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7 WEIHER, Ph.D.

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

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LANCE S. WILSON
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11 RICHARD W. LEWIS, Ph.D.,
12 Plaintiff,

Case No. CV-N-99-386-DWH (RAM)

STATE DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

13 v.

14 ELIZABETH RICHITT, Ph.D., et al.
15 Defendants.

17 COME NOW Defendants CHRISTA PETERSON, Ph.D., and RICHARD WEIHER, Ph.D.,
18 (herein "State Defendants") by and through counsel, FRANKIE SUE DEL PAPA, Nevada Attorney
19 General, and STEPHEN D. QUINN, Deputy Attorney General, and respectfully move this court
20 pursuant to Fed. R. Civ. P. 56 for summary judgment of dismissal with prejudice of Plaintiff's Second
21 Amended Complaint.

22 State Defendants make this motion on the grounds there is no genuine issue as to any material
23 fact and State Defendants are entitled to judgment as a matter of law. This motion is based on the
24 attached Points and Authorities including the exhibits 1 through 7 attached thereto, the Affidavits of
25 Christa Peterson, Ph.D., and Richard Weiher, Ph.D., submitted herewith the record on file

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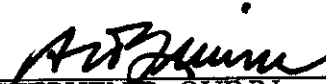
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1 herein, and such other and further matter as shall properly be brought to the attention of this court in
2 these premises.

3 Dated this 19th day of September 2001.

4 Respectfully submitted,

5 FRANKIE SUE DEL PAPA
6 Attorney General

7 By 
8 STEPHEN D. QUINN
9 Deputy Attorney General
10 Litigation Division

11 Attorneys for Defendants CHRISTA PETERSON, Ph.D.,
12 and RICHARD WEIHER, Ph.D.

13 **POINTS AND AUTHORITIES**

14 State Defendants Christa Peterson, Ph.D., and Richard Weiher, Ph.D., submit the following
15 points and authorities in support of their motion for summary judgment. State Defendants request
16 dismissal with prejudice of Plaintiff's second amended complaint.

17 **I.**

18 **STATEMENT OF THE CASE**

19 This action has a somewhat tortuous history. First, the court granted a motion to strike
20 Plaintiff's initial Complaint in its entirety. Doc. #43. Plaintiff filed an amended complaint, but in about
21 February, 2000 asked the defendants to forbear responding because of it appeared based on recent
22 decisions that absolute immunity barred Plaintiff's claims. Finally, in October, 2000, after court
23 involvement, Plaintiff was permitted to file his Second Amended Complaint.

24 Plaintiff's Second Amended Complaint asserts only one § 1983 claim of conspiracy. The thrust
25 of Plaintiff's conspiracy claim is that Defendants Dr. Peterson and Dr. Weiher conspired to induce Mr.
26 and Mrs. Duff to file a complaint against Plaintiff with the Nevada State Board of Psychological
27 Examiners. This motion seeks summary judgment of dismissal, with prejudice, as to Defendants Dr.
28 Peterson and Dr. Weiher on the grounds there is no genuine issue as to any material fact and they are
entitled to dismissal as a matter of law.

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II.

STATEMENT OF FACTS

A. Plaintiff's Claims

Plaintiff's Second Amended Complaint ("complaint") alleges the Defendants Dr. Peterson and Dr. Weiher conspired together and with Mr. and Mrs. Duff to violate Plaintiff's due process "and other civil rights" by inducing Mr. Duff to contrive and file a false complaint against Plaintiff with the psychology board. *A copy of the Second Amended Complaint is attached as Exhibit 7. See p.10, ¶ 52.* Plaintiff alleges "[t]he conspiracy started on or about July 14, 1995." Exhibit 7, p. 4, ¶ 23. Plaintiff alleges "Defendants met and discussed their plan to discredit Dr. Lewis by use of the State Disciplinary Board for Psychologists and through a civil action filed based upon false findings of fact and conclusions of a (sic) law." Exhibit 7, p. 10, ¶ 53. The plan was:

- (1) find patients that would contrive facts to discredit [Plaintiff];
- (2) cause those patients to file a complaint with the Board of Psychological Examiners;
- (3) provide information to the Board of Psychological Examiners that was not part of the investigation or hearing process in order to taint the same;
- (4) agree to covertly supply otherwise confidential information to Mr. and Mrs. Duff; publish the private reprimand to further discredit [Plaintiff]; once the process was complete force Dr. Lewis to sell Western Counseling Services or close that entity. The desired affect (sic) of this plan was to so discredit [Plaintiff] and his Corporation, Western Counseling Services, that they would not consider bringing a civil action to enforce the terms and conditions of their contract with the State of Nevada.

Exhibit 7, p. 10, ¶ 53.

