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Attorneys for Defendants ADAM GARCIA,  
JAIME MCGUIRE (sued as Jamie McGuire),  
KENNETH HUNTER and GREG PARI

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION**

JUDY ANNE MIKOVITS,

Plaintiff,

v.

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

Defendants.

Case No. CV14-08909 SVW (PLA)

**ADAM GARCIA'S, JAIME  
MCGUIRE'S, KENNETH  
HUNTER'S AND GREG PARI'S  
NOTICE OF MOTION AND  
MOTION TO STRIKE  
PLAINTIFF'S PRAYER FOR  
PUNITIVE DAMAGES PURSUANT  
TO RULE 12(f); SUPPORTING  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION  
OR ROBERT M. DATO**

Date: April 13, 2015 [to be vacated]  
Time: 1:30 p.m. [to be vacated]  
Judge: Hon. Paul L. Abrams,  
Magistrate Judge

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that Defendants Adam Garcia, Jaime McGuire, Kenneth Hunter, and Greg Pari will and hereby do move the Court to strike Plaintiff Judy Anne Mikovits' prayer for punitive damages from the Complaint pursuant to Federal Rule of Civil Procedure 12(f).

1 This motion is made on the grounds that Plaintiff fails to allege facts to  
 2 support an award of punitive damages and the requested relief is not available as a  
 3 matter of law.

4 The Motion is based on this Notice, the Memorandum of Points and  
 5 Authorities, the Declaration of Robert M. Dato, all other pleadings on file with the  
 6 Court in this matter and on any oral argument that the Court may consider at the  
 7 hearing on the motion.

8 Counsel for Defendants attempted to meet and confer with Mikovits pursuant  
 9 to Local Rule 7-3 on February 11, 2015, but received no response. See Declaration  
 10 of Robert M. Dato.

11 Other defendants in this action have filed their own motions to dismiss. (See,  
 12 e.g., Dock. Nos. 48, 52, 55.) Magistrate Judge Paul L. Abrams has issued orders  
 13 setting forth the time within which to file opposition and reply papers, and  
 14 indicating that the Court will take the matter under submission without oral  
 15 argument. (See, e.g., Dock. Nos. 51, 54, 59.) Moving Defendants bring the present  
 16 motion and request the Court for a similar order.

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 18 DATED: February 18, 2015

BUCHALTER NEMER  
 A Professional Corporation

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 21 By: /s/ Robert M. Dato  
 Robert M. Dato  
 Sarah A. Syed

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 23 Attorneys for Defendants  
 ADAM GARCIA, JAIME MCGUIRE,  
 24 KENNETH HUNTER, and GREG PARI  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

As demonstrated in the concurrently filed motions to dismiss, Plaintiff's Complaint fails to allege any claim for relief against Defendants Adam Garcia, Jaime McGuire, Kenneth Hunter and Greg Pari (collectively, "Defendants"). Despite that the Complaint alleges no wrongful conduct by the Defendants, Plaintiff requests and prays for punitive damages against them. Even if Plaintiff could withstand the motions to dismiss, she certainly has not met her burden of pleading "clear and convincing" facts amounting to "oppression, fraud or malice" to support a punitive damages claim.

Therefore, the Court should strike Plaintiff's request for punitive damages from the Complaint.

### **II. PLAINTIFF IS NOT ENTITLED TO PUNITIVE DAMAGES**

#### **A. Legal Standard On Motion To Strike**

Under Federal Rule of Civil Procedure 12(f), the Court may strike from any pleading "any redundant, immaterial, impertinent, or scandalous matter." The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). The Court may also strike under Rule 12(f) a prayer for relief which is not available as a matter of law. *Tapley v. Lockwood Green Eng'rs*, 502 F.2d 559, 560 (8th Cir. 1974).

With respect to punitive damages claims, the trial court must evaluate the pleadings with the substantive evidentiary burden of clear and convincing evidence in mind: "Since [the plaintiff's] ultimate burden at trial will be to satisfy the jury by clear and convincing evidence that defendants were guilty of malice, oppression, or fraud ([Cal.] Civ. Code § 3294(a)), then a determination of whether a prima facie case exists will have to be judged by that same standard." *Looney v. Superior*

1 *Court*, 16 Cal.App.4th 521, 537 (1993); *Shade Foods, Inc. v. Innovative Products*  
 2 *Sales & Marketing, Inc.*, 78 Cal.App.4th 871, 892 (2000). If the plaintiff is  
 3 ultimately ever going to prevail on a punitive claim, she can only do so by clear and  
 4 convincing evidence. *Looney*, 16 Cal.App.4th at 537-540.

