

For the Record of the Board of prison commissioners meeting on Tuesday May 19, 2015.

From: <nvmemorialfund@aol.com>
To: <helpdesk@doc.nv.gov>, <msblackwell@doc.nv.gov>
Date: 5/15/2015 1:22 PM
Subject: For the Record of the Board of prison commissioners meeting on Tuesday May 19, 2015.
Attachments: 2014 APPEAL STATEMENT IN THE SUPREME COURT OF THE STATE OF NEVADA DECEMBER 30, 2014.docx;
 Department_of_Aging_Services_regarding_Fred_Huston_2007.jpg;
 DAG_withheld_exculpatory_evidence_from_IN_CAMERA_EX_3811.jpg

Dear Board of Prison Commissioners:

As an Advocate for the Inmates and the Innocent I will be placing this email/letter along with the attachments for the record of the May 19, 2015 Board of Prison Commissioners meeting.

1. December 30, 2014 Nevada Supreme Court Opening Statement on Appeal for the record. Attached
2. December 2, 2005 Letter from the Attorney General Office exonerating Brown, Klein from the Fred Huston Investigation that DAG William Geddes withheld from Mr. Klein's federal case Klein v Helling Case No. 3:05-cv-n-0390-LRH-VPC. This became a part of the Settlement Agreement Tonja Brown made with the State of Nevada in the wrongful death suit of Nolan Klein that the State of Nevada Breached the terms of the Settlement Agreement that was set for trial on April 6, & 8, 2015. Minutes of the December 5, 2011 pg 1.
<http://www.doc.nv.gov/sites/doc/files/pdf/boc/2011-12-05/Attachment%202.pdf> . Attached
3. January 17, 2007 Klein v Helling Case No. 3:05-cv-n-0390-LRH-VPC Reports and Recommendations presented to the Board of Prison Commissioners meeting held on May 17, 2012 the Board of Prison Commissioners have yet to this document placed on the record.
https://www.docketalarm.com/cases/Nevada_District_Court/3--05-cv-00390/Nolan_Klein_VS_Don_Helling_et_al./66/. Will be hand delivered at the meeting.
4. Affidavit from Fred Huston pg 3 Minutes of December 5, 2011
<http://www.doc.nv.gov/sites/doc/files/pdf/boc/2011-12-05/Attachment%202.pdf>
5. Unsigned letter from Fred Huston pg 6 Minutes of December 5, 2011 Board of Prison Commissioners meeting.
6. December 30, 2011 Letter from Ms. Carol Sala, to Tonja Brown regarding the 2007 Fred Huston investigations. I contacted Ms. Sala that I had discovered during the wrongful death suit of Nolan Klein that they had conducted an investigation into me and I wanted to know I was never contacted regarding me being under investigation I was still on Mr. Huston's bank account? I informed Ms. Sala that in 2005 I informed Mr. Huston that he didn't sign the letter revoking the Trust and the bank would not remove my name so the Trust was still in effect until he wrote his Will. NDOC would know this because they read Mr. Huston's mail I was told by Ms. Sala she would look into it and get back to me.

I was contacted by Ms. Sala and was told that they had found the information I was wanting the answers too. I was told that according to their records they did attempt to contact me by way of NDOC, but, when they contacted NDOC to get the contact information on me so that they could speak to me as to why I was still listed on Mr. Huston's bank account, they were told by NDOC that they did not have any contact information on me, nor did they know my whereabouts. So the investigation was listed as unsubstantiated. I told her NDOC knew exactly how to contact me, because, they knew when I come to visit my brother, they had my phone number, address and email address. They just didn't want you to contact me.

I asked for a letter regarding what she discovered. She said she would have to speak to her attorney first before

she could write a letter. After receiving this letter from her I contacted her regarding her letter because what we discussed in our phone conversation was not included in the letter. I was told that she spoke with her attorney and she was limited to what she could put in the letter.

7. Attorney General Motion to Dismiss Page 10 DAG Hickman acknowledges it's not a crime for the Attorney General Office to withhold exculpatory/evidence from the Plaintiff's federal cases and the federal court.

As an Advocate for the Inmates and the Innocent I will strongly recommend that the plaintiffs, whether the Plaintiff is an inmate, family member, or private citizen in cases do not settle with the state because the state tends to breach the terms of the settlement agreement made with the state. I base this on the facts that the attorney general's has been withholding evidence, even exculpatory that is favorable to the Plaintiff's cases when the state is the defendant. The state will violate ones constitutional Rights in order to win. This is a pattern and a practice of the Attorney General's Office.

With the recent shooting and death of Carlos Perez, 28, and Andrew Arevalo, 24, the inmate who was injured I have valid concerns that the NDOC and the Attorney General's Office will not be forthcoming with all of the evidence. I have seen the state of Nevada withhold evidence and several plaintiff's cases and the courts have issued orders with an adverse outcome, because of the evidence being withheld from them and the Plaintiff's.

It should be pointed out that in my December 20, 2014 Appeal Opening Statement it describes that I discovered the Attorney General's office withheld exculpatory evidence from the Plaintiffs federal case. This became a part of my Settlement Agreement that they breached.

On Appeal I Argue that Judge James Wilson decision was wrong because it was the Attorney General's Office that was untimely first. Their Motion to dismiss and their Reply was untimely first. They were late by several days to file their Request for submission and I was the only one to be cited for being untimely. The Judge should have denied the Attorney General for being untimely and not I.

If the Nevada Supreme Court upholds the lower courts decision, I will file an Appeal to the Federal Court based on Pro Se Litigants are held to a higher standard than attorney's or the Attorney General's Office and that is discrimination.

With that being said, can Plaintiff's really trust the integrity of the state of Nevada to turn over the evidence? I think not. Therefore, as an Advocate I will place this information on the record for those who are considering to Settle their lawsuits rather than to take their case to trial. They should be made ware that the State of Nevada very well could breach the terms of the Settlement Agreements with them. Like in my case.

Tonja Brown
2907 Lukens Lane
Carson City, NV 89706
775-882-2744

1 of 3 AG's Motion to Dismiss, For the Record May 19, 2015 Board of Prison Commissioners meeting

From: <nvmemorialfund@aol.com>
To: <helpdesk@doc.nv.gov>, <msblackwell@doc.nv.gov>
Date: 5/15/2015 1:15 PM
Subject: 1 of 3 AG's Motion to Dismiss, For the Record May 19, 2015 Board of Prison Commissioners meeting

To be placed on the Record of the May 19, 2015 Board of Prison Commissioners meeting

7. Attorney General Motion to Dismiss Page 10 DAG Hickman acknowledges it's not a crime for the Attorney General Office to withhold exculpatory/evidence from the Plaintiff's federal cases and the federal court

Tonja Brown
2907 Lukens Lane
Carson City, NV 89706

2 of 3 AG's Motion to dismiss. For the Record of the Board of Prison Commissioners meeting May 19, 2015

From: <nvmemorialfund@aol.com>

To: <helpdesk@doc.nv.gov>, <msblackwell@doc.nv.gov>

Date: 5/15/2015 1:18 PM

Subject: : 2 of 3 AG's Motion to dismiss. For the Record of the Board of Prison Commissioners meeting May 19, 2015

1 CATHERINE CORTEZ MASTO
Nevada Attorney General
2 BETH HICKMAN
Senior Deputy Attorney General
3 Nevada Bar No. 11596
100 North Carson Street
4 Carson City, Nevada 89701
Tel: 775-684-1251

5 Attorneys for Defendants
6 State of Nevada ex rel. Nevada Department of Corrections,
7 Greg Cox, Howard Skolnik, Donald Helling, James Benedetti,
Pamela DelPorto, Catherine Cortez Masto, William Geddes,
8 Kara Krause, Brian Sandoval and Ross Miller

9 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR CARSON CITY**

11
12 **TONJA BROWN, as an Individual, and**
13 **TONJA BROWN, as the Administrator of the**
Estate of Nolan Edward Klein,
14 **Plaintiffs,**

Case No. 13 TRT 00054 1B
Dept. No. 2

15 vs.

16 **STATE OF NEVADA ex rel. NEVADA**
17 **DEPARTMENT OF CORRECTIONS, et al.,**
18 **Defendants.**

19 **DEFENDANTS' MOTION TO DISMISS**

20 Defendants State of Nevada ex rel. Nevada Department of Corrections, Greg Cox,
21 Howard Skolnik, Donald Helling, James Benedetti, Pamela Del Porto, Catherine Cortez
22 Masto, William Geddes, Kara Krause, Brian Sandoval and Ross Miller, by and through
23 counsel, Catherine Cortez Masto, Nevada Attorney General, and Beth Hickman, Senior
24 Deputy Attorney General, move to dismiss Plaintiffs' complaint for failure to state a claim on
25 which relief can be granted. This motion is brought pursuant to Nevada Rule of Civil
26 Procedure (NRCP) 12(b)(5) and NRCP 8(a) and is based on the following memorandum of
27 points and authorities.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of the Case

Plaintiff Tonya Brown ("Brown"), has filed an action seeking monetary damages for personal injury arising from various alleged wrongdoings by Defendants against both her and her deceased brother, former Nevada Department of Corrections (NDOC) inmate Nolan Klein ("Klein"). Complaint at 5. In the Complaint, Brown details her theory that Klein was innocent of the crime for which he was convicted. *Id.* at 7-9, 28-29, 32-34. She argues that he should have and would have been released from prison had he not died in September 2009, despite his life sentence, due to ineffective assistance of counsel in the underlying criminal case, the withholding of exculpatory evidence, the tampering of evidence, and the discovery of new evidence.¹ *Id.* The allegations relating to Klein's underlying criminal conviction are irrelevant to the matters over which this Court has jurisdiction in this civil action.

The causes of action asserted in the Complaint arise from two distinct factual bases. First, Brown asserts personal injury claims, both personally and as the administrator of the Estate of Nolan Klein, arising from an alleged computer glitch that placed false charges in Klein's prison records on June 5, 2007. *Id.* at 2-39. Second, Brown asserts tort and contract claims, again both personally and as the administrator of the Estate of Nolan Klein, arising from conduct relating to the alleged concealment of a letter from an Attorney General's Office investigator to a NDOC investigator dated December 2, 2005, which she alleges exculpated her and Klein from any alleged wrongdoing relating to an investigation into whether they exploited an elderly inmate named Huston. *Id.*

Brown seeks damages on behalf of the Estate of Nolan Klein for the "loss to Mr. Klein's Estate from any civil actions brought against the State of Nevada for past and or future civil litigation [for] monies he would have won and been able to receive if Defendants' slanderous and libel [sic] statements had not been a factor to the decision making of the Courts." *Id.* at 16-17, 19. She argues that, in addition to speculatively recovering monetary damages in civil

¹ These allegations of wrongdoing relating to Klein's criminal conviction are not alleged to have occurred by the named Defendants in this action.

1 suits relating to his conditions of confinement in prison, Mr. Klein would have been released if
2 not for the conduct of Defendants and would have sued "for the wrongful conviction and the
3 21 years he spent incarcerated for a crime he did not commit." *Id.* at 29. Brown appears to
4 seek damages for this hypothetical lawsuit on behalf of the estate through the present suit.²
5 *Id.* Further, Brown seeks damages on behalf of the estate because, "Once Mr. Klein had
6 been released he would have begun working for the law offices of Hager and Hearne with
7 starting salary of \$50,000, plus bonuses and benefits. Mr. Klein would have then supported
8 Brown so that she would no longer have to work and he would have paid all of her bills." *Id.* at
9 30. The claims asserted on behalf of the estate fail to state a claim, are barred by the statute
10 of limitations, are claims for which Defendants have immunity, and assert only speculative
11 damages. Dismissal of all claims asserted on behalf of the estate is warranted.

12 On her own behalf, Brown seeks damages for the "unnecessary and wonton infliction of
13 pain and physical injury resulting in her suffering from uncontrollable high blood pressure,
14 [a]nxiety, depression, sleepless nights, anger, the loss of her brother and having to watch and
15 listen to Mr. Klein go through the pain and suffering, breaking the promise she made to him
16 that he wouldn't die in prison for a crime he didn't commit, and our mother who no longer
17 wanted to live after the loss of her innocent son, her [a]dvocacy where in Brown's [sic] has
18 had an adverse effect to help others because of Defendant's [sic] actions." *Id.* at 15, 17.
19 Brown also seeks damages for the loss of "probable future companionship, society and
20 comfort and financial support" relating to the death of Klein. *Id.* at 23. The claims asserted on
21 behalf of Brown fail to state a claim, are barred by the statute of limitations, and are claims for
22 which Defendants have immunity. Dismissal of all claims asserted on behalf of Brown is
23 warranted.

24 ///

25 ///

26 _____
27 ² This is an example of a flaw that exists throughout this complaint. Brown seeks monetary damages, but fails
28 to link the damages to the fault of any of the named Defendants. Certainly damages for a hypothetical wrongful
conviction would not fall on prison authorities but rather those involved in the underlying allegedly wrongful
conviction. Throughout the complaint, Brown seeks damages for pain and suffering and other economic losses
that are not and can not be linked to alleged wrongdoing by the Defendants in this civil action.