Plaintiff alleges the overt acts of the conspiracy included "locating a disgruntled complainant (Mr. Duff) [and] causing Mr. Duff to file a false complaint with the Board of Psychological Examiners." Exhibit 7, p. 6, ¶ 29. Plaintiff alleges that Defendant Peterson "conspired with Rhonda Moore, Richard Weiher, and the Duffs to initiate a false disciplinary complaint against [Plaintiff]." Exhibit 7, p. 4, ¶ 22. Plaintiff alleges Mr. Duff's complaint resulted in Board disciplinary proceedings that concluded Plaintiff violated regulations applicable to the practice of psychology. Exhibit 7, p. 7, ¶ 36. Plaintiff alleges the Board issued a private reprimand and ordered Plaintiff to pay the costs of the proceeding. Exhibit 7, p. 7, ¶ 36.

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1 **B. Mr. Duff's Complaint**

2 On about August 26, 1993 Mr. Duff filed a written complaint with the Psychology Board
3 against Plaintiff.¹ Attached hereto is a copy of Mr. Duff's complaint marked **Exhibit 1a**. Mr. Duff
4 complained that Plaintiff failed to provide Mr. Duff's records to Mr. Duff or to his treating psychiatrist
5 and psychologist, and that Plaintiff gave improper testimony in court. Mr. Duff subsequently
6 complained about the progress of the Board action in letters to the board or the deputy attorney general
7 handling the case. See copies of Mr. Duff's letters: September 16, 1993 **Exhibit 1b**; December 16,
8 1993 **Exhibit 1c**; March 4, 1993 **Exhibit 1d**; and September 11, 1993 **Exhibit 1e**.

9 **C. Defendants' Affidavits**

10 Defendants Dr. Peterson and Dr. Weiher submit affidavits in support of this motion. Dr.
11 Peterson and Dr. Weiher specifically deny the conspiracy alleged by Plaintiff.

12 Mr. Duff's made his complaint on August 26, 1993. Dr. Peterson and Dr. Weiher did not learn
13 of it until well after it was made. *Affidavit of Dr. Peterson*, ¶ 7; *Affidavit of Dr. Weiher*, ¶ 7. Dr.
14 Weiher learned of it about October 6, 1993, when he was hired to consult and advise the Board
15 concerning the complaint. *Aff't of Dr. Weiher*, ¶ 7. Dr. Peterson learned of Board disciplinary
16 proceedings against Dr. Lewis shortly before the hearing in May 20, 1995, when the deputy attorney
17 general prosecuting the case distributed copies of the Board complaint and notice of hearing to all board
18 members. *Aff't of Dr. Peterson*, ¶ 7.

19 Neither had any advance contact with Mr. Duff regarding his complaint. Dr. Weiher did not
20 speak with Mr. Duff about his complaint until after it was made, and when he did it was to investigate
21 it, not to encourage or induce Mr. Duff to file it. *Aff't of Dr. Weiher*, ¶ 10.

22 Dr. Peterson had no contact with Mr. Duff at any time (*Aff't of Dr. Peterson*, ¶ 10) and did not
23 discuss the discipline of Dr. Lewis with Dr. Weiher or Deputy Attorney General Ronda Moore prior to
24 the hearing in May 1995 (*Aff't of Dr. Peterson*, ¶ 7).

25 **D. Board Authority**

26 The Legislature declared that the practice of psychology is a learned profession that affects
27 public safety and is subject to regulation. NRS. 641.010. The Legislature mandated creation of a five-

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¹ The complaint concerned acts and omissions of Plaintiff in connection with his role as court appointed psychologist in a post divorce decree custody dispute between Mr. Duff and his former spouse.

1 member board appointed by the governor to license and discipline psychologists. *See* NRS 641-030
2 and NRS 641.100. Grounds for discipline include violation of Board regulations. NRS 641.230(7).

3 Any person may file a written complaint against a psychologist. NRS 641.250. A complaint is
4 confidential (*see* NRS 641.255) until the board determines it is not frivolous. NRS 641.270. Once the
5 board determines a complaint is not frivolous, it refers the complaint to the Attorney General for
6 investigation. NRS 641.270. Thereafter, the complaint remains confidential except as necessary to
7 conduct an investigation. NRS 641.255. At the conclusion of the investigation, the Attorney General
8 reports the results to the board. NRS 641.271. The board then determines whether to proceed with
9 formal disciplinary action. NRS 641.271.

