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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

TAMARA RUBIN,	**Case No.: 3:19-cv-01377-IM**
Plaintiff,	
v.	**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
THE STATE OF OREGON, KRIS KALANGES, MICHAEL GLENN, KAREN ERTEL, MARK KLEYNA, and JOHN/JANE DOE,	
Defendants.	

INTRODUCTION

Plaintiff brings this action against the State of Oregon and state officials Kris Kalanges, Michael Glenn, Karen Ertel, and Mark Kleyna, alleging violation of 42 U.S.C § 1983 and her federal constitutional rights under the Fourth, Fifth, and Fourteenth Amendment, as well as state laws prohibiting malicious prosecution and abuse of process. Before the Court is defendants'

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Motion for Summary Judgment on all claims. ECF 78. For the following reasons, defendants' motion should be denied.

I. STATEMENT OF FACTS

1. *Plaintiff's Childhood Lead Poisoning Prevention Advocacy Attracts National Attention*

In 2005, two of plaintiff's children were acutely poisoned by lead and suffered permanent brain damage caused by a contractor's work painting their home. As a result, plaintiff became a vocal and well-known lead safety advocate. In 2011, plaintiff founded the non-profit, Lead Safe America Foundation ("LSAF" or the "foundation"), and served as its Executive Director until 2016. By the beginning of 2016, plaintiff had become the most prominent lead safety activist in the state and one of the most prominent lead safety activists in the nation. At the time, lead poising and lead safety were front-page national news after the Governor of Michigan declared a state of emergency in the city of Flint as a result of toxic levels of lead in the city's drinking water. *See* Declaration of Zack Duffly, Exhibit 1, pp. 2-3.[1]

In February 2016, against that backdrop, plaintiff appeared on stage in Flint, Michigan at with U.S. Senator Bernie Sanders, then running to be the national Democratic party's U.S. Presidential nominee, to discuss the lead crisis. Plaintiff planned to use the national momentum to help promote LSAF's nearly-completed documentary "muckraking" film about the lead industry, "*MisLEAD: America's Secret Epidemic*." *Id*.

2. *The DOJ and Kris Kalanges Begin Investigating LSAF and Plaintiff*

In March 2016, plaintiff and LSAF received a Civil Investigative Demand ("CID") from the Oregon Department of Justice ("DOJ") Charitable Activities Section, requesting documents

[1] Unless otherwise noted, all exhibits referenced are enclosed with the separately filed Declaration of Zack Duffly in support of this Opposition.

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relating to the foundation's finances as part of an investigation into the "oversight of the organization's assets and the proper financial management." The CID was signed by defendant Mark Kleyna and directed inquiries to DOJ financial investigator Kris Kalanges, who conducted DOJ's investigation. Answer ¶ 12; TAC ¶ 26.

As part of the investigation, Kalanges analyzed what he claimed was the total dollar amount of payments purportedly made by LSAF to or for the benefit of plaintiff. Kalanges Depo 134:19-21; Answer ¶ 14; TAC ¶ 28. Kalanges characterized this analysis as "basically a spreadsheet showing the cash flows between Lead Safe and the Rubins' bank accounts. So it was not a conclusion as to what those cash flows meant, what they involved." Kalanges Depo at 82:10-13, 110:23-111:15, and 125:9-11. In fact, according to Kalanges, his analysis and investigation reached no conclusion, because he "didn't have sufficient documents to make a conclusion." *Id.*, at 83:16-20. "I lacked an explanation as to what – what gave rise to the transactions, what was the purpose of them[.]…. I couldn't come to any conclusion without additional information." *Id.*, at 83:23-84:7 and 110:23-111:15.

Kalanges stated that the transactions he examined may have been "appropriate business records," but that he "didn't have sufficient information to conclude one way or the other." Kalanges Depo 164:25-165:3. "If I had information, additional information, that helped me to clarify and understand those transactions taken from the bank statement, I would look at them differently, I would interpret them differently." Kalanges Depo at 159:20-24.