5 **B. Plaintiff Cannot Recover Punitive Damages**

6 The United States Supreme Court has held that the imposition of punitive  
 7 damages has constitutional implications requiring evidence of “reprehensibility”  
 8 equal to criminal conduct. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.  
 9 408, 417-418 (2003). As such, punitive damage claims are subject to heightened  
 10 scrutiny at every phase of the action from initial pleadings until final judgment.  
 11 *Id.* at 416-419; *BMW of North America v. Gore*, 517 U.S. 559, 574-575 (1996).  
 12 Where the alleged harm is merely financial, “[i]t should be presumed that a plaintiff  
 13 has been made whole by compensatory damages, so punitive damages should be  
 14 awarded only if the defendant’s culpability is so reprehensible to warrant the  
 15 imposition further sanctions to achieve punishment or deterrence.” *Id.* at 419;  
 16 *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal.4th 1159, 1182-1183 (2007)  
 17 (analyzing California and U.S. Supreme Court precedents imposing constitutional  
 18 limits on the pleading and proof of punitive damages claims).

19 In California, punitive damages are only available against defendants “guilty  
 20 of oppression, fraud, or malice.” Cal. Civ. Code § 3294(a); *see Greenwich Ins. Co.*  
 21 *v. Rodgers*, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010). A plaintiff alleging a  
 22 claim for punitive or exemplary damages under section Civil Code section 3294  
 23 cannot rest on mere averments of “malicious” and “oppressive” conduct by the  
 24 defendant. The plaintiff must instead plead **specific facts** which would show the  
 25 “malicious,” “oppressive,” or “fraudulent” conduct required to support such an  
 26 award. *Brousseau v. Jarrett*, 73 Cal.App.3d 864, 872 (1977).

27 California decisions interpreting Civil Code Section 3294 make clear that in  
 28 order to recover punitive damages, the act complained of must not only be

1 intentional, but also accompanied by aggravating circumstances amounting to  
 2 malice. *Mock v. Michigan Millers Mutual Ins. Co.*, 4 Cal.App.4th 306, 328 (1992).  
 3 The malice requirement implies an act conceived in a spirit of mischief or with  
 4 criminal indifference towards the obligations owed to others. *Taylor v. Superior*  
 5 *Court*, 24 Cal.3d 890, 894 (1979). Mere spite or ill will is not sufficient; and mere  
 6 negligence, even gross negligence, is not sufficient to justify an award of punitive  
 7 damages. *Ebaugh v. Rabkin*, 22 Cal.App.3d 891, 894-895 (1973).

8 In striking a punitive damages claim based upon a similarly conclusory  
 9 complaint as Plaintiff's here, the court in *Grieves v. Superior Court*, 157  
 10 Cal.App.3d 159, 166-167 (1984), explained that "[t]he mere allegation that an  
 11 intentional tort was committed is not sufficient to warrant an award of punitive  
 12 damages. Not only must there be circumstances of oppression, fraud or malice, but  
 13 facts must be alleged in the pleading to support such a claim."

14 Similarly, in *Brousseau, supra*, the court held that plaintiff's conclusory  
 15 allegations that the defendant acted "intentionally, willfully, fraudulently, and with  
 16 wanton reckless disregard for the possible injuries" were "patently insufficient" to  
 17 state a claim for punitive damages under Section 3294. *Brousseau, supra*, 73  
 18 Cal.App.3d at 872; see also *G.D. Searle & Co. v. Superior Court*, 49 Cal.App.3d  
 19 22, 28-29 (1975) (an exemplary award is not satisfied simply by characterizing  
 20 defendant's conduct as "reckless"); *Cohen v. Groman Mortuary*, 231 Cal.App.2d 1,  
 21 8 (1964) (allegations of "wanton" or "willful disregard" are nothing more than  
 22 legal conclusions); *Hilliard v. A.H. Robbins Co.*, 148 Cal.App.3d 374 (1983) (mere  
 23 allegation that an intentional tort was committed is not sufficient to warrant an  
 24 award of punitive damages).

25 Here, the Complaint does not state a claim for punitive damages against the  
 26 Defendants for at least three reasons.

27 First, the Complaint contains no facts that amount to "criminal  
 28 reprehensibility" or "oppression, fraud or malice."

1 Second, the Complaint does not even contain the typical “buzz” words often  
 2 found in complaints seeking punitive damages, such as “wanton,” “reckless” or  
 3 “malicious,” though even these conclusory buzz words would still be insufficient to  
 4 support a claim for punitive damages.

5 Third, the Complaint fails to even distinguish among the multiple Defendants  
 6 for purposes of determining punitive damages.

7 The Complaint merely demands punitive damages in the prayer for relief.  
 8 This is woefully insufficient to state a claim for punitive damages under California  
 9 or federal law.

# 10 V. CONCLUSION

11 Based on the foregoing, Defendants respectfully request that the Court grant  
 12 this motion and strike Plaintiff’s request for punitive damages from the Complaint.

13 DATED: March 3, 2015

BUCHALTER NEMER  
 A Professional Corporation

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 16 By: /s/ Robert M. Dato  
 Robert M. Dato  
 Sarah A. Syed

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 18 Attorneys for Defendants  
 ADAM GARCIA, JAIME MCGUIRE,  
 19 KENNETH HUNTER, and GREG PARI  
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**DECLARATION OF ROBERT M. DATO**

I, the undersigned Robert M. Dato, declare as follows:

1. I am an attorney at law admitted to this Court. I am employed by Buchalter Nemer, PC, counsel of record for defendants Adam Garcia, Jaime McGuire, Kenneth Hunter, and Greg Pari in this action. I have personal knowledge of the facts contained in this declaration and am competent to testify about them.

2. On February 11, 2015, I sent the following e-mail to Plaintiff Judy Mikovits at the e-mail address she listed on her Complaint, jamikovits@me.com:

“Ms. Mikovits:

“This email serves as meet and confer efforts with you pursuant to Central District Local Rule 7-3 as to defendants Garcia, McGuire, Hunter and Pari. We have reviewed your complaint and have found various issues that warrant dismissal of these defendants in this action. If these defendants are not dismissed from this action, they will move to dismiss your claims pursuant to Federal Rule of Civil Procedure 12(b)(2) and/or 12(b)(6) as follows:

“1. The Central District of California does not have personal jurisdiction over defendants Hunter or Pari. Neither Hunter nor Pari have the minimum contacts sufficient to establish general jurisdiction nor have they purposefully availed themselves of California for purposes of special jurisdiction.

“2. None of the complaint’s six counts identify Hunter or Pari in any wrongful conduct. In fact, other than being identified as party defendants, the only two allegations against them are that they were consulted regarding termination and a vague, unsupported assertion that they engaged in active conspiracy with other defendants. These two allegations are insufficient to state a claim.

“3. The statute of limitations bars all your claims against all of these defendants. With respect to a section 1983 claim, the state personal injury statute of limitations, which in California is two years, applies. All of the alleged



1 events occurred on November 18, 2011. The complaint was not filed until  
2 November 17, 2014, three years later, and one year too late.

3 “4. Neither Hunter nor Pari were acting under color of state law for  
4 purposes of a section 1983 claim. The allegations of a conspiracy are conclusory  
5 and do not satisfy pleading requirements. Even if Hunter and Pari were somehow  
6 acting under color of state law, they along with Garcia and McGuire are all  
7 protected by the qualified immunity doctrine. The complaint does not contain any  
8 allegations that Hunter or Pari violated any constitutional or statutory right or that  
9 no reasonable official would have believed that the purported conduct was lawful.  
10 As to Garcia and McGuire, probable cause, and even arguable probable cause, is a  
11 defense to liability for an alleged unlawful arrest.

12 “5. The complaint does not comply with the heightened pleading  
13 standards set forth in Rule 9 of the Federal Rules of Civil Procedure regarding  
14 allegations of fraud, particularly with respect to count IV, which is essentially a  
15 judicial deception claim.

16 “Finally, Defendants Garcia, McGuire, Hunter and Pari also intend to  
17 move to strike the complaint’s punitive damages claim as it is not pleaded with the  
18 requisite specificity demanded by both the United States and California Supreme  
19 Courts.

20 “If you have any questions regarding the above issues or would like to  
21 discuss these matters further, please let me know and we can arrange a time to  
22 discuss. In the alternative, if you intend to oppose these defendants’ motions to  
23 dismiss, you may so state in a return e-mail.”

24 3. As of the filing of my clients’ motions to dismiss and to strike, I have  
25 received no response to my e-mail.

26 I declare under penalty of perjury under the laws of the United States of  
27 America that the foregoing is true and correct.  
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1 Executed at Irvine, California on February 18, 2015.  
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3 /s/Robert M. Dato  
4 Robert M. Dato  
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**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is at BUCHALTER NEMER, A Professional Corporation, 18400 Von Karman Avenue, Suite 800, Irvine, California 92612-0514.

On the date set forth below, I served the foregoing document described as:

**ADAM GARCIA'S, JAIME MCGUIRE'S, KENNETH HUNTER'S AND GREG PARI'S NOTICE OF MOTION AND MOTION TO STRIKE PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES PURSUANT TO RULE 12(f); SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROBERT M. DATO**

on all other parties and/or their attorney(s) of record to this action as follows:

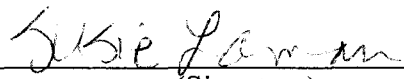
**SEE ATTACHED SERVICE LIST**

☒ **BY CM/ECF SYSTEM** I certify that I caused a copy of the above document to be served upon the following counsel via the court CM/ECF System on February 18, 2015.

☒ **BY MAIL** I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. The address(es) shown above is(are) the same as shown on the envelope. The envelope was placed for deposit in the United States Postal Service at Buchalter Nemer in Irvine, California on February 18, 2015. The envelope was sealed and placed for collection and mailing with first-class prepaid postage on this date following ordinary business practices.

☒ I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on February 18, 2015 at Irvine, California.

Susie Lamarr

  
(Signature)

**UNITED STATES DISTRICT COURT – LOS ANGELES DIVISION**  
**JUDY ANNE MIKOVITS vs. ADAM GARCIA, et al.**  
**CASE NO. CV14-08909 SVW (PLA)**

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