10 If the board determines to proceed with formal disciplinary action, the board prepares and serves
11 a written complaint and notice of hearing on the psychologist. *See* NRS 641.125 and NRS 641.275.
12 Statutes give the responding psychologist the right to notice of the charges, the time, date and place of
13 the hearing, to be present and participate at the hearing, to legal representation by an attorney during all
14 stages of the proceedings, to introduce evidence on his behalf and to cross-examine witnesses against
15 him, and to a written decision setting forth findings of facts, conclusions of law, violations found,
16 sanctions imposed and the reasons therefor. NRS 641.2755 and NRS 641.280. The Nevada
17 Administrative Procedures Act applies, including the psychologist's right to judicial review of an
18 adverse decision. *See* NRS 233B.032 and NRS 233B.121 *et seq.*

19 ***E. The Board Proceeding Against Plaintiff***

20 On May 1, 1995 the Board served Plaintiff with a formal written complaint setting forth the
21 charges against him and notifying him of the date, time and place for a hearing. *A copy of the*
22 *Complaint and Notice of Hearing is attached as Exhibit 2.* The complaint charged Plaintiff with 22
23 separate violations.

24 On May 19, 1993 Plaintiff answered the complaint. *A copy of Dr. Lewis' Answer (excluding*
25 *exhibits) is attached as Exhibit 3.* Plaintiff admitted many of the factual allegations, but denied the
26 admitted allegations were grounds for discipline.²

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2 ² Plaintiff's admissions refers to paragraphs in the Board complaint. Those facts referred herein are those admitted, but are identified by reference to the paragraphs of the Board complaint where they are alleged.

1 The Board complaint charged Plaintiff, *inter alia*, with withholding and failing to provide in a
 2 timely fashion to responsible treating professionals information important to the making of decisions in
 3 the ongoing diagnosis and treatment of the Duffs. Exhibit 2, p. 12, ¶¶ 5 and 6. The Board complaint
 4 alleged that Dr. Rasul, a psychiatrist treating Mr. Duff, requested records several times prior to October,
 5 1993, and that Plaintiff said he would send records to Dr. Rasul, but never did. Exhibit 3, p. 6-7, ¶¶ 9-
 6 11. The Board also charged Plaintiff with failing to give appropriate explanations of his assessment
 7 results to the court when he testified. Exhibit 2, p. 13, ¶ 14.

8 The Board held its hearing May 20, 1993. *A copy of the transcript of the hearing and exhibits A*
 9 *- II are attached collectively as Exhibit 4.* Plaintiff was present, represented by counsel, and testified
 10 first as a witness for the state (Exhibit 4, p. 18), then in his own defense (Exhibit 4, pp. 80-109).
 11 Plaintiff also called Dr. Jerry Nims to testify as a percipient and expert witness on his behalf. Exhibit 4,
 12 pp. 109-135. Defendant Dr. Weiher testified for the state. Exhibit 4, pp. 52-79. Defendant Dr.
 13 Peterson's only involvement was to preside over the proceeding as President of the Board. Exhibit 4, p.
 14 1 *et seq.*

15 Plaintiff admitted Judge Jordan appointed him in 1993 to do an independent custody assessment
 16 in connection with Mr. Duff's custody dispute with his former spouse. Exhibit 2, p. 2, ¶ 1 (General
 17 Allegations). Plaintiff admitted doing his evaluation between April and July 1993. *Id.* at ¶ 2. Plaintiff
 18 admitted failing to send, or delaying sending, requested information to Dr. Everts. Exhibit 2, pp. 3-4, ¶
 19 12-14. Plaintiff admitted stating that he had no intention of communicating further with Dr. Everts, but
 20 knowing that further communication regarding records was necessary. *Id.* at ¶ 16.

21 Plaintiff admitted never sending any records to Dr. Rasul, but denied Dr. Rasul requested them.
 22 Exhibit 2, p. 3, ¶¶ 8,10 and 11. The State of Nevada introduced a letter from Dr. Rasul stating that he
 23 requested information from Plaintiff, and Plaintiff promised to send the information, but never did.
 24 Exhibit 4, pp. 46-47, and exhibits R, S and T.

25 Plaintiff giving testimony in the custody dispute on July 6, 1993 regarding his assessment,
 26 opinions and conclusions, but denied any impropriety. *Id.* at p. 4, ¶ 17. The State of Nevada introduced
 27 a transcript of Plaintiff's actual testimony. *See* portions of Exhibit 4 to this motion.

28 At the conclusion of the hearing the Board found Plaintiff guilty of failing to timely provide

1 information to a treating professional. The Board also found Plaintiff guilty of providing incomplete
2 and misleading testimony regarding assessment results to a court. Exhibit 4, pp. 147-49. Its written
3 Findings of Fact, Conclusions of Law and Order stated that Plaintiff failed to timely turn over medical
4 records to Mr. Duff's treating psychologists or psychiatrist, and that Plaintiff gave misleading testimony
5 regarding his assessment in his testimony in the Duff custody dispute. *A copy of the Board's Findings*
6 *of Fact, Conclusions of Law and Order (Findings and Conclusions) is attached hereto as Exhibit 5.*

7 The Board found that Plaintiff failed to provide Dr. Rasul with duly requested medical records
8 to which he was entitled. Exhibit 5, p. 2, ¶¶ 2-3. The Board also found Plaintiff failed to timely
9 provide Dr. Everts with information duly requested that was important to the making of decisions in the
10 ongoing diagnosis and treatment of Mr. Duff. Exhibit 5, pp. 3-4, ¶¶ 4-7. The Board further found that
11 Plaintiff did not properly communicate reservations or limitations concerning his assessments, and
12 reported diagnostic conclusions to the court that were misleading and resulted in distorted psychological
13 findings. Exhibit 5, pp. 3-5, ¶¶ 9 – 16.