Kalanges requested financial records from plaintiff in order to assess the propriety of financial transactions between plaintiff and LSAF. According to Kalanges, he needed this information in order to form any conclusions based on his analysis. *Id.*, at 111:16-21. Kalanges asked plaintiff for "this information, these documents to be put into a format, an accounting

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system, in which I could then audit it and arrive at some sort of conclusion about what was the purpose of these transactions, what was their character, was there anything excessive here or not, are these proper transactions." Kalanges Depo at 126:5-11. According to Kalanges, the kind of information he needed and was waiting for was "the kind of information that [plaintiff later] provided to the IRS[.]" Kalanges Depo at 160:1-3. Plaintiff provided DOJ with financial records in response. Answer ¶ 13; TAC ¶ 27; Kalanges Depo at 114:2-6, 14-20.

Through his analysis, Kalanges concluded that plaintiff received nearly $500,000 in "income" from LSAF between 2011 and 2016. Exhibit 1 at 4:4-19. Kalanges forwarded the results of his investigation to the Oregon Department of Health and Human Services ("DHS") and the IRS. Answer ¶ 17; TAC ¶ 32. Kalanges Depo at 148:10-14; TAC ¶ 32.

3. *The DHS and Michael Glenn Start Investigating Plaintiff Based on DOJ's Investigation*

On June 13, 2016, DHS Investigator Michael Glenn opened and started a joint administrative DHS investigation based on his review of "a completed investigation report from Kris A. Kalanges…that showed DHS Client Tamara Elise Rubin and her husband Leonard Rubin, have received payments to or for the benefit of themselves an amount of approximately $450,248.13 from Lead Safe America." Answer ¶ 19; TAC ¶ 34. According to Glenn,

> "Kris A. Kalanges from Oregon DOJ did a detailed financial analysis of Lead Safe America Foundation's (LSAF) bank records between April 2011 through March 2016. The purpose of the analysis was to determine the total dollar amount of payments made wither [*sic*.] to or for the benefit of Tamara and Leonard Rubin and their family.

See Exhibit 2 ("Glenn Report"), pp. 18-19.

> "I received a completed investigation report from Kris A. Kalanges … that showed [plaintiff] and her husband Leonard Rubin, between 2011 and 2016 have received payments to or for the benefit of themselves an amount of approximately $450,248.13 from Lead Safe America. In reviewing Rubin's DHS benefit history, the association to or the payments from Lead Safe America was never accurately reported.

Id., p. 2.

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On September 12, 2016, Mr. Glenn completed his administrative report and submitted it and the evidence to the DHS Overpayment Writing Unit. On May 8, 2017, DHS Overpayment Writer Marisol Carter completed the administrative overpayment review. *Id.*, at 26. DHS concluded that plaintiff's family had received an overpayment in public benefits. Answer ¶ 21; TAC ¶ 36.

On May 15, 2017, Glenn drafted a "Criminal Report" summarizing his investigation of plaintiff (Exhibit 2). Glenn concluded his report with a "Criminal Referral for Prosecution," stating, "I applied the case information to the Oregon Revised Statutes and believe beyond a reasonable doubt DHS and DOH evidence proves Client Tamara Rubin intentionally, knowingly, and fraudulently obtained State welfare benefits by failing to accurately report all income, assets, and resources. I will submit the investigation and evidence to the Multnomah County District Attorney's office for consideration of criminal prosecution." Exhibit 2, p. 27. Glenn then forwarded his report to the DA for prosecution.

After that, Glenn "continued to be involved with the case[.]" Glenn Depo at 99:5-101:24. He "was involved with the DDA requests, the grand jury, the meetings that Ms. Rubin's attorneys requested" and he also monitored and kept notes about plaintiff's social media. Glenn Depo at 99:5-101:24.

4. *IRS Audit*

In May 2017, the same month that Glenn forwarded his report to the County, the IRS notified plaintiff it was auditing her tax returns from 2013-2015 and proposing that plaintiff owed $500,000 in additional taxes based on excess benefit transactions she received from LSAF during those years. For the next sixteen months, the IRS conducted its audit of plaintiff. *See* Exhibit 3, pp. 1-2.

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The issue before the IRS was whether LSAF made any unreported payments to or for the benefit of the Rubins. The IRS began its audit by making many of the same allegations that defendants here did, namely that plaintiff comingled funds with LSAF, paid personal expenses out of LSAF accounts, wrote checks and made transfers to herself from LSAF accounts, and reimbursed herself for expenses that did not satisfy the Treasury Regulations and therefore constituted personal economic benefits from LSAF. The IRS auditor reviewed the same transactions (payments, debits, transfers, and cash withdrawals from the LSAF bank and PayPal accounts), financial analysis, and documents as the DOJ and DHS used to determine whether they were made to or for the benefit of plaintiff. *Id*.

