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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 Billy Malone, a married man,

12 Plaintiff,

13 v.

14 Western National Parks Association,
15 Leann Simpson, Jim Babbitt;

16 Defendants.

No. CV-08-8027-HRH

**BILLY MALONE'S RESPONSE TO
WNPA'S MOTION FOR SUMMARY
JUDGMENT RE CIVIL CONSPIRACY.**

(Oral Argument Requested)

17 Pursuant to Fed. R. Civ. P. 56 and LRCiv 56.1, Plaintiff ("Billy Malone") submits
18 his Response to the Motion for Partial Summary Judgment Re: Civil Conspiracy.

19 WNPA's motion relies on a misunderstanding of the law respecting available damages to
20 him. Billy Malone's Response is supported by pleadings on file, the attached
21 memorandum and the response to WNPA's Separate Statement of Facts ("RPSSOF") and
22 Billy Malone's Separate Statement of Facts ("PSSOF") submitted in support of his
23 response.

24 **I. RELEVANT FACTS.¹**

25 1. LeAnn Simpson elaborated to the NPS investigator, Paul Berkowitz, in a number

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27 ¹ Billy Malone disputes the material facts submitted by WMPA in this motion. See Billy
28 Malone's Response to WNPA's Separate Statement of Facts ("RDSSOF") and his SSOF
("PSSOF") filed concurrently with this Response. What follows are his recitation of
relevant material facts.

1 of phone calls in July and August of 2006 about the partnership arrangement she believed
2 existed between WNPA and NPS. PSSOF ¶ 27.

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4 2. LeAnn Simpson shared with NPS investigator Paul Berkowitz her view that
5 initially all WNPA wanted was the consignment ledgers but that after the search warrants
6 were executed and vast quantities of property was seized from Billy Malone's home,
7 Clyde Yee, Chip David Mike Snyder and Steve Martin had all variously approached her
8 and the WNPA Board requesting financial support from WMPA for the investigation.

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10 PSSOF ¶ 28.

11 3. LeAnn Simpson told NPS Investigator Paul Berkowitz that she had been told that
12 by contributing financially and assisting NPS, WNPA would have privileged case access
13 and would ultimately recover its costs through property seized from the Malone home.

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15 PSSOF ¶ 29.

16 4. LeAnn Simpson indicated to NPS Investigator Paul Berkowitz that she might just
17 keep Billy Malone's property seized at HTP because she doubted anyone could produce
18 receipts to prove that it was theirs. PSSOF ¶ 30.

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20 5. LeAnn Simpson also recounted to NPS investigator Paul Berkowitz that Mike
21 Snyder had suggested to her a few weeks earlier that WNPA should keep all the
22 consignment property found at the HTP. PSSOF ¶ 31.

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24 6. LeAnn Simpson asked NPS investigator Paul Berkowitz to consider her comments
25 "off the record" and that he should "keep it to yourself." PSSOF ¶ 32

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27 7. Toward the end of his conversation with LeAnn Simpson, she discussed her views
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1 of limitations on potential liability claims by WNPA and further inquired whether the
2 United States Attorney might negotiate with Billy Malone over WNPA's potential liability
3 in determining whether or not to prosecute Billy Malone. PSSOF ¶ 33.

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5 8. LeAnn Simpson's calls to and communications with NPS investigator Paul
6 Berkowitz toward the end of July of 2006 were an elaboration of the "deal" she claimed
7 had been made between her on behalf of WNPA and the NPS (Clyde Yee, Chip Davis,
8 Steve Martin, Mike Snyder, etc.) for WNPA to provide funding for the investigation in
9 exchange for the promise that what WNPA would eventually get all the property seized
10 from Malone. PSSOF ¶ 34.

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13 9. In an interview he gave to the OIG, Mike Snyder of the NPS told of a December
14 2006 conversation he had with LeAnn Simpson in December of 2006 immediately to a
15 WNPA Board meeting in which she expressed that "WNPA was frustrated with the lack
16 of progress [in the investigation] and how the money they provided to the investigation
17 did not culminate in the expected returns of merchandise, etc." The OIG report further
18 indicated that "Simpson wanted Snyder to tell the board that WNPA could keep the
19 evidence seized from Malone's residence to compensate WNPA for the money they had
20 expended on the investigation. Snyder refused to do that." Snyder reported that he was
21 later "lambasted" by the WNOA Board. PSSOF ¶¶ 35 and 36.

