

1 BUCHALTER NEMER
A Professional Corporation
2 Robert M. Dato (SBN: 110408)
Email: rdato@buchalter.com
3 Sarah A. Syed (SBN: 253534)
Email: ssyed@buchalter.com
4 18400 Von Karman Avenue, Suite 800
Irvine, CA 92612-0514
5 Telephone: (949) 760-1121
Fax: (949) 720-0182

6
7 Attorneys for Defendants ADAM GARCIA,
JAIME MCGUIRE (sued as Jamie McGuire),
and KENNETH HUNTER
8

9
10 **UNITED STATES DISTRICT COURT**
CENTRAL DISTRICT OF CALIFORNIA
11 **LOS ANGELES DIVISION**

12 JUDY ANNE MIKOVITS,

13 Plaintiff,

14 v.

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

21 Defendants.
22

Case No. CV14-08909 SVW (PLA)

**ADAM GARCIA'S, JAMIE
MCGUIRE'S AND KENNETH
HUNTER'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**

Date: February 22, 2016
Time: 1:30 p.m.
Courtroom 6

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

24 **PLEASE TAKE NOTICE** that, on February 22, 2016, at 1:30 p.m. in Courtroom
25 6 of the above entitled court, defendants Adam Garcia, Jaime McGuire (sued as
26 "Jamie McGuire"), and Kenneth Hunter (collectively "the UNR defendants") will
27 and hereby do move the Court to strike Plaintiff Judy Anne Mikovits' prayer for
28 punitive damages (Prayer for Relief, ¶ 6) from the second amended complaint

1 pursuant to Federal Rule of Civil Procedure 12(f) on the ground that Mikovits fails
 2 to allege facts to support an award of punitive damages and the requested relief is
 3 not available as a matter of law.

4 The motion is based on this notice, the supporting memorandum of points
 5 and authorities, the declaration of Robert M. Dato, all other pleadings on file with
 6 the Court in this matter and on any oral argument that the Court may consider at the
 7 hearing on the motion. Counsel for defendants Garcia, McGuire, and Hunter sent a
 8 “meet and confer” e-mail to Mikovits’ counsel pursuant to Local Rule 7-3 on
 9 December 22, 2015, but received no response. See Declaration of Robert M. Dato.

10
 11 DATED: December 29, 2015

BUCHALTER NEMER
 A Professional Corporation

12
 13
 14 By: /s/ Robert M. Dato
 Robert M. Dato
 Sarah A. Syed

15
 16 Attorneys for Defendants
 ADAM GARCIA, JAIME MCGUIRE, and
 17 KENNETH HUNTER
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants Adam Garcia, Jaime McGuire (sued as “Jamie McGuire”), and Kenneth Hunter (collectively “the UNR defendants”) moved to strike the punitive damages allegations in plaintiff Judy Anne Mikovits’ original complaint, and this Court granted the motion giving Mikovits leave to amend. This Court did not rule on the merits of the UNR defendants’ motion to strike the punitive damages prayer of the first amended complaint.

The second amended complaint (SAC), however, does not cure the deficiencies of the original or first amended complaints. As demonstrated in the concurrently filed motion to dismiss, the SAC fails to allege any claim for relief against the Defendants. Despite that the SAC alleges no wrongful conduct by the Defendants, Mikovits requests and prays for punitive damages against them.

Even if Mikovits 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. Even after having had the opportunity to amend her complaint and provide sufficient allegations to support an award of punitive damages, Mikovits has failed to do so.

Therefore, the Court should strike Mikovits’ request for punitive damages (Prayer for Relief, ¶ 6) from the SAC.

II. MIKOVITS 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

1 as a matter of law. *Tapley v. Lockwood Green Eng'rs*, 502 F.2d 559, 560 (8th Cir.
2 1974).