The IRS concluded that LSAF *did not* make the payments to plaintiff alleged by Mr. Kalanges and relied on by DHS to determine overpayments. *Id*.

As explained in a September 14, 2017, letter from tax attorney Leila E. Vaughan of Klehr Harrison Harvey Branzbu, who represented plaintiff with regards to the IRS audit:

> "The auditor's goal was to determine whether any expenses or transactions of the Foundation were 'excess benefit transactions,' i.e., transactions for your benefit that were not approved by the Board of Directors of the Foundation or whether they were expenses in furtherance of the Foundation's tax-exempt purpose and adequately substantiated. As a result of documentation provided to the auditor in July, August and September, as well as access to your records during our meeting…you will receive a letter from the IRS that finalizes her determination that there were no excess benefit transactions. In addition, no discrepancy adjustment should be issued by the IRS with respect to any of your tax returns."

See Exhibit 4.[2]

/ / /

[2] Ms. Vaughan's letter also stated that, "[t]hough not necessarily relevant to the auditor's determination,…the auditor noted the effective advocacy work that you did while serving as Executive Director of the Foundation and offered her willingness to answer any questions if you are involved in future nonprofit advocacy." *See* Exhibit 4.

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5. *Defendants Receive Notice that the IRS Audit May Exonerate Plaintiff*

Possibly by October 1, 2017, but no later than October 24, 2017, Kalanges received notice from the County that he would be appearing before the grand jury to testify in relation to plaintiff's case on November 1, 2017. Kalanges Depo at 44:1-8; 140:21-23; 141:13-18; 143:9-14.

On October 5, 2017, at 8:25 a.m., plaintiff sent Mr. Kleyna two letters. The first letter, from plaintiff, was provided "to follow up on our…investigation into transaction between the Foundation and myself" and asserted that "the IRS investigated the same transactions to determine whether there were any excess benefit transactions or compensation" and "concluded that there were [none]." *See* Exhibit 4.

The second letter plaintiff sent was from tax attorney Leila E. Vaughan of Klehr Harrison Harvey Branzbur to plaintiff, dated September 14, 2017. In that letter, Ms. Vaughan, who represented plaintiff with regards to the IRS audit, states:

> "The auditor's goal was to determine whether any expenses or transactions of the Foundation were 'excess benefit transactions,' i.e., transactions for your benefit that were not approved by the Board of Directors of the Foundation or whether they were expenses in furtherance of the Foundation's tax-exempt purpose and adequately substantiated. As a result of documentation provided to the auditor in July, August and September, as well as access to your records during our meeting…you will receive a letter from the IRS that finalizes her determination that there were no excess benefit transactions. In addition, no discrepancy adjustment should be issued by the IRS with respect to any of your tax returns."

Id.

Later on October 5, 2017, plaintiff sent Mr. Kleyna a second email: "Please review the attached and forward as necessary. Consistent with my attorney's letter (emailed to you this morning), today I received the attached letter from the IRS notifying me that no excess benefit transactions were found." Attached to this email was a letter, dated October 3, 2017, from IRS

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Director of Exempt Organizations Examinations to plaintiff, stating that, "[b]ased on our audit,…there is no change to your tax liability." *See* Exhibit 5.

On October 6, 2017, plaintiff followed-up by email with Mr. Kleyna and Mr. Kalanges. Plaintiff wrote, "I am writing to confirm that you got the second email I sent yesterday…I will follow up a.s.a.p. regarding the additional requested documentation." Mr. Kleyna responded the same day, confirming that "[w]e have received your email and attached letter" and adding that "the conclusions of the Internal Revenue Service auditor described in Ms. Vaughan's letter do not appear to agree with this office's analysis…In order for us to be able to reconcile these different conclusions, we would have to review all documents relevant to the IRS's determinations." *See* Exhibit 6.

On October 16, 2017, attorney Phil Bezanson of Bracewell LLP, emailed Mr. Kleyna and Mr. Kalanges: "I'm in the process of being retained…I understand you have an open request for [the IRS] materials…and I expect Ms. Rubin will be able to provide those[.]" Mr. Bezanson requested a phone conferral for the following day. *See* Exhibit 7.