1 **II. Legal Standard**

2 NRCP 12(b)(5) permits a complaint to be dismissed for failure to state a claim on which
3 relief can be granted. A motion to dismiss for failure to state a claim should not be granted
4 unless it appears "beyond a doubt that the plaintiff could prove no set of facts which, if
5 accepted by the trier of fact, would entitle him to relief." *Vacation Village v. Hitachi America*,
6 110 Nev. 431, 434, 874 P.2d 744, 745 (1994). The Court must construe pleadings liberally
7 and draw every reasonable inference in favor of the non-moving party. *Pankopf v. Peterson*,
8 175 P.3d 910, 912 (Nev. 2008). However, the Court is not required "to accept legal
9 conclusions cast in the form of factual allegations if those conclusions cannot reasonably be
10 drawn from the facts." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).

11 **III. Argument**

12 **A. First Cause of Action – Breach of Contract**

13 Count One of Brown's complaint alleges that Defendants Sandoval, Masto, Miller,
14 Geddes, Krause, and Cox breached a Settlement Agreement on December 5, 2011, by
15 "disallowing documents that were deemed [n]ot [c]onfidential by all parties to be public records
16" *Complaint* at 12. Brown admits that the Settlement Agreement at issue was not entered
17 into until "on or about March 30, 2012." *Id.*

18 "[A] settlement agreement is a contract . . . Basic contract principles require, for an
19 enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May*
20 *v. Anderson*, 121 Nev. 558, 572, 119 P.3d 1254, 1257 (2005) (citing *Reichelt v. Urban Inv. &*
21 *Dev. Co.*, 611 F.Supp. 952, 954 (N.D. Ill. 1985)). A contract cannot be breached unless there
22 existed an enforceable contract. *Chung v. Atwell*, 103 Nev. 482, 484, 745 P.2d 370, 371
23 (1987).

24 Brown's breach of contract claim, asserted as the First Cause of Action, fails to state a
25 claim on which relief can be granted. *Complaint* at 12. Brown alleges Defendants breached a
26 Settlement Agreement on December 5, 2011. *Id.* However, the Settlement Agreement that
27 was allegedly breached was not entered into until March 30, 2012, nearly four months after
28 the alleged breach. *Id.* Absent the existence of an enforceable contract on December 5,

1 2011, Defendants could not have breached the contract. Brown's breach of contract claim
2 fails as a matter of law because, even construing the facts in the light most favorable to
3 Brown, no contract existed at the time of the alleged breach.

4 Although Brown has not and cannot identify a retroactive legal duty to modify the
5 minutes of the Board of Prison Commissioner's meeting to be consistent with the
6 confidentiality terms of the Settlement Agreement that was entered into after the December 5,
7 2011, meeting, the minutes were ultimately amended to publish the documents that the
8 Settlement Agreement, when entered in March of the following year, did not deem
9 confidential.³ Therefore, not only does Brown's breach of contract claim fail, the minutes of
10 the December 5, 2011, meeting demonstrate that the Board of Prison Commissioner's went
11 beyond their legal duty to accommodate Brown's desire to have documents placed on the
12 record. The First Cause of Action must be dismissed.

13 **B. Second Cause of Action - Intentional Infliction of Emotional Distress**

14 **1. The Second Cause of Action fails to state a claim on which relief can**
15 **be granted under NRCP 8(a)**

16 NRCP 8(a) requires a short and plain statement of a claim showing that the pleader is
17 entitled to relief. While the requirements for notice pleading are liberal, the standard is not
18 without limits. The allegations must give fair notice of the nature and basis of a legally
19 sufficient claim and the relief requested. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842,
20 946 P.2d 1252, 1260 (1997). "[A] formulaic recitation of the elements of a cause of
21 action" is insufficient to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
22 The factual allegations must state a claim that is "plausible on its face," meaning there is more
23 than a sheer possibility that a defendant has acted unlawfully. *Id.* (internal citations omitted).

24 ///

25
26 ³ Pursuant to NRS 47.130, facts capable of accurate and ready determination by resort to sources whose
27 accuracy cannot reasonably be questioned are subject to judicial notice. See also NRS 47.150. The Court can,
28 therefore, take judicial notice of the fact that the document that Brown alleges "exonerates" her from alleged
wrongdoing associated with the Huston Trust is publicly available as an attachment to the Minutes of the December
5, 2011, Board of Prison Commissioner's Meeting, accessible at http://www.doc.nv.gov/sites/doc/files/pdf/boc/2011-12-05/120511_%20Prison_Board_Minutes_revised_52412.pdf (last accessed 11/25/13)

1 The Intentional Infliction of Emotional Distress claim asserted in the complaint fails to
2 put Defendants on notice of the nature of the allegation asserted against each of them.
3 Complaint at 15. An intentional infliction of emotional distress claim requires a plaintiff to
4 establish the following elements: (1) extreme and outrageous conduct by the defendant with
5 either the intention of, or reckless disregard for, causing emotional distress; (2) severe or
6 extreme emotional distress suffered by the plaintiff; and (3) actual or proximate causation.
7 *Olivero v. Lowe*, 116 Nev. 395, 398-399 (2000) (citing *Star v. Rabello*, 97 Nev. 124, 125
8 (1981)).

9 The claim alleges that "Defendants have acted with reckless disregard for the truth and
10 intentionally disseminated statements about the Plaintiff that were not true, and that
11 Defendant's knew were not true." Complaint at 15. However, the Defendants in this case
12 range from the Governor of the State of Nevada and other high ranking governmental officials
13 to individual prison officials and attorneys. *Id.* at 1. Each is left to speculate as to whether the
14 claim is asserted against them and what factual conduct they are alleged to have participated
15 in to give rise to the claim. The unspecified "statements about the Plaintiff that were not true"
16 are insufficient to put each Defendant on notice of the conduct in which they were involved
17 that allegedly resulted in the intentional infliction of emotional distress.

18 Although Nevada requires only notice pleading, Brown's Complaint fails to meet even
19 this liberal pleading standard as it does not identify the Defendants against whom the claim is
20 asserted and does not identify the conduct that was allegedly extreme and outrageous. The
21 claim fails to include any factual allegations addressing the elements of an intentional infliction
22 of emotional distress claim. *Id.* at 15-16. Instead, it merely incorporates by reference the
23 allegations previously asserted in the complaint. Because the allegations do not put each
24 Defendant on notice of a legally sufficient claim, the claim must be dismissed.

25 **2. Insofar as the intentional infliction of emotional distress claim arises**
26 **from the alleged "computer glitch" in Klein's NDOC electronic file,**
27 **the claim is barred by the statute of limitations**

28 Even if an intentional infliction of emotional distress claim was properly plead, insofar
as it related to the alleged "computer glitch" in 2007, the claim is barred by the statute of

1 limitations. In Nevada, an action for personal injury must be brought within 2 years of the
 2 accrual of the action. NRS 11.190(4)(e). Although personal injury actions survive death, the
 3 estate administrator "is subject to all defenses that might have been asserted against the
 4 decedent . . . a personal representative inherits the benefits and burdens connected with the
 5 running of any applicable statute of limitations, measured from when the cause of action first
 6 accrued in favor of the decedent." *Schwartz v. Wasserburger*, 117 Nev. 703, 708, 30 P.3d
 7 1114, 1117 (2001).

8 Klein has been deceased for more than four years. Any action that caused Klein
 9 extreme emotional distress must have occurred when he was alive. It must have occurred
 10 more than four years ago. Given the two year statute of limitations for an intentional infliction
 11 of emotional distress claim, the present claim asserted by the estate on behalf of Klein relating
 12 to the 2007 computer glitch is barred by the statute of limitations.

13 **3. Insofar as the intentional infliction of emotional distress claim arises**
 14 **from the alleged "computer glitch," the claim fails as the conduct**
 15 **was not intentional**

16 Even if the claim associated with the computer glitch was not barred by the statute of
 17 limitations, it fails to state a claim for intentional infliction of emotional distress. An element of
 18 an intentional infliction of emotional distress claim is extreme and outrageous conduct by the
 19 defendant with either *the intention of, or reckless disregard for,* causing emotional distress.
 20 *Olivero*, 116 Nev. at 398-399 (emphasis added). A "computer glitch" is not an intentional act
 21 sufficient to satisfy the intent element of this intentional tort. Further, the complaint fails
 22 entirely to link the conduct of any named Defendant to this alleged "computer glitch." Insofar
 23 as the intentional infliction of emotional distress claim is attempting to be asserted based on
 24 the alleged 2007 "computer glitch," the claim fails as a matter of law.

25 **4. Insofar as the intentional infliction of emotional distress claim arises**
 26 **from the alleged refusal to publish documents at the December 5,**
 27 **2011, Board of Prison Commissioner's meeting, the claim fails to**
 28 **state a claim on which relief can be granted under NRCP 12(b)(5)**

As discussed above, an intentional infliction of emotional distress claim requires
 Plaintiff to allege facts that show: (1) defendants committed acts that were extreme and

1 outrageous with either the intention of, or with reckless disregard for, causing emotional
 2 distress; (2) plaintiff suffered severe or extreme emotional distress; and (3) defendants' acts
 3 were the actual and proximate cause of plaintiff's distress. *Olivero*, 116 Nev. at 398-399 (citing
 4 *Star*, 97 Nev. at 125 (1981)).

5 Extreme and outrageous conduct is a high legal standard to meet. Defendants'
 6 conduct must be "outside all possible bounds of decency" and regarded as "utterly intolerable
 7 in a civilized community." *Maduik v. Agency Rent-A-Car*, 114 Nev. 1, 4 (1998) (citing Cal.
 8 Book of Approved Jury Instructions No. 12.74). All people are "expected and required to be
 9 hardened . . . to occasional acts that are definitely inconsiderate and unkind." *Id.* "Liability for
 10 emotional distress generally does not extend to mere insults, indignities, threats, annoyances,
 11 petty oppressions, or other trivialities." *Watson v. Las Vegas Valley Water Dist.*, 378
 12 F.Supp.2d 1269, 1278 (D. Nev. 2005) (quoting *Burns v. Mayer*, 175 F.Supp.2d 1259, 1268 (D.
 13 Nev. 2001)).

14 To support an intentional infliction of emotional distress claim, Plaintiff's emotional
 15 distress must be so severe "that no reasonable [person] could be expected to endure it."
 16 Rest. 2d. Torts § 46(j) (1965). While bodily harm is not a requirement to show severe
 17 emotional distress, in cases where no bodily harm exists, courts tend to look for more in the
 18 way of outrage as a guarantee that the claim is genuine. *Id.* at § 46(k).

19 The viability of a claim for infliction of emotional distress is a question of law:

20 In an attempt to minimize wasted judicial resources on meritless
 21 claims for relief under this tort, however, "it becomes the duty of the
 22 court in the first instance, as society's conscience, to determine
 23 whether the acts complained of can be considered as extreme and
 24 outrageous conduct in order to state a claim for relief." *Midas Muffler
 Shop v. Ellison*, 650 P.2d 496, 499 (Ariz. Ct. App. 1982) (quoting
 25 *Cluff v. Farmers Ins. Exch.*, 460 P.2d 666, 668 (Ariz. Ct. App. 1969)).

26 Whether the alleged conduct is extreme and outrageous and whether the Plaintiff's
 27 distress is sufficient and severe enough to advance to the trier of fact are exclusively
 28 questions for the court to determine. *Alamo v. Reno Hilton Corp.*, 819 F. Supp. 905, (D. Nev.
 1993); also citing *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141, 1145 (1983).
 ("The questions of whether the evidence of Plaintiff's distress is sufficient (i.e. 'severe') to

1 allow the claim to advance to the trier of fact and whether Defendant's conduct may
2 reasonably be regarded as so extreme and outrageous as to permit recovery are questions for
3 the Court to answer") (citing Restatement (Second) of Torts § 46 comment h and comment j
4 (1965)).

5 Insofar as Brown is attempting to assert an intentional infliction of emotional distress
6 claim arising from the alleged refusal of Defendants to publish documents at the December 5,
7 2011, Board of Prison Commissioner's meeting, the claim fails as a matter of law. Defendant
8 Geddes' reservation of rights on behalf of the NDOC to strike documents that are deemed
9 confidential by a settlement agreement, while the settlement agreement was continuing to be
10 negotiated and the confidentiality terms had not yet been finalized, is not conduct that is
11 "outside all possible bounds of decency." To the contrary, Defendant Geddes' conduct was
12 entirely reasonable and the allegation that such a reservation of rights constitutes extreme
13 and outrageous conduct is meritless. Defendants Sandoval, Masto and Miller were merely
14 present at the December 5, 2011, board meeting. No "extreme and outrageous" conduct can
15 be imputed on these Defendants. And the remaining named Defendants played no role
16 whatsoever in the December 5, 2011, board meeting. The conduct that allegedly occurred at
17 the December 5, 2011, board meeting in relation to the document that Brown alleges cleared
18 her of any alleged wrongdoing fails, as a matter of law, to constitute extreme and outrageous
19 conduct sufficient to support an intentional infliction of emotional distress claim. The alleged
20 conduct of Defendants simply isn't extreme or outrageous.

21 The claim also fails because Brown cannot demonstrate causation between the alleged
22 conduct of Defendants at the December 5, 2011, Board of Prison Commissioner's meeting
23 and her alleged extreme emotional distress. In fact, in her complaint Brown attributes her
24 emotional distress to pain and suffering associated with "the loss of her brother and having to
25 watch and listen to Mr. Klein go through the pain and suffering, breaking the promise she
26 made to him that he wouldn't die in prison for a crime he didn't commit..." and suffering
27 associated with their "mother who no longer wanted to live after the loss of her innocent son ...
28" *Complaint* at 15. She cannot demonstrate causation, an essential element of an

1 intentional infliction of emotional distress claim, between the alleged striking of documents at
2 the December 5, 2011, Board of Prison Commissioner's meeting and her alleged extreme
3 distress.