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24 10. Snyder later was interviewed about LeAnn Simpson's statement that he has
25 suggested WNPA simply keep Billy Malone's property. He acknowledged the
26 conversation had taken place but indicated that the suggestion that WNPA keep the
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1 property came from Simpson. PSSOF ¶ 37.

2 11. Despite WNPA's denial, there are multiple witnesses to WNPA's executive director
3 LeAnn Simpson saying words to the effect that Billy Malone was a thief or a crook or had
4 stolen millions of dollars on multiple occasions. PSSOF ¶¶ 43, 44 and 45.

6 12. The OIG's effort to interview Clyde Yee resulted in his refusal to answer questions
7 after consulting with counsel and insisting on being granted immunity from prosecution.
8 PSSOF ¶ 38.

10 13. Documents obtained by the plaintiff provide evidence that Clyde Yee has a history
11 of mishandling evidence, withholding information from both prosecution and defense
12 counsel, and providing false statements in reports. PSSOF ¶ 39.

14 14. On February 17, 2006 Yee's immediate supervisor (SSA Brian Smith) had a
15 conversation with SSA Paul Berkowitz, the new Hubbell case agent, about Yee's level of
16 candor and propensity to withhold case information related to the Hubbell Investigation.
17 In that conversation, Smith acknowledged that Yee had a record of this type of conduct,
18 and that he (Smith) was dealing with Yee on those same issues on several other cases.
19 PSSOF ¶ 40

22 15. The OIG's concluding report had the following about Clyde Yee. "Our
23 investigation determined that the NPS Special Agent Clyde Yee, the case agent assigned
24 to the Hubbell Trading Post Investigation, submitted false information on the search
25 warrant affidavit and did not properly account for cash and evidence seized. The U.S.
26 Attorney's Office declined prosecution of Yee in lieu of administrative remedies.

1 PSSOF ¶ 41.

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3 **II. LEGAL STANDARD AND ANALYSIS.**

4 **A. Summary Judgment Standard.**

5 The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules
6 of Civil Procedure. Under this rule, summary judgment is properly granted when, after
7 viewing the evidence in the light most favorable to the non-moving party, no genuine
8 issues of material fact remain for trial. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S.
9 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th
10 Cir.1987).

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13 The moving party bears the burden of demonstrating that it is entitled to summary
14 judgment. *Mur-ray Mgmt. Corp. v. Founders Title Co.*, 169 Ariz. 417, 819 P.2d 1003,
15 1005 (Ariz. App.1991). If the moving party makes a *prima facie* case showing that no
16 genuine issue of material fact exists, the burden shifts to the opposing party to produce
17 sufficient competent evidence to show that a triable issue of fact does remain. *Ancell v.*
18 *United Station Assocs., Inc.*, 166 Ariz. 457, 803 P.2d 450, 452 (Ariz. App.1990). The
19 Court must regard as true the non-moving party's evidence, if it is supported by affidavits
20 or other evidentiary material. *Celotex*, 477 U.S. at 324. However, the non-moving party
21 may not merely rest on its pleadings, it must produce some significant probative evidence
22 tending to contradict the moving party's allegations and thereby creating a material
23 question of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986)(holding
24 that the plaintiff must present affirmative evidence in order to defeat a properly supported
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1 motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253,
2 289 (1968).

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4 **III. WNPA NEGLECTS TO UNDERSTAND THAT THE CIVIL CONSPIRACY**
5 **VIOLATED MALONE'S CONSTITUTIONAL RIGHTS.**

6 When a civil wrong occurs as the result of concerted action, the participants in the
7 common plan are equally liable. W. Prosser and W.P. Keeton, *The Law of Torts*, § 46 at
8 323 (5th ed. 1984). The word “conspiracy” is generally used in connection with imposing
9 vicarious liability for concerted action. *Id.* at 324.