On October 17, 2017, Mr. Bezanson spoke by phone with Mr. Kleyna and Mr. Kalanges. Mr. Kleyna asked Mr. Bezanson to provide: (i) documentation addressing the loan repayments and reimbursements, (ii) the documentation substantiating the loans and expenses, (iii) correspondence between Ms. Vaughan and the IRS, and (iv) a set of auditable books (the "IRS material"). Mr. Bezanson agreed to provide the requested materials. *See* Exhibit 3, p. 2.

By October 24, 2017, but possibly as early as October 1, 2017, Kalanges knew he was going to appear before the grand jury on November 1, 2017. Kalanges Depo at 44:1-8; 140:21-23; 141:13-18; 143:9-14. Before appearing, Kalanges met with DDA Andrew Sherwood multiple times regarding testifying. *Id*., at 108:24-109:7.

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On November 1, 2017, Mr. Kalanges testified before the grand jury. Kalanges Depo at 43:25-44:13 and 140:18-20. Mr. Glenn also testified before the grand jury that day. ECF 82 at 1. Glenn could not rule out that he was familiar with the IRS audit and conclusions by then. Glenn Depo at 105:1-21.

Following Mr. Kalanges's November 1st appearance, Kalanges received another notice from the County to appear before the grand jury to testify a second time on November 9, 2017. Kalanges Depo at 140:18-141:1.

On November 8, 2017, Mr. Bezanson emailed Mr. Kleyna and Mr. Kalanges: "I'm planning to provide IRS-related and other financial materials to you this week. The materials include Quickbooks files for LSAF that have been prepared by a bookkeeper, not by Tamara." *See* Exhibit 8. Kalanges confirmed that he received and read this email. Kalanges Depo at 150:20-25.

On November 9, 2017, Mr. Kalanges testified before the grand jury a second and final time. *Id*., at 140:18-20. Mr. Glenn also testified before the grand jury that day. See his MSJ Decl. It is possible that Glenn discussed the IRS audit with Kalanges before one or both of them testified before the grand jury. Glenn Depo at 109:25-110:9. Following his grand jury appearances, Kalanges continued to communicate with the DA. Kalanges Depo at 108:8-10.

On November 10, 2017, Mr. Bezanson emailed Mr. Kleyna and Mr. Kalanges again. The letter contained a hyperlink to access the IRS materials, as well as a letter to "be read in connection with the materials." That letter stated: "As we discussed…we are producing copies of correspondence and other materials Ms. Rubin and her counsel have provided to and received from the [IRS] along with the financial data you requested." "The materials we are producing….demonstrate that the Rubins did not receive any improper financial benefits from

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the Lead Safe America Foundation and are summarized at Rubin 000917-000920." Mr. Bezanson then sent Mr. Kleyna and Mr. Kalanges a separate email with the password. *See* Exhibit 9. Defendants admit that they received (and sent) the October and November emails above. Answer ¶ 46; TAC ¶ 246.

Mr. Kalanges claims that he did not read Mr. Bezanson's November 10th email until November 13, 2017, because he was out of the office on November 10th, which was an official state holiday (Veterans Day), and did not return to the office until Monday, the 13th. Defendants told plaintiff that Mr. Kleyna was also out the week that Mr. Bezanson forwarded the IRS material.

6. Multnomah County's Criminal Indictment, Arrest, and Prosecution of Plaintiff

On November 13, 2017, an indictment was returned in Multnomah County Case Number 17CR75385, charging plaintiff with nine Class C felonies (seven counts of felony Theft in the First Degree and two felony counts of welfare fraud), based on allegations that she received income or benefits from LSAF that she failed to report on her applications for, and/or while receiving, Medicaid and SNAP benefits. Answer ¶ 27; TAC ¶ 50. Per the indictment, Mr. Kalanges and Mr. Glenn were the only two witnesses examined before the Grand Jury.

On November 28, 2017, officers from the Multnomah County Sheriff's office arrested plaintiff at home while she was sitting with her son at the kitchen table. On November 29, 2017, plaintiff was booked into Multnomah County jail and arraigned. Answer ¶ 30; ¶ TAC 53. Plaintiff pleaded not guilty to all charges.

On December 21, 2017, at defendant Kleyna's request, Mr. Bezanson, provided the password for the QuickBooks files, which were a subset of the documents Mr. Bezanson had previously produced. Defendants deny the password to the Quickbooks subset of documents had

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previously been provided. Defendant Kleyna thanked Mr. Bezanson for sending the password. Answer ¶ 34; TAC ¶ 60.