4 **C. Third Cause of Action - Infliction of Personal Injury Pursuant to**
5 **NRS 41.130**

6 NRS 41.130 allows recovery against a person responsible for an injury to another or
7 against the employer or corporation responsible for the conduct of the person causing the
8 injury. However, NRS 41.130 does not create a cause of action independent of the underlying
9 tort that allegedly caused the injury. This claim relates only to the recovery of damages and,
10 therefore, fails to state an independent claim on which relief can be granted.

11 Viewing the allegations contained within the Third Cause of Action, they are duplicative
12 of the allegations asserted in the Second Cause of Action alleging intentional infliction of
13 emotional distress or the Fifth Cause of Action alleging slander and libel. To the extent the
14 allegations are not duplicative, the allegations themselves fail to state a claim on which relief
15 can be granted.

16 Brown appears to allege malicious prosecution, but admits that she was never charged
17 with a crime. *Complaint* at 19. An essential element of a malicious prosecution claim is the
18 initiation or active participation in the continuation of a criminal action against the plaintiff.
19 *LaMantia v. Redis*, 118 Nev. 27, 30, 38 P.3d 877, 879-880 (2002). Because Brown was
20 never criminally prosecuted, any attempt to assert a malicious prosecution claim fails as a
21 matter of law.

22 Further, Brown alleges that Defendants conspired to conceal a crime. *Complaint* at 19.
23 The crime, according to Brown, was Defendant Geddes' alleged withholding of evidence in a
24 federal civil case. *Id.* Even if the alleged discovery violation had hypothetically occurred in
25 Mr. Klein's federal civil case, a civil discovery violation does not constitute a crime. Her own
26 assertion that Defendants may have conspired "individually" further defeats her own
27 conspiracy claim. Most significantly, Brown cannot use this civil action as a means of
28 improperly attempting to privately prosecute alleged criminal acts.

1 The allegations in the Third Cause of Action are duplicative of other causes of action
 2 plead in the complaint or, to the extent new facts are alleged, it does not state a legally
 3 cognizable claim. As such, the Third Cause of Action fails to state a claim on which relief can
 4 be granted and must be dismissed.

5 **D. Fifth Cause of Action⁴ – Slander/ Libel pursuant to Chapter 41, NRS 41.085,
 6 41.180, 41.130, 41.322 and 41.1335**

7 Brown appears to allege two distinct claims of defamation against Defendants in count
 8 five. First, she alleges she was defamed by Defendants at the December 5, 2011, Board of
 9 Prison Commissioner's meeting. *Complaint* at 20-21. This claim fails as a matter of law.
 10 Second, on behalf of the estate of Klein, Brown alleges that Klein was defamed when false
 11 charges were placed in his prison record on June 5, 2007, as the result of a "computer glitch."
 12 *Id.* at 21-23. This claim is barred by the statute of limitations.

13 To recover for a claim of defamation, a plaintiff must demonstrate that there was a false
 14 and defamatory statement, an unprivileged publication of that statement to a third party, fault
 15 amounting to at least negligence on the part of the publisher, and general damages or special
 16 damages. *Lubin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001). Defamation claims
 17 must be brought within two years. NRS 11.190(4)(c).

18 **1. Board of Prison Commissioner's meeting**

19 Brown alleges that Defendants are civilly liable for slander and libel because, at the
 20 December 5, 2011, Board of Prison Commissioner's meeting, she spoke before the Board of
 21 Prison Commissioners and "had to broadcast to a room full of private citizens, state
 22 employees, the media, a televised broadcast to the individuals down in Las Vegas, NV . . .
 23 that she was a part of an investigation in order to clear her name from the investigation that
 24 had been conducted against her and her deceased brother, Mr. Nolan Klein." She "had to
 25 publicly implicate herself in an investigation to show she had been cleared of wrongdoing."
 26 She alleges that after implicating herself in the investigation, Defendants then refused to allow
 27 her to exonerate herself by placing documents on the public record. *Id.* at 21.

28 ⁴ The Complaint does not contain a Fourth Cause of Action.

1 First, a defamation claim requires a false and defamatory statement. Any statement
 2 made relating to Brown being the subject of an investigation regarding the Huston Trust is
 3 true; therefore, it cannot form the basis of a defamation claim. Second, Brown cannot hold
 4 Defendants liable for alleged defamation when she published the allegedly defamatory
 5 information to third parties at the December 5, 2011, Board of Prison Commissioner's
 6 meeting. Brown has not alleged facts demonstrating that any Defendant acted with fault
 7 amounting to at least negligence in the publication of defamatory information. Brown's
 8 defamation claim fails as a matter of law.⁵ Allegedly failing to provide the platform from which
 9 Brown wanted to "exonerate" herself, after she chose to publish the accurate fact that she was
 10 the target of an investigation, does not state a claim for defamation.⁶

11 2. 2007 Computer Glitch

12 Brown asserts a defamation claim on behalf of the estate of Klein, alleging that false
 13 charges were placed in Klein's NDOC records in 2007 and were subsequently transmitted to
 14 the parole board and pardons board. *Complaint* at 22. Klein was denied parole in 2008. *Id.*
 15 at 26.

16 Defamation claims are governed by a two year statute of limitations. NRS 11.190(4)(c).
 17 The statute of limitations begins to run when a party knew, or reasonably should have known,
 18 of the necessary facts giving rise to a cause of action. *Nevada State Bank v. Jamison Family*
 19 *Partnership*, 106, Nev. 792, 800, 801 P.2d 1377, 1382 (1990). Although personal injury
 20 actions survive death, the estate administrator "is subject to all defenses that might have been
 21 asserted against the decedent . . . a personal representative inherits the benefits and burdens
 22 connected with the running of any applicable statute of limitations, measured from when the
 23 cause of action first accrued in favor of the decedent." *Schwartz v. Wasserburger*, 117 Nev.
 24 703, 708, 30 P.3d 1114, 1117 (2001).

25 ⁵ Insofar as Brown may be alleging that she was defamed when the NDOC referred the Huston Trust matter
 26 to the Aging and Disability Services Division of the Department of Health and Human Services, the NDOC is
 27 entitled to immunity pursuant to NRS 200 5096 as the reporting party.

28 ⁶ Defendant Geddes reserved the right to strike from the record documents that were confidential. *Complaint*
 at 14. The document that Brown alleges "exonerates" her from wrongdoing associated with the Huston Trust, as
 well as all other non-confidential documents Brown submitted for the record at the Board of Commissioner's
 meeting, was eventually placed on the public record after confirmation that it was not confidential. See *fn 2*,
supra.

1 At the latest, Klein knew or should have reasonably known of facts sufficient to assert
 2 his civil defamation claim when he was denied parole in 2008, allegedly based on the
 3 existence of the false charges in his prison record.⁷ Complaint at 22. He would have then
 4 had two years, until 2010, to file his defamation claim. Because he died in 2009, the estate
 5 would have had the ability to pursue the defamation claim on his behalf until the running of the
 6 statute of limitations in 2010. Efforts by the estate to pursue this claim five years after Klein
 7 knew or should have known the necessary facts giving rise to the cause of action are
 8 improper.

9 To the extent Brown may argue that Klein was defamed even after his death in 2009 as
 10 a result of the false charges in his record, this argument fails. No civil cause of action exists
 11 for the alleged defamation of a deceased person. *Casamasina v. Worcester Telegram &*
 12 *Gazette*, 307 N.E. 2d 865 (Mass. App. 1974) (one who defames the memory of the dead is
 13 not liable civilly to the estate); *Gilliken v. Bell*, 118 S.E. 2d 609 (N.C. 1961) (no cause of action
 14 exists for the defamation of a dead person); *Flynn v. Higham*, 149 Cal.App.3d 677 (1983);
 15 (malicious defamation of the memory of the dead is not a proper basis for recovery in a civil
 16 action); *Saucer v. Giroux*, 54 Cal.App. 732 (1921) (no cause of action for defamatory
 17 statements made about one who is dead). The only alleged civil defamation claim that could
 18 have been actionable relating to the alleged 2007 false charges was an action by Klein
 19 relating to defamation that occurred while he was alive. That alleged defamation claim is
 20 barred by the statute of limitations.

21 **E. Sixth Cause of Action – Damages for loss of probable future**
 22 **companionship, society, comfort and financial support**

23 Brown's Sixth Cause of Action is brought pursuant to Nevada's Wrongful Death statute,
 24 NRS 41.085. Within this claim, Brown repeats the allegations that form the basis of her
 25 intentional infliction of emotional distress claim and defamation claim. Complaint at 23-31.
 26

27 ⁷ Klein knew of the elements to state a defamation claim, at the latest, in 2008 when he was allegedly denied
 28 parole as a result of the false charges in his record. To the extent Brown may argue that Klein or the estate
 believed the false charges to be in retaliation, rather than the result of a computer glitch, until 2011, this
 argument does not toll the statute of limitations under the discovery rule. The cause of the false charges is
 irrelevant as, in either situation, facts supporting the elements of a defamation action existed.

3 of 3 AG's Motion to Dismiss. For the Record Board of Prison Commissioners May 19, 2015 meeting

From: <nvmemorialfund@aol.com>
To: <helpdesk@doc.nv.gov>, <msblackwell@doc.nv.gov>
Date: 5/15/2015 1:21 PM
Subject: 3 of 3 AG's Motion to Dismiss. For the Record Board of Prison Commissioners May 19, 2015 meeting

The attorney generals office withheld exculpatory evidence in the 2005 case Nolan Klein v. Donald helling, also in the following cases In the matter of the Estate of Nolan Edward Klein, Michael Spenser case and in the Chemensky federal case too

Tonja Brown

1 such an arbitrary remedy. More significantly, Brown's complaint fails to state a claim upon
 2 which any civil liability against Defendants can be based; therefore, Brown is not entitled to
 3 any relief including injunctive relief. The Eighth Cause of Action must be dismissed.

4 **H. Ninth and Tenth Causes of Action – Violations of NRS Chapter 199¹⁰ and**
 5 **NRS Chapter 200**

6 In her Ninth and Tenth Causes of Action, Brown seeks monetary damages in this civil
 7 action for crimes she alleges were committed pursuant to NRS Chapter 199 and NRS
 8 Chapter 200. *Complaint* at 37-39. These criminal statutes, which impose criminal penalties,
 9 must be brought in criminal actions and prosecuted in the name of the State of Nevada, as
 10 plaintiff. See NRS 169.055. NRS Chapters 199 and 200 do not contemplate litigation of
 11 criminal offenses by private parties within a civil proceeding. The Ninth and Tenth Causes of
 12 action, brought pursuant to criminal statutes, must be dismissed from this lawsuit.

13 **IV. Conclusion**

14 Each of Brown's causes of action fail under the substantive law, are barred by the
 15 statute of limitations, or were not plead with sufficient particularity to state a claim against
 16 each of the Defendants. Defendants respectfully request that their Motion to Dismiss be
 17 granted.

18 Dated: December 12, 2013.

19 CATHERINE CORTEZ MASTO
 20 Nevada Attorney General

21 By: Beth Hickman
 22 BETH HICKMAN
 23 Senior Deputy Attorney General

24 *Attorneys for Defendant*

25
 26
 27
 28 ¹⁰ Brown also asserts the Ninth Cause of Action pursuant to NRS 210. There is presently no NRS Chapter
 210 in effect.

1 such an arbitrary remedy. More significantly, Brown's complaint fails to state a claim upon
2 which any civil liability against Defendants can be based; therefore, Brown is not entitled to
3 any relief including injunctive relief. The Eighth Cause of Action must be dismissed.

4 **H. Ninth and Tenth Causes of Action – Violations of NRS Chapter 199¹⁰ and**
5 **NRS Chapter 200**

6 In her Ninth and Tenth Causes of Action, Brown seeks monetary damages in this civil
7 action for crimes she alleges were committed pursuant to NRS Chapter 199 and NRS
8 Chapter 200. *Complaint* at 37-39. These criminal statutes, which impose criminal penalties,
9 must be brought in criminal actions and prosecuted in the name of the State of Nevada, as
10 plaintiff. See NRS 169.055. NRS Chapters 199 and 200 do not contemplate litigation of
11 criminal offenses by private parties within a civil proceeding. The Ninth and Tenth Causes of
12 action, brought pursuant to criminal statutes, must be dismissed from this lawsuit.

13 **IV. Conclusion**

14 Each of Brown's causes of action fail under the substantive law, are barred by the
15 statute of limitations, or were not plead with sufficient particularity to state a claim against
16 each of the Defendants. Defendants respectfully request that their Motion to Dismiss be
17 granted.

18 Dated: December 12, 2013.

19 CATHERINE CORTEZ MASTO
20 Nevada Attorney General

21 By Beth Hickman
22 BETH HICKMAN
23 Senior Deputy Attorney General
24 *Attorneys for Defendant*

25
26
27
28
Office of the
Attorney General
600 N. Carson St.
Carson City, NV
89701-4717

¹⁰ Brown also asserts the Ninth Cause of Action pursuant to NRS 210. There is presently no NRS Chapter 210 in effect.

1 such an arbitrary remedy. More significantly, Brown's complaint fails to state a claim upon
2 which any civil liability against Defendants can be based; therefore, Brown is not entitled to
3 any relief including injunctive relief. The Eighth Cause of Action must be dismissed.

