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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF DISTRICT OF NEVADA

8 CASE NO: CV-N-99-00386- ECR (RAM)

9 RICHARD LEWIS, Ph.D.

10 Plaintiffs,

11 v.

**RESPONSE TO MOTION
TO DISMISS FILED BY
STATE DEFENDANTS**

12 ELIZABETH RICHITT, Ph.D.; RICHARD
13 WEIHER, Ph.D., DAVID ANTONUCCIO,
14 Ph.D., LOUIS MORTILLARO, DENNIS
15 ORTWEIN, CHRISTA PETERSON,
STATE OF NEVADA, BOARD OF
16 PSYCHOLOGICAL EXAMINERS

17 Defendants.

18 Plaintiff, Richard Lewis by and through counsel, Mirch & Mirch, hereby responds to
19 Defendants' Motion to Dismiss under Rules of Civil Procedure 12(b), and Local Rule 7-2. This
20 reply is made and based upon the following points and authorities, exhibits, affidavits and all other
21 pleadings on file herein.

22 **POINTS AND AUTHORITIES**

23 The following points and authorities are submitted in support of Plaintiff's Response to the
24 State of Nevada's motion to dismiss Plaintiffs Second Amended Complaint.

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I.

INITIAL STATEMENT

Defendants have filed a number of motions designed to stall the proceedings in this case. This motion to dismiss address one party only, the State of Nevada. In that regard, it concerns whether the state is a person for purposes of 42 U.S.C. §1983. If it is not considered a person, dismissal is proper. Plaintiff agrees with the State of Nevada that it is not a "person" for purposes of 42 U.S.C. §1983, and therefore should be dismissed. However, the other Defendants are "persons" and this concession should have no affect, nor should be construed that these individuals were acting within their official capacities when the conduct complained of in this action occurred.

II.

STATEMENT OF FACTS

The State of Nevada understates Dr. Lewis' factual allegations which provide as follows:

14. For several years, Dr. Lewis has worked, on a contract basis, with Washoe County to provide independent commitment evaluations.

15. During May of 1994, the State of Nevada through its Division of Child and Family Services entered into a contract with Western Counseling, LLC. At all times relevant hereto, Western Counseling, LLC , was owned by Drs. Lewis, Dr. Nims, Debra Prince Lewis, and Martha Nims. Debra Prince Lewis managed Western Counseling Services. Ms. Lewis resigned from a management position with a major hospital when she accepted her position at Western Counseling Services..

16. Pursuant to the terms of that contract, Western Counseling, LLC, was to provide "out patient" care for qualified individuals on behalf of the State of Nevada, Department of Child and Family Services. Western Counseling was compensated on a fee for services basis. Christa Peterson represented to Dr. Lewis, Dr. Nims and Ms. Lewis that approximately \$900,000 had been budgeted for services annually. Based upon this statement Western Counseling services hired employees, signed lease agreements for office space, and obtained a line of credit to maintain the anticipated services required to service the contract with the Division of Child and Family Services. The contract with the Division of Child and Family Services was negotiated and prepared by members of the Attorney General s Office.

17. Pursuant to the terms of the contract, Western was expected to meet with Group Home Owners and others in order to establish comprehensive wrap around therapeutic services for children in Foster Care. At the time that the contract was executed, neither Christa Peterson nor any agent nor employee of the Division of Child and Family Service disclosed that a widespread dispute existed with Group Homes and Foster Care Homes concerning the quality of care and financial support being provided to those entities. Effectively, the State of Nevada was ignoring treatment and when confronted with the same used intimidation to avoid legal confrontation.

1 18. At all times relevant hereto, Group Homes and Foster Care Homes were used by the
 2 State of Nevada to house children with serious problems resulting from abuse or neglect.

3 19. At all times relevant hereto, Defendant, Christa Peterson was the Deputy
 4 Administrator of the Department of Child and Family Services. As is discussed above and
 5 at all times relevant hereto, Ms. Peterson was also a member of the Board of Psychological
 6 Examiners. Ms. Peterson used her position on the Board of Psychological Examiners to
 7 improperly further her career with the Division of Child and Family Services. The Division
 8 of Child and Family Services is an entity operated under the direction and control of the State
 9 of Nevada.