7. The Case Against Plaintiff Falls Apart

Following her arrest, plaintiff hired Celia Howes and Megan McVicar of Hoevet Olsen Howes to defend her from the County's charges. Ms. Howes requested relevant discovery materials from the DA and the DA provided materials in response.

In a February 8, 2018, phone conferral with the Multnomah County Deputy District Attorney ("DDA"), Ms. Howes informed DDA Leineweber that it appeared the County's discovery responses were incomplete and that, in particular, the IRS materials that plaintiff provided in DOJ in October 2017, had not been produced. See Exhibit 1, pp. 4-6; TAC ¶ 62.

On February 9, 2018, Ms. Howes met with Mr. Kalanges, Mr. Glenn, and DDA Leineweber. Glenn Depo 106:7-8; 110:18-19. At this meeting, Kalanges admitted that he "had reviewed some, but not all, of the documents provided" by plaintiff beginning in October 2017. Answer ¶ 37; TAC ¶ 64. According to Ms. Howes, Mr. Kalanges admitted that he had withheld the IRS conclusions and the substantiating financial records from DHS and the DA.[3] *See* Exhibit 1, pp. 4-6.

On February 12, 2018, plaintiff provided the DA with significant discovery and information showing that Ms. Rubin had been wrongfully charged. *Id*.

On March 8, 2018, Ms. Howes sent DDA Leineweber a letter outlining plaintiff's complete defense to all charges in the case and seeking dismissal of the prosecution. Along with the letter, Ms. Howes included materials showing that (1) defendants incorrectly calculated plaintiff's income and resources based on incomplete information, and (2) based on corrected

[3] Kalanges denies attending any meeting. Kalanges Depo at 162:21-163:11.

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income calculations, plaintiff was at all relevant times eligible for the medical and SNAP benefits she received. *See* Exhibit 10.

On March 14, 2018, Ms. Howes sent a letter to DDA Leineweber demanding that the state provide any and all exculpatory material, including but not limited to the substantive financial documents supporting the financial summaries and analysis of Mr. Kalanges and the DHS findings that the Rubins were ineligible for the benefits they received. At that point, DOJ had not provided or even informed DHS or the DA that it had in its possession the exculpatory financial documents directly undermining Mr. Kalanges's preliminary and unsubstantiated findings. The DA forwarded the discovery request to defendants. *See* Exhibit 11.

On April 11, 2018, the state produced additional discovery consisting of some of Mr. Kalanges's working papers (e.g., Excel workbooks) summarizing the financial transactions and some but not all of the financial statements Mr. Kalanges relied upon when conducting his analysis. Key documents, however, were still missing. *See* Exhibit 1, pp. 7-8.

On April 30, 2018, frustrated with the unexplained, slow pace of the County's response to the complete defense from the charges that Ms. Howes had nearly three months prior, Ms. Howes sent the DA a final exhortation to drop the charges or provide the missing discovery. Along with this email, Ms. Howes submitted a draft motion to compel discovery and supporting memorandum that she indicated she would soon be filing. Exhibit 1.

On May 10, 2018, the DA dismissed all counts against plaintiff.

8. *Tort Claim Notice*

On May 11, 2018, plaintiff provided Multnomah County and the Oregon DOJ and DAS with a Tort Claim Notice pursuant to ORS 30.275. Summarizing the above-stated facts, plaintiff notified defendants of potential federal and state law claims against them, including but not

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limited to false arrest, false imprisonment, malicious prosecution, abuse of process, and denial of her civil and constitutional rights. *See* Exhibit 12.

9. *DHS Continues to Pursue Plaintiff*

On or about June 15, 2018, despite the IRS's findings in plaintiff's favor and the DA's dismissal of criminal charges and almost a month after plaintiff filed her tort claim notice, DHS continued to pursue plaintiff for overpayment of benefits--based on the same transactions and information that DOJ, the IRS, and the County had all just examined. Plaintiff opposed these new charges as well, meeting on or about February 4, 2019, with DHS Investigator Karen Ertel to demonstrate that there was no reasonable basis supporting DHS' contest case against plaintiff. DHS continued to pursue charges against plaintiff. On May 14, 2019, under duress plaintiff signed a Settlement Agreement with DHS to settle the pending claims for overpayments.