3 With respect to punitive damages claims, the trial court must evaluate the
4 pleadings with the substantive evidentiary burden of clear and convincing evidence
5 in mind: "Since [the plaintiff's] ultimate burden at trial will be to satisfy the jury
6 by clear and convincing evidence that defendants were guilty of malice, oppression,
7 or fraud ([Cal.] Civ. Code § 3294(a)), then a determination of whether a prima facie
8 case exists will have to be judged by that same standard." *Looney v. Superior*
9 *Court*, 16 Cal.App.4th 521, 537 (1993); *Shade Foods, Inc. v. Innovative Products*
10 *Sales & Marketing, Inc.*, 78 Cal.App.4th 871, 892 (2000). If the plaintiff is
11 ultimately ever going to prevail on a punitive claim, she can only do so by clear and
12 convincing evidence. *Looney*, 16 Cal.App.4th at 537-540.

13 **B. Mikovits Cannot Recover Punitive Damages**

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

27 In California, punitive damages are only available against defendants "guilty
28 of oppression, fraud, or malice." Cal. Civ. Code § 3294(a); *see Greenwich Ins. Co.*

1 *v. Rodgers*, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010). A plaintiff alleging a
 2 claim for punitive or exemplary damages under section Civil Code section 3294
 3 cannot rest on mere averments of “malicious” and “oppressive” conduct by the
 4 defendant. The plaintiff must instead plead **specific facts** which would show the
 5 “malicious,” “oppressive,” or “fraudulent” conduct required to support such an
 6 award. *Brousseau v. Jarrett*, 73 Cal.App.3d 864, 872 (1977).

7 California decisions interpreting Civil Code Section 3294 make clear that in
 8 order to recover punitive damages, the act complained of must not only be
 9 intentional, but also accompanied by aggravating circumstances amounting to
 10 malice. *Mock v. Michigan Millers Mutual Ins. Co.*, 4 Cal.App.4th 306, 328 (1992).
 11 The malice requirement implies an act conceived in a spirit of mischief or with
 12 criminal indifference towards the obligations owed to others. *Taylor v. Superior*
 13 *Court*, 24 Cal.3d 890, 894 (1979). Mere spite or ill will is not sufficient; and mere
 14 negligence, even gross negligence, is not sufficient to justify an award of punitive
 15 damages. *Ebaugh v. Rabkin*, 22 Cal.App.3d 891, 894-895 (1973).

16 In striking a punitive damages claim based upon a similarly conclusory
 17 complaint as Mikovits’ here, the court in *Grieves v. Superior Court*, 157
 18 Cal.App.3d 159, 166-167 (1984), explained that “[t]he mere allegation that an
 19 intentional tort was committed is not sufficient to warrant an award of punitive
 20 damages. Not only must there be circumstances of oppression, fraud or malice, but
 21 facts must be alleged in the pleading to support such a claim.”

22 Similarly, in *Brousseau, supra*, the court held that plaintiff’s conclusory
 23 allegations that the defendant acted “intentionally, willfully, fraudulently, and with
 24 wanton reckless disregard for the possible injuries” were “patently insufficient” to
 25 state a claim for punitive damages under Section 3294. *Brousseau, supra*, 73
 26 Cal.App.3d at 872; see also *G.D. Searle & Co. v. Superior Court*, 49 Cal.App.3d
 27 22, 28-29 (1975) (an exemplary award is not satisfied simply by characterizing
 28 defendant’s conduct as “reckless”); *Cohen v. Groman Mortuary*, 231 Cal.App.2d 1,

1 8 (1964) (allegations of “wanton” or “willful disregard” are nothing more than
 2 legal conclusions); *Hilliard v. A.H. Robbins Co.*, 148 Cal.App.3d 374 (1983) (mere
 3 allegation that an intentional tort was committed is not sufficient to warrant an
 4 award of punitive damages).