4 **H. Ninth and Tenth Causes of Action – Violations of NRS Chapter 199¹⁰ and**
5 **NRS Chapter 200**

6 In her Ninth and Tenth Causes of Action, Brown seeks monetary damages in this civil
7 action for crimes she alleges were committed pursuant to NRS Chapter 199 and NRS
8 Chapter 200. *Complaint* at 37-39. These criminal statutes, which impose criminal penalties,
9 must be brought in criminal actions and prosecuted in the name of the State of Nevada, as
10 plaintiff. See NRS 169.055. NRS Chapters 199 and 200 do not contemplate litigation of
11 criminal offenses by private parties within a civil proceeding. The Ninth and Tenth Causes of
12 action, brought pursuant to criminal statutes, must be dismissed from this lawsuit.

13 **IV. Conclusion**

14 Each of Brown's causes of action fail under the substantive law, are barred by the
15 statute of limitations, or were not plead with sufficient particularity to state a claim against
16 each of the Defendants. Defendants respectfully request that their Motion to Dismiss be
17 granted.

18 Dated: December 12, 2013.

19 CATHERINE CORTEZ MASTO
20 Nevada Attorney General

21 By: Beth Hickman
22 BETH HICKMAN
23 Senior Deputy Attorney General
24 Attorneys for Defendant
25
26
27

28 ¹⁰ Brown also asserts the Ninth Cause of Action pursuant to NRS 210. There is presently no NRS Chapter 210 in effect.

1 such an arbitrary remedy. More significantly, Brown's complaint fails to state a claim upon
2 which any civil liability against Defendants can be based; therefore, Brown is not entitled to
3 any relief including injunctive relief. The Eighth Cause of Action must be dismissed

4 **H. Ninth and Tenth Causes of Action – Violations of NRS Chapter 199¹⁰ and**
5 **NRS Chapter 200**

6 In her Ninth and Tenth Causes of Action, Brown seeks monetary damages in this civil
7 action for crimes she alleges were committed pursuant to NRS Chapter 199 and NRS
8 Chapter 200. Complaint at 37-39. These criminal statutes, which impose criminal penalties,
9 must be brought in criminal actions and prosecuted in the name of the State of Nevada, as
10 plaintiff. See NRS 169.055. NRS Chapters 199 and 200 do not contemplate litigation of
11 criminal offenses by private parties within a civil proceeding. The Ninth and Tenth Causes of
12 action, brought pursuant to criminal statutes, must be dismissed from this lawsuit.

13 **IV. Conclusion**

14 Each of Brown's causes of action fail under the substantive law, are barred by the
15 statute of limitations, or were not plead with sufficient particularity to state a claim against
16 each of the Defendants. Defendants respectfully request that their Motion to Dismiss be
17 granted.

18 Dated: December 12, 2013.

19 CATHERINE CORTEZ MASTO
20 Nevada Attorney General

21 By Beth Hickman
22 BETH HICKMAN
23 Senior Deputy Attorney General
24 Attorneys for Defendant

25
26
27
28 ¹⁰ Brown also asserts the Ninth Cause of Action pursuant to NRS 210. There is presently no NRS Chapter
210 in effect.

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONJA BROWN, AS AN INDIVIDUAL,) Supreme Court No. 66924
IN THE MATTER OF THE ESTATE OF) District Court No. 13TRT000541B
NOLAN EDWARD KLEIN,) **Due Date: December 31, 2014**
Appellant,)
vs.)
STATE OF NEVADA, EX. REL.,)
NEVADA DEPARTMENT OF CORRECTIONS; GREG)
COX, HOWARD SKOLNIK; DONALD HELLING;)
JAMES BENEDETTI; INSPECTOR GENERAL;)
ATTORNEY GENERAL KATHERINE CORTEZ MASTO;))
DEPUTY ATTORNEY GENERAL WILLIAM GEDDES;)
DEPUTY ATTORNEY GENERAL KARA KRAUSE;)
GOVERNOR BRIAN SANDOVAL; AND)
SECRETARY OF STATE ROSS MILLER;)
DEFENDANTS IN THEIR OFFICIAL CAPACITY,)
AND AS AN INDIVIDUAL,)
Respondents.)

CIVIL PROPER PERSON APPEAL STATEMENT

Tonja Brown
2907 Lukens Lane
Carson City, NV 89706

Clark G. Leslie
Attorney General
100 N. Carson St.

Appellant in Proper Person

Attorney for Respondents

The state of Nevada Department of
Corrections
Greg Cox
Howard Skolnik
Donald Helling, Warden
James Bendedetti
Catherine Cortez Masto
William Geddes
Hon. Brian Sandoval
Ross Miller, Secretary of State
Respondents

Judgment or Order You Are Appealing. List the judgment or order that you are appealing from and the date that the judgment or order was filed in the district court.

Filed Date	Name of Judgment or Order
October 20, 2014	Order Granting Defendants' Motion For Judgment on the Pleadings

Notice Of Appeal. Give the date you filed your notice of appeal in the district court: November 18, 2014

Related Cases. List all other court cases related to this case. Provide the case, title of the case and name of the court where the case was filed.

Case No.	Case Title	Name of Court
3:10-cv-00679-HDM-VPC	Tonja Brown, Administratrix of the Estate of NOLAN KLEIN and TONJA BROWN, as an Individual	United States District Court District of Nevada
3:05-cv-00390-LRH-VPC	NOLAN E. KLEIN v Don Helling, et al.	United States Court District of Nevada
57259	In The Matter of: Estate Of Nolan Klein Tonja Brown vs. Washoe County District Attorneys; John and Jane Does- A-Z; Pardon Board; Attorney General Katherine Cortez-Masto; John and Jane Does A-Z	Nevada Supreme Court
CV-10-1057	Nolan Klein vs. Washoe County District Attorneys; John and Jane Does A-Z Pardons Board; Attorney General Katherine Cortez Masto; John and	Second Judicial District Court

Jane Does A-Z

58789 Edward Allen Wilkinson aka Nevada Supreme Court

CR88-1692 Nolan Klein vs. State of Nevada
Dept. No. 6 (Petition For Exoneration)

CV-90-3087 Nolan Klein vs. Second Judicial District
CR-88-P1692 Klein vs. E.K. McDaniel, Warden
Ely State Prison, Court

27514 Nolan Klein vs. The State of Nevada Nevada Supreme Court

HC-0140892 Nolan Klein vs. Seventh Judicial District
(August 19, 1992) Court

CV-N-94-193-DWH Klein vs. United States Court
District of Nevada

CV-N-01-211-DWH-(VPC) Klein vs. Don Helling, et. Al United States Court
District of Nevada

3:2009-cv-00221 Klein vs. Bisbee United States Court
District of Nevada

Plaintiff, Nolan Klein's 1989 criminal conviction was still pending in Federal Court at the time of his death on September 20, 2009. Mr. Klein has always maintained his innocence and continued to do so throughout his state litigation and his appeals.

Issues on Appeal. Does your appeal concern any of the following issues?

X Other- briefly explain: October 20, 2014 Order FJDC, **Breach of**

Settlement Agreement; FJDCR 15 (4) 15(5), 15(6), Nevada Rules of Civil Procedure Rule 6

(a); **Nevada Supreme Court ADKT 427.**

Statement of Facts. Explain the facts of your case.

This is a Breach of Settlement Agreement which arises out of the wrongful death suit of Nolan Edward Klein. Plaintiff Brown filed her FJDC case No. 13 TRT 00054 1B Civil Complaint in pro se due to the 2012 untimely death of her attorney. A trial date was set for April 6 & 8, 2015. On **March 30, 2012** Plaintiff entered into a Settlement Agreement with Respondent in the wrongful death suit of Nolan Klein. As part of the Settlement Agreements certain Documents were to be released and deemed **Not Confidential** as part of the Settlement Agreement that Brown in good faith entered in to. Part of the Settlement Agreement was that Plaintiffs could use the not -confidential documents in order to exonerate Plaintiffs/ Appellants names from the Fred Huston, Nolan Klein, Tonja Brown Investigations USDC case No. 3:05-cv-00390-LRH-VPC, exonerate and expose the June 5, 2007 computer glitch that placed false felony charges in Klein's NDOC file and then was submitted to the 2007 Parole Board and 2008 Pardons Board , the Don Helling, Dr. Karen Gedney depositions that supported Plaintiff's Brown testimony and other not confidential documents given during the **December, 5, 2011, May 12, 2012, March19, 2013 BOPC public meeting See FJDC Case No. 13 TRT 00054 1B Second Amended Civil Complaint and Attachments 1-10.** When Appellant went to do so Respondents Sandoval, Masto, Miller Geddes, Krause, NDOC Cox had everything stricken and removed from the record. This has precluded Brown from seeking a Posthumous Pardon from Klein's 1989 conviction . The withholding of document NDOC 03811 where Brown and Klein were exonerated on December 2, 2005 by Defendant Geddes from Klein's USDC 3:05-cv-00390-LRH-VPC resulted in an adverse decisions in the case, his paroles and him seeking a compassionate pardon. The disseminating of the Huston investigations remain in the states files. The computer glitch still exist in the NDOC NOTIS file, 2007 Parole Board file,and the 2008

Pardons Board files, this all plays a factor in seeking a posthumous pardon for Klein Brown, See USDC 3:2009-cv-00221 and the above "Related Case" pgs. 2-3. On **October 20, 2014** the Honorable Judge James Wilson issued an Order in the above entitled case "Order Granting Defendants' Motion For Judgment On The Pleadings" It was the Defendants' Motion For Judgment On The Pleadings that is **untimely filed**. Respondents must have filed their "Defendants Reply In Support of Their Motion For Judgment On The Pleadings" and **Request For Submission of Motion For Judgment on the Pleadings** no later than **September 2, 2014**. They filed their Reply on **September 5, 2014**, and their Request For Submission of Motion For Judgment on the Pleadings on **September 8, 2014** respectively. Appellant' filed her Request for Submission in Opposition on **September 10, 2014**. Appellant filed her memorandum of points and authorities in opposition on **August 25, 2014**. Appellant was **the only one cited** for failure to file a memorandum of points and authorities in opposition Rule 15(5) and failure to address the legal issues. **Respondents filed their Motions untimely** too under FJDCR Rule 15 (4), 15 (5), 15 (6) and were **not cited** by the court. Appellant should have prevailed. See Appellants Motions filed on **July 18, 2014; August 20, 2014; August 25, 2014; September 22, 2014, October 13, 2014; October 27, 2014; See October 30, 2014; November 17, 2014**. Appellant directs the court to Respondents own admission of being untimely in "Defendants' Opposition To Plaintiff's Motion To Strike" pg 3, lines 4- 6 The Court cited Appellant **failed to address the legal issues**: Appellant is not an attorney informed the court that she could not find any cases similar to refer to and cited pro se cases in her **August 25, 2014** Opposition pgs. 12-14.).

STATEMENT OF DISTRICT COURT ERROR. Explain why you believe the district court was wrong. Also state what action you want the Nevada Supreme Court to take.

1st Court Error: Rules of Practice for the First Judicial District Court of the State of Nevada, ("FJDCR") Rule 15 (a), (b), (c). Respondents filed their Request For Submission Of Motion For Judgment On The Pleadings **6 days late**; Defendants Reply In Support Of Their

Motion For Judgment On The Pleadings **3 days late**; Order Granting Defendants' Motion For Judgment On The Pleadings **3 days late**; Respondents were Untimely, based on FJDCR 15 (4), 15(5), 15(6), Nevada Rules of Civil Procedure Rule 6 (a), Judge James Wilson failed to cite Respondents' under Rules FJDCR 15 (4) 15(5), 15(6). The Court cannot show any presence of bias and or prejudice towards one party when both parties failed to file their Requests for Submissions on the pleadings. The Court should not have considered Respondents Motion for Judgment on the Pleadings and it should have been denied for failure to file in a timely manner. See *Graham v. Carson-Tahoe Hosp.*, 91 Nev. 609, 540 P.2d 105 (1975); *Daugherty v. Wabash Life Ins. Co.*, 87 Nev. 32, 482 P.2d 814 (1971); *Dzack v. Marshall*, 80 Nev. 345, 393, P2d 610 (1964),).

