

1 recording him during the same relevant time period. De La Cruz filed this state-law counterclaim
2 two years after the alleged recording happened; the statute of limitations for the claim is one year.
3 Plaintiff moves to dismiss it as untimely. Mot., ECF No. 39. De La Cruz opposes. Opp’n, ECF
4 No. 41. The court heard the motion on June 30, 2017. Mins, ECF No. 46. As discussed below,
5 the court DENIES plaintiff’s motion.

6 I. BACKGROUND

7 A. Parties’ Employment Relationship

8 Plaintiff studied criminal justice at Humphreys, a private college in Stockton,
9 California. First Am. Compl., ECF No. 33 ¶ 15. She briefly worked as an assistant to Jesse
10 De La Cruz, performing “general clerical and reception duties.” *Id.* ¶¶ 6, 17. Plaintiff alleges
11 De La Cruz sexually assaulted and harassed her while she worked for him. *Id.* ¶ 18. She brings
12 federal harassment and retaliation claims against Humphreys and a series of related state-law
13 claims against all three named defendants, as follows:

- 14 • Harassment and retaliation against Humphreys under Title VII of the federal Civil
15 Rights Act of 1964 (Title VII), 42 U.S.C. § 2000;
- 16 • Harassment and retaliation against all defendants under California’s Fair
17 Employment and Housing Act (FEHA), Cal. Gov’t Code § 12940 *et seq.*;
- 18 • Aiding, abetting, inciting, compelling, or coercing acts forbidden by Cal. Gov’t Code
19 § 12900 *et seq.*, against all defendants;
- 20 • Sexual Battery and False Imprisonment against De La Cruz; and
- 21 • Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional
22 Distress, and Negligence against all defendants.

23 *Id.* ¶¶ 35-101.

24 All named defendants answered the complaint. In his answer, filed May 10, 2017,
25 De La Cruz counterclaimed against plaintiff for civil penalties based on her allegedly illegal
26 recording. Counterclaim, ECF No. 34 at 11 (citing Cal. Penal Code § 637.2(a)). The claim is
27 brief, alleging only that, “In or around August 2015, [] Malaivanh intentionally, and without the
28 consent of [] De La Cruz, used an electronic recording device to record the confidential

1 communications of [] De La Cruz.” *Id.* at 11:4-7. The parties agree the applicable statute of
2 limitations for this counterclaim, which state law determines, is one year. Mot. at 2:21-23; Opp’n
3 at 2:11-13. They disagree on which tolling rules apply.

4 II. LEGAL STANDARDS

5 A party may move to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6)
6 as time barred when “the running of the statute [of limitations] is apparent on the face of the
7 complaint.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir.
8 2010) (citation omitted). Where a federal court’s jurisdiction originates in federal law, but federal law
9 does not create the rights at stake, the forum state’s statute of limitations applies in all but a narrow set
10 of “exceptional circumstances.” *In re Sterba*, 852 F.3d 1175, 1180 (9th Cir. 2017) (citing *Huynh v.*
11 *Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)).

12 Here, the parties agree state law dictates the statute of limitations, but they dispute
13 whether the court should apply California’s tolling rules rather than federal common law’s tolling
14 rules to determine the counterclaim’s timeliness. The answer may be dispositive because the state
15 rules toll the counterclaim’s statute of limitations from the moment Malaivanh filed her original
16 complaint regardless of the counterclaim’s factual relatedness to the complaint; federal law
17 permits tolling only if the counterclaim and original complaint overlap factually.

18 A. Choice of Law: What Tolling Rules Apply?

19 The parties dispute whether *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938),
20 governs the choice of law analysis here. Opp’n at 3-4; Reply at 2-3, ECF No. 44. It does. *Erie*
21 provides that when deciding state-law claims through an exercise of diversity jurisdiction, federal
22 courts must apply state substantive law and federal procedural law. *Erie R.R. Co.*, 304 U.S. at 78.
23 Statutes of limitations are substantive for *Erie* purposes. *Guar. Tr. Co. of N.Y. v. York*, 326 U.S.
24 99, 108-09 (1945). De La Cruz relies on *Erie* to argue state law determines his counterclaim’s
25 timeliness; Malaivanh argues federal common law governs this inquiry because *Erie* applies only
26 in diversity jurisdiction cases, not in cases where, as here, the court’s jurisdiction is predicated on
27 a federal question and the state-law claims are merely supplemental.