10. *Plaintiff's Complaint*

Plaintiff commenced this action on August 28, 2019. In five claims for relief, plaintiff contends that defendants' violated her due process rights and engaged in malicious prosecution and abuse of process.

II. STANDARD

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett* , 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). "Where the record taken as a whole could not lead a rational trier of fact to

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find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and quotation marks omitted).

Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). Thereafter, the non-moving party bears the burden of designating "specific facts demonstrating the existence of genuine issues for trial." *Id.* The non-moving party must do more than raise a "metaphysical doubt" as to the material facts at issue. *Matsushita*, 475 U.S. at 586.

III. ARGUMENT

A. STATUTE OF LIMITATIONS

The statute of limitations for all of plaintiff's claims is two years. *Sain v. City of Bend*, 309 F.3d 1134, 1139 (9th Cir. 2002); *Woodroffe v. Oregon*, No. 2:12-cv-00124-SI, at *11 (D.Or, May 6, 2015). Plaintiff commenced this action on August 28, 2019. Therefore, any claim for an act that occurred more than two years before then, or August 28, 2017, is barred. However, "time-barred acts [that] are not themselves actionable…may be used for other purposes, such as to establish motive; provide background; demonstrate the required municipal policy, custom, or practice; or put any timely-filed claim in context." *Addison v. City of Baker City*, 258 F.Supp.3d 1207, 1236-37 (D.Or 2017).

Here, defendants argue that, "[a]bsent some indication that any of the claims was [*sic.*] reasonable discovered after that date, that date is the date of accrual; as such, any claims arising before August 28, 2017, are barred." MSJ, p. 8. Defendants also argue that, because the record shows that Kalanges completed his analysis in May 2016, and met and discussed his analysis with plaintiff, "all claims based on Kalanges' analysis are time-barred." MSJ, p. 9.

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The relevant consideration, however, in assessing the timeliness of plaintiff's claims is *not* when Kalanges completed his analysis or first discussed it with plaintiff , but rather when plaintiff knew or had reason to know that Kalanges withheld the IRS materials from DHS and the DA. *See Bibeau v. Pac. Nw. Rsch. Found. Inc.,*188 F.3d 1105, 1108 (9th Cir. 1999) (stating the discovery rule is observed by Oregon state law and federal law).

The court in *Smith v. City of the Dalles*, No. 6:16-cv-1771-SI, at *6 (D.Or. June 4, 2021), explained that the discovery rule under Oregon law "is triggered when Plaintiff *knew his arrest was unlawful under state law*." (Emphasis in original.) The Oregon Court of Appeals has explained that this means when a person knew or reasonably should have known facts that would alert the person to a substantial possibility that no probable cause existed. *Id.* (citing *Denucci v. Henningsen*, 248 Or App 59, 69-70 (2012).[4] Applying that rule, the court in *Smith* "[did] not find that the fact that Plaintiff filed federal claims under the Fourth Amendment…shows as a matter of law that he knew enough facts to alert him to a substantial possibility that his arrest under Oregon law was without probable cause. He had the subjective belief that his arrest was unlawful, but that is not determinative." No. 6:16-cv-1771-SI, at *6. *See also Denucci*, 248 Or App, at 69 n.9 (explaining that "we do not impute to an arrestee knowledge that she was arrested without probable cause merely because she suffered the indignity of an arrest"). Similarly, under the federal rule, the statute only begins to run once a plaintiff has knowledge of the "critical facts" of her injury, which are "that [s]he has been hurt and who has inflicted the injury. *Wilson v. State*, 3:20-cv-2078-SI, at *6 (D Or, Aug 25, 2021) (quoting *Bibeau*, 188 F.3d at 1108).

[4] This determination is ordinarily a question for the jury. *Denucci v. Henningsen*, 248 Or App 59, 67 (2012); *Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or. 270, 278 (2011) ("Application of the discovery rule presents a factual question for determination by a jury unless the only conclusion that a jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter.").

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On that basis, one or more of plaintiff's claims accrued on or after February 9, 2018, when plaintiff's criminal counsel discovered that Kalanges had failed to review the exculpatory IRS material and withheld the same from the DA. Other claims arose after August 28, 2017, and are based on Kalanges's analysis, but not the initiation of that analysis. Contrary to defendants' argument, those claims are also actionable. *See* ECF 27 at 4-5 ("This Court grants Defendants' motion to dismiss any claims based on the initiation of the DOJ, DHS, or IRS investigation because each of those investigations occurred more than two years before Plaintiff filled this lawsuit and any claims based on the initiation of those investigations are time-barred.").