2nd Court Error: Appellant argues the Court did not fully address the Appellant's Motion and Exhibits presented to dispute Defendants' Motion For Judgment On The Pleadings" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), *Berger v. City of Seattle*, 569 F.3d 1133 (9th Cir. 2009), *Scott v. Harris*, 550 U.S. 372, 380, (2007)

3rd Court Error: Court cited Plaintiff failed to address the legal issues, Appellant is not an attorney and cited pro se cases. Appellant stated that she could not find any cases to compare to in her August 25, 2014 Opposition pgs 12-14. (1997). *Vance v. Judas Priest, Not Reported in P.2d (1990); cited in westlaw 1990 WL 130920;* *Public Utils. Comm'nv. Pollak*, 343 U.S. 451.72 S.Ct. 813 (1952)when he stated "[t]his is a case of first impression. There are no precedents to construe; no principles previously expounded to apply. the fact that an action is brought based upon a novel theory is an insufficient reason to deprive litigants of their day in court. See, *Robertson v. Grogan Investment Co.*, 710 S.2d 678, 680 See Clark County School District v. Local Government Employee Management Relations Board, 90 Nev. 442 (1974) **Parallel Citations** 530 P.2d 114, 88 L.R.R.M. (BNA) 2774, 76 Lab.Cas. P 53,551, See *Short v. Hotel*

Riviera, Inc., 79 Nev. 94, 378 P.2d 979 (1963), See *Mullis v. Nevada National Bank*, 98 Nev. 510, 512, 654 P.2d 533 (1982), See *Shapro v. Forsythe*, 103 Nev. 666, 668, 747 P.2d 241 (1987), See *Mullis*, 98 Nev. at 512; *Montgomery v. Ponderosa Constr., Inc.*, 101 Nev. 416, 418, 705 P.2d 652 (1985); *Johnson v. Steel, Inc.*, 100 Nev. 181, 182, 678 P.2d 676 (1984), *Parmana v. Petricciani*, 70 Nev. 427, 436, 272 P.2d 492 (1954); See *Williams v. State*, 18 N.Y.2d 491, 276 N.Y.S.2d 885, 886, (1996), See *Scott v. Harris*, 550 U.S. 372, 380, (2007)

4th Court Error: Appellant provided evidence in her Civil Complaint, Plaintiff's Motion in Opposition to Defendants' Motion For Judgment On The Pleadings with her Exhibits that supported her claim that Respondents breached the Settlement Agreement and continue to do so even to this day. Appellant provided additional evidence in her Motions throughout the proceedings that Respondents stricken, removed, blocked and interfered with her not confidential records from December 5, 2011 to present December 30, 2014, that were and established by the terms of the March 30, 2012 Settlement Agreement. See **Tatum v. County & County of San Francisco, 441 F3d. 1090, 1100 (9th Cir 2006)**. Appellant Clearly-Established Defense. In the absence of a clearly established defense. **Montgomery v. Ponderosa Constr., Inc., 101 Nev. 416.705 P.2d 652(1985)**., summary judgment in favor of the defendant must be denied. No weighing the Evidence See *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986), See **Ingram v. Martin Marietta Long Term Disability Income Plan for Salaried Employeees of Transferred GE Operations, 244 F.3d 1109 (9th Cir. 2001)**, See **Hunt v. Cromartie, 526 U.S. 541 (1999)**, See **Cox v. Office of Fed. Detention Tr., 2010 U.S. Dist. LEXIS 126316 (9th Cir. 2010)**, *Scott v. Harris*, 550 U.S. 372, 380, (2007) *Vance v. Judas Priest, Vignolo v. Miller* 120 f3d 1075,

5th Court Error: ADKT 427, Appellant presented evidence that exculpatory evidence was

withheld from Mr. Klein's USDC 3:05-cv-00390-LRH-VPC case. As part of the Settlement Agreement Appellants could exonerate their names from the Fred Huston investigations. These investigation reports were disseminated to the 2007 Parole Board Hearings where Mr. Klein was denied paroles and to the October 29, 2008 Pardons Board where he was appearing for a compassionate release and was denied. Appellant has been precluded seeking a Posthumous Pardon for Klein's 1989 conviction for which he has always maintained his innocence and continued through his appeals that were still pending. See "Related Cases" above. These documents still exist in the NDOC, Parole Board, and Pardons Board files making it appear as though Brown and Klein had committed crimes against Mr. Huston and none of this was true. Appellant continues to this day to have her **not confidential** documents stricken from the record and blocked thereby breaching the terms of the Settlement Agreement made on March 30, 2012. The court erred because all of the above described actions by the authorities are Brady violations and the undisclosed materials are not just a WORK PRODUCT.). Vance v. Judas Priest, Not Reported in P.2d (1990); cited in westlaw 1990 WL 130920; Public Utils. Comm'nv. Pollak, 343 U.S. 451.72 S.Ct. 813 (1952) NRS 197.220, 199, chapter 174, Brady, Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763 (1972)Brady, Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103 (1957), Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995), (1972, Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936 (1999). State v Mazzan.__At no time did Plaintiff waive her protected rights in the Settlement Agreement she had entered into on March 30, 2012. The Defendants interfered and continued to interfere with Appellant's protected rights under the guise of confidentiality as a part of the Settlement Agreement, See 120 f3d 1075 Vignolo v. Miller. 1075.

Appellant would like the Court to Reverse and Remand back to District Court for Trial.

Appellant asks that the Nevada Supreme Court define the low threshold of a SUBSTANTIAL LIKELYHOOD required in ADKT 427 be defined as "reasonable cause".

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONJA BROWN, AS AN INDIVIDUAL,) Supreme Court No. 66924
IN THE MATTER OF THE ESTATE OF) District Court No. 13TRT000541B
NOLAN EDWARD KLEIN,)
Appellant,)
vs.)
STATE OF NEVADA, EX. REL.,)
NEVADA DEPARTMENT OF CORRECTIONS; GREG)
COX, HOWARD SKOLNIK; DONALD HELLING;)
JAMES BENEDETTI; INSPECTOR GENERAL;)
ATTORNEY GENERAL KATHERINE CORTEZ MASTO;))
DEPUTY ATTORNEY GENERAL WILLIAM GEDDES;)
DEPUTY ATTORNEY GENERAL KARA KRAUSE;)
GOVERNOR BRIAN SANDOVAL; AND)
SECRETARY OF STATE ROSS MILLER;)
DEFENDANTS IN THEIR OFFICIAL CAPACITY,)
AND AS AN INDIVIDUAL,)
Respondents, _____)

REQUEST FOR SUBMISSION CIVIL PROPER PERSON APPEAL STATEMENT

Appellant, TONJA BROWN, in proper person, submits her request for submission of the Civil Proper Person Appeal Statement filed December 30, 2014.

Dated the 30th day of December, 2014.

Tonja Brown, Appellant
2907 Lukens Lane
Carson City, NV 89706
775-882-2744

CERTIFICATE OF SERVICE

I certify that I, TONJA BROWN, on the 30th day of December, 2014, I hand delivered to the Attorney General's Office a true and correct copy of the foregoing CIVIL PROPER PERSON APPEAL STATEMENT, REQUEST FOR SUBMISSION CIVIL PROPER PERSON APPEAL STATEMENT addressed as follows:

Dated: December, 30 2014.

Hand Delivered to:

Clark G. Leslie
Senior Deputy Attorney General
100 North Carson Street
Carson City, NV 89701
775-684-1258
Attorneys for Respondents

TONJA BROWN
2907 Lukens Lane
Carson City, NV 89706
775-882-2744



BRIAN SANDOVAL
Governor

STATE OF NEVADA
DEPARTMENT OF HEALTH AND HUMAN SERVICES
AGING AND DISABILITY SERVICES DIVISION

3416 Goni Road, D-132
Carson City, Nevada 89706

(775) 687-4210 • Fax (775) 687-4264
adسد@adسد.nv.gov

MICHAEL WILLDEN
Director

CAROL SALA
Administrator

December 30, 2011

Tonja Brown
2907 Lukens Lane
Carson City, NV 89706

Dear Ms. Brown:

Following our conversation on December 2, and in accordance with your request, I researched the files within Aging and Disability Services Division (ADSD) pertaining to a report made to Elder Protective Services in 2007. The record retention policy requires ADSD to keep records for 3 years. Since this report is more than 3 years old the hard copies of the case files have been destroyed.

However, I was able to ascertain through the database that a report concerning you was received in 2007. The matter was investigated and the allegations of exploitation were determined to be unsubstantiated.

I hope this alleviates any further concerns you may have regarding possible unfavorable information about you existing in the files of ADSD.

Sincerely,

A handwritten signature in cursive script that reads "Carol A. Sala".

Carol A. Sala
Administrator

Las Vegas Regional Office
1860 E Sahara Ave.
Las Vegas, Nevada 89104
(702) 486-3545
(702) 486-3572 Fax

Reno Regional Office
445 Apple St., Ste. 104
Reno, Nevada 89502
(775) 688-2964
(775) 688-2969 Fax

Elko Regional Office
1010 Ruby Vista Dr., Ste. 104
Elko, Nevada 89801
(775) 738-1966
(775) 753-8543 Fax

- CONFIDENTIAL -

This document, and the information contained in it, may not be reproduced, disseminated, or used for any purpose or legal proceeding, other than its authorized use for discovery proceedings in Brown v. Skolnik et al., Case No 157:10-cv-00679-ECR-VPC.

ATTORNEY GENERAL
NEVADA DEPARTMENT OF JUSTICE

100 North Carson Street
Carson City, Nevada 89701-4717

GEORGE J. CHANOS
Attorney General



RECEIVED

DEC 3 2005

ATTORNEY GENERAL
DOC

RANDAL R. MUNN
Assistant Attorney General

December 2, 2005

PC
Patrick J. Conmay
Inspector General
Nevada Department of Corrections
P.O. Box 7011
Carson City, NV 89701

Dear Inspector Conmay,

Our office has concluded the investigation concerning Inmate Fred Huston #72877 monies entrusted to Tonja F. Brown. Our investigation revealed Inmate Huston set up a trust and appointed Tonja Brown as a trustee of that account. Inmate Huston became concerned when no supporting documentation was submitted to him reflecting the source and distribution of his funds.

Interviews conducted with the individuals involved in the trust and the reviewing of the bank documents revealed no criminal activity existed. A conversation with Patricia McGaffin who is the Inmates caseworker revealed Inmate Huston has no further concerns regarding his monies. If you have any questions please feel free to contact me.

Sincere Regards,

GEORGE J. CHANOS
Attorney General

By:

[Signature]
DALE LIEBHERR
Acting Chief Investigator
Investigations Division
(775) 684-1153

DL:rrj

1 Plaintiff brings his complaint pursuant to 42 U.S.C. § 1983, alleging that prison officials retaliated
2 against him after he exercised his First Amendment rights (#21).³ Plaintiff names as defendants
3 Don Helling (“Helling”), Warden of Northern Nevada Correctional Center (“NNCC”); James
4 Benedetti (“Benedetti”), Assistant Warden of NNCC; and Chuck Fournier (“Fournier”),
5 Correctional Officer/Investigator at NNCC. *Id.*

6
7 _____ In count I, plaintiff alleges that the defendants retaliated against him by removing him from
8 the general population at NNCC and transferring him to LCC “because of Plaintiff’s efforts to
9 exercise his U.S. Constitution First Amendment Rights to seek redress through the court and
10 grievances, his right to free speech, his right to provide information, as well as his right to assist
11 other inmates with legal matters.” *Id.*, p. 4. Plaintiff states that because of the allegedly retaliatory
12 transfer, he lost his “prison job, pay, work credits, and earned preferred housing assignment, his
13 religious practices, physical disabilities and property.” *Id.* Plaintiff additionally alleges that the
14 defendants “collectively conspired to chill the effect of Plaintiff’s exercise of his First Amendment
15 Constitutional Rights.” *Id.* at 3, 4.

16
17 Specifically, the plaintiff contends that due to back and hip injuries, he was “medically
18 assigned” to NDOC’s regional medical facility at NNCC in 2001. *Id.*, ¶ 1. Plaintiff was housed
19 in NNCC Unit 3, which is apparently recognized as a unit where housing rules are more relaxed
20 to facilitate the daily activities of disabled prisoners. *Id.*, ¶¶ 2-3. Plaintiff alleges that in October
21 2004, at the direction of the Warden, NNCC began to strictly enforce the prison’s housing rules
22 in Unit 3 to purposely make it more difficult for disabled prisoners. *Id.*, ¶ 4. Plaintiff contends
23 that other Unit 3 inmates consulted him and it was agreed that plaintiff would find counsel to file
24 a class action to ensure compliance with the Americans with Disabilities Act (“ADA”). *Id.*, ¶ 5.

25
26
27 _____
28 ³ Plaintiff filed his original complaint on August 8, 2005 (#7) and his first amended complaint on
January 6, 2006 (#21).

1 Plaintiff contacted Treva Hearne, Esq. (“Ms. Hearne”), who sent a letter to Jackie Crawford,
2 Director of NDOC, setting out the Unit 3 inmates’ concerns. *Id.*, ¶¶ 6-8; *see also* #43, Ex. 1.
3 Allegedly, Unit 3 conditions thereafter returned to pre-October 2004 conditions. *Id.*, ¶ 8.
4

5 Beginning in March 2005, a number of incidents occurred which led plaintiff to conclude
6 that defendants were retaliating against him for the potential class action, as well as for
7 contributing to a book entitled, *To Prove His Innocence*, which was published in February 2005
8 and reflected poorly on certain NDOC administration officials, including Helling. *Id.*, ¶ 10. The
9 allegedly retaliatory incidents include the following: (1) a law librarian told plaintiff that he should
10 be locked up or transferred for promoting a lawsuit (*Id.*, ¶ 9); (2) prison officials cancelled two
11 appointments Ms. Hearne made to meet with the plaintiff without explanation, although Ms.
12 Hearne’s law partner was allowed to meet with plaintiff on the same day Ms. Hearne’s cancelled
13 appointment had been scheduled (*Id.*, ¶¶ 10-11); (3) defendants moved the plaintiff from the
14 medical unit to a restrictive unit at NNCC, Unit 7b, allegedly because the prison was investigating
15 whether plaintiff had assisted another inmate (“Inmate A”),⁴ in locating counsel to draft a trust
16 (“Inmate A Trust”) (*Id.*, ¶¶ 13-14); (4) Fournier, who was the officer in charge of the Inmate A
17 Trust investigation, was disinterested when Ms. Hearne called to inform him that the plaintiff
18 would not benefit under the Inmate A Trust (*Id.*, ¶ 15); and (5) prison officials transferred plaintiff
19 from NNCC Unit 7b to LCC while he was still under investigation for the Inmate A Trust matter
20 (*Id.*, ¶¶ 17-21).
21
22
23

24 Plaintiff alleges that prior to his transfer to LCC, he had not had a disciplinary infraction
25 in over five years, and that to this day, prison officials have never told him why he was under
26

27 ⁴ For confidentiality purposes, the court will refer to this inmate only as “Inmate A.” The details of
28 this investigation are central to the case and will be set out in greater detail below.