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1 Plaintiff's attempt to distinguish between supplemental and diversity jurisdiction
2 for the purpose of identifying the applicable law here is unavailing. The *Erie* analysis is the same
3 for state claims heard in federal court based on supplemental jurisdiction as it is for those based
4 on diversity jurisdiction. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)
5 (citing *Erie* and explaining "if [considerations of judicial economy, convenience and fairness] a
6 federal court should hesitate to exercise [supplemental] jurisdiction over state claims, even though
7 bound to apply state law to them"); see also *Doty v. Sewall*, 908 F.2d 1053, 1063 (1st Cir. 1990)
8 (citing *Gibbs* to explain, "it is well settled that the application of *Erie* is not limited to cases in
9 which federal jurisdiction is based on diversity of the parties, but is also extended to actions in
10 which federal jurisdiction is conferred on pendent grounds to state law claims."); see also *In re*
11 *Sterba*, 852 F.3d at 1180 (citing *Huynh*, 465 F.3d at 997, to explain even in federal question
12 cases, state law statute of limitations and tolling rules apply).

13 Indeed, *Erie*'s logic applies equally to supplemental jurisdiction cases: "[R]ights
14 enjoyed under local law should not vary because enforcement of those rights was sought in
15 federal court rather than in the state court." *Ragan v. Merchs. Transfer & Warehouse Co., Inc.*,
16 337 U.S. 530, 532 (1949). So, when a "cause of action is created by local law, the measure of it
17 is found only in local law. It carries the same burden and is subject to the same defenses in the
18 federal court as in the state court. It accrues and comes to an end when local law so declares."
19 *Id.* (citations omitted). In sum, *Erie* applies here, and state substantive law governs the tolling
20 question.

21 Plaintiff effectively concedes state law should govern the statute of limitations
22 inquiry but then argues federal law should govern the tolling of that state limitations period. If
23 the court applies a state statute of limitations, then it should also apply that state's tolling rules.
24 See *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 530 (9th Cir. 2011) ("Federal courts must
25 abide by a state's tolling rules, which are integrally related to statutes of limitations.") (citation
26 omitted); cf. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980) ("the policies behind *Erie*
27 and *Ragan* control the issue whether, in the absence of a federal rule directly on point, state
28 service requirements which are an integral part of the state statute of limitations should control in

1 an action based on state law which is filed in federal court”); *cf. also Ragan*, 337 U.S. at 532 (for
2 statute of limitations purposes, federal courts should apply state law that identifies the “start date”
3 of a lawsuit using the time of service, not the federal rule that sets the start date as when a
4 complaint is filed). At hearing, plaintiff’s counsel could cite no authority in which a court applied
5 a state statute of limitations but federal tolling rules.

6 De La Cruz’s state-law counterclaim is subject not only to California’s statutes of
7 limitation, as plaintiff concedes, but also California’s tolling laws.

8 B. Applying California’s Tolling Rules

9 When determining what California tolling rules require, this court is bound by the
10 decisions of the highest state court. *Harvey’s Wagon Wheel, Inc. v. Van Blitter*, 959 F.2d 153,
11 154 (9th Cir. 1992). If the state’s high court has not decided an issue, as here, the court must
12 predict how that court would resolve it. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d
13 176, 186 (9th Cir. 1989) (citations omitted).

14 A state appellate court recently has provided an apt description of the state tolling
15 law in deciding whether filing a lawsuit tolls all counterclaims, regardless of their factual relation
16 to the main action: “[The statute of limitations] is a bar to the defendant’s affirmative claim only
17 if the period has already run when the complaint is filed. The filing of the complaint suspends the
18 statute during the pendency of the action, and the defendant may set up his or her claim by
19 appropriate pleading at any time.” See *ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.*, 5
20 Cal. App. 5th 69, 84-85 (2016) (internal citations omitted), *as modified* (Nov. 30, 2016)²; *cf.*
21 *Ragan*, 337 U.S. at 532 (federal courts should apply state law tolling rules).

22 At this stage it is unclear if De La Cruz’s counterclaim relates factually to
23 plaintiff’s primary action. Therefore, it is necessary to consider whether the state tolling rule
24 applies only to both factually related or compulsory, and factually unrelated or permissive
25 counterclaims. As the court in *ZF Micro Devices* explained, amendments to the relevant state
26 rules trigger some confusion in this area. Before 1971, California’s statutory scheme assigned the
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28 ² The California Supreme Court declined to review this case on February 15, 2017.