14 On the basis of these finding the Board concluded Plaintiff violated regulations regarding the
15 timely transmittal of medical records and information, and regulations regarding explanations where
16 necessary to avoid misleading a court. Exhibit 5, pp. 6-7, ¶¶ 3-8. The Board ordered a private
17 reprimand of Plaintiff, and that Plaintiff pay the costs of the disciplinary proceedings including the
18 investigation. Exhibit 5, p. 8.

19 Plaintiff subsequently filed a petition for judicial review of the Board's decision, but withdrew
20 his petition. *Copies of Dr. Lewis' Petition for Judicial Review (excluding exhibit) and Withdrawal of*
21 *Petition are attached respectively as Exhibit 6 and Exhibit 7.*

22 ***F. The Relief Sought by this Motion***

23 This motion seeks summary judgment in favor of Defendants and against Plaintiff for dismissal
24 with prejudice of Plaintiff's second amended complaint on several grounds. Summary judgment is
25 proper on the ground that no evidence exists that Defendants Dr. Peterson or Dr. Weiher conspired or
26 otherwise had any contact with Mr. Duff concerning filing a complaint against Plaintiff prior to Mr.
27 Duff's complaint to the Board in August 1993. No evidence exists that Dr. Peterson and Dr. Weiher
28 had any contact regarding Plaintiff prior to the May 1995 Board proceeding. No evidence exists that

1 Dr. Peterson had any contact with Deputy Attorney General Ronda Moore concerning Plaintiff until
2 shortly prior to the May 1995 Board hearing. Finally, no evidence exists that Dr. Peterson, Dr. Weiher
3 and/or Mr. and Mrs. Duff had any common intention regarding Plaintiff.

4 Defendants are also entitled to summary judgment on the grounds that Plaintiff's complaint is
5 barred by *res judicata* and/or collateral estoppel. The claim of conspiracy raised by Plaintiff could have
6 been raised in defense of the Board's charges of professional misconduct. Moreover, the issues
7 regarding the truth of the complaint by Mr. Duff were fully litigated in the disciplinary proceeding. The
8 Board found, contrary to Plaintiff's denials, that Plaintiff failed to timely provide information to other
9 treating health care professionals as required. The Board also found that Plaintiff's testimony in the
10 Duff custody dispute was misleading. Plaintiff could have sought judicial review of the Board's
11 decision, but he declined to do so. The Board's findings and conclusions are therefore binding upon
12 him and he cannot relitigate them in this action.

13 Defendants are also entitled to summary judgment based on Plaintiff's pleadings. Plaintiff
14 alleges the conspiracy to induce Mr. Duff to contrive and file a complaint started in July 1995.
15 However, it is incontrovertible that Mr. Duff filed his complaint with the Board a full two years earlier
16 in August 1993.

17 Finally, Defendants are entitled to summary judgment of dismissal based on qualified immunity.
18 Plaintiff fails to identify a constitutionally protected interest that was violated by the alleged conspiracy
19 to get Mr. Duff to file a false complaint. The parameters of Plaintiff's rights were not sufficiently
20 clearly established to alert Dr. Peterson and Dr. Weiher of them. Finally, under the circumstances, Dr.
21 Peterson and Dr. Weiher had no reasonable way of knowing that the acts they allegedly committed
22 would violate the constitutional rights of Plaintiff. Plaintiff cannot show that they engaged in the
23 alleged conduct in any event. Therefore, as a matter of law, Dr. Peterson and Dr. Weiher are entitled to
24 qualified immunity.

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III.

ISSUES PRESENTED

- A. Whether there Is No Genuine Issue of Material Fact and Defendants Are Entitled to Summary Judgment as a Matter of Law?**
- B. Whether Plaintiff's Action is Barred by *Res Judicata* and Collateral Estoppel?**
- C. Whether Plaintiff's Complaint Fails to State A Claim?**
- D. Whether Plaintiff's Complaint is Barred by Qualified Immunity?**

IV.

DISCUSSION

A. No Genuine Issue of Material Fact.

1. Standard for Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The moving party has the initial burden of showing the absence of a genuine issue of material fact. See *Adickes v. S.H. Kress & Co.* 398 U.S. 144 (1970); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), cert. denied, 460 U.S. 1085 (1983). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. See *Admiralty Fund v. Hugh Johnson & Co.*, 677 f.2d 1301, 1305-06 (9th Cir. 1982). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). Likewise, "legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." *Id.*

Summary judgment is appropriate if a party fails to make a sufficient showing on

1 an essential element of the case on which it would bear the burden of proof at trial. *Celotex v. Catretti*,
 2 477 U.S. 317, 322 (1986). Failure of proof as to such an element renders all other facts immaterial. *Id.*
 3 at 323. "[S]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut,
 4 but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just,
 5 speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ.
 6 P. 1).

