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20 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

21 IN AND FOR THE COUNTY OF WASHOE

22 WHITTEMORE PETERSON INSTITUTE
23 FOR NEURO-IMMUNE DISEASE, a
24 Nevada non-profit corporation,

25 Plaintiff,

26 vs.

27 JUDY A. MIKOVITS, an individual,

28 Defendant.

Case No. CV11-03232

Dept. No. B6

29 **REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

30 **I. INTRODUCTION**

31 This Court should grant the Whittmore Peterson Institute for Neuro Immune Disease
32 (“WPI”)’s motion and once again order defendant Judy Mikovits (“Mikovits”) to return the
33 Misappropriated Property (critical laboratory notebooks and other valuable intellectual property
34 belonging to WPI), so that WPI can continue its ongoing research to find a cure for Neuro-

1 Immune Disease. Plaintiff's Opposition does not contest that WPI owns the Misappropriated
2 Property or that the loss of the Misappropriated Property causes WPI irreparable harm.
3 Similarly, Plaintiff's Opposition does not contest that Mikovits should return the
4 Misappropriated Property if she has it. Instead, Plaintiff's Opposition asserts a single defense -
5 that Mikovits did not take the Misappropriated Property.

6 This defense is false. WPI has recently learned of new and compelling evidence proving
7 that Mikovits masterminded the theft of the Misappropriated Property. Since WPI's filing of its
8 Motion for Temporary Restraining Order/Preliminary Injunction, Max Pfof, a researcher whom
9 Mikovits supervised, has confessed that he took WPI's laboratory notebooks at Mikovits's
10 behest, following her instructions and using her research office and desk keys that she provided
11 to him for this purpose. Pfof has further revealed that after Mikovits's secret return to Reno on
12 October 17, 2011, he delivered WPI's laboratory notebooks to Mikovits at her request and that
13 she told him she would store them in a safe location. Finally, Pfof has confirmed that both
14 prior to and after her termination, Mikovits kept one or more laptops containing WPI's
15 proprietary information.

16 Mikovits must quit this costly and damaging charade and simply return the
17 Misappropriated Property to the WPI as she has previously been ordered to do and make amends
18 for her harmful conduct.

19 **II. FACTS:**

20 On September 29, 2011, WPI terminated Mikovits' employment. Mikovits immediately
21 called Pfof, a WPI researcher whom she supervised, to tell him she had been terminated.
22 Exhibit 1 (Affidavit of Max Pfof, "Pfof Aff." 6). Mikovits was very angry, and told Pfof that
23 she had had enough of WPI and that WPI would go down. (*Id.*)

24 Later in the early evening of September 29, 2011, Mikovits met Pfof at a bar. (*Id.*)
25 Mikovits instructed Pfof to return to the Institute to take irreplaceable patient samples and
26 laboratory notebooks that she and other researchers had worked on at WPI and to provide them

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1 to Mikovits at a later date. (*Id.* ¶ 7). After having a couple of beers and before Pfof left the bar,
2 Mikovits gave Pfof the keys to her office and desk at WPI, and instructed Pfof to use the keys
3 to unlock her desk and her office and access the notebooks. (*Id.* ¶ 6).

4 Following Mikovits's direction and between approximately 4:00 a.m. and 5:00 a.m. on
5 September 30, 2011, Pfof attempted to get into the locked offices of the WPI, but was unable to
6 gain entry at that time because his card key had been inactivated. (*Id.*) He returned a few hours
7 later before the normal business hours of WPI but knowing that the building would be unlocked.
8 He parked behind the building near the loading area to avoid detection. (*Id.*).

9 At approximately 8:00 a.m. on September 30, 2011, following Mikovits's instruction,
10 Pfof used the office and desk keys that Mikovits had provided to him to unlock Mikovits's
11 office and her desk drawer where she stored laboratory notebooks. (*Id.* ¶ 8). Following
12 Mikovits's instruction, Pfof took between 12 and 20 laboratory notebooks containing
13 approximately five years of research notes and the keys to WPI's ownership of its intellectual
14 property, including notebooks of Mikovits, Pfof, and fellow researchers Cassandra Puccinelli
15 and Kathryn Hagen. (*Id.*) Pfof put some of the notebooks in his backpack and carried other
16 notebooks in his arms out of the building. He hid the notebooks and backpack in his car, and
17 then drove the notebooks to his condo in the Riverwalk Condominiums, which he was renting
18 from Mikovits and her husband David Nolde.

19 The notebooks remained at the Riverwalk Condominium for approximately four days,
20 when he hid them in a large multi-colored "Happy Birthday" bag, which he had in the condo.
21 Exhibit 2 (Second Affidavit of Max Pfof.) At that point, knowing that WPI was continuing to
22 search for the stolen notebooks, Pfof took the notebooks in the "Happy Birthday" bag to his
23 mother's house in Sparks, Nevada, where he hid the notebooks in the garage. Exhibits 1 and 2.
24 Mikovits requested by telephone that Pfof ship the notebooks to her in California or to a safe
25 location in Virginia, but Pfof replied that he could not pay the shipping costs for mailing the
26 heavy notebooks and that she could retrieve the notebooks when she returned to Reno to pick up
27 her personal items from the condo she had vacated at the Palladio in Reno. Exhibit 2.