1 label “crossclaim” to what the federal law labels “compulsory counterclaim,” meaning only those
2 clams that factually relate to the main cause of action. *See* Cal. Code Civ. Proc. §§ 438, 442; *ZF*
3 *Micro Devices*, 5 Cal. App. 5th at 85. In 1971, California’s statutory scheme broadened
4 “crossclaim” to include factually unrelated or permissive claims. *See* Cal. Law. Revision Com.,
5 Stats. 1971, c. 244, § 23, p. 378); *ZF Micro Devices*, 5 Cal. App. 5th at 85 (citing new 1971
6 provision, Cal. Civ. Proc. Code § 428.10(a)). Under the post-1971 statute, a defendant could
7 assert in a cross-complaint “any cause of action against any of the parties who filed the complaint
8 or cross-complaint against him [or her],” regardless of whether the claims were related to those
9 the suit was brought to advance. Cal. Code Civ. Proc. § 428.10(a) (1971). Case law referencing
10 the pre-1971 statute treats “crossclaims” and “compulsory counterclaims” synonymously and
11 does not explicitly acknowledge that since 1971 “crossclaim” refers to both factually-related and
12 factually-unrelated counterclaims. Applying pre-1971 case law to the post-1971 crossclaim
13 statute can lead to confusion, and error. *See ZF Micro Devices*, 5 Cal. App. 5th at 85 (detailing
14 this confusion).

15 The California Supreme Court has not answered whether the post-1971 tolling
16 rules apply to both compulsory and permissive counterclaims. Pre-1971 state appellate cases that
17 seemingly limited the tolling doctrine to compulsory cross-claims are no longer controlling,
18 because they cite the outdated statutory scheme and do not directly answer, either affirmatively or
19 negatively, the tolling doctrine’s applicability to permissive crossclaims. *See, e.g., Trinidad v.*
20 *Superior Court*, 29 Cal. App. 3d 857, 860 (1973); *see also Sidney v. Superior Court*, 198 Cal.
21 App. 3d 710, 713-14 (1988) (relying on *Trinidad*).

22 To assess the tolling doctrine’s scope, the court therefore looks to the state
23 Supreme Court’s generalized descriptions and explanations of the doctrine. For nearly a century,
24 the state Court has characterized the tolling doctrine as embracing all crossclaims by a defendant
25 against the plaintiff, without reference to their relatedness to the original complaint. As early as
26 1922, the Court had this to say, in describing the tolling doctrine broadly: “Ordinarily the statute
27 of limitations will bar a cross-complaint in the same fashion as if the defendant had brought an
28 independent action, unless the original complaint was filed before the statute of limitations on the

1 cross-complaint had elapsed.” *Whittier v. Visscher*, 189 Cal. 450, 456 (1922) (citations omitted);
2 *see also Perkins v. W. Coast Lumber Co.*, 120 Cal. 27, 28 (1989) (“the filing of the complaint
3 suspends the running of the statute of limitations” on a counterclaim not time-barred when the
4 action was commenced); *Jones v. Mortimer*, 28 Cal. 2d 627, 633 (1946) (“A counterclaim which
5 is not barred by the statute of limitations at the commencement of the action in which it is pleaded
6 does not become barred afterward during the pendency of the action, even though the statutory
7 period has run when the counterclaim is pleaded”); *Union Sugar Co. v. Hollister Estate Co.*, 3
8 Cal. 2d 740, 746 (1935) (“the filing of the complaint operated to suspend the running of the
9 statute of limitations as to any counterclaim existing at that date in favor of defendant”); *Liberty*
10 *Mut. Ins. Co. v. Fales*, 8 Cal. 3d 712, 715, n.4 (1973) (citing *Whittier* to apply the same broad
11 definition).

12 *ZF Micro Devices* remains the only post-1971 published state appellate decision to
13 directly address whether the tolling doctrine applies to permissive cross-complaints, answering
14 the question affirmatively. 5 Cal. App. 5th at 92 (tolling doctrine embraces all crossclaims by a
15 defendant against the plaintiff, regardless of their relatedness to the claims in the complaint). The
16 state Supreme Court declined to review it six months ago. *See id.* (review denied on Feb. 15,
17 2017).

18 If faced with the question today, the California Supreme Court would likely apply
19 the tolling doctrine broadly to related and unrelated crossclaims. The court need not analyze how
20 closely the counterclaim here relates to plaintiff’s claims in her complaint. Plaintiff filed her
21 complaint within the one-year statutory period, so De La Cruz’s counterclaim is timely.

22 **III. CONCLUSION**

23 The court DENIES plaintiff’s motion to dismiss De La Cruz’s counterclaim.
24 Plaintiff’s answer is due within twenty-one days.

25 This order resolves ECF No. 39.

26 IT IS SO ORDERED.

27 DATED: August 16, 2017.

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UNITED STATES DISTRICT JUDGE