10 20. During 1995, the Division of Child and Family Services had overrun its budgetary
 11 authority and could not pay Western Services for the work that it had been performed for the
 12 State of Nevada.

13 21. Because of her budget problems, Dr. Peterson was required to cut costs or suffer the
 14 consequences. Dr. Peterson first cut costs by cutting care in Group Homes and Foster Care
 15 facilities. This was done by simply refusing to refer children to Western Counseling Services.

16 22. In order to further reduce costs, the Christa Peterson started to renegotiate the State's
 17 contract with Western Counseling Services. In order to avoid being sued by Western
 18 Counseling Services for Breach of Contract, Ms. Peterson stopped payments due to Western
 19 Counseling Services, initiated an audit of services done to date, and conspired with Rhonda
 20 Moore, Richard Weiher, and the Duffs to initiate a false disciplinary complaint against Dr.
 21 Lewis. Dr. Peterson through the Nevada Attorney General's Office recruited Defendant Duff
 22 as part of her scheme to cause Dr. Lewis and Western Counseling Services to agree to the
 23 State of Nevada's breach of contract and waive over \$80,000.00 of fees due to him.

24 23. The conspiracy started on or about July 14, 1995. On that date, Dr. Lewis wrote to
 25 Mr. Craig Wetzel, the Purchase Placement Program Manager for the Department of Child
 26 and Family Services, and requested payment of \$86,222.76 which was due to Western
 27 Counseling Services. Prior to that time, Dr. Lewis had requested payment on a number of
 28 occasions. Mr. Wetzel worked for and was controlled by Dr. Peterson. In that
 correspondence, Dr. Lewis confirmed that the following amounts were overdue as of July
 14, 1995:

1994	4,147.04
January 1995	67.20
February 1995	2,371.95
March 1995	4,786.06
April 1995	1,8,296.77
May 1995	34,237.39
June 1995	21,856.35

23 Total

24 This failure to pay amounts when due had caused substantial damage to Western Counseling
 25 Services and exposed the State of Nevada to substantial liability for breach of contract.

26 24. Additionally, during the Spring of 1995, Dr. Lewis through Western Counseling
 27 attempted to intervene and resolve the dispute that existed between the Division of Child and
 28 Family Services and the Group Homes and Foster Care Homes. Specifically, Group Homes

1 were upset with their treatment by the Division of Child and Family Services. In that regard,
2 Crista Peterson had initiated new policies with the Group Homes and Foster Care Homes
3 which effectively impaired proper treatment of the children in their care. As with Western
4 Counseling Services, the Division started to reduce or not pay amounts due to the Homes,
5 but more importantly stopped approving certain types of care for the children. At the
6 suggestion of Dr. Lewis and Western Counseling Services, the Homes established an entity
7 to represent their concerns before the State of Nevada (i.e., the "Nevada Youth Care
8 Providers"). Dr. Lewis and Western Counseling Services only made the suggestion in an
9 attempt to resolve disputes which they felt were impacting needed care for the children
10 involved. The formation of Nevada Youth Care Providers triggered an audit of Western
11 Counseling Services by the State of Nevada, Division of Child and Family Services.

12 25. Nevada Youth Care providers was most concerned with severe criticisms being
13 leveled against the Homes and then being used as an excuse to renegotiate contracts with the
14 Homes. At one point, certain Group Home and Foster Care facility owners were forbidden
15 by the Division of Child and Family Services from discussing any business matter with any
16 other owner of similar facilities.

17 26. During 1995, the Group Homes retained counsel as a group to negotiate new contract
18 terms. At that time, Western Counseling had developed a relationship of trust with the Group
19 Homes, which had contributed to the success of Western Counseling.

20 27. Upon learning that the Group Homes Association had been formed at the suggestion
21 of Dr. Lewis/Western Counseling, the Defendants, including but not limited to, Crista
22 Peterson became enraged.

23 28. In retaliation for Dr. Lewis insistence that Payment be made to Western Counseling
24 and because of Dr. Lewis involvement in the Group/Foster Home dispute, the Defendants
25 conspired and acted in concert to devise a plan to discredit Dr. Lewis. In so doing, the
26 Defendants acted under color of state law or authority, and with a discriminatory intent, to
27 devise a scheme which eventually subjected Dr. Lewis to a deprivation of his right to due
28 process and freedom of speech and association.