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1 On October 7, 2011, Max Pfof had a long telephone conversation with his mother
2 wherein he confessed that he had taken the notebooks from WPI at the request of Mikovits and
3 had hidden them in his mother's garage.

4 Prior to the meeting between Mikovits and Pfof on October 17, 2011, Pfof retrieved
5 the notebooks from his mother's garage in Sparks and returned them to the Riverwalk
6 Condominiums, continuing to hide them in the "Happy Birthday" bag. Exhibit 2. At
7 approximately 12:15 a.m. on October 17, 2011, Mikovits returned to Reno to retrieve the stolen
8 laboratory notebooks. (Exhibit 1 ¶ 9.) Pfof picked up Mikovits at the Reno Tahoe International
9 Airport at approximately 12:20 a.m. on October 17, 2011. Exhibit 2. The first thing Mikovits
10 asked about was the location of the notebooks, and Pfof told her that they were at the Riverwalk
11 Condominium in a "Happy Birthday" bag. Exhibit 2. Pfof drove Mikovits to the Riverwalk
12 Condominium where she spent the night. Exhibit 2.

13 At approximately 12:45 a.m. on October 17, 2011, Pfof gave Mikovits all the
14 laboratory notebooks he had taken from WPI on September 30, 2011. Mikovits informed Pfof
15 that she would store the notebooks in a safe location, and that she was hiding out on a boat to
16 avoid being served with papers from WPI. Exhibit 1. Mikovits then gave Pfof her card key,
17 parking pass and the silver WPI laboratory computer containing WPI's proprietary information,
18 with instructions to wait "a couple of days" before returning these items to WPI. (Exhibit 1 ¶
19 10; Exhibit 2.) She told Pfof to tell WPI that he had received her employee materials in the
20 mail from her, and instructed him to secretly put the WPI silver laboratory computer back into
21 the WPI laboratory at a later date. (Exhibit 2.)

22 On the morning of October 17, 2011, Pfof left Mikovits with total and exclusive
23 control over the laboratory notebooks in the "Happy Birthday" bag, just as Mikovits had
24 planned. (Exhibit 2.) As Pfof left for work at WPI that morning, Mikovits requested that he
25 keep her informed as to the whereabouts of WPI personnel so that Mikovits could avoid
26 detection in Reno. Mikovits informed Pfof that she would take a casino shuttle to the airport,
27 and that she would rent a car and return to California. Pfof stayed in touch with Mikovits that
28 morning from approximately 8:40 a.m. until 10:30 a.m. by text. When Pfof returned from work

1 later on October 17, 2011, Mikovits and the notebooks in the “Happy Birthday” bag were gone,
2 as Mikovits had planned. In addition, Mikovits’s personal items from the Palladio that were
3 being stored for her in the Riverwalk condo were gone.

4 Pfof also confirms that after Mikovits’ termination, Mikovits kept a laptop containing
5 WPI’s proprietary information. (*Id.* ¶ 7, 11). This is the black computer that has been missing
6 since her termination on September 29, 2011.

7 In addition to masterminding the theft of the notebooks, computer and flash drives,
8 Mikovits also instructed Pfof to take biological items from the lab and send them to Dr. Frank
9 Ruscetti. (Exhibit 1 at 10). At the request of Mikovits, Pfof then attempted to recruit other
10 WPI employees to remove additional materials from WPI. For example, on or about September
11 30, 2011, Max Pfof asked research assistant Amanda McKenzie to remove cell lines and blood
12 samples from the lab and deliver them to Dr. Ruscetti. (Exhibit 3. Affidavit of Amanda
13 McKenzie, “McKenzie Aff.” at 2). Ms. McKenzie declined to do so.

14 **III. ARGUMENT:**

15 WPI is entitled to a preliminary injunction because WPI has established “(1) a likelihood
16 of success on the merits; and (2) a reasonable probability that the non-moving party’s conduct, if
17 allowed to continue, will cause irreparable harm for which compensatory damage is an
18 inadequate remedy.” *University Sys. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 721, 100 P.3d
19 179, 187 (2004).

20 First, the Max Pfof, Annette Whittemore and Vincent Lombardi affidavits establish that
21 WPI is likely to succeed on its breach of contract, specific performance, trade secret
22 misappropriation, conversion, breach of implied covenant, and replevin claims. Mikovits’s only
23 response on the likelihood of success prong - that WPI has not established that Mikovits took the
24 materials - fails, in light of the direct evidence from Max Pfof that she masterminded the theft
25 of the Misappropriated Property. At a minimum, Mikovits formulated the plan for the theft of
26 the notebooks, instructed and enabled a researcher she supervised (Pfof) to implement her plan,
27 received the stolen property at a later date, hid the stolen property from the WPI, encouraged
28 others to lie about these matters, and caused great harm to the reputation of the WPI in the

