Michael R. Hugo, *Pro Hac Vice*
BBO # 243890
1 Catherine Rd,
Framingham, MA 01701 (617) 448-4888
Fax (617) 607-9655
mike@hugo-law.com

Robert J. Liskey
California State Bar Number 197287
1308 East Colorado Blvd., #232
Pasadena, CA 91106
(626) 319-5817
robliskey@liskeylawfirm.com

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUDY ANNE MIKOVITS, **Plaintiff** **v.** **ADAM GARCIA, et al,** Defendants.	**Case No. 2:14-cv-08909-SWV-PLA** **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS FILED BY ALL DEFENDANTS IN THIS ACTION OTHER THAN GEOFF DEAN**

Plaintiff Judy Anne Mikovits opposes the Motion to Dismiss filed by Defendants Harvey Whittemore, Annette Whittemore, Michael Hillerby, Carli Kinne, Vincent Lombardi, The Whittemore-Peterson Institute (WPI) and UNEVX, Inc. (each of the herein named defendants are collectively referred to as the "Whittemore Consortium"), and Adam Garcia, Jamie Maguire, ("UNR Defendants") and Richard Gammick ("Reno Consortium")on the following grounds.

1. INTRODUCTION

This is an action grounded in several distinct theories. It alleges, without limitation, violations of the plaintiff's civil rights, defamation, emotional harm, fraud and conspiracy. Within the civil rights claim are claims for false arrest, wrongful detainer, unnecessary delay in processing/releasing, abuse of process, excessive use of force – unreasonable arrest or other seizure and other claims relative to Dr. Mikovits being targeted for her refusal to remain silent

when she observed scientific misconduct at the WPI, and threatening the investment made by the Whittemores.

Prior to the events leading to this lawsuit, Dr. Mikovits was among the elite of our country's molecular virologists. Her work in chronic inflammation at the National Cancer Institute is the foundation of much of today's notorious cancer research. Her work on HIV with such luminaries as Dr. Frank Ruscetti is the cornerstone of today's HIV/AIDS treatment.

Her notoriety in the scientific community attracted the attention of the Whittemores, who were searching desperately for a cure for their daughter's illness. The Whittemores went on a mission to find the cure for their daughter.

A basic understanding of the Whittemores is crucial to understanding the underlying facts of this lawsuit.

Harvey Whittemore was an attorney and a lobbyist for the gaming industry, as well as the tobacco and alcohol industries in Nevada. These clients gave him the reputation of "one of the most powerful men in Nevada." [1] Mr. Whittemore was known as an aggressive and highly respected, yet feared member of the legal community in Reno. Because of his incredible power and seemingly unending wealth, he became a political force, which lead to his downfall and eventual incarceration in the US Bureau of Prisons, within which he is currently serving time within the State of California. According to the US DOJ press release issued in 2012, he was indicted on charges that he made unlawful campaign contributions to an elected member of Congress, caused false statements to be made to the Federal Election Commission (FEC) and lied to the FBI.[2] See Exhibit 1, Indictment. According to various sources including the Justice Department, Mr. Whittemore allegedly caused an employee to transmit $138,000 in contributions to Senator Harry Reid's campaign committee, the vast majority of which were conduit contributions that Whittemore had personally funded through various employees and family members as his conduit, in order to satisfy his pledge. Dr. Mikovits was one of the unwitting conduits for Mr. Whittemore's scheme, which he assured her, as a member of the Bar of the State of Nevada, was totally legal. See Exhibit 2, Check from Harvey Whittemore to Judy Mikovits in the amount of $10,000.00. The campaign committee then unknowingly filed

[1] Myers, Dennis (3 March 2005). "Public power, private man". *Reno News Review*.

[2] http://www.justice.gov/opa/pr/nevada-lobbyist-harvey-whittemore-indicted-making-unlawful-campaign-contributions-and-lying

false reports with the FEC stating that the conduits had made the contributions, when in fact Whittemore had made them.[3]

Upon his conviction on three of the four charges brought against him, Whittemore was sentenced to two years in prison and was also given a $100,000 fine, along with two years supervision after his incarceration and 100 hours community service.[4]

Never to act on a conventional scale, Mr. Whittemore decided to dabble in real estate. His idea of playing the real estate market consisted of developing a $30 Billion golf community just outside of Las Vegas. Not a simple golf course condo community, but a community of 160,000 homes, 12 golf courses and several casino hotel complexes on a 43,000 acre stretch of desert.[5] The project was fraught with regulatory issues.

Whittemore obtained land in the Coyote Springs Valley from a private owner but was unable to acquire all of the land or build on what he owned because of regulatory obstacles. The desert land included a sanctuary for the desert tortoise, an endangered species, and some of the adjacent land was designated a wilderness study area. A federal easement for utilities was also present, and the United States Environmental Protection Agency (EPA) would not allow building due to the presence of stream beds in the area.[6] Water rights agreements were also needed. It would take a monstrous effort to navigate the hallways of the various regulatory agencies, and there was much speculation that it was only Whittemore's strong ties to his U.S. Senator, that was able to steamroll so many roadblocks.[7] The United States Environmental Protection Agency initially refused to grant permits based on the projected environmental impact of destroying stream beds in the Coyote Springs Valley. In what EPA officials called an "unusual" move, Senator Harry Reid contacted the EPA administrator after a process including a phone call from his son Leif, Whittemore's personal attorney.[8] Soon thereafter, the EPA came to an agreement with Whittemore and also awarded Whittemore's company an environmental sensitivity award. The prize was accepted by Leif Reid. Senator Reid's office denied any

---

[3] *Id.*

[4] Sonner, Scott (29 May 2013). "Developer Guilty of Illegal Contributions to Reid". *Seattle Post Intelligencer*.