29 29. Overt acts were completed pursuant to the conspiracy which damaged Dr. Lewis.
30 Specifically the defendants agreed to cause Dr. Lewis to be improperly disciplined and to
31 defame him in retaliation for requesting payment from the State of Nevada. The overt acts
32 included but were not limited to locating disgruntled complainant (Mr. Duff); causing Mr.
33 Duff to file a false complaint with the Board of Psychological Examiners; and after a private
34 reprimand was improperly obtained against Dr. Lewis, publishing, without restriction, the
35 private reprimand in the monthly psychological newsletter.

36 30. Once Mr. Duff agreed to participate, the Defendants conspired to act under color of
37 law to deprive Plaintiff of his constitutional right to freedom of speech, association, and his
38 right to due process with respect to his license to practice psychology within the State of
39 Nevada. Mr. Duff was not a patient of Dr. Lewis, but instead had been analyzed by Dr.
40 Lewis in conjunction with a child custody dispute. Mr. Duff's interview and preparation for
41 the disciplinary hearing occurred under the supervision and control of the State of Nevada
42 and each of the Defendants described above.

43 31. Pursuant to Duff's complaint to the Board of Psychological Examiners, the Board
44 conducted an investigation into Lewis' handling of the custody proceeding.

1 32. The Lewis disciplinary investigation was marred with fraud. Specifically, the Board
2 and the Attorney General's Office withheld exculpatory evidence from Dr. Lewis and held
3 ex parte meetings with Board Members prior to formal discipline being imposed. The
4 ex-parte meetings included, but were not limited to regular discussions in person and by
5 phone as well as the transfer of documents prior to the hearing. The transfer of documents
6 prior to the hearing without the same being disclosed or admitted into evidence tainted the
7 process. This preheating procedure was outside the scope of the of duties of the Board of
8 Psychological Examiners.

9 33. Additionally, a letter was sent by Dr. Weiher to Attorney General Moore which
10 exonerated Dr. Lewis from any wrongdoing. The letter was sent prior to a formal disciplinary
11 hearing being held. The letter was not disclosed, and its existence was denied by Rhonda
12 Moore, other representatives of the Attorney General's office, and the Board of Psychological
13 Examiners.

14 34. Upon information and belief, after Dr. Weiher had personally informed Rhonda
15 Moore that Dr. Lewis had acted ethically, she urged him to change his opinion.

16 35. On September 1, 1994, Dr. Weiher succumbed to pressure from the Attorney General's
17 Office and issued an incorrect letter written solely to justify the complaint filed against Dr.
18 Lewis.

19 36. On *May 20, 1995*, a hearing was held before the Board. On July 20, 1995, the Board
20 entered its findings of fact and conclusions of law. The Board stated that Lewis' evaluation
21 of Duff was deficient for the following reasons: (1) Lewis did not inform the district court
22 how Duff's medications might affect his performance on the psychological tests; (2) Lewis
23 selective reporting of psychological findings left the impression that Duff was of substandard
24 intelligence; and (3) Lewis failed to avoid misleading the district court when he did not
25 explain that Duff fell within the average range of intellectual functioning. Accordingly, the
26 Board ordered that Lewis be issued a private letter of reprimand and that he pay \$4,000.00
27 for the cost of the disciplinary proceedings. These findings were contrary to the Fifth
28 Amendment Rights of Dr. Lewis as the Attorney General's Office had a number of ex-parte
communications with the Board, falsified findings of fact, and failed to disclose conflicts that
existed between the parties, and had a financial interest in the litigation.

37. As a result of this conspiracy, on July 20, 1995, false findings of fact were proffered
by Ronda Moore and signed by Christa Peterson, imposing a fine of \$4,000 and a private
reprimand upon Dr. Lewis. Later, the fine was arbitrarily increased to \$6,000.00. These
findings of fact were false, retaliatory, designed to avoid paying amounts due to Western
Counseling Services and to cause uncertainty within Nevada Youth Care Providers. The
findings of fact were false as the Board either dismissed most of the claims or had found no
evidence to support the same. Dr. Lewis was not aware of the false findings until receiving
a confidential transcript of deliberations between Board Members and a representative of the
Attorney General's Office, Mr. Marcher. Dr. Lewis received a copy of that transcript at the
end of October of 1998.

38. Not only were false findings filed, but Rhonda Moore and Christa Peterson leaked
the findings to Tyrone Duff prior to their receipt by Dr. Lewis. On July 21, 1995, with the
false findings of fact in hand, Mr. Duff filed a civil action against Dr. Lewis. Disclosure of
the false findings of fact and conclusions of law was wholly inappropriate as the reprimand
was private, but nonetheless, part of the overall scheme to discredit Dr. Lewis. Providing this
information to Mr. Duff was outside the purview of the Board of Psychological Examiners.

1 39. Following Dr. Lewis discipline, Christa Peterson stopped referring to Western
2 Counseling Services, but instead used Children s Behavior Services (CBS) and for profit
3 institutional facilities. Many children were not treated. This decision was outside the purview
4 of the Board of Psychological Examiners.

5 40. On or about September 1, 1995, the State of Nevada made arbitrary changes to its
6 contract with Western Services. Again, Dr. Lewis discipline was specifically referred to as
7 the reason for the change. Following this contract amendment, Western Counseling Service
8 s referrals deteriorated to the point that it started to suffer operating losses. This conduct was
9 outside the purview of the Board of Psychological Examiners.

10 41. Shortly, thereafter, Western Counseling Services entered into an agreement to assign
11 its contract to Family Counseling Services of Nevada. The assignment was necessary as
12 Western Counseling had lost most of its referral business as a result of the bad publicity
13 regarding Dr. Lewis discipline. Western Counseling Services went out of business on April
14 1, 1996.

15 42. On or about March 29, 1996, Dr. Christa Peterson approved the assignment of
16 Western Counseling s contractual obligation with the Department of Human Resources,
17 Division of Child and Family Services, to Family Counseling Services of Northern Nevada.

18 43. While acting under color of law, the Attorney General s Office actually contacted Mr.
19 Duff and his attorneys and provided information, without a subpoena, to aid them in their
20 civil litigations. Again, this conduct was outside the purview of the Board of Psychological
21 Examiners.

22 44. Following his discipline, Dr. Lewis requested on numerous occasions copies of all
23 correspondence that the Board had received from Dr. Weiher. The Board s Counsel refused
24 to provide the documents and implied that those documents did not exist. These statements
25 were false and constitute intentional concealment.

26 45. As is mentioned above, in order to bias the Board, documents were secretly provided
27 to the Board prior to Dr. Lewis hearing. This was done without the consent of Dr. Lewis or
28 his attorney.

46. The documents contained false information used solely to bias the Board, justify a
decision against Dr. Lewis, for economic benefit for certain members, and to generate funds
for the Attorney General s Office through a fine.

47. In August of 1995, Christa Peterson with assistance from other parties authored an
article for the Monthly Nevada Psychology Magazine which was contrary to both the actual
findings of the Board and violated the Board s decision to privately reprimand Dr. Lewis.
The following statements were not the findings and therefore were false:

a. In 1994, a psychologist treating the father also requested on at least 4
occasions that Dr. Lewis provide him with interview and testing data on the father.
The presiding just in the case had authorized the release of the records. As of May
20, 1995. or. [sic] Lewis had not provided the psychologist or the psychiatrist with
all the relevant psychological records.

b. When Dr. Lewis performed his evaluation of the father, he administered on
4 of the WAIS-R sub-tests and prorated the results of produce a extrapolated score.

1 Dr. Lewis knew that the father was impaired by the medication he was taking at the
2 time of the test administration, but he did not properly communicate any reservation
3 or limitations about the assessment results when he testified in court as a
psychological expert. Dr. Lewis also made misleading statements in court about the
father's intelligence level by using percentile Values without proper explanation.

4 c. Dr. Lewis also continues to serve as the court-appointed monitor for the
5 father's psychotherapy even though the father filed a complaint with the Board against
Dr. Lewis and owes Dr. Lewis approximately \$1,200.

6 d. Dr. Lewis violated this section of the Code of Conduct by withholding
7 psychological information from the psychiatrist and failing to provide psychological
records in a timely manner to the treating psychologist.

8 e. Dr. Lewis violated this provision of the Code of Conduct because he failed
9 to avoid misleading the court when he reported without adequate qualification in his
10 data and conclusions drawn from the WAIS-R regarding the father's intellectual
functioning. A psychologist must explain any limitations in the data he presents,
including performance on any psychological tests that may be affected by transitory
11 factors, including poor motivation and medications.

12 These statements are false and not part of the original board proceedings. Public disclosure
exceeded the authority and duties of the Board of Psychological Examiners.

13 48. In order to avoid an action by Western Counseling against the State of Nevada, Crista
14 Peterson, other parties, and the Attorney General's Office purposely and improperly became
involved in Duff's Civil Litigation.

15 49. In that regard, the Attorney General Office, while acting under color of law, provided
16 Duff and his Attorney with confidential information, including but not limited to the outcome
of the disciplinary proceedings. Specifically, when the private reprimand was issued, but
17 prior to the time it was published in the Nevada Psychologist, its terms and conditions had
been disclosed to Duff and his attorneys.

18 50. Duff then used to the Attorney General's Office to obtain information about Dr.
19 Lewis that he could use in his civil action against Dr. Lewis. The Attorney General's Office
knew that the information was disseminated in order to help Mr. Duff obtain a judgment
20 against Dr. Lewis.

21 These allegations are properly plead.

22 **III.**

23 **STATEMENT OF ISSUES PRESENTED**

24 Defendant, State of Nevada, addresses the following issues in its motion to dismiss:

- 25 1. Whether the State is not a "Person" for purposes of §1983.
- 26 2. Whether the Eleventh Amendment immunity bars Plaintiff's action in federal court.
- 27 3. Whether Plaintiff's claim is barred by the doctrine of sovereign immunity.

IV.

DISCUSSION

a. Plaintiff agrees that the State of Nevada is not a “person” for purposes of 42 U.S.C. §1983.

The State of Nevada, first argues that it is not a person subject to liability within the meaning of § 1983. *Will v. Michigan*, 491 U.S. 58, 70-71 (1989). Plaintiff agrees and the complaint should be dismissed only as to the State of Nevada, not the individual defendants. See *Salman v. Nevada Comm’n on Judicial Discipline*, 104 F.Supp. 2d 1262; 2000 LEXIS 10441.

b. Since the State of Nevada is not a “person” this issue is moot.

Next, the State of Nevada argues that it does not have immunity from suit in federal court. *Edelman v. Jordan*, 451 U.S. 651, 663 (1974). This issue is moot as Plaintiffs agree that the State of Nevada is not a “person” for purposes of 42 U.S.C. §1983. Since the issue is moot further discussion of the matter is not necessary.

c. Whether the State of Nevada has waived its sovereign immunity to Civil Rights actions is moot as it is not a person for purposes of 42 U.S.C. §1983.

Next, the State argues that it has sovereign immunity, which it conditionally waives in order to permit suit against it provided the "action [is] brought. . . against the State of Nevada. . . on relation of the particular department, commission, board or other agency.,, whose actions are the basis for the suit." NRS 41.03 1(2). Again, this issue is moot as the state is not a “person” within 42 U.S.C. §1983 and for that reason should be dismissed from the action.

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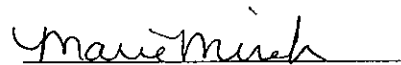
II.

CONCLUSION

Defendants motion only applies to the State of Nevada not the other individual defendants. Accordingly, dismissal only against the State of Nevada is proper. Based on the foregoing, Defendants do not oppose the State of Nevada's Motion to Dismiss.

Dated: this 8 of June, 2001.

Mirch & Mirch


Kevin J. Mirch
Marie C. Mirch

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5, I declare that I am an employee of Mirch & Mirch, over the age of EIGHTEEN (18) and not a party to this action. In that capacity I served by United States mail, postage prepaid, a true and correct copy of the foregoing Response to Motion to Dismiss (State of Nevada), by United States mail, postage prepaid, in an envelope addressed to the individuals described more fully below:

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Stephen Quinn, Esq.
Deputy Attorney General
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Tyrone and Linda Duff
P.O. Box 2512
Bellingham, WA 98225

Dated this 9 day of June, 2001.

Maree Murt