1 investigation, nor has plaintiff ever received any disciplinary citation or violation. *Id.*, ¶¶ 21-23.
2 Plaintiff was told that he could not be transferred back to NNCC from LCC until he was no longer
3 under investigation, but shortly thereafter, he was transferred back to NNCC and placed in
4 restrictive Unit 7b instead of Unit 3,⁵ apparently because he had been placed on another inmates'
5 (later discovered to be Inmate A) "enemy list." *Id.*, ¶¶ 26-28. Plaintiff alleges that being placed
6 on an inmate's "enemy list" is a method defendants use to keep prisoners in restrictive housing
7 when defendants have no legitimate reason to do so, since an inmate has no way to challenge
8 another inmate's confidential "enemy list." *Id.*, ¶¶ 29-30. Plaintiff further alleges that Inmate A
9 has informed him that he did not place the plaintiff on his "enemy list." *Id.*, ¶ 31.
10

11
12 After reviewing a copy of the trust and other documents from the confidential report, the
13 court finds that the following facts regarding the Inmate A Trust are undisputed:

14 (1) Tonja Brown, the plaintiff's sister, was the trustee of the Inmate A Trust (#62, D-MSJ
15 29-39 (*sealed*);

16 (2) Robert Brown, Ms. Brown's husband and the plaintiff's brother-in-law, was the
17 successor trustee of the Inmate A Trust, *id.*;

18 (3) Inmate A had all of the assets in his Wells Fargo checking account transferred into the
19 trust, *id.*;

20 (4) Inmate A's Wells Fargo checking account was titled "[Inmate A], Tonja F. Brown,
21 POA," *id.*;

22 (5) the Trustee had full discretion over the trust assets as she "deem[ed] proper for [Inmate
23 A's] comfort, welfare and happiness" and was entitled to "reasonable expenses for services
24 rendered, payable without court order," *id.*;

25
26
27 ⁵ Plaintiff has since been transferred back to LCC (#16).

1 (6) Joseph M. Carpino, another inmate at NNCC, was the trust beneficiary, *id.*; and

2 (7) Ms. Hearne, who has acted as the plaintiff's attorney on a number of occasions, drafted
3 the Inmate A Trust (#39, ¶7).

4 The court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the
5 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff
6 the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir.
7 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

9 II. DISCUSSION & ANALYSIS

10 A. Discussion

11 1. Summary Judgment Standard

12 Summary judgment allows courts to avoid unnecessary trials where no material factual
13 disputes exist. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th
14 Cir. 1994). The court grants summary judgment if no genuine issues of material fact remain in
15 dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C). In
16 deciding whether to grant summary judgment, the court must view all evidence and any inferences
17 arising from the evidence in the light most favorable to the nonmoving party. *Bagdadi v. Nazar*,
18 84 F.3d 1194, 1197 (9th Cir. 1996). In inmate cases, the courts must

19 [d]istinguish between evidence of disputed facts and disputed
20 matters of professional judgment. In respect to the latter, our
21 inferences must accord deference to the views of prison authorities.
22 Unless a prisoner can point to sufficient evidence regarding such
23 issues of judgment to allow him to prevail on the merits, he cannot
24 prevail at the summary judgment stage.

25 *Beard v. Banks*, ___ U.S. ___, 126 S.Ct. 2572, 2576 (2006). Where reasonable minds can differ on
26 the material facts at issue, however, summary judgment should not be granted. *Anderson v.*

1 *Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

2 The moving party bears the burden of informing the court of the basis for its motion, and
3 submitting evidence which demonstrates the absence of any genuine issue of material fact. *Celotex*
4 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party
5 opposing the motion may not rest upon mere allegations or denials in the pleadings but must set
6 forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477 U.S. at 248.
7 Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against
8 a party who fails to make a showing sufficient to establish the existence of an element essential
9 to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477
10 U.S. at 322-23.
11

12 **2. First Amendment Retaliation**

13 Prisoners have a right to meaningful access to the courts, and prison authorities may not
14 penalize or retaliate against an inmate for exercising this right. *Bradley v. Hall*, 64 F.3d 1276,
15 1279 (9th Cir. 1995). Prison officials may be sued under Section 1983 for retaliating against a
16 prisoner for exercising his or her constitutional rights. *Pratt v. Rowland*, 65 F.3d 802, 806 & n.4
17 (9th Cir. 1995). A retaliation claim involves five elements: "(1) An assertion that a state actor took
18 some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that
19 such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did
20 not advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir.
21 2004).
22

23 Although an inmate alleging a retaliatory transfer has "no constitutionally-protected liberty
24 interest in being held at, or remaining at, a given facility," an inmate need not establish "an
25 independent constitutional interest in... assignment to a given prison... because the crux of his
26
27
28

1 claim is that state officials violated his *First Amendment* rights by retaliating against him for his
2 protected speech activities.” *Pratt*, 65 F.3d at 806 (emphasis in original). Retaliation claims must
3 be evaluated in light of the deference accorded to prison officials. *Id.* at 807. The inmate bears
4 the burden of pleading and proving the absence of legitimate correctional goals for the alleged
5 retaliatory action. *Id.* at 806; *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). The Ninth
6 Circuit has recognized that “timing can properly be considered as circumstantial evidence of
7 retaliatory intent.” *Id.*, citing *Pratt*, 65 F.3d at 808.

9 **3. Conspiracy**

10 Pursuant to 42 U.S.C. § 1985, a plaintiff has a cause of action if two or more state actors
11 conspire to deprive him of his constitutional rights. 42 U.S.C. § 1985(3). A claim under section
12 1985 must allege facts to support the allegation that defendants conspired together, and a mere
13 allegation of conspiracy without factual specificity is insufficient. *See Johnson v. State of*
14 *California*, 207 F.3d 650, 655 (9th Cir. 2000), citing *Karim-Panahi v. Los Angeles Police*
15 *Department*, 839 F.2d 621, 626 (9th Cir. 1988).

17 **B. Analysis**

18 **1. Plaintiff’s motion for summary judgment**

19 **a. Retaliation**

20 Plaintiff alleges that the defendants retaliated against him because he contacted Ms. Hearne
21 regarding a class action lawsuit on behalf of disabled prisoners in NNCC Unit 3 and because he
22 contributed to a book that did not reflect well on Helling and another prison administrator (#38).
23 Plaintiff asserts that Fournier began an investigation into plaintiff’s involvement with the Inmate
24 A Trust only because defendants Helling and Benedetti needed a basis to carry out their retaliation
25 against the plaintiff for exercising his First Amendment rights. *Id.*, p. 13. Plaintiff contends that
26
27
28

1 proof that the investigation was a retaliatory sham is that Fournier has never spoken to plaintiff
2 regarding Inmate A's allegations that the plaintiff defrauded Inmate A, nor did Fournier listen to
3 Ms. Hearne when she called to advise him that the plaintiff had no involvement in the Inmate A
4 Trust nor would he benefit from it. *Id.*, pp. 12-13. Further, plaintiff alleges that another unnamed
5 inmate designated in the Inmate A Trust stood to benefit, but that the other inmate was never
6 punished, transferred or investigated. *Id.*, p. 12. Benedetti placed the plaintiff on a transfer list and
7 then on Inmate A's enemy list two days before he even responded to plaintiff's informal grievance
8 questioning why plaintiff had been placed in Unit 7b. *Id.*, pp. 14-15. Plaintiff was transferred to
9 LCC on May 3, 2005 while he was still under investigation for his involvement in the Inmate A
10 Trust, *id.*, p. 15, and it was not until June 22, 2005, that the defendants told him he was transferred
11 to LCC "for safety and security reasons." Plaintiff has never been written up for any disciplinary
12 infraction or received any notice of violation. *Id.*

15 Plaintiff also alleges: (1) plaintiff engaged in all of his First Amendment activity between
16 December 2004 and March 2005, most of which was directed at Helling and Benedetti; (2)
17 defendants were aware that Ms. Hearne was involved in possibly filing a class action against
18 NDOC for violations of the American with Disabilities Act ("ADA") and she had assisted plaintiff
19 in publishing the book *To Prove His Innocence*; (3) Helling interfered with Ms. Hearne's access
20 to the plaintiff in March 2005 by canceling her visits without justification; (4) when defendants
21 learned that Ms. Hearne had prepared the Inmate A Trust, they took advantage of "this particular
22 obscure connection between Plaintiff and Inmate A's Trust to perfect their veiled attempt to silence
23 or chill Plaintiff's First Amendment conduct;" (5) Ms. Hearne's explanation to Fournier that
24 plaintiff was not named in the Inmate A Trust should have removed all suspicion from plaintiff;

1 and (6) Benedetti “knew the jig was up” after Ms. Hearne called to explain; therefore, Benedetti
2 had plaintiff transferred to LCC. *Id.*, pp. 16-19. Plaintiff submits an affidavit in which he affirms
3 that he was not given notice of the April 27, 2005 reclassification hearing in which the transfer
4 decision was made, nor did he attend the hearing or present evidence in his defense (#59).
5 Additionally, the unit to which plaintiff has been assigned at LCC contains just as many – or more
6 – elderly inmates as were in his unit at NNCC such that there is no significant difference between
7 the two units. *Id.*

9 Defendants maintain that there are disputed facts, but that the facts overwhelmingly favor
10 defendants; therefore, summary judgment should be granted in their favor on their cross-claim
11 (#48, p. 10). Defendants argue that plaintiff’s original 2001 placement at NNCC was always
12 intended to be temporary because plaintiff had been classified to the sex offender program at LCC,
13 and he was moved to NNCC to be given a hip injection while awaiting transfer to LCC. *Id.*, pp.
14 10-11; *see also* #51, D-MSJ 5 (entry for May 1, 2001); *see also* Helling’s Affidavit, D-MSJ 76.
15 The plaintiff was never “medically assigned” to NNCC as he alleges, and the prison officials
16 intended to transfer the plaintiff to LCC many years before the plaintiff engaged in any protected
17 First Amendment conduct (#48, p. 11).

19 The defendants further claim that Ms. Hearne’s December 2004 letter to Director Crawford
20 complaining about ADA violations did not identify the plaintiff, and any inference that Director
21 Crawford created problems for defendants Helling and Benedetti, who then in turn retaliated
22 against the plaintiff based on the content of the letter and the threat of a lawsuit, is unsupported.
23 *Id.*, p 12. Helling attests that he has come to view the threat of an inmate lawsuit as an “ordinary
24 incident of prison administration,” and that such a common threat would not result in retaliation.
25
26
27
28

1 *Id.*, p. 13; *see also* Helling's Affidavit, D-MSJ 80. Helling also affirms that a policy instituted in
2 October 2004 to prevent inmate-on-inmate assaults did make it more difficult for the NNCC Unit
3 3 medical inmates, but when this was discovered, Unit 3 was exempted from the new policy. *Id.*

4
5 Defendants also contend that plaintiff's allegation that the law librarian told him sometime
6 in March 2005 that he should be locked up or transferred for promoting a lawsuit in violation of
7 prison policy is hearsay, and therefore inadmissible. *Id.* Further, defendants argue that there is no
8 connection between the law librarian's statement and the actual defendants in this case. *Id.*, p. 14.

9
10 Defendants additionally argue that Helling did not improperly interfere with meetings
11 between the plaintiff and his attorney, Ms. Hearne, in March 2005. *Id.* Ms. Hearne had requested
12 permission to bring in the book *To Prove His Innocence* to the plaintiff for signing, and that
13 Helling properly denied the request pursuant to prison regulations. *Id.*, p. 16; *see also* D-MSJ 11.
14 The visit was not perceived to be an attorney-client visit, but rather, a book-signing visit. In any
15 event, Ms. Hearne failed to clarify that the visit was to confer with her client. *Id.*; *see also*,
16 Helling's Affidavit, D-MSJ 80. Further, *To Prove His Innocence* does not disparage Helling and
17 plaintiff admitted in his deposition that he never even read the book and did not write anything
18 critical of Helling. *Id.*, p. 17 and *citing* D-MSJ 116, p. 100-101.

19
20 Defendants note that inmates have no independent right to be housed at any particular
21 correctional facility, *see id.*, p. 18, *citing Hewitt v. Helms*, 459 U.S. at 467, n.4; however, they also
22 concede that the defendants may not transfer a prisoner in retaliation for protected conduct. *Id.*,
23 p. 18, *citing*, 120 F.3d at 1077-78. Defendants assert that plaintiff has failed to show that they took
24 adverse action against him since separating plaintiff from potential fraud victims does not
25 constitute adverse action, and plaintiff has no right to choose the locale of his confinement. *Id.*,
26
27
28

1 p. 20. Defendants point out that plaintiff is in general population at LCC, not administrative
2 segregation; thus, he is confined under similar conditions as NNCC. *Id.* Further, plaintiff admitted
3 in his deposition that the medical treatment at LCC was “probably adequate,” and that he has been
4 given the opportunity to return to NNCC for required medical treatment if necessary. *Id.*

5 The defendants argue that the basis for their transfer decision – the Inmate A Trust
6 investigation – was for the legitimate penological purpose of protecting elderly inmates. *Id.* at 28.
7 On April 14, 2005, Fournier received a complaint from Inmate A that: the plaintiff had approached
8 Inmate A and convinced him that he needed to set up a trust account for his retirement money; that
9 the trust was set up by Ms. Hearne with the plaintiff’s sister, Tonja Brown, as trustee; that Inmate
10 A had not received any account statements for the trust; and that Inmate A believed he had been
11 defrauded. *Id.*, p. 21; *see also* Helling’s Affidavit, D-MSJ 85-86. Fournier drafted a report and
12 referred the investigation to the Inspector General’s office, which began a confidential
13 investigation into the matter. *Id.*, p.22. Plaintiff and Inmate A were immediately separated. *Id.*
14 In response to the allegation that Fournier was not interested in the plaintiff’s side of the story,
15 defendants argue that Fournier was under an obligation to keep the details of the investigation
16 confidential, which was why he was not forthcoming when Ms. Hearne called him on April 19,
17 2005. *Id.* The Inspector General’s office subsequently referred the matter to the criminal division
18 of the Attorney General’s office. *Id.* During the investigation, it was discovered that Robert
19 Brown, the plaintiff’s brother-in-law (Tonja Brown’s husband), was the successor trustee for the
20 Inmate A Trust. *Id.*, p. 27.

21 Pursuant to Administrative Regulation (“AR”) 522, it is NDOC’s responsibility to
22 determine whether inmates need to be physically separated from each other, and staff may do so
23
24
25
26
27
28

1 if there is a significant need. *Id.*, p. 23. The final determination whether an inmate is removed
2 from a “separatee” list is at the discretion of NDOC staff rather than with the protected inmate.
3 *Id.* Plaintiff has been separated from Inmate A and others similarly situated since April 14, 2005
4 due to the investigation into the potential fraud, although defendants admit that “no formal
5 disciplinary or criminal charges were leveled against” plaintiff. *Id.*, p. 25. Nevertheless, Helling
6 states that in his long tenure as a prison administrator and under the totality of the circumstances
7 – Inmate A came forward on his own, he had not received statements, he is elderly, the plaintiff
8 has a history of extracting payment from other inmates⁶, and the inter-relationship between the
9 parties to the trust – it was and is his opinion that the plaintiff should remain separated from Inmate
10 A and other elderly and easily confused inmates. *Id.* Based on these facts, keeping the plaintiff
11 away from such potential victims serves a legitimate penological interest. *Id.*, p. 26.
12
13

14 In his reply, plaintiff restates his original arguments and claims he has suffered adverse
15 actions, including loss of his prison job, ten days per month work time credits, and preferred
16 housing (#58, pp. 8-19). Finally, plaintiff contends that Inmate A had made “similar unfounded
17 claims in the past, sometimes against prison staff, which should have raised a red flag necessitating
18 further investigation before jumping to conclusions.” *Id.*, p. 24.
19

20 Viewing the evidence in the light most favorable to the defendants, the court concludes that
21 the plaintiff has not met his burden of proving the absence of legitimate correctional goal for the
22

23 ⁶ Defendants point to a 2001 disciplinary infraction in which plaintiff was found guilty of committing
24 an “MJ 29” violation for charging or collecting a fee or favors for services as a counsel-substitute, legal
25 assistant or “writ-writer.” *See* #48, p. 26; *see also* D-MSJ 7, entry dated Jan. 30, 2001. Plaintiff contends
26 that this infraction was a misunderstanding over a \$100 deposit to his account “from a person not known to
27 him” regarding his typewriter (#28).
28

1 alleged retaliatory transfer. *See Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1997).

2 The defendants have a legitimate penological interest in protecting inmates from harm
3 inflicted by other inmates. In his affidavit, Helling states:

4 NNCC holds a large population of elderly, infirmed, and easily-
5 confused inmates, owing largely to the design of the NNCC facility,
6 which features a “flat yard” design and houses regional medical
7 facilities, both of which accommodate elderly and infirmed inmates.
8 Protecting elderly, infirmed, and easily-confused inmates from
9 potentially predatory, fraudulent, and abusive conduct of other
10 inmates is a legitimate correctional goal at NNCC and within the
11 NDOC system. The elderly, infirmed and easily-confused inmates
12 are especially vulnerable to exploitation. Such victimization is very
13 difficult to discover, as physical force is often not used. Verbal
14 threats and fraudulent behavior often leave no outward, discernible
15 indicators or physical injuries. When such victimization or
16 potential victimization has been discovered, stopping the harm or
17 threat of harm must be immediate. Physically separating an elderly,
18 infirmed, or easily-confused inmate claiming to be a likely victim
19 of fraud, from the suspected perpetrators or collaborators of that
20 fraud is a legitimate correctional goal at NNCC. Given that NNCC
21 has a large concentration of elderly inmates, as compared to other
22 correctional facilities within the NDOC system, separating inmate
23 Klein from inmates housed at NNCC would further the goal of
24 separating inmate Klein from elderly, infirmed, or easily-confused
25 and easily-manipulated inmates.

18 #48, Helling’s Affidavit, D-MSJ 83, ¶ 25.

19 The court has reviewed defendants’ sealed and *in camera* submission, the “Confidential
20 NDOC Inspector General’s Report and Materials,” *see* #62 (*sealed*),⁷ and concludes that the

21 ⁷ The plaintiff submitted a request that the court take judicial notice of the fact that the “final”
22 version of the Inspector General’s Confidential Report is dated April 29, 2005 but that the decision to
23 transfer the plaintiff to LCC was made on April 27, 2005 (#64). The plaintiff argues that the defendants are
24 attempting to make after-the-fact and bogus justifications for the transfer decision. The court notes that while
25 the “final” version of the report is dated April 29, 2005, the investigation began on April 14, 2005. The
26 report’s supporting documentation is dated between April 14, 2005 and April 22, 2005, thus, the court
27 concludes that the defendants likely had much of the information available to them on April 27, 2005 when
28 the committee made the transfer decision. The court concludes that merely because the final draft of the
investigative report was dated two days after the decision to transfer the plaintiff to LCC does not mean that

1 defendants, in their discretion, had a reasonable basis for suspecting the plaintiff of fraud and
2 beginning an investigation. The confidential documentation as well as plaintiff's own statements,
3 reveal that it was the plaintiff who referred Inmate A to his attorney, Ms. Hearne, for assistance
4 in setting up a trust account for Inmate A's retirement funds (#38, p. 12).⁸ The evidence before
5 the court also reveals that plaintiff's sister, Tonja Brown, was the trustee for the Inmate A Trust,
6 that her husband Robert Brown was the successor trustee, and that Ms. Brown had check-writing
7 privileges on Inmate A's checking account (#62, D-MSJ 29-39 (*sealed*)). Fearing that he had been
8 defrauded because he had not received any statements of his trust account in which he had over
9 \$50,000 in retirement funds, Inmate A approached prison officials. *Id.*, D-MSJ 28 (*sealed*).

11 Defendants have a responsibility to secure the safety of all inmates, especially those who
12 may be unable to protect themselves, such as elderly and disabled prisoners. However, as set out
13 in more detail below, the court concludes that reasonable minds can differ over whether the
14 plaintiff's transfer was for a legitimate penological purpose. Therefore, viewing the evidence in
15 the light most favorable to the defendants, the plaintiff has failed to demonstrate that his transfer
16 was not for the legitimate correctional purpose of securing the safety of Inmate A and others
17
18

the defendants did not review a previous draft that contained the same or similar information.

19
20 ⁸ In his complaint and motions, plaintiff admits that he referred Inmate A to Ms. Hearne (#21, ¶¶ 13
21 & 15; *see also* #38, p. 4, ¶ 9; *see also* #58, p. 21). Ms. Hearne's affidavit also states that the plaintiff referred
22 Inmate A to her (#39, ¶ 11). The plaintiff's sister, Tonja Brown, also states in her affidavit that the plaintiff
23 referred Inmate A to Ms. Hearne (#42, Affidavit dated May 19, 2006). However, plaintiff concurrently
24 submitted the affidavit of another inmate, Joseph M. Carpino, who states that it was he (inmate Carpino) who
25 referred Inmate A to Ms. Hearne (#41, ¶ 3). Additionally, the plaintiff submitted two affidavits from Inmate
26 A – one that says that it was the plaintiff who referred him to Ms. Hearne (#40, Affidavit dated July 7, 2005,
27 ¶ 1) and another that states “another one of my friends,” not the plaintiff, found him the attorney who drafted
28 his trust (#40, Affidavit dated October 24, 2005, ¶ 4). Oddly enough, in the same motion in which he states
that he *did* refer Inmate A to Ms. Hearne, *see* #58, p. 21, plaintiff *denies* referring Inmate A to Ms. Hearne.
See #58, p. 23.

1 similarly situated.⁹ As plaintiff has not met his burden, his motion for summary judgment must
2 be denied.

3 **b. Conspiracy to Retaliate**

4 The plaintiff has alleged that the defendants conspired to retaliate against him for
5 exercising his constitutional rights (#21, p. 4).¹⁰ Even giving the full benefit of the doubt to the
6 plaintiff, the court finds that there is absolutely no evidence that the defendants made an agreement
7 or had a “meeting of the minds” to retaliate against the plaintiff for exercising his Constitutional
8 rights. The plaintiff’s motion for summary judgment is denied as to the plaintiff’s conspiracy
9 claim.
10

11 **2. Defendants’ cross-motion for summary judgment**

12 **a. Retaliation**

13 Defendants make essentially the same arguments in their cross-motion for summary
14 judgment (#50) as they did in their opposition to plaintiff’s motion for summary judgment (#48).
15 Plaintiff also makes similar arguments in his opposition to defendants’ cross-motion for summary
16 judgment (#58) as he did in his own motion for summary judgment (#38). Most arguments are
17
18

19 ⁹ The court’s conclusion that plaintiff has failed to demonstrate the absence of a legitimate
20 correctional purpose is not to say that the court has concluded that defendants, in fact, had a legitimate
21 correctional goal in transferring plaintiff. The court’s conclusion is that the plaintiff has not met his burden
22 on summary judgment. *See Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1997) (The inmate bears the burden
23 of pleading and proving the absence of legitimate correctional goals for the alleged retaliatory action).
Whether the defendants had a legitimate penological goal in instituting the transfer of plaintiff that was
devoid of retaliatory intent is a material fact that is at issue, as set out in further detail below.

24 ¹⁰ Plaintiff does not bring his conspiracy claim pursuant to 42 U.S.C. § 1985, however, the court
25 construes his pleading liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).
26
27
28

1 sufficiently summarized above; however, to the extent that certain arguments are more relevant
2 to the defendants' motion for summary judgment, the court now addresses them.

3 **(1) The "Some Evidence" Standard**

4 The defendants maintain that in the Ninth Circuit, the court must apply a deferential "some
5 evidence" standard to decisions of prison boards (#60, p. 6, *citing Barnett v. Centoni*, 31 F.3d 813
6 (9th Cir. 1994)). Defendants contend that the plaintiff's retaliation claim is essentially a challenge
7 to the decision by the reclassification committee to transfer him to LCC, and as such, the "some
8 evidence" standard applies to support the legitimate correctional decision (#50, p. 13). Plaintiff
9 contends that his claim is a retaliation claim and that in *Hines v. Gomez*, 108 F.3d 265 (9th Cir.
10 1997), the Ninth Circuit held that the *Barnett* "some evidence" standard does not apply to
11 retaliation claims and instead only applies to due process claims attacking the result of a
12 disciplinary board's proceeding (#58, p. 7). Plaintiff notes that the reason for this distinction is
13 because the "some evidence" standard gives deference to the actions of a prison board because
14 boards are constrained by "procedural safeguards" and make their own credibility determinations
15 based on independent evidence. *Id.*

16 In *Barnett*, the plaintiff alleged retaliation by prison officials in finding him guilty of
17 possessing alcohol and in classifying him as a gang member. *Barnett*, 31 F.3d at 815-16. The
18 court found that summary judgment in favor of the defendants on the plaintiff's retaliation claim
19 was proper because (1) the defendants had submitted "some evidence" to support the plaintiff's
20 reclassification – namely, the guilty verdict by the disciplinary board for possessing alcohol, an
21 affidavit by a prison official stating that there was no retaliation, and a confidential report with
22
23
24
25
26
27
28

1 supporting documentation “indicating” that the plaintiff was a member of a gang – and; (2) the
2 board’s reclassification of the plaintiff was for the legitimate penological purpose of maintaining
3 prison discipline. *Id.* at 816, citing *Superintendent v. Hill*, 472 U.S. 445 (1985).

4 In *Hines*, the Ninth Circuit held that while the deferential “some evidence” standard applied
5 to “a prison disciplinary board’s finding of a rule violation,” the standard did not apply to “a prison
6 guard’s initial accusation of a rule violation where the guard’s accusation itself allegedly is false
7 and retaliatory.” *Hines v. Gomez*, 108 F.3d 265, 268 (9th Cir. 1997). The court based its decision
8 on its reading of *Hill*, in which the Supreme Court had based *its* decision on the fact that a prisoner
9 is afforded procedural safeguards such as advance notice and the opportunity to attend and present
10 evidence when a disciplinary board makes a decision. *Id.* at 268-69. The *Hines* court noted that
11 *Barnett* “focused on a prison classification committee decision to discipline the prisoner,” and
12 stated that when the “prison factfinder’s guilt determination... necessarily considers the merits of
13 the charge,” the “some evidence” standard applies. *Id.* at 269-70.

14 The Ninth Circuit subsequently clarified in *Bruce v. Ylst*, 351 F.3d 1283 (9th Cir. 2003)
15 that “In *Hines*,... we held that the ‘some evidence’ standard of *Hill* did not apply to retaliation
16 claims. The ‘some evidence’ standard applies only to due process claims attacking the result of
17 a disciplinary board’s proceeding.” *Ylst*, 351 F.3d at 1289 (emphasis added).