B. CLAIMS FOR RELIEF

In five separate claims for relief, plaintiff argues that defendants, individually and together, violated the law by fabricating and suppressing evidence and prosecuting her without probable cause in violation of her federal constitutional rights and state law prohibiting malicious prosecution and abuse of process.

1. *Deliberate Fabrication & Deliberate or Reckless Suppression of Evidence*

The Fourteenth Amendment prohibits the deliberate fabrication of evidence by a state official. *Devereaux v. Abbey* , 263 F.3d 1070, 1074–75 (9th Cir. 2001) (en banc). To prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty. *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111 (9th Cir. 2010). "Mere careless[ness] is insufficient, as are mistakes of tone, and errors concerning trivial matters." *Spencer v. Peters*, 857 F3d 789, 798 (9th Cir 2017) (internal citations and quotation marks omitted) (brackets in original). Fabricated evidence does not give rise to a claim if the plaintiff cannot "show the fabrication actually injured her in some way." *Id.*

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Deliberate fabrication can be established by circumstantial evidence. *Id.* at 793. For example, evidence that officials "continued their investigation of [a person] despite the fact that they knew or should have known that he was innocent," can raise the inference that the investigator has an "unlawful motivation to frame an innocent person." *Id*. (quoting *Devereaux*, 263 F.3d at 1076) (brackets in *Spencer*). Deliberate fabrication can also be shown by direct evidence, for example, when "an interviewer ... deliberately mischaracterizes witness statements in her investigative report." *Id.* In cases involving direct evidence, the investigator's knowledge or reason to know of the plaintiff's innocence need not be proved. *Id.*

According to the Ninth Circuit, "our cases strongly suggest that a lack of probable cause to prosecute a defendant is not an element of a deliberate-fabrication claim." *Id.*, at 801 (noting that "[t]he only two sister circuits to have addressed this issue directly have held that the plaintiff need not prove a lack of probable cause for the prosecution"). In sum, the Constitution prohibits the deliberate fabrication of evidence whether or not the officer knows that the person is innocent. *Id.*, at 800. *See also Devereaux*, 263 F.3d at 1074–75 (noting there is "a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government").

"As to what constitutes an injury, a § 1983 plaintiff need not be convicted on the basis of the fabricated evidence to have suffered a deprivation of liberty—being criminally charged is enough." *Caldwell v. City of S.F.*, 889 F.3d 1105, 1115 (9th Cir. 2018) (*citing* NINTH CIR. JURY INSTR. COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS, § 9.33 (2017) ("The defendant [*name*] deliberately fabricated evidence that was used to [[criminally charge] [prosecute] [convict]] the plaintiff.") (brackets in instruction)).

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The Fourteenth Amendment also protects against a person being subjected to a criminal trial when favorable evidence has been deliberately or recklessly withheld from the prosecutor. *See* 9th Cir. Jury Instruction 9.33A. For a plaintiff to prevail on a claim of deliberate or reckless suppression of evidence, the plaintiff must prove by a preponderance of the evidence that: (1) the defendant suppressed evidence that was favorable to the accused from the prosecutor and the defense; (2) the suppression harmed the accused; and (3) the defendant acted with deliberate indifference to an accused's rights or for the truth in suppressing the evidence. In this context, "deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions. *Id*.

Here, the evidence in the record, viewed in the light most favorable to plaintiff and drawing all reasonable interests in plaintiff's favor, establishes a genuine dispute of material fact as to plaintiff's claim that defendants unlawfully and deliberately fabricated evidence and recklessly and deliberately suppressed evidence. Kalanges, an experienced investigator, created an analysis based on plaintiff's financial records and then notified the IRS and DHS of the transactions, which he improperly characterized as income. As a result, the IRS audited plaintiff and DHS referred plaintiff from felony criminal prosecution by the County. Kalanges and Kleyna received exculpatory records and materials from plaintiff and her counsel, supported by documentation from the IRS regarding the conclusion of its audit from October 5, 2017, to November 13, 2017. Viewing the evidence in the light most favorable to plaintiff, that means that, even accounting for the Veterans Day holiday, defendants knew as early as October 5, 2017, that plaintiff was sharing exculpatory information imminently. Glenn, meanwhile, took Kalanges's analysis—an analysis that Kalanges himself went to pains to characterize as

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essentially meaningless—and built his own case around that. Plaintiff's criminal attorney later vitiated Kalanges's and Glenn's analysis, forcing the County to dismiss the charges.