5 Here, the SAC does not state a claim for punitive damages against the
 6 Defendants for at least three reasons.

7 First, the SAC contains no facts that amount to “criminal reprehensibility” or
 8 “oppression, fraud or malice.”

9 Second, the one paragraph in the SAC (para. 173)¹ which contains an
 10 allegation that the UNR defendants acted intentionally and with malice is
 11 conclusory and insufficient to support a claim for punitive damages.

12 Third, the SAC fails to even distinguish among the multiple defendants for
 13 purposes of determining punitive damages.

14 The SAC merely demands punitive damages in the prayer for relief without
 15 having met the heightened pleading requirements to support an award for punitive
 16 damages. This is woefully insufficient to state a claim for punitive damages under
 17 California or federal law.

18
 19
 20
 21
 22
 23
 24
 25
 26 ¹ Paragraph 162 within the abuse of process claim also contains an allegation that
 27 certain defendants (“HW, AW, WPI and UNEVX”) acted intentionally and with
 28 malice. The UNR defendants however, are nowhere identified in this claim. To the
 extent the UNR defendants are included in this claim, paragraph 162 is still
 insufficient to support a claim of punitive damage because the allegation is simply a
 legal conclusion devoid of any facts demonstrating malice, oppression or fraud.

1 **V. CONCLUSION**

2 Based on the foregoing, Defendants respectfully request that the Court grant
3 this motion and strike Mikovits' request for punitive damages from the Complaint.

4 DATED: December 29, 2015

BUCHALTER NEMER
A Professional Corporation

6
7 By: /s/ Robert M. Dato

Robert M. Dato
Sarah A. Syed

8
9 Attorneys for Defendants
ADAM GARCIA, JAIME MCGUIRE, and
10 KENNETH HUNTER
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 (sued as "Jamie McGuire"), and Kenneth Hunter in this action. I have personal knowledge of the facts contained in this declaration and am competent to testify about them.

2. On December 22, 2015, I sent the following e-mail to Mike Hugo and Rob Liskey, counsel for Plaintiff Judy Mikovits:

Gentlemen:

This email serves as meet and confer efforts with you pursuant to Central District Local Rule 7-3 as to defendants Garcia, McGuire, and Hunter.

I sent a similar e-mail to both of you regarding the first amended complaint. And although the second amended complaint has eliminated much of the hyperbole of the prior versions, there are still various issues that warrant dismissal of these defendants in this action. All of these issues are also discussed in the motions to dismiss the original and first amended complaints. If these defendants are not dismissed from this action, they will move to dismiss your client's second amended complaint 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 defendant Hunter. He does not have, nor does the second amended complaint allege, the minimum contacts sufficient to establish general jurisdiction nor has he purposefully availed himself of California for purposes of special jurisdiction. His declarations in support of the motion to dismiss the original and first amended

1 complaints were not contradicted in any way.

2 2. The statute of limitations bars at least all your client's
3 federal claims against these defendants. With respect to a section
4 1983 claim (counts 1-5, liberally construed), the state personal injury
5 statute of limitations, which in California is two years, applies. All of
6 the alleged events occurred on November 18, 2011. The complaint
7 was not filed until November 17, 2014, three years later, and one year
8 after the statute of limitations expired. Although we realize you have
9 pleaded a "continuing violation" theory, none of the authorities relied
10 on in opposition to the motion to dismiss the first amended complaint
11 is on point. If there are additional authorities not cited in that
12 opposition, please forward them to me; I am unaware of any such
13 authority. I am also unaware of authority supporting the theory of a
14 "duty to retract." If there were such authority, there would never be a
15 statute of limitations on a cause of action such as defamation.

16 3. Defendant Hunter was not acting under color of state law
17 for purposes of a section 1983 claim. The allegations of a conspiracy
18 are still conclusory and do not satisfy pleading requirements. Even if
19 Hunter was somehow acting under color of state law, he along with
20 Garcia and McGuire are all protected by the qualified immunity
21 doctrine. The amended complaint does not contain any allegations
22 that Hunter violated any constitutional or statutory right or that no
23 reasonable official would have believed that the purported conduct
24 was lawful. As to Garcia and McGuire, probable cause, and even
25 arguable probable cause, is a defense to liability for an alleged
26 unlawful arrest.