[5] Lipper, John; Jim Efstathiou, Jr. (26 February 2008). "Las Vegas Running Out of Water Means Dimming Los Angeles Lights". *Bloomberg;* Riley, Brendan (31 March 2008). "Developer seeks rural Nevada water for $30 billion project". *The San Francisco Chronicle*.

[6] Neubauer, Chuck; Richard T. Cooper (20 August 2006). "Desert Connections". *The Los Angeles Times* (Los Angeles, California).

[7] Harry's deal". *The Pittsburgh Tribune*. 25 September 2007.

[8] Neubauer, at Fn 6

wrongdoing, but acknowledged that Leif Reid should not have called his father on behalf of his employer.

Following the same grand scheme, rather than have his daughter seek medical treatment at a hospital or clinic specializing in virally mediated CFS, Mr. Whittemore founded a research laboratory and clinic at his and his wife's *alma mater*, University of Nevada – Reno (UNR), and endowed the Whittemore-Peterson Institute. He stocked the laboratories with the best minds he could entice, including the very virologist who was credited with discovering that there was a retrovirus found in rodents that appeared to be the – if not one of the – causes of CFS. He made Dr. Mikovits his Institute's first Research Director. As the Director, the plaintiff was responsible for establishing a translational research program aimed at identifying biomarkers and underlying causes of chronic fatigue syndrome and other debilitating neuro- immune diseases with overlapping symptoms such as fibromyalgia, chronic Lyme disease, atypical multiple sclerosis and autism spectrum disorder. As research director she was responsible for planning, establishing and directing the institute's scientific research program including the selection training and supervision of staff, writing, and managing grants and collaborating with other Scientific organizations. The WPI under her direction grew from a small foundation to an internationally recognized center for the study of neuro- immune diseases in which she obtained investigator initiated grant money from the NIH and Department of Defense and brought international attention to chronic fatigue syndrome as a physiological disease.

Dr. Mikovits' work was heralded in the media across the globe. The media had a feeding frenzy as she began to link her newly discovered XMRV to many of the world's most perplexing and insidious diseases. Mr. & Mrs. Whittemore's investment appeared to be working out. Their daughter was improving on a daily basis, and patients came great distances to participate in the seemingly successful studies. All was wonderful with one notable exception. In the late summer of 2011, Dr. Mikovits discovered that some original experiments in her work could not be replicated. This is usually the death knell to a scientific hypothesis.

Dr. Mikovits shared her concern with Lombardi, the post doctoral fellow responsible for those experiments and a scientist under her supervision. He could not account for the discrepancies in his numbers and Dr. Mikovits attempted to terminate him from the study. Her decision to terminate Lombardi was immediately over-ridden by Mrs. Whittemore. When she

confronted Mrs. Whittemore with the impropriety of protecting Lombardi, the person responsible for the statistical breakdown, Mrs. Whittemore instructed Dr. Mikovits to change the numbers in her assumptions. When Dr. Mikovits refused to participate in the Whittemore's fraud, she was summarily terminated.

Unbeknownst to Dr. Mikovits, the Whittemores and Lombardi were taking her research and misusing the grants that were awarded to her to commercialize and sell her work under the name of a different company, which they co-owned. The Whittemore greed got in the way of scientific integrity, and in this case, integrity had no chance of prevailing. Dr. Mikovits began to take steps to publicize the flaws in her scientific model, and the Whittemores, who were depending on untold wealth from the commercialization of her research in part to finance the Coyote Springs real estate development, and in part to repay the Seeno family, his partners in that venture, for funds that they claimed he had embezzled.

The Seenos examined the company books in August 2010 and accused Mr. Whittemore of embezzling money.[9] Whittemore said he lent another party $30 million, and it was reported that Whittemore had borrowed $10 million from Thomas Seeno. Whittemore met with the Seenos in Reno, where, according to Whittemore, Albert Seeno, Jr. threatened his life if he did not repay the Seenos.[10] On March 6, 2011, Whittemore reported to the Reno police that he was afraid of being killed; there was allegedly a phone call from Albert Seeno III in which he threatened Whittemore physically.[11] Reno police took recorded statements from Whittemore in March and November.

Dr. Mikovits discovered the scientific discrepancies and the fact that the Whittemores were profiting from her research at the same time that Whittemore was being threatened. It is respectfully suggested that the key to repaying the allegedly embezzled money was to be found in the potentially astronomical profits the XMRV testing would have generated. The news of the scientific uncertainty could not have come at a worse time for Mr. Whittemore, who was in fear for his life. She was terminated by Mrs. Whittemore, the President of the WPI, on

---

[9] Gafni, Matthias (March 3, 2012). "What went wrong in Nevada for the powerful East Bay builders". *Contra Costa Times* (Bay Area News Group). Retrieved March 17, 2012. Hosted by MercuryNews.com.

[10] *Id.*

[11] *Id.*

September 29, 2011, during this turbulent period for the Whittemores. See Exhibit 3, Letter of Termination.

During the exit process, Dr. Mikovits confronted Lombardi, whom she believed to be working research scientist one her grants at the WPI, but came to learn was working solely as the Director of Operations for UNEVX; Mr. & Mrs. Whittemore; Carli Kinne who was a Vice President and general counsel to WPI; and Michael Hillerby, an employee of WPI; and told them that she intended to report the misappropriation of the grant money which was awarded to her, and for which she was accountable, to the NIH and the Department of Defense. See Exhibit 4, Response by Dr, Mikovits dated October 1, 2011.

The Whittemore-related defendants fought her as if one of their lives depended upon it. What followed was an almost unimaginable series of events that demonstrated the desperation being felt by a man who was acting indestructible to Dr. Mikovits, but who was really trembling with fear that the Seeno family would make good on their alleged threats if he were to show any financial vulnerability. Because of her desire to keep her reputation as an ethical scientist, Dr. Mikovits retracted those data from scientific paper on XMRV and CFS. Having the scientific community invalidate the work his Institute had just invested in and which was helping his daughter cope with her illness would have been catastrophic. He became a desperate man, and had to stop Mikovits however he could.

This is where his political capital would have to be invested. Quickly, quietly and with the utmost of efficiency. The Judge who he approached was an old friend. Interestingly, as discussed below, that judge recused himself immediately after making various findings, rulings and orders against Mikovits and cited the fact that Whittemore was his major donor for his campaigns, *after the damage was done.*

Upon her termination Dr. Mikovits was accused of stealing a laptop and 19 laboratory notebooks which were in reality all her own property. She would have refused to return any of these items to WPI, inasmuch as they were her intellectual property, there was no claim to that property by WPI, and the laboratory notebooks represented the totality of her work including that while at NIH, which preceded her employment at WPI – except they were already in the

hands of WPI, as she left them in her desk before she knew she would be forever locked out of her office..

On November 4, 2011, WPI filed a lawsuit against Dr. Mikovits. In that suit they alleged breach of contract, trade secret misappropriation, conversion, breach of implied covenant of good faith and fair dealing, seeking specific performance and replevin against Dr. Mikovits. On November 7, 2011, WPI filed a motion for a TRO seeking the return of the computer and lab books. Judge Brent Adams entered a TRO against her. On November 9, 2011, service was made of the complaint and TRO. Dr. Mikovits was not home, she was away taking care of her elderly mother. She returned to her home on November 13, 2011, to find the summons and complaint taped to the wall on the porch of her house. The next morning she contacted Atty. Dennis Jones and hired him.

On November 18, 2011, while on her way to meet with her new attorney, she was arrested without a warrant at 1:00 PM by Ventura County and University of Nevada campus police in California. She was taken to the Ventura County Jail where she was held with no charges until November 22, 2011. There was a bail hold placed upon her, as she was considered a fugitive from justice. Nobody told her what the underlying charges were upon which the predicate charge of "fugitive" was based. *As* will be discussed below in the Argument section of this memorandum, her detention in jail was a clear violation of her civil rights. Even the bail bondsman reported to Dr. Mikovits' attorney that he had never seen anything happen like this before. On that same day her attorneys filed an opposition to the motion for preliminary injunction asserting that she did not have possession or control of any misappropriated property. In fact, when the Ventura County officers searched her house and took her family members' computers, tablets and phone, they did not find a single notebook. That is because all of her notebooks were held in her lab at WPI, under the control of Annette Whittemore, and Dr. Mikovits never got the opportunity to go back to her office after being fired, as she was not even on the premises at the time.

On November 22, 2011, there was a hearing on her civil case while she was in jail and under-represented. At this time she and her attorney had never spoken personally to one another so he could not take any steps to bind or make any representations for her in open court. In addition Dr. Mikovits did not have counsel retained yet for the criminal proceedings.

She eventually retained an attorney by the name of Scott Freeman, who is now a sitting judge in Reno. At the November 22, 2011, hearing, Dr. Mikovits was not present as she was in jail and while her attorney was clear that he could not speak for her until he met her, there was an in chambers "agreement" struck. She was ordered to return seven categories of documents.

On that same evening at about 7pm, Dr. Mikovits was released from custody in Ventura County California. At the time the judge in Ventura County ordered her release on bail, he also denied the opportunity to a reporter by the name of Jon Cohen from *Science Magazine*, to attain a mug shot or photograph of Dr. Mikovits. Cohen argued that a message needed to be sent to scientists so this doesn't happen again and urged the judge to allow him access to the mug shot so he could publish it in *Science*. The fact that a judge would deny access to a mug shot was a signal that there was some irregularity in the procedure. This request was denied if for no other reason than the fact that there was no mug shot because Dr. Mikovits was never properly charged and never properly processed before being held in a jail cell for five days by Sheriff Geoff Dean.

After some motion practice over the next month, on December 15, 2011, there was an order entered by the court denying Dr. Mikovits' emergency motion to stay and for reconsideration. Hearing on the show cause order occurred on December 19, 2011. At that hearing, her attorney told the court that any and all of the apparent missteps and misdeeds of the client were done on his advice. In addition, Dr. Mikovits refused to give up her personal Gmail as it would have put thousands of study participants at risk for confidentiality issues impacting bias, losing jobs and/or insurance. Mr. Freeman made an offer of proof that Dr. Mikovits was only following the advice of counsel and that if that advice was erroneous she could still fully comply with the preliminary injunction within days. Judge Adams struck her answer, and entered the default over the protest of Mr. Freeman.

On January 24, 2012, the judge entered the default judgment, stating that he was doing so for willful and wanton disregard of the orders of this court in a manner which flaunts and otherwise mocks and ignores the essential discovery of the very information which is the subject of this lawsuit. He issued a permanent injunction and scheduled a damages hearing for January 25, 2012. That hearing did not go forward. However, Mr. Whittemore has fraudulently asserted that Judge Adams assessed a $5.5 million dollar sanction on Dr. Mikovits, and she believed him, and filed for bankruptcy protection on September 4, 2012. On March 1, 2013,

Mr. & Mrs. Whittemore filed a fraudulent claim in the Bankruptcy Court asserting a judgment that was false, fraudulent and fictitious against Dr. Mikovits. This fraudulent act, committed on March 1, 2013, has triggered the statute of limitations as of that date, and has mooted all defenses by WPI, Mr. & Mrs. Whittemore, Vincent Lombardi, Carli Kinne, and Michael Hillerby, each of whom conspired to defraud Dr. Mikovits through their wrongful acts, as all of the within defendants were in an active conspiracy to defraud Dr. Mikovits, as laid out in the Amended Complaint.

On March 14, 2012, Judge Adams recused himself. Prior to going on record there was a long conversation between the judge and Jones the attorney for Dr. Mikovits . The judge began his commentary by stating that he had seen a television story about the Congressman who warned anyone who ever accepted a campaign contribution from Harvey Whittemore to donate that contribution immediately to charity within two weeks. He added that these statements presented a problem for him personally because he lives on his salary and he used the contributions from Harvey Whittemore, his family members and the affiliated Whittemore companies on his campaign as a judge. A discussion ensued in which the judge asked Dr. Mikovits' lawyers whether they were planning on filing a motion to disqualify. When they answered in the affirmative, he asked them not to file that motion immediately as he was going on vacation and he did not want to disturb his vacation with this issue. That was all mooted the next day when the judge issued a decision recusing himself.

To conclude this portion of the tragic recount, Dr. Mikovits has very recently been forced to liquidate all of her property and to turn over the proceeds to the WPI, by order of the US Bankruptcy Court, in March of 2014. She is unable to participate in federally funded studies as a scientist, and her harm is continuing to this day, and will continue until she has a chance to clear her name.

2. ARGUMENT

Preliminarily, the Plaintiff incorporates by reference herein each of the arguments and factual assertions raised in the other Oppositions to Motions to Dismiss filed in this case.

A. Conspiracy has been properly pled in the Amended Complaint, although additional facts are needed that can only be attained through discovery.

Under California law, the elements of a civil conspiracy are (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage

resulting. *Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1048, 74 Cal.Rptr.2d 550. Also under California law, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, 28 Cal.Rptr.2d 475, 869 P.2d 454.

The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582, 47 Cal.Rptr.2d 752. The requisite concurrence and knowledge 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 157 Cal.Rptr. 392, 598 P.2d 45. One court has called it a "legal commonplace" that the existence of a conspiracy may be inferred from circumstances, and that the conspiracy need not be the result of an express agreement but may rest upon tacit assent and acquiescence. *Holder v. Home Savings & Loan Assn. of Los Angeles* (1968) 267 Cal.App.2d 91, 108, 72 Cal.Rptr. 704.

The agreement between conspirators need not be proved by direct evidence, but may be shown by circumstantial evidence that tends to show a common intent. In fact, in the absence of a confession by one of the conspirators, it is usually very difficult to secure direct evidence of a conspiracy, so that in the usual case the ultimate fact of a conspiracy must be determined from those inferences naturally and properly to be drawn from those matters directly proved." *Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 163, 300 P.2d 915.

B. The Statute of Limitations has yet to be tolled, as the harm suffered by the Plaintiff is a continuing tort.

It is well settled that the statute of limitations accrues at the time of the injury. At common law, a "cause of action accrues `when [it] is complete with all of its elements' — those elements being wrongdoing, harm, and causation." *Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th

788, 797; Norgart *v. Upjohn Co.* (1999) 21 Cal.4th 383, 397; Code Civ. Proc., § 312. The statutes of limitation have been tempered over the years by various equitable alterations, through judicial interpretation. These revisions include the "discovery rule," *Norgart v. Upjohn Co.,* (1999) 21 Cal.4th 383, 397; accord, *Fox v. Ethicon Endo-Surgery, Inc.,* 35 Cal.4th 797, at 807equitable tolling for fraudulent concealment, Regents of University of California v. Superior Court (1999) 20 Cal.4th 509, 533.

In addition to the above judicial revisions to the statutes of limitation, there are two theories allowing an enlargement of the traditional window of those statutes. These are the "continuing violation doctrine," and the "continuous accrual theory." These are compared and contrasted in the recent California Supreme Court case of *Aryeh v. Cannon Bus. Solutions, Inc.,*(2013) 55 Cal. 4th1185, 1192. According to that case, "The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them. Citing *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 811-818; and *National Railroad Passenger Corporation v. Morgan* (2002) 536 U.S. 101, 118.

Aryeh goes on to define the theory of continuous accrual, as "a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period." Citing *Howard Jarvis Taxpayers Assn. v. City of La Habra, supra,* 25 Cal.4th 809, at pp. 818-822.

In this case, the within defendants began a chain of events that started in September of 2011 and has continued without differentiation or separation to the present day. When Dr. Mikovits discovered the errant statistical analysis and confronted Dr. Lombardi with her concerns, he conspired with each of the other members of the Whittemore Consortium to withhold this information from the scientific community, the NIH and the Department of Defense, in order to continue the revenue stream to WPI and the Whittemore family. As part of this wrongful act, they formulated a plan to terminate and destroy the reputation of Dr. Mikovits before she could do harm to their project. That chain of events has continued to the present day, as does the harm to Dr. Mikovits' reputation and ability to earn a wage.

The actions taken by the Whittemore Consortium to falsify information given to the various law enforcement agencies that have been joined in this action are continuing to harm

Dr. Mikovits, as to this day she is continuing to be deprived of her lab notebooks which were seized by Mrs. Whittemore back in 2011. The fact that the Whittemore Consortium still has the only path to that information is consistent with the plaintiff's position that the final act of the torts alleged in the complaint has not yet occurred and therefore, the harm has not fully accrued and the tort is one continuous injury and not a series of wrongs or injuries as discussed in *Aryeh*. Rather, there has been a continuing violation of Dr. Mikovits' rights and until the notebooks are returned and until the name of Judy Mikovits is cleared of any wrongdoing in the scientific community, the limitation period cannot be seen as accruing. "The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them." *Aryeh, supra,* at 1192.

The Whittemore Consortium challenges the case further by invoking the State's Statute of Limitations tied to the Civil Rights allegations, 42 U.S.C. § 1983. This challenge, too, is without merit. Civil Rights claims are the classic seat of the theories of continuing violations allowing exceptions from the statute of limitations defense. It has been held in the civil rights arena, that ongoing civil rights violations do not begin until the violation has ended. *Virginia Hospital Association v. Baliles,* 868 F. 2d 653 (4th Cir. 1989). Until the notebooks and reputation are restored to Dr. Mikovits, the violation of her civil rights cannot end. *Id* at 663.

More specifically, in the context of this case the actions of the Whittemore Consortium were conspiratorial. The allegations brought by Mr. Whittemore to the various law enforcement defendants were contrived in order to stop Dr. Mikovits from going public with her concerns about the validity of the work done at WPI and UNEVX. When reporting the notebooks stolen, one or more of the Whittemore Consortium misrepresented that fact, as they well knew that the notebooks that represented the life work and that were the property of Dr. Mikovits remained in their exclusive control and custody. They lied to the UNR police about the whereabouts of those notebooks, putting the interstate civil rights violations into motion. Mrs. Whittemore knew that the laptop that she was accusing Dr. Mikovits of stealing was actually a gift that the Whittemores gave to Dr. Mikovits as a reward for her tireless work. They lied to the UNR police about this, also.

While the arrest may have occurred on November 18, 2011, the seizure of her property by UNR and the various law enforcement defendants that occurred roughly simultaneously,

continues and has not been broken temporally since that day. Similarly, the destruction of Dr. Mikovits' reputation and the harm has not subsided, and is getting worse, if anything. Because of these false charges, Dr. Mikovits is still barred from carrying out any government sponsored research to this day.

This conspiracy among the Whittemore Consortium is not limited to this group of defendants. The extent of the conspiratorial acts is a fact question for the jury to resolve after discovery is conducted and the truth is revealed as to how deeply in the pockets of Mr. Whittemore the District Attorney, the UNR and its police force, and the other defendants were.

C. **The Conspiracy Is Alleged And Clear In The Complaint and Forms a Sufficient Basis To Sustain An Action Under §1983.**

The F.R. Civ. P. provides that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Rule 1.

The allegations, including those pertaining to Ms. Kinne submitting a falsified document to the Bankruptcy Court are not so vague that the defendants could not frame a response in their Motion to Dismiss. The allegations in the complaint are more than sufficient to frame the case against the Whittemore Consortium.

Kinne conspired with the rest of the Whittemore Consortium in its plan to abuse the legal process and to trigger the events that lead to this lawsuit. This case is clearly all about abuse of process as a legal theory.

To establish a cause of action for abuse of process, there must be two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a willful act in a wrongful manner." *Coleman v. Gulf Insurance Group,* (1986) 41 Cal.3d 782, 792 . The Restatement Second of Torts, section 682 provides: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

The gist of an abuse of process claim is the misuse of the power of the court: It is an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose. Some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used

to obtain an unjustifiable collateral advantage. *Younger v. Solomon*, (1974) 38 Cal.App.3d 289, 297. "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive." *Ion Equipment Corp. v. Nelson*, (1980) 110 Cal.App.3d 868, 876. "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. *Trear v. Sills,* (1999) 69 Cal.App.4th 1341, 1359.

In this case, the initiation of the criminal proceedings by the Whittemore Consortium constituted an abuse of process and is actionable. The unlawful and unnecessary delay in releasing Dr. Mikovits is only a part of the basis of liability against UNR police Chief Adam Garcia, and UNR Detective Jaime McGuire for orchestrating the entire plot and giving false information to Geoff Dean, Ventura County Sheriff, upon which Dean illegally seized and detained Dr. Mikovits. This will be elaborated upon, *infra.* The fact is that the Sheriff and his deputies knew that there was something unusual going on, and on the third day of her still-unexplained incarceration, two deputies came to her cell and apologized to her for what was happening! Sheriff Dean turned his back on what was happening to Dr. Mikovits and should have enquired further, having no paperwork to verify the fugitive "charge."

What followed the initiation of the criminal process was even more egregious. Dr. Mikovits was held in a jail cell for five days with no charges ever filed against her, and no hearing before a magistrate of judge, as she is entitled to under the U.S. Constitution and the laws of California.

Under California law, an unnecessary delay in processing a prisoner is actionable in tort. Through the many fraudulent acts and misrepresentations made by the Whittemore Consortium to several law enforcement agencies and judicial tribunals, the total abandonment of proper procedure was fostered. Penal Code section 834 provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person." The definition of arrest anticipates that there will be a seizure "authorized by law." Furthermore, Penal Code section 825(a) provides, in part: "[T]he defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays." The arrest at 1:00 PM on a Friday was timed to place her in jail through the weekend. There can be no

other rationale. Had she been properly processed with photos, fingerprints and the usual jailhouse intake, she would not have been able to appear before a judge as there would not have been time. The fact is that all these years later, Dr. Mikovits has still not been processed for entry to jail! So, there was no reason that she could not have appeared before the judge on the afternoon of her arrest, as the Ventura County lockup facility where she was taken was in the same building as the court and the Judge.

Government Code section 820.4 provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment." Clearly the acts of the non-party Ventura County Police Department constitute false arrest and false imprisonment.

As for the wrongful acts of the Sheriff, Geoff Dean, the delay in arraignment is equally inexplicable. "The critical factor is the necessity for any delay in arraignment. These provisions do not authorize a two-day detention in all cases. Instead, 'a limit [is placed] upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute' and of the Constitution." (*People v. Thompson,* (1980) 27 Cal.3d 303, 329. "'[F]alse arrest' and 'false imprisonment' are not separate torts. False arrest is but one way of committing a false imprisonment, and they are distinguishable only in terminology." (*Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 673.

In determining which delays are necessary, the Appellate Court has rejected arguments that the delay was 'not unusual' or made 'the work of the police and the district attorney easier.' As the Court of Appeal recently observed, '[t]here is no authority to delay for the purpose of investigating the case. Subject to obvious health considerations ***the only permissible delay between the time of arrest and bringing the accused before a magistrate is the time necessary: to complete the arrest; to book the accused; to transport the accused to court***; or the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.' " *Youngblood v. Gates* (1988) 200 Cal.App.3d 1302, 1319. The facts of this case: that there was no time spent in making the arrest, booking Dr. Mikovits, or transporting her to court in the same building, make out a very compelling *prima facie* case of unnecessary delay. The California Supreme Court has defined situations such as this as the

basis of liability. "[W]here the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay." *Dragna v. White* (1955) 45 Cal.2d 469, 473.

D. District Attorney Richard Gammick Was Complicit And Participated In The Conspiracy By Pressuring Certain Witnesses To Not Get Involved Through Threats And Coercion.

Dr. Mikovits' attorney, Dennis Jones was attempting to pull together sworn exculpatory evidence in order to clear her name. He prepared an affidavit for execution by one of Dr. Mikovits' lab assistants named Max Pfost. When Attorney Jones contacted Pfost for his signature, his request was refused. Mr. Pfost was the person that first told Dr. Mikovits that her office had been locked down and that it had been ransacked, immediately after she learned she was fired. Mr. Pfost was one of the only persons – other than the Whittemore Consortium - who knew that Dr. Mikovits' notebooks were locked in her desk. All of her lab assistants knew where they were locked up, and all knew of the "hiding place" for the key. Other than the Whittemore Consortium and Dr. Mikovits, Mr. Pfost was the only person that knew that the notebooks were still in possession of the Whittemore Consortium and out of Dr. Mikovits' office when they lied to the Reno law enforcement and UNR employees claiming that Mikovits had them. Because of this unique knowledge, Mr. Pfost was subjected to such a high level of harassment by D.A. Gammick, that he fled the country! The D.A. forced him to have periodic telephone contact and threatened that if he fell out of touch, he would be arrested and jailed! For the D.A. to claim that he is not a co-conspirator is totally disingenuous.

The arguments pertaining to Abuse of Process and conspiracy enumerated above are hereby incorporated by reference as to all defendants.

By participating in the conspiracy enumerated above, Mr. Gammick has availed himself of the jurisdiction of this Court. He knew or should have known of the interstate nature of this case, the arrest in California, and the police officers that traveled from UNR were sent under his direction and with his blessing. You cannot fire a missile across the border without having to account for your deed wherever that missile lands.

Finally, the retired D.A.'s claim of immunity is abrogated by his participation in a willful scheme to deprive a citizen of their civil rights. He cannot harass witnesses, participate in a fraudulent enterprise such as he did, cause an innocent person to be incarcerated without

charges and in a false manner, and claim somehow that he should be entitled to protections typically afforded prosecutors who make a bad judgment call, or act in a negligent manner with no malice aforethought. The argument above is incorporated herein by reference. See, Gov't Code §820.4.

E. Certain Acts by Sheriff Geoff Dean bear out the allegation of conspiracy and joint liability.

The arguments pertaining to Abuse of Process and conspiracy enumerated above are hereby incorporated by reference as to this defendant.

When she was taken to jail, Dr. Mikovits was never properly processed as an incoming inmate. She does not recall being fingerprinted and was not photographed, and was not properly informed of her charges, was denied counsel, refused the right to contact an attorney, and while it was early enough in the day to go in front of a magistrate of a judge, the Sheriff made no attempt to secure her release before the impending weekend. When asked why she was there, she was told that she was a fugitive from justice. When she attempted to ask how that could be, inasmuch as she has never had any contact with law enforcement and never committed a crime, she was told that she is a fugitive and cannot be bailed out with no further discussion allowed. Properly

To add to the absurdity of the situation, her husband was told the same things as she was. Furthermore, on the Monday following the weekend the Sheriff continued to refuse to allow any contact with the outside world beyond her husband, and took no steps to get her in front of any judicial tribunal. On Tuesday, she appeared before a Magistrate, and her bail was set at $100,000.00 and she was returned to the jail until approximately 8:00 PM that night, at which time she was released as mysteriously as she was apprehended. As of today, she still has not been charged with any underlying offense, upon which the predicate offense of "fugitive" could be based. There is still no logical explanation for the misfeasance.

Several calls ensued while Dr. Mikovits was incarcerated. Her husband and one of her collaborators, Dr. Frank Ruscetti, received several phone calls from Mr. Whittemore. He told them both that he can get Dr. Mikovits released from Sheriff Dean's Jail in Ventura County if she would sign an "apology" letter – in which she would confess to stealing the notebooks which were: 1.) hers, and 2.) already in the possession of Mrs. Whittemore and not in Dr. Mikovits' possession! Of course she wouldn't sign such a false statement. The other condition

was that Mr. Whittemore wanted access to some scientific samples from Dr. Lipkin's study, which Dr. Mikovits could access. He wanted those samples because three days earlier, the NIH pulled a $350,000 grant from WPI, and the Whittemores were feeling that their daughter's treatment may be compromised and that her CFS would relapse.

If Sheriff Dean was not a co-conspirator with the other parties, how could Mr. Whittemore have been the holder of the keys to the jail house from a state away?

Recent evidence obtained since the Amended Complaint was filed has demonstrated that there was, in fact, improper communication with law enforcement in Reno, Nevada and Sheriff Dean, pointing to a conspiracy. In recent discussions between counsel, it has become apparent that Sheriff Dean is claiming that the allegations surrounding the improper booking are baseless and in which counsel for Dean has threatened to bring perjury charges against the plaintiff for a certain incorrect statement made in her affidavit, and for certain other comments that have been misconstrued by Dean and his counsel. In support of his contentions, Dean has supplied at least one forged document. In order to demonstrate that the Plaintiff was photographed as a part of her booking process, he submitted a booking sheet with a mug shot appearing on it. This would tend to disprove the assertion of the Plaintiff – if it were not an obvious forgery. The photograph that appears on the sheet and is dated November 18, 2011, was actually ***not even taken until at least 10 days after the date the Sheriff says it was***, and was taken in Reno, Nevada. Unless Dean had been in contact with Defendant Gammick and/or the UNR defendants in an improper and conspiratorial manner, there is no other explanation as to how he used a photo that didn't even exist yet! See Exhibit 5, Booking Sheet and Exhibit 6 mug shot taken in Reno on November 28, 2011 for comparison.

Because of the conspiratorial nature of his actions, Sheriff Dean and his Deputies cannot invoke a statute of limitations defense any more than any of the other co-conspirators, and his Motion to Dismiss must be DENIED.

E. The Actions Of Defendants Garcia And McGuire Are Also Part Of The Conspiratorial Activities, They are Not subject to Absolute or Qualified Immunity, And Their Motion To Dismiss Must Also Be Denied.