If Kalanges and Glenn testified at the grand jury on November 1, 2017, and November 9, 2017, then defendants had known of the exculpatory information for approximately a month when they testified. In other words, by the time either defendant appeared at the grand jury, Kleyna and Kalanges had received a letter from tax attorney Ms. Vaughan, a letter from the IRS, and emails from plaintiff and her counsel on October 5th, October 6th, and October 16th, all promising the delivery of essential materials—exactly those kind of materials that defendants had requested from plaintiff—as well as a phone conferral with plaintiff's counsel Mr. Bezanson. Not only did defendants fail to share that information or the supporting materials with the DA before or at the grand jury, they continued to sit on them after the County arrested plaintiff, and then for another *five months*. Defendants only produced the records once they had been caught red-handed, at which point the County realized that it had no case and dropped all the charges. Amazingly, defendants continued to pursue plaintiff via a DHS contested case notice. Although plaintiff challenged the new round of DHS charges until defendants were forced to drastically reduce the amount allegedly overpaid, faced with the prospect of continued persecution, she ultimately relented and signed a settlement under duress. Kleyna and Ertel directly participated in the above. *See Gowin v. Heider*, 237 Or 266, 276 (although the criminal charge against the plaintiff was dismissed after the parties reached a settlement, the settlement may have been the result of duress). Kleyna and Ertel are also liable for plaintiff's state tort law claims via a theory of respondeat superior.

A reasonable juror could conclude from the above that Glenn intentionally mischaracterized facts in their analyses and reports. That is direct evidence of deliberate

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fabrication, whether or not defendants knew or had reason to know that plaintiff was innocent. The fact that defendants continued their investigations of plaintiff when they knew—or should have known—that plaintiff was innocent, is circumstantial evidence of deliberate fabrication. It does not matter whether or not defendants had probable cause to prosecute plaintiff, therefore it does not matter whether defendants had a subjective and objectively reasonable belief that the defendant committed a crime. Plaintiff suffered the requisite harm when she was arrested, booked into jail, arraigned, and charged with seven Class C felony counts of theft. *See Devereaux*, 263 F.3d at 1074–75 (noting there is "a clearly established constitutional due process right *not to be subjected to criminal charges*"); *Caldwell*, 889 F.3d at 1115 ("being criminally charged is enough").

The same evidence also shows defendants' deliberate or reckless suppression of evidence that was favorable to plaintiff, and that the suppression harmed the accused. Defendants withheld exculpatory and impeachment evidence from the DA. A reasonable juror could infer from the record that the DA would never have prosecuted plaintiff.

Defendants argue that, because plaintiff also possessed the IRS materials, they have not violated the law. But *Caldwell* makes clear that a section 1983 deprivation of liberty exists when an individual is criminally charged. Here, plaintiff was subjected to arrest, incarceration, and months of continued prosecution to which she would not have been subjected had defendants not deliberately or recklessly suppress evidence such as the IRS materials. That is sufficient. "To prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty. *Costanich* , 627 F.3d at 1111. To establish the second element of causation, the plaintiff must show that (a) the act was the cause in fact of the deprivation of

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liberty, meaning that the injury would not have occurred in the absence of the conduct; and (b) the act was the 'proximate cause' or 'legal cause' of the injury, meaning that the injury is of a type that a reasonable person would see as a likely result of the conduct in question." *Spencer* 857 F.3d at 798. "In *United States v. Howell*, 231 F.3d 615[, 625] (9th Cir. 2000), the government argued that its failure to notify defense counsel of errors in police reports before trial was not a *Brady* violation because the defendant 'knew the truth and could have informed his counsel.'" *Tennison v. City and County of San Francisco*, 570 F3d 1078, 1091 (9th Cir 2008). The court rejected the state's argument and held that "[t]he availability of particular statements through the defendant himself does not negate the government's duty to disclose." *Id.* Defendants "cannot always remember all of the relevant facts or realize the legal importance of certain occurrences. Consequently, [d]efense counsel is entitled to plan his trial strategy on the basis of full disclