d 839, 856-57 (9th Cir. 1999).

Here, plaintiff's allegations are conclusory and vague. The crux of plaintiff's conspiracy allegations is that she believes there was a conspiracy against her because the outcomes of the legal proceedings were all against her. But other than naming some of the judges who presided over her cases, plaintiff fails to allege any facts reflecting which State of California and LAC officials conspired with Miller to violate her constitutional rights, and plaintiff also fails to allege any facts supporting the existence of any agreement. *See Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000) ("a mere allegation of conspiracy without factual specificity is insufficient" to state a claim) (quotation marks and citations omitted); *Ivey*, 673 F.2d at 268. Moreover, the allegations do not meet the plausibility standard. The facts as alleged by plaintiff do not allow the court to draw a

reasonable inference that Miller conspired with LAC and State of California officials to violate her constitutional rights in multiple cases over a period of 10-14 years. To the contrary, plaintiff's allegations actually reflect the state courts had a proper basis for their decisions – specifically the fact that plaintiff violated a court order and moved her children to Mexico.

Accordingly, plaintiff fails to allege a conspiracy.

G. <u>All Claims Except Claim Eight Are Untimely</u>

Defendants argue the claims are untimely because the Complaint was not filed within the two-year limitation period for personal injury actions in California. LAC MTD at 15-16; Miller MTD at 12-14; State MTD at 9-10.

Section 1983 does not contain a statute of limitations. *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). As such, "[f]or actions under 42 U.S.C. § 1983, courts apply the forum state's statute of limitations for personal injury actions, along with the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law." *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); *Owens v. Okure*, 488 U.S. 235, 240-41, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). In California, the statute of limitations for personal injury claims is two years. Cal. Civ. Proc. Code § 335.1.

Under federal law, the statute of limitations accrues when a plaintiff knew or should have known of the injury which is the basis of the claim. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002); *see also Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000) ("Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues."). With the exception of Claim Eight, the claims all accrued well over two years ago.

Plaintiff neither disputes the two-year statute of limitations nor the fact that Claims One through Seven and Nine accrued from 2007-2015. Instead, plaintiff

asserts the statute of limitations does not bar her claims because the continuing violations doctrine applies. Opp. LAC MTD at 10-13; Opp. Miller MTD at 15-18; Opp. State MTD at 10-13. Construing plaintiff's arguments liberally, plaintiff alleges an ongoing conspiracy to commit serial violations of her constitutional rights, including the 2021 court proceedings concerning her alleged violation of a restraining order. Opp. LAC MTD at 10-13; Opp. Miller MTD at 15-18; Opp. State MTD at 10-13.

"The doctrine of continuing violations . . . is actually a conglomeration of several different ideas, the essence of which is that when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period," *Bird v. Dep't of Human Servs.*, 935 F.3d 738, 746 (9th Cir. 2019) (internal quotation marks and citations omitted). There were two recognized applications of the doctrine: "first, 'to a series of related acts, one or more of which falls within the limitations period,' and second, to 'the maintenance of a discriminatory system both before and during [the limitations] period.'" *Id.* (quoting *Gutowsky v. Cnty. of Placer*, 108 F.3d 256, 259 (9th Cir. 1997)). Following *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), however, "little remains of the continuing violations doctrine." *Bird*, 935 F.3d at 748. The Supreme Court found that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger*, 536 U.S. at 112. Thus, each claim must fall within the statute of limitations in order to be actionable. *See Bird*, 935 F.3d at 747 (citing *Nat'l R.R. Passenger*, 536 U.S. at 113-14).

Notwithstanding plaintiff's conclusory allegations of a continuing conspiracy, plaintiff actually alleges a number of discrete acts, each of which allegedly violate her constitutional rights at different times. Given the limited

scope of the continuous violation doctrine, the fact that the time-barred claims arguably may be related to the 2021 charges against plaintiff for her violation of the temporary restraining order (Claim Eight) does not save them. Each of these claims must be timely, and plaintiff does not contest that the limitation period has run for every claim except Claim Eight.

As such, all claims except Claim Eight are time-barred.

H. The Court Need Not Decide Whether Punitive Damages Are Adequately Pled

A plaintiff may be entitled to punitive damages in a § 1983 action "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983). The Ninth Circuit held, therefore, "malicious, wanton, or oppressive acts or omissions" are "proper predicates for punitive damages under § 1983." *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005).

District courts in this circuit are split as to whether a Rule 12(b)(6) motion is the proper mechanism to challenge a prayer for punitive damages. In *Whittlestone, Inc. v. Handi-Craft Company*, the defendant, pursuant to Rule 12(f), moved to strike portions of the complaint seeking lost profits and consequential damages. 618 F.3d 970, 973 (9th Cir. 2010). The Ninth Circuit held "Rule 12(f) [] does not authorize a district court to dismiss a claim for damages on the basis it is precluded as a matter of law." *Id.* at 975. Because the defendant was really seeking to have certain portions of the complaint dismissed or to obtain summary judgment, the actions were better suited under a Rule 12(b)(6) or 56 motion. *Id.* at 974. Since *Whittlestone*, district courts have been split as to whether a Rule 12(b)(6) motion is the proper vehicle for challenging the sufficiency of a damages claim. *See Mora v. City of Chula Vista*, 2021 WL 4220633, at *6 (S.D. Cal. Sept. 16, 2021) (citing

district court cases); *see, e.g., Sturm v. Rasmussen*, 2019 WL 626167, at *3-*4 (S.D. Cal. Feb. 14, 2019) (damages are a remedy and, therefore, a motion to dismiss a damage prayer is proper only where defendant contends the damages are precluded as a matter of law, and not for failure to state a claim); *Anaya v. Machines de Triage et Broyage*, 2019 WL 359421, at *3 (N.D. Cal. Jan. 29, 2019) (a challenge for a request for damages claim must be raised in a Rule 12(b)(6) motion).

Here, the court need not decide whether a Rule12(b)(6) motion is the proper vehicle to challenge the damages request because the Complaint should be dismissed with prejudice on multiple grounds.

I. Leave to Amend Would Be Futile

The court generally must give a pro se litigant leave to amend her complaint "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quotation marks and citations omitted). Thus, before a pro se civil rights complaint may be dismissed, the court must provide the plaintiff with a statement of the complaint's deficiencies. *Karim-Panahi*, 839 F.2d at 623-24. But where amendment of a pro se litigant's complaint would be futile, denial of leave to amend is appropriate. *See James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000).

Here, neither Miller nor the State of California is subject to suit under § 1983, the Eleventh Amendment bars claims against the State of California, prosecutorial immunity bars the DA specific claims against LAC, and all claims except for Claim Eight are time-barred. None of these defects may be cured by amendment. Although the statute of limitations has not expired for Claim Eight, amendment of this claim also would be futile because the DA has absolute immunity and the Sheriff's Department cannot initiate criminal prosecutions. Because leave to amend would be futile, dismissal without leave to amend is

warranted.

IV.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) granting defendants' motions to dismiss (docket nos. 7, 13, 18); and (3) directing that Judgment be entered dismissing the Complaint and this action with prejudice and without leave to amend.

DATED: January 27, 2022

SHERI PYM
United States Magistrate Judge

APPENDIX C

Additional material from this filing is available in the Clerk's Office.