7 **2. Applicable Law**

8 A section 1983 claim requires the plaintiff to prove that a person acting under color of state law
 9 deprived the plaintiff of a right, privilege or immunity secured by the Constitution or federal law.
 10 *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 629, 634 (9th Cir. 1988). To recover on a claim for
 11 conspiracy under section 1983, the plaintiff must prove specific facts to support the existence of the
 12 claimed conspiracy." *Burns v. County of King*, 883 F.2d 819 (9th Cir. 1989) citing *Coverdell v. Dept. of*
 13 *Social and Health Services*, 834 F.2d 758, 769 (9th Cir. 1987).

14 A civil conspiracy requires proof of a combination of two or more persons engaged in
 15 concerted action intended to accomplish an unlawful objective for the purpose of harming another that
 16 causes actual harm. *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev.
 17 1304, 971 P.2d 951 (1998). A plaintiff must prove that each co-conspirator shared the common
 18 objective of the conspiracy. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541
 19 (9th Cir. 1989).

20 In an alleged section 1983 conspiracy the plaintiff must demonstrate some overt act committed
 21 in furtherance of the conspiracy. *Sykes v. State of California Dep't of Motor Vehicles*, 497 F.2d 197,
 22 200 (9th Cir. 1974); *see also Eikelberger v. Tolotti*, 96 Nev. 525, 528, 611 P.2d 1086, 1088 n.1 (the
 23 right to recovery is not based on the agreement, but on proof of wrongful acts done).

24 **3. Discussion**

25 **a) No Wrongful Acts**

26 Plaintiff claims that Dr. Peterson and Dr. Weiher conspired to induce or entice Mr. Duff to file a
 27 false complaint against Plaintiff with the psychology board. The object of the alleged conspiracy was to
 28 get Mr. Duff to devise and file a false complaint. Dr. Peterson and Dr. Weiher state under oath that

1 they engaged in no wrongful acts in furtherance of getting a complaint against Plaintiff. Dr. Peterson
2 and Dr. Weiher state under oath that they had no contact with Mr. Duff concerning his complaint prior
3 to August 26, 1993, when Mr. Duff filed his complaint with the Board. Dr. Weiher only had limited
4 contact with Mr. Duff after Mr. Duff filed his complaint, and that contact was limited to Dr. Weiher's
5 investigation on behalf of the Board into the matters alleged by Mr. Duff. Dr. Peterson had no contact
6 with Mr. Duff at any time, and did not have any contact with Ronda Moore concerning Mr. Duff prior
7 to August 1993. Dr. Weiher and Dr. Peterson had no contact with each other regarding Mr. Duff or the
8 Lewis disciplinary matter until Dr. Weiher testified at the hearing. Thus, Dr. Weiher and Dr. Peterson
9 did not commit any wrongful acts in furtherance of the alleged conspiracy.

10 Moreover, Plaintiff does not allege he was disciplined because of conduct of Dr. Peterson or Dr.
11 Weiher. The record shows the Board disciplined Plaintiff based on the evidence presented at the May
12 1995 hearing. Therefore, there is no basis for any liability because Dr. Weiher and Dr. Peterson were
13 not the proximate cause of harm to Plaintiff. *See De La Cruz v. DuFresne*, 533 F.Supp. 145, 149 (D.
14 Nev. 1982).

15 *b) No Constitutionally Protected Interest.*

16 Plaintiff fails to allege the deprivation of a right, privilege or immunity secured by the
17 Constitution of federal law by alleged acts of Dr. Peterson and Dr. Weiher. *See Karim-Panahi v. Los*
18 *Angeles Police Dept.*, 839 F.2d at 634. Assuming arguendo Dr. Peterson and Dr. Weiher did induce
19 Mr. Duff to file his August 1993 complaint even though they deny any contact, the only consequence to
20 Plaintiff was the Board's formal disciplinary action. The Board held a full hearing and determined
21 based on the evidence presented that discipline was appropriate. The result was not based on the
22 complaint. The only discipline was a private reprimand. Dr. Weiher and Dr. Peterson are not liable for
23 discipline imposed by the Board based on evidence presented at the hearing. In any event, a private
24 reprimand does not constitute a deprivation of a constitutionally protected interest. *See Board of*
25 *Regents v. Roth*, 408 U.S. 564, 569 (1972); *Schroeder v. McDonald*, 55 F.3d 454, 462 (9th Cir. 1995).
26 Absent deprivation of a constitutionally protected interest, Plaintiff cannot state a § 1983 action.

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1 **B. Res Judicata and Collateral Estoppel**

2 **1. Applicable Law**

3 *Res judicata* and collateral estoppel attach to the Board's disciplinary proceeding. Under *res*
 4 *judicata*, also known as claim preclusion, a final judgment on the merits of a case precludes the parties
 5 from relitigating all claims that were or could have been raised in that action. *Rein v. Providian*
 6 *Financial Corp.*, 252 F.3d 1095, 1098 (9th Cir. 2001). "[W]hen an administrative agency is acting in a
 7 judicial capacity and resolves disputed issues of fact properly before it which the parties have had an
 8 adequate opportunity to litigate, the courts . . . apply *res judicata* to enforce repose." *United States v.*
 9 *Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966); *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir.
 10 1999). Any claim or defense that was or could have been raised in the first action is barred. *See Olson*
 11 *v. Morris*, 188 F.3d at 1086. Preclusion applies not only to those claims actually raised, but also to
 12 those claims or defenses that could have been raised. *Olson v. Morris*, 188 F.3d at 1086. Where issue
 13 or claim preclusion doctrines apply, the federal court "**lacks jurisdiction** to engage in appellate
 14 review." *Vogt v. Vogt*, No. 00-664-ST, 2000 U.S. Dist. LEXIS 10546, at *10 (D. Ore. June 21, 2000).

15 **2. Discussion**

16 The claims and issues raised by Plaintiff in this action were litigated or could have been litigated
 17 in the Board proceeding. The truth of Mr. Duff's complaint about Plaintiff's refusal to turn over
 18 records and court testimony was fully litigated before the Board. The Board charged Plaintiff with
 19 failure to timely turn over records and information, and providing misleading testimony in court. The
 20 Board held a full evidentiary hearing on those issues and concluded Plaintiff failed to turn over records
 21 and provided misleading testimony in the custody proceeding.

22 The Board action is final as to those issues. *Vogt v. Vogt*, No. 00-664-ST, 2000 U.S. Dist.
 23 LEXIS 10546, at *10 (*Rein v. Providian Financial Corp.*, 252 F.3d at 1098). Plaintiff cannot relitigate
 24 those issues here. As in *Wallace v. Richett*, CV-N-98-0427-ECR-RAM, the issue preclusion prevents
 25 Plaintiff from proving an essential element of his claim. Further, the only harm suffered was the Board
 26 discipline, which was based on facts found to be true. Plaintiff cannot relitigate those facts. Plaintiff
 27 cannot prove any other harm. He therefore cannot prove an essential element of his claim.

28 Preclusion also applies to defenses raised or that might have been raised. *See Olson v. Morris*,

1 188 F.3d 1083, 1086 (9th Cir. 1999). Plaintiff could have asserted that Mr. Duff's complaint was the
 2 product of a conspiracy. Though the Board could not grant § 1983 damages, the Board had jurisdiction
 3 to consider the claim of conspiracy as a defense. Plaintiff could have defeated the charges had he
 4 proved that they were the result of a conspiracy. Although he did not raise the conspiracy claim, he
 5 could have. Therefore, he is precluded from raising it here.

6 **B. Failure to State a Claim**

7 A civil conspiracy requires proof of a combination of two or more persons engaged in concerted
 8 action intended to accomplish an unlawful objective for the purpose of harming another that causes
 9 actual harm. *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 971
 10 P.2d 951 (1998). A plaintiff must prove that each co-conspirator shared the common objective of the
 11 conspiracy. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989).

12 Plaintiff alleges Dr. Peterson and Dr. Weiher conspired to induce Mr. Duff to file a false
 13 complaint with the Board. Mr. Duff filed his complaint in August 1993. Plaintiff states, however: "The
 14 conspiracy started on or about July 14, 1995" (*Second Amended Complaint*, p. 4, line 16), a full two
 15 years after Mr. Duff made his complaint. By Plaintiff's own admission there was no conspiracy to
 16 induce Mr. Duff to contrive and file his complaint.

17 **F. Qualified Immunity.**

18 **1. Applicable Law**

19 "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, No. 99-1977, 2001 U.S. LEXIS 4664, *2156 (June 18, 2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Summary judgment on qualified immunity is appropriate. *Id.*

22 In determining whether qualified immunity applies, the threshold question that must first be
 23 answered is: "Taken in the light most favorable to [Plaintiff] do the facts alleged show the
 24 [Defendants'] conduct violated a constitutional right?" *Saucier*, 2001 U.S. LEXIS at *2156. If no
 25 constitutional right is violated, no further inquiry is necessary. *Id.* If a violation is made out, the next
 26 step is to inquire whether the right allegedly violated is sufficiently clearly established to alert a
 27 reasonable official of its constitutional parameters. *Gabbert v. Conn*, 131 F.3d 793, 799 (9th Cir. 1997).
 28 The third step in the inquiry is whether, under the circumstances presented, a reasonable official would

1 understand that what he is doing violates the constitutional right of the plaintiff identified. *Id.*

2 **2. Discussion**

3 Plaintiff alleges Dr. Peterson, Dr. Weiher and Mr. Duff conspired to have Mr. Duff make a false
4 complaint to the Board. His allegations fail to show that Dr. Peterson or Dr. Weiher violated any
5 constitutional right. The filing of, or the participation in a scheme to cause the filing of, a false
6 disciplinary complaint against a psychologist does not violate a constitutional right.

7 Plaintiff alleges the purpose of the false complaint was to get the Board to initiate formal
8 disciplinary proceedings. Bringing about Board discipline does not violate a constitutional right.

9 In this instance the Board discipline resulted in a private reprimand. Had the Board suspended
10 or revoked Plaintiff's license, the analysis might differ, but a private reprimand does not infringe on a
11 constitutionally protected right. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Schroeder v.*
12 *McDonald*, 55 F.3d 454, 462 (9th Cir. 1995). Since the allegations show no constitutional right violated,
13 no further inquiry is necessary. *Saucier*, 2001 U.S. LEXIS at *2156.

14 In any event, Plaintiff does not assert a constitutional right that is so clearly established that Dr.
15 Peterson and Dr. Weiher were alerted of its parameters. Plaintiff generally asserts violation of due
16 process and other constitutional rights, but does not identify which right was violated by what conduct.
17 General allegations are insufficient to meet the heightened pleading standard required for conspiracy.
18 *See Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997). In any event, the Board found Mr. Duff's
19 complaint true. Further, no evidence exists Dr. Peterson and Dr. Weiher contrived with or induced Mr.
20 Duff to make his complaint.

21 Lastly, Plaintiff cannot show that Dr. Peterson and Dr. Weiher knew under the circumstances
22 that inducing Mr. Duff to file a complaint, even if false, would violate Plaintiff's constitutional rights.
23 It is not clear filing a false complaint against a psychologist with the psychology board violates the
24 constitutional rights of the psychologist.

25 Again, in any event, Dr. Peterson and Dr. Weiher did not do the acts alleged. They did not
26 conspire with Mr. Duff. Their affidavits show they had no contact with Mr. Duff before he filed his
27 complaint. Therefore, even if Plaintiff's allegations pass the first two inquiries, which they do not,
28 Plaintiff cannot prove the defendants engaged in the alleged conduct.

V.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the State Defendants' motion for summary judgment of dismissal with prejudice should be granted, and that Plaintiff's Second Amended Complaint should be dismissed, with prejudice.

Dated: this 19th day of September 2001.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General

By 

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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

11 RICHARD W. LEWIS, Ph.D.,
12 Plaintiff,
13 v.
14 ELIZABETH RICHETT, Ph.D., et al.,
15 Defendants.
16

Case No. CV-N-99-386-ECR (RAM)

AFFIDAVIT OF CHRISTA PETERSON

18 STATE OF NEVADA)
19 COUNTY OF CLARK) ss:

21 I, the undersigned, CHRISTA PETERSON, Ph.D., Affiant, having been duly sworn, hereby
22 depose and state:

- 23 1. I am a psychologist licensed to practice by and under the laws of the State of Nevada.
- 24 2. I am a defendant in the above action and I make this affidavit in support of my motion for
- 25 summary judgment against the plaintiff for dismissal of the plaintiff's second amended complaint
- 26 herein.
- 27 3. Except as otherwise indicated as based upon information and belief, the statements contained
- 28 herein are based upon my personal knowledge.

1 4. I make the following statements under penalty of perjury, and if called to testify concerning
2 the following statements, I would testify consistently herewith.

3 5. Over the period of about 17 years, since I have been licensed to practice in Nevada, I have
4 been acquainted with Plaintiff Richard Lewis, Ph.D., as a colleague.

5 6. I was a member of the Nevada State Board of Psychological Examiners from 1987 to 1997.

6 7. I first learned that a complaint had been made against Dr. Lewis and that the Board was
7 proceeding with disciplinary action against Dr. Lewis a few days before the Board hearing held May 20,
8 1995 on the matter of the disciplinary charges against Dr. Lewis. I learned when Ronda Moore, the
9 Deputy AG who prosecuted the case, delivered to me a copy of the complaint and notice of hearing. I
10 never discussed with Ronda Moore the matter of the discipline of Dr. Lewis prior to the hearing date.

11 8. On about May 20, 1995 I was a member of the Board that heard that conducted the hearing
12 and decided the matter regarding the discipline of Dr. Lewis.

13 9. I am acquainted with Richard Weiher, Ph.D., because he served on the Board during my
14 tenure. I never communicated with Dr. Weiher about the disciplinary matter regarding Dr. Lewis, Mr.
15 Duff, and the matter of Mr. Duff's complaint against Dr. Lewis to the Board.

16 10. I never had any contact or communication with Mr. Duff.

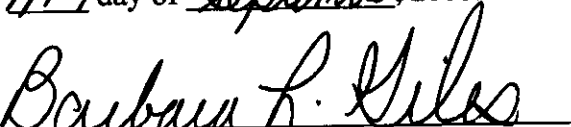
17 11. All my acts concerning or regarding the discipline of Dr. Lewis were in my capacity and
18 pursuant to my functions as a member of adjudicatory body of the Board that conducted the hearing on
19 the disciplinary charges against Dr. Lewis.

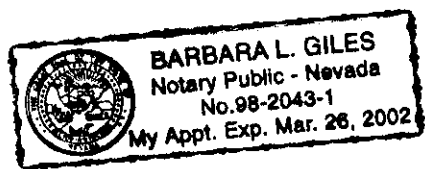
20 12. At all times I acted in good faith concerning the matter of the discipline of Dr. Lewis.

21 Further Affiant sayeth naught.

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23
24 
CHRISTA PETERSON

25
26 SIGNED and SWORN to before me this
17th day of September 2001.

27
28 
Notary Public



1 FRANKIE SUE DEL PAPA
Attorney General
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6 Attorneys for Defendants
RICHARD WEIHER, Ph.D., and
7 CHRISTA PETERSON, Ph.D.,

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

11 RICHARD W. LEWIS, Ph.D.,
12 Plaintiff,
13 v.
14 ELIZABETH RICHETT, Ph.D., et al.,
15 Defendants.

Case No. CV-N-99-386-ECR (RAM)

AFFIDAVIT OF RICHARD WEIHER

17 STATE OF NEVADA)
18) ss:
19 COUNTY OF WASHOE)

20 I, the undersigned, RICHARD WEIHER, Ph.D., Affiant, having been duly sworn, hereby
21 depose and state:

- 22 1. I am a psychologist licensed to practice by and under the laws of the State of Nevada.
23 2. I am a defendant in the above action and I make this affidavit in support of my motion for
24 summary judgment against the plaintiff for dismissal of the plaintiff's second amended complaint
25 herein.
26 3. Except as otherwise indicated as based upon information and belief, the statements contained
27 herein are based upon my personal knowledge.

1 4. I make the following statements under penalty of perjury, and if called to testify concerning
2 the following statements, I would testify consistently herewith.

3 5. Over the period of about 20 years, since I have been licensed to practice in Nevada, I have
4 been acquainted with Plaintiff Richard Lewis, Ph.D., as a colleague.

5 6. I was a member of the Nevada State Board of Psychological Examiners from about 1983 to
6 1989.

7 7. My first knowledge of any disciplinary complaint against Dr. Lewis came on about October
8 6, 1993 when a deputy in the Attorney General's Office contacted me on behalf of the Board to
9 investigate a complaint dated August 26, 1983 made to the Board against Dr. Lewis by Tyrone Duff.

10 8. On about May 20, 1995 I testified before the Board in the matter of the formal disciplinary
11 charges against Dr. Lewis.

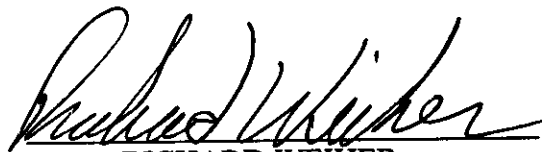
12 9. I am acquainted with Christa Peterson, Ph.D., because she served on the Board during my
13 tenure. I never communicated with Dr. Peterson about the disciplinary matter regarding Dr. Lewis, Mr.
14 Duff, Mr. Duff's complaint against Dr. Lewis to the Board, or my investigation.

15 10. I had occasion to speak with Mr. Duff during my investigation, but I never encouraged Mr.
16 Duff to file a complaint against Dr. Lewis.

17 11. All my actions relating to the discipline of Dr. Lewis concerned gathering data and
18 information that was the basis for my opinions and conclusions regarding the matter complained of by
19 Mr. Duff concerning Dr. Lewis.

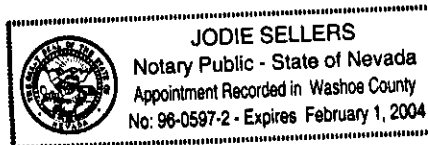
20 12. At all times I acted in good faith concerning my acts and conduct relating to the matter of
21 the discipline of Dr. Lewis by the Board.

22 Further Affiant sayeth naught.

23
24 
25 RICHARD WEIHER

26 SIGNED and SWORN to before me this
27 4th day of ~~September~~, 2001.

28 
Notary Public



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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 19th day of September, 2001, I served a copy of the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, by mailing a true copy to the following:

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Defendants/Counterclaimants Appearing Pro Se