1 process of fabricating her defense to these matters. Mikovits is therefore liable. *See, e.g.*, Rest.
2 2d. Torts § 877(a) (“For harm resulting to a third person from the tortious conduct of another,
3 one is subject to liability if he (a) orders or induces the conduct, if he knows or should know of
4 circumstances that would make the conduct tortious if it were his own:); Rest. 2d. Torts § 876
5 (“For harm resulting to a third person from the tortious conduct of another, one is subject to
6 liability if he (a) does a tortious act in concert with the other or pursuant to a common design
7 with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial
8 assistance or encouragement to the other so to conduct himself, or (c) gives substantial
9 assistance to the other in accomplishing a tortious result and his own conduct, separately
10 considered, constitutes a breach of duty to the third person.”)¹

11 Second, the affidavits of Annette Whittemore and Vincent Lombardi establish that WPI
12 is likely to suffer irreparable harm if an injunction is not granted. (*See, e.g.*, Lombardi Aff. ¶¶
13 12-15; AWhittemore Aff. ¶¶ 14-15; see also Lombardi Aff. ¶¶ 8-10, AWhittemore Aff. ¶¶ 7-9.)
14 WPI needs the Misappropriated Property on a daily basis to continue its critical research on NID
15 and to defend its earlier research findings. (*Id.*) More broadly, WPI needs the Misappropriated
16 Property to research effectively, continue ongoing experiments and studies, communicate with
17 research subjects effectively, apply for patents, recruit researchers, and obtain grants to help find
18 a cure for those patients suffering with NID. (*Id.*) Mikovits’s only response on the irreparable
19 harm prong - that Mikovits was not engaged in wrongful conduct - is refuted by the direct
20 evidence from Pfof. Further, Mikovits’s own declaration implicitly acknowledges the harm
21 that WPI suffers, by acknowledging “the importance of this security cannot be overstated” and

22
23 ¹ In the criminal context, these facts establish a specific intent under an aiding and abetting
24 theory as well as coconspirator liability. *See, e.g., Sharma v. State*, 118 Nev. 648, 56 P.3d 868
25 (2002) (for a person to be held accountable for specific intent crime of another under an aiding
26 and abetting theory of principal liability, the aider and abettor must have knowingly aided the
27 other person with the intent that the other person commit the charged crime); *Bolden v. State*,
28 121 Nev. 908, 124 P.3d 191 (2005), reversed on other grounds (to convict on a specific intent
crime under the theory of vicarious coconspirator liability, it must be proved that she had
specific intent to commit that offense.) Similarly, in Nevada, constructive possession is
sufficient for criminal embezzlement. *Batin v. State*, 118 Nev. 61, 38 P.3d 880 (2002). The
Nevada Supreme Court has defined constructive possession as “both the power and the intention
at a given time to exercise dominion or control over a thing, either directly or through another
person or persons.” *Id.* at 65; *see also Palmer v. State*, 112 Nev. 763, 769 (1996) (same).

1 “the notebooks...contain extremely sensitive confidential information.” (Declaration of Judy
2 Mikovits, ¶¶ 5-7, 35).

3 Finally, WPI has established that the balance of equities is in WPI’s favor, and the public
4 interest supports the issuance of injunctive relief. *See University Sys.*, 120 Nev. at 721 (in
5 considering preliminary injunctions, courts also weigh the potential hardships to the relative
6 parties and others, and the public interest.) In light of Pfof’s sworn evidence, Mikovits’s only
7 identified hardship (inability to comply with the order) fails as Mikovits has had exclusive
8 possession, dominion and control over the laboratory notebooks since at least October 17, 2011.
9 *See Batin*, 118 Nev. at 65 (the Nevada Supreme Court has defined constructive possession as
10 “both the power and the intention at a given time to exercise dominion or control over a thing,
11 either directly or through another person or persons.”); *see also Palmer v. State*, 112 Nev. 763,
12 769 (1996) (same); *Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 160 (3rd Cir.
13 2004) (In the context of Fed.R.Civ.P. 34(a), if a party has the ability to obtain the documents
14 from another source upon demand, that party is deemed to have control and must produce the
15 documents). Here, Mikovits has both dominion and control over the notebooks, laptop and other
16 WPI intellectual property. She exercised the dominion and control by providing Pfof with her
17 keys and directing Pfof to remove the property from WPI and deliver it to her at the Riverwalk
18 Condominium. Mikovits continues to exercise dominion and control over the notebooks and
19 property which she has told Pfof are hidden in a secure location. (Exhibit 2.) As set forth in
20 WPI’s moving papers, and as uncontroverted by Plaintiff, WPI’s requested injunction is in the
21 public interest as it is enforcing a contract and protecting trade secret rights.

22 **IV. CONCLUSION**

23 For the foregoing reasons, this Court should grant WPI’s Motion for Preliminary
24 Injunction.

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 21st day of November, 2011.

BOWEN HALL

By: /s/ Ann O. Hall
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CERTIFICATE OF SERVICE

Pursuant to NRCF 5(b), I hereby certify that I am an employee of BOWEN HALL, and that on this date I personally served a true copy of the foregoing document addressed to:

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DATED this 21st day of November, 2011.

By /s/ Lawry Kristie
LAWRY KRISTIE, ACP

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