10
11 **A. *Billy Malone Alleged Bivens Claims Against WNPA and Its Agents.***

12 The gist of WNPA's motion is its claim that since, at the end of the day, Billy
13 Malone got his property back, he is undamaged. Motion at 3 and 4. (“Mr. Malone cannot
14 prevail on his civil conspiracy count because all of the items seized during the search
15 warrant were returned to him.”) WNPA neglects to appreciate that the damages for
16 violation of constitutional rights are not limited to the return of the illegally seized
17 property. the involvement of the WNPA defendants with NPS *Bivens* defendants in a
18 conspiracy to seize and retain Billy Malone's property.

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21 WNPA lays out part of the analysis but neglects the remainder. Motion for
22 Summary Judgment Re: Civil Conspiracy (“Motion”) at 3. It is true that Arizona law does
23 not provide damages for the conspiracy *per se*. In *Tovrea Land and Cattle Co. v.*
24 *Linsenmeyer*, 100 Ariz. 107, 131, 412 P.2d 47, 63 (1966), the Arizona Supreme Court
25 stated, “[t]here is no such thing as a civil action for conspiracy. The action is one for
26 damages arising out of the acts committed pursuant to the conspiracy,” citing *Hale v.*
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1 *Brown*, 84 Ariz. 61, 323 P.2d 955 (1958). The thrust of *Tovrea* is that a mere agreement
2 to do a wrong imposes no liability; an agreement plus a wrongful act may result in
3 liability. The *Tovrea* case stated: “The damage for which recovery may be had in such a
4 civil action is not the conspiracy itself but the injury to the plaintiff produced by the
5 specific overt acts.” 100 Ariz. at 131, 412 P.2d at 63.

7
8 The gravamen of a civil action for damages resulting from an alleged conspiracy
9 then is thus not the conspiracy itself but rather the civil wrong which has been committed
10 pursuant to the conspiracy and which results in damage to the plaintiff. The resultant
11 damages in a civil conspiracy action must necessarily result from overt acts, whether or
12 not those overt acts in themselves are unlawful. *McElhanon v. Hing*, 151 Ariz. 386, 392,
13 728 P.2d 256, 262 (App. 1985).

15 The Court recognized that a *Bivens* conspiracy claim might lie against persons who
16 were non-governmental defendants. Private individuals who are "willful participant[s] in
17 joint actions with the [federal government] of its agents" may be liable under *Bivens*.
18 *Schowengerdt v. Gen. Dynamics Corp.*, 823 F. 2d 1328, 1338 n. 17 (9th Cir.
19 1987)(quoting *Dennis v. Sparks*, 449 U.S. 27, 29 (1980). August 4, 2009 Order of the
20 Court at 12. The conspiratorial agreement need not be express; it may be implied by the
21 tortious conduct itself. Restatement (Second) of Torts § 876 cmt. a (1979). A conspiracy
22 may be established by circumstantial evidence through the nature of the acts, the
23 relationship of the parties, the interests of the conspirators, or other circumstances.
24 *Mohave Elec. Coop., Inc. v. Byers*, 189 Ariz. 292, 306, 942 P.2d 451, 465 (App.1997).

1 Billy Malone did file a Corrected First Amended Complaint "(CFAC)" which plead
2 with the requisite particularity the involvement of WNPA and its agents in the civil
3 conspiracy to seize and retain property belonging to Billy Malone.
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5 ***B. Denial of Constitutional Rights are Compensable in Bivens Claims with Tort***
6 ***Damages.***

7 When a plaintiff is deprived of constitutional rights which are eventually honored,
8 “[i]t is facile to suggest that no damage is done.” *Dellums v. Powell*, 184 U.S.App.D.C.
9 275, 303, 566 F.2d 167, 195 (1977). There is no reason why such an injury should not be
10 compensable in damages.

11 The appropriate starting point of any analysis in this area is the Supreme Court's
12 opinion in *Carey v. Piphus*, 435 U.S. 247(1978); *Memphis Community School Dist. v.*
13 *Stachura*, 477 U.S. 299 (1986). In *Carey* the Court was considering damages available in
14 claims arising under 42 U.S.C. § 1983.² The Court recognized that “the basic purpose of
15 a § 1983 damages award should be to compensate persons for injuries caused by the
16 deprivation of constitutional rights.” *Id.*, at 254. The Court explained, however, that
17 application of that principle to concrete cases was not a simple matter. 435 U.S., at 257.
18 “It is not clear,” the Court stated, “that common-law tort rules of damages will provide a
19 complete solution to the damages issue in every § 1983 case.” *Id.*, at 258. Rather, “the
20 rules governing compensation for injuries caused by the deprivation of constitutional
21 rights should be tailored to the interests protected by the particular right in question-just as
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27 ² Courts rely on cases construing 42 U.S.C. § 1983 to construe *Bivens* claims. See
28 *Pollard v. The GEO Group, Inc.*, 629 F.3d 843, 854-55 (9th Cir. 2010).

1 the common-law rules of damages themselves were defined by the interests protected in
2 various branches of tort law.” *Id.*, at 259.

3
4 Following *Carey*, the Courts of Appeals have recognized³ that invasions of
5 constitutional rights sometimes cause injuries that cannot be redressed by a wooden
6 application of common-law damages rules. In *Hobson v. Wilson*, 237 U.S.App.D.C. 219,
7 275-281, 737 F.2d 1, 57-63 (1984), cert. denied, 470 U.S. 1084 (1985), the District Court
8 found that the defendants had succeeded in diverting plaintiffs from, and impeding them
9 in, their protest activities. The Court of Appeals for the District of Columbia Circuit held
10 that that injury to plaintiffs' constitutional rights (in that case First Amendment-protected
11 interests) could itself constitute compensable injury wholly apart from any “emotional
12 distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety
13 and anguish” suffered by plaintiffs. 237 U.S.App.D.C., at 280, 737 F.2d, at 62 (footnotes
14 omitted).

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18 The rationale of WNPA's motion for summary judgment re civil conspiracy must
19 be denied. WNPA acting primarily through LeAnn Simpson and others entered into a
20 conspiracy to seize and retain Billy Malone's property with her committed view,
21 frequently denied even as she repeated it, that Billy Malone was a "crook" and that he had
22 "stolen millions." Indeed, LeAnn Simpson worked diligently to retain Billy Malone's
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25 ³ See, e.g., *Bell v. Little Axe Independent School District No. 70 of Cleveland Cty.*, 766
26 F.2d 1391, 1408-1413 (CA10 1985); *Hobson v. Wilson*, 237 U.S.App.D.C. 219, 275-281,
27 737 F.2d 1, 57-63 (1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142
28 (1985); *Kincaid v. Rusk*, 670 F.2d 737, 745-746 (CA7 1982); *Mickens v. Winston*, 462
F.Supp. 910, 913 (ED Va.1978), summarily aff'd, 609 F.2d 508 (CA4 1979).

1 property even after the decision had been made and executed to return the bulk of it to
2 Billy Malone in July of 2006. She spoke with NPS investigator Berkowitz in August of
3 2006 about her dismay at the result of the "partnership" she believed WNPA had with
4 NPS personnel. She reported a conversation she had with Mike Snyder of the NPS
5 suggesting that she simply retain Malone's property because he could not prove that it was
6 his. Mike Snyder details that LeAnn Simpson was of the view that WNPA had an
7 agreement with NPS persons which would result in WNPA ending up with Billy Malone's
8 property. She inquired of NPS investigator Berkowitz in that same period of time about
9 having the United States Attorney negotiate with Billy Malone for immunity for WNPA
10 for what had been done to him. This was conduct parallel to the original instructions
11 given to NPS investigator Berkowitz.
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16 **IV. CONCLUSION.**

17 WNPA's Motion for Partial Summary Judgment on Billy Malone's civil conspiracy
18 claim must be denied.

19
20 RESPECTFULLY SUBMITTED this 25th day of July, 2011.

21 LAW OFFICES OF WILLIAM R. HOBSON, P.C.

22 by s/William R. Hobson
23 William R. Hobson
24 Attorney for Plaintiff Billy Malone
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, I electronically transmitted the attached document to the Clerk's office using CM/ECF System for filing and transmittal of a notice of Electronic Filing to the following CM/ECF registrants:

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