All above arguments are specifically incorporated by reference herein, and the following is added as to defendants Garcia and McGuire (referred to as UNR Campus Police), the two UNR campus police officers.

The UNR campus police officers fabricated a phony search warrant with the assistance of other co-conspirators, most likely either Mr. Whittemore, one or more of his law office employees, and/or Attorney Carli W. Kinne. What makes this document invalid are several items. First and foremost, it is fraught with untruths, and is in bad faith.

Even more pressing was the fact that it was a facially invalid Search Warrant. In California a valid search warrant must meet four requirements: (1) the warrant must be filed in good faith by a law enforcement officer; (2) the warrant must be based on reliable information showing probable cause to search; (3) the warrant must be issued by a neutral and detached magistrate; and (4) the warrant must state specifically the place to be searched and the items to be seized. See also, *Mincey v. Arizona,* 437 US 385 (1978).

The search warrant executed in this case was fatally flawed. See Exhibit 8, "Warrant." A cursory examination shows that on page 1 of 10, there is no name of an affiant, or signature on page 4 of 10, there is no signature or even name of the issuing judge. The same is true of the undated and untimed Seizure order at the bottom of that page, which were supposed to be filled in by a presiding Judge of the Superior Court.

In addition to the above, discovery is needed to flesh out the participation of the UNR defendants in the transference of the photograph discussed above.

The federal rule of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Saucier v. Katz*, 533 U.S. 194, 202, 206 (2001) quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Further, under the qualified immunity doctrine, the constitutional right the officer allegedly violated must have been "clearly established" in a "particularized … sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("the unlawfulness must be apparent"). "Clearly established" means the "existing precedent must have placed the statutory or constitutional question *beyond debate*." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149, 1159 (2011).

Qualified immunity is usually decided at the summary judgment stage of the litigation in order to allow the plaintiff to conduct a factual discovery on disputed claims. Defendants routinely object to any sort of discovery by the plaintiff before the qualified immunity issue is resolved. In some cases, limited discovery may be needed on the qualified immunity issue to

properly establish the contours of the right in question. A court may defer its decision on the immunity question, allow limited discovery to achieve the requisite factual development and decide the issue on summary judgment. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Supreme Court noted that qualified immunity should serve to protect public officials from "the costs of 'broad-reaching' discovery," but also recognized that "limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity." *Crawford-El*, 523 U.S. at 593 n.14.

However, if the face of the complaint suggests the officer's conduct is arguably lawful, a Rule 12(b)(6) motion to dismiss based on qualified immunity at the outset of the case is appropriate. Such is clearly not the case here. The law enforcement officers seeking to hide behind this doctrine knew well that they were intentionally misrepresenting the facts and that no crime had been perpetrated by Dr. Mikovits. They knew that they were pursuing a fugitive from justice warrant with no underlying charge as they crossed the border and entered California for purposes of effecting what they knew was a politically motivated vendetta, rather than justice. They knew that they were violating clearly established constitutional rights of an innocent party when they conspired to commit this hoax.

For this reason, the claim of qualified immunity must fail. Should the Court be inclined to honor this doctrine, the Plaintiff is asking for limited discovery to go forward so she can build her proofs.

This is also chargeable against co-conspirator Dean. For the reasons set forth above, the Motion to Dismiss by defendants Dean, Hunter, Garcia and McGuire must be DENIED.

F. The Motion To Dismiss Filed By Defendant Hunter Must Be Denied

All arguments and points set forth above are hereby incorporated by reference as to defendant Hunter.

Hunter is a professor at UNR and participated in the Scientific Advisory Board of WPI. As such, he was in a position to avert the activities of the other Nevada based defendants. He could have chosen to team up with Dr. Mikovits and those who were concerned by the newly discovered breaches of scientific integrity when Dr. Mikovits first questioned the validity of their work. Instead, this defendant decided to turn a deaf ear on the crucial issues, and joined the conspiracy to cover up the questionable findings, and to continue to move forward with what amounted to a fraud on the FDA/NIH and the DoD.

Had he objected to what was transpiring, he would have incurred the wrath of the Whittemores, but he showed that he lacked courage to do that which was right and that he was willing to throw Dr. Mikovits under the bus. His credentials were utilized to attempt to keep the flow of government grants coming, and to lend some measure of credibility to the commercial venture.

For the reasons set forth above, the Motion to Dismiss filed by defendant Hunter must be DENIED.

3. CONCLUSION

For the reasons set forth hereinabove, the within Motions to Dismiss should be DENIED. In the alternative, the plaintiff, Judy Mikovits should be given an opportunity to conduct discovery in order to prove the allegations deemed wanting by the Court.

Dated: October 19, 2015

The Plaintiff,
By: ____/s/ Michael R. Hugo_____
Michael R. Hugo, *Pro Hac Vice*
BBO # 243890
1 Catherine Rd,
Framingham, MA 01701 (617) 448-4888
Fax (617) 607-9655
mike@hugo-law.com

By: ____/s/ Robert S. Liskey_____
Robert J. Liskey
California State Bar Number 197287
1308 East Colorado Blvd., #232
Pasadena, CA 91106
(626) 319-5817
robliskey@liskeylawfirm.com