18 The defendants argue that the plaintiff is challenging the prison board’s reclassification and
19 transfer decision, such that he is “*implicitly* asserting a substantive “due process” claim” (#60, p.
20 7, n.19). The court disagrees with the defendants’ characterization of the plaintiff’s claim. The
21 court notes that the plaintiff does not allege a due process violation, but a retaliation claim (#21,
22
23
24
25
26
27
28

1 pp. 3, 4). The plaintiff is not alleging that the *board/reclassification committee* acted in a
2 retaliatory manner, but that the individual defendants – Helling, Benedetti and Fournier – acted in
3 a retaliatory manner by commencing an investigation and essentially spoon-feeding information
4 to the committee in order to effectuate the plaintiff’s transfer before the investigation was
5 complete. *Id.*, pp. 2-4. As noted by the defendants themselves, none of the named defendants was
6 on the board that reclassified the plaintiff (#60, p. 9, n.25; *see also id.*, p. 8, n. 21; *see also* #60,
7 Benedetti Affidavit, D-MSJ 168, ¶4b). Further, if the plaintiff *had* alleged a due process violation,
8 there likely would be an issue of fact as to whether the plaintiff was given any procedural
9 protections in his reclassification.¹¹ Because plaintiff’s claim is a retaliation claim against the
10 *individual* defendants for initiating the transfer proceedings, and not a due process claim against
11 the prison board for making the transfer decision without affording the plaintiff due process, the
12 deferential “some evidence” standard does not apply. *Bruce v. Ylst*, 351 F.3d 1283, (9th Cir.
13 2003) (“[t]he ‘some evidence’ standard of *Hill* [does] not apply to retaliation claims” and “applies
14 only to due process claims attacking the result of a disciplinary board’s proceeding”). Thus,
15 defendants need more than just “some evidence” to support their proffered justification for
16 effectuating the plaintiff’s transfer.
17
18
19

20 (2) Genuine Issues of Material Fact as to Defendants’ Motive

21 Viewing the evidence in the light most favorable to the plaintiff, the court concludes that
22

23 ¹¹ The plaintiff states that he was not given notice of the reclassification hearing, did not attend and
24 was not able to present evidence in his defense (#58, p.8). Defendants, however, argue that the plaintiff did
25 attend the hearing because Benedetti states in his affidavit that the term “Personal” written in plaintiff’s
26 chrono file on April 27, 2005 means that the plaintiff attended the hearing (#60, p. 8; *see also* #60, D-MSJ
27 168, ¶ 4c). However, it is unclear whether plaintiff was allowed to present a defense if in fact he did attend
28 the hearing. It is obviously disputed as to whether the plaintiff was afforded procedural protections.

1 genuine issues of material fact exist regarding the defendants' motive or intent in transferring the
2 plaintiff to LCC. These issues of material fact preclude granting the defendants' cross-motion for
3 summary judgment.

4 First, the plaintiff offers the timing of the transfer prior to the completion of the
5 investigation and prior to his grievances being resolved. The investigation and transfer occurred
6 close in time to the class action letter from Ms. Hearne, the publishing of the book *To Prove His*
7 *Innocence*, and before the investigation was concluded (#43, Ex. 2, Helling's Response to Request
8 for Admissions, p. 3, No. 9). In *Pratt*, the court recognized that "timing can properly be considered
9 as circumstantial evidence of retaliatory intent." *Pratt*, 65 F.3d at 808. Although the defendants
10 argue that it was important to separate the plaintiff from Inmate A and others similarly situated
11 immediately, there is also an issue of fact as to whether the inmate population at LCC is
12 significantly different than that at NNCC. *See infra*, fn. 13.

15 Second, the plaintiff raises the fact that "although plaintiff stood to gain nothing by way
16 of the [Inmate A] trust, there was another NNCC Unit 3 inmate named as a beneficiary to the
17 [Inmate A] trust" (#58, p. 21). Plaintiff alleges that, to his knowledge, this other inmate was not
18 transferred or punished. *Id.*, p. 29. A review of the Inmate A Trust Agreement shows that another
19 inmate, Joseph Carpino,¹² was the named beneficiary of the Inmate A Trust (#62, D-MSJ 32
20 (*sealed*)). The plaintiff notes that in April 2005, the trustee (plaintiff's sister, Tonja Brown) spoke
21 with the Inspector General investigator, Larry Adamson, who allegedly told her that "if anyone
22 should have been locked up during the course of the investigation it should have been the inmate
23

24
25 ¹² Inmate Carpino is the same inmate who states in his affidavit (in contradiction to other evidence)
26 that it was he, not the plaintiff, who referred Inmate A to Ms. Hearne (#41, ¶ 3).
27
28

1 that was named in [Inmate A]’s Trust, not Mr. Klein” (#42, Brown Affidavit, dated May 19, 2006;
2 *see also* #38, p. 13).

3 Defendants do not respond to the allegations about inmate Carpino, except to argue that
4 they had more than enough information to investigate the plaintiff (#60, p. 15). From the
5 information provided to the court, it appears that inmate Carpino was just as involved in the Inmate
6 A Trust Account as the plaintiff, since Carpino was a named beneficiary to the Trust, *see* #62, D-
7 MSJ 32 (*sealed*), and he admits to being involved in initially persuading Inmate A to create a trust
8 (#41, Carpino Affidavit, p. 1, § 3). The defendants have not given this court any information
9 regarding whether inmate Carpino’s participation was also investigated or whether he suffered any
10 consequence for his involvement. While the court agrees that the defendants had cause to
11 investigate the plaintiff’s involvement, assuming that inmate Carpino was not investigated and
12 transferred away from elderly inmates in a similar manner as the plaintiff, it appears from the
13 evidence before the court that the plaintiff was treated differently.
14
15

16 Defendants argue that even if there was retaliatory motive to transfer the plaintiff, if there
17 was *also* a legitimate penological reason to transfer the plaintiff, there can be no finding of
18 unconstitutional retaliation. *See* #60, p. 5 (“It would be illegal for DOC officials to transfer the
19 plaintiff *solely* in retaliation for his exercise of protected First Amendment rights”) (emphasis in
20 #60, *citing Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995)). Thus, defendants argue that the
21 plaintiff must prove the defendants *only* reason for transferring the plaintiff was retaliation. The
22 court finds that the defendants’ justifications for the transfer are at issue here. If the plaintiff was
23 treated differently than another inmate who appears to have been just as involved – if not more –
24
25
26
27
28

1 in the alleged scam as the plaintiff, the court cannot conclude that the defendant's proffered
2 "legitimate penological basis" for the defendants' initiation of the plaintiff's transfer prior to the
3 close of the investigation was not pretextual. There exists a genuine issue of material fact
4 regarding whether the defendants' motives and intent were retaliatory in transferring the plaintiff
5 to LCC.

6 Defendants also argue that there is no evidence that they knew of the plaintiff's First
7 Amendment activities because the plaintiff's name was not on the class action letter (#60, p. 11).
8 Plaintiff responds that the defendants did know he was the inmate behind the letter because it was
9 his attorney who wrote it, and defendants were well aware that Ms. Hearne represented plaintiff
10 in his appeals (#58, p.12). The court notes that the defendants were at least aware of the book that
11 the plaintiff contributed to because Helling denied Ms. Hearne's request to meet with the plaintiff
12 to have him sign the book, *see* #48, D-MSJ 11, and Helling apparently would not allow the book
13 into the prison (#60, p. 13, *incorporating by reference* #48, p. 18, *citing* Plaintiff's Deposition).
14
15

16 Although defendants state that plaintiff's 2001 placement at NNCC was always intended
17 to be temporary because prison officials planned to transfer plaintiff to LCC, *see* #48, p. 11 and
18 #51, D-MSJ 5 (entry for May 1, 2001), the plaintiff was housed at NNCC for approximately four
19 years. The court finds that four years is not "temporary."

20
21 Finally, plaintiff notes that he has never been charged with wrongdoing. Defendants admit
22 this fact, stating "ultimately, no formal disciplinary or criminal charges were leveled against inmate
23 Nolan Klein related to the Investigation," *see* #50, p. 5, ¶ 9 and p. 21; however, they fail to explain
24 why this is so. Despite not bringing charges or making a formal finding of wrongdoing, the
25
26
27
28

1 defendants argue that in Helling’s “professional judgment and opinion,” the plaintiff “should
2 remain as a ‘separatee’ of the above-identified inmates,... because Inmate A and others similarly
3 situated “remain especially prone to victimization of fraudulent schemes by [the plaintiff]” (#50,
4 p. 5, ¶ 10).

5 The court finds it curious that the plaintiff has never been charged with a violation. While
6 it appears that there was cause to investigate the circumstances surrounding the Inmate A Trust,
7 it is unclear whether investigators ever came to a conclusion that a crime or fraud was committed
8 and by whom. For instance, there is no information before the court regarding whether
9 investigators concluded that the trust was actually fraudulent, that money was missing from Inmate
10 A’s trust account, and if so, who took the money. The court is not clear whether, to this day, the
11 investigation is “completed” or whether charges might be brought sometime in the future. The
12 plaintiff was transferred before any of these issues were resolved (#43, Ex. 2, Helling’s Response
13 to Request for Admissions, p. 3, No. 9). Reasonable minds can differ as to whether, had the
14 defendants waited, they may have found no wrongdoing or basis to transfer the plaintiff. It appears
15 to the court that the plaintiff is being kept at LCC only pursuant to Helling’s opinion that he should
16 be kept away from elderly inmates. While the court must defer to the discretion of prison officials,
17 there is a limit to that deference, and the court finds that there is a question here as to the
18 defendants’ motives underlying their discretionary decisions.
19
20
21

22 The plaintiff argues that there are as many or more elderly inmates at LCC. If this is in fact
23 the case,¹³ it is unclear to the court why the plaintiff would be transferred to LCC and why he

24 ¹³ The defendants submit an affidavit stating that 8.9% of the NNCC population is over age 60, while
25 5.35% of the LCC population is over age 60 (#60, D-MSJ 171, ¶ 5; *see also* #60, p. 18). The court notes that
26 when one considers the total populations for each institution – 1,275 inmates (NNCC) and 1,548 inmates
27
28

1 would remain there. Although the defendants do provide information regarding the percentages
2 of elderly inmates at NNCC and LCC as a whole, they do not provide information regarding how
3 many elderly inmates inhabit the restricted units at NNCC, such as Unit 7b, as compared to NNCC
4 Unit 3 and LCC. As the Ninth Circuit has noted, if the defendants abuse prison procedure as a
5 pretext to silence or punish an inmate for protected First Amendment conduct, “they cannot assert
6 that [the plaintiff’s transfer] served a valid penological purpose, even though he may have
7 *arguably* ended up where he belonged.” *Ylst*, 351 F.3d at 1289 (emphasis in original).
8

9 The court agrees that the circumstances of the Inmate A Trust account are suspicious, most
10 notably that plaintiff’s family and attorney were intimately involved in the trust account. Thus,
11 it appears that there was good cause to investigate the plaintiff. However, reasonable minds can
12 differ as to whether there was retaliatory motive in the defendants’ instigation of the transfer itself
13 where defendants punish one inmate but allow another equally involved inmate to remain where
14 he was without investigation. Further, reasonable minds can differ as to whether there is a
15 retaliatory motive based on the fact that the defendants never ultimately found the plaintiff guilty
16 of wrongdoing but continue to keep him at a different institution where there are arguably almost
17 as many elderly inmates. The court concludes that the timing of the transfer, combined with the
18 lack of investigation into inmate Carpino’s role and the fact that no charges have ever been brought
19 against the plaintiff, raise genuine issues of material fact regarding whether there was retaliatory
20 motive behind the transfer. *Ylst*, 351 F.3d at 1289.
21

22
23 _____
24 (LCC) as of October 31, 2006 – there is no significant difference. *See*
25 http://www.doc.nv.gov/stats/2006/10/2006-10_DAILY_POP_COUNTS.pdf, page 31. This means that as
26 of October 31, 2006, there are approximately 113 inmates over the age of 60 at NNCC and 83 inmates over
27 the age of 60 at LCC.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

b. Conspiracy to Retaliate

As noted above, there is absolutely no evidence before the court that the defendants made an agreement or conspired to retaliate against the plaintiff. As such, the court grants summary judgment in favor of the defendants as to plaintiff’s conspiracy claim.

III. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that plaintiff has failed to meet his burden of demonstrating that there was no legitimate penological reason for his transfer to LCC and has failed to present any evidence of a conspiracy to retaliate on the part of the defendants. Defendants have failed to show there are no genuine issues of material fact as to their motive behind the plaintiff’s transfer prior to the completion of an investigation that ultimately resulted in no charges being filed. Therefore, the court recommends that plaintiff’s motion for summary judgment (#38) be **DENIED** and defendants’ cross-motion for summary judgment (#50) be **DENIED** as to the retaliation claim but **GRANTED** as to the conspiracy claim.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this report and recommendation within ten days of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and Recommendation” and should be accompanied by points and authorities for consideration by the District Court.
2. This report and recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s judgment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

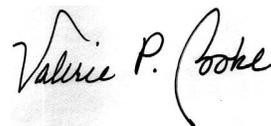
IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that

(1) Plaintiff's motion for summary judgment (#38) be **DENIED**; and

(2) Defendants' cross-motion for summary judgment (#50) be **DENIED** as to the retaliation claim and **GRANTED** as to the conspiracy claim.

DATED: January 17, 2007.



UNITED STATES MAGISTRATE JUDGE