27 4. The amended complaint still does not comply with the
28 heightened pleading standards set forth in Rule 9 of the Federal Rules

1 of Civil Procedure regarding allegations of fraud (count 8).

2 Finally, these defendants also intend to move once again to
3 strike the complaint's punitive damages claim (no. 6 in the prayer) as
4 it is not pleaded with the requisite specificity demanded by both the
5 United States and California Supreme Courts.

6 If you would like to discuss these matters further, please let me
7 know and we can arrange a time to discuss. In the alternative, if (as I
8 suspect) you intend to oppose these defendants' motion to dismiss and
9 to strike, you may so state in a return e-mail.

10 3. As of the filing of my clients' motions to dismiss and to strike, I have
11 received no response to my e-mail.

12 I declare under penalty of perjury under the laws of the United States of
13 America that the foregoing is true and correct.

14 Executed at Irvine, California on December 29, 2015.

15
16 /s/Robert M. Dato
17 Robert M. Dato
18
19
20
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2
3 I am employed in the County of Orange, State of California. I am over the
4 age of 18 and not a party to the within action. My business address is at
5 BUCHALTER NEMER, A Professional Corporation, 18400 Von Karman Avenue,
6 Suite 800, Irvine, California 92612-0514.

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

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

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

14 **SEE ATTACHED SERVICE LIST**

15 ☒ **BY CM/ECF SYSTEM** I certify that I caused a copy of the above
16 document to be served upon the following counsel via the court CM/ECF System
17 on December 29, 2015

18 ☐ **BY MAIL** I am readily familiar with the business' practice for collection
19 and processing of correspondence for mailing with the United States Postal Service.
20 The address(es) shown above is(are) the same as shown on the envelope. The
21 envelope was placed for deposit in the United States Postal Service at Buchalter
22 Nemer in Irvine, California on December 29, 2015. The envelope was sealed and
23 placed for collection and mailing with first-class prepaid postage on this date
24 following ordinary business practices.

25 ☒ I declare that I am employed in the office of a member of the bar of this court
26 at whose direction the service was made. Executed on December 29, 2015 at
27 Irvine, California.

28
Susie Lamarr


(Signature)

SERVICE LIST**JUDY ANNE MIKOVITS v. ADAM GARCIA, et al.
USDC CASE NO. CV14-08909 SVW (PLA)**

Robert J. Liskey The Liskey Law Firm 1308 E. Colorado Blvd., Suite 232 Pasadena, CA 91106	Attorney for Plaintiff Judy Anne Mikovits Email: robliskey@liskeylawfirm.com
Michael R Hugo, <i>Pro Hac Vice</i> Law Office of Hugo and Associates LLC 1 Catherine Road Framingham, MA 01701	Attorney for Plaintiff Judy Anne Mikovits Email: mike@hugo-law.com
Mary Margaret Kandaras Washoe County District Attorney P. O. Box 11130 Reno, NV 89520-0027	Attorneys for Defendant Richard Gammick Emails: mkandaras@da.washoecounty.us tgalli@da.washoecounty.us, cmendoza@da.washoecounty.us
Brian Warner Hagen Whittemore Law Firm 9432 Double R Boulevard Reno, NV 89501	Attorneys for Defendants F. Harvey Whittemore, Annette F. Whittemore, Carli West Kinne, Whittemore-Peterson Institute, UNEVX, Inc., Michael Hillerby and Vincent Lombardi Email: bwhagen@gmail.com
James S. Eicher, Jr. Paul B. Beach Lawrence Beach Allen & Choi, PC 100 W. Broadway, Suite 1200 Glendale, CA 91210	Attorneys for Defendant Geoff Dean Emails: jeicher@lbaclaw.com pbeach@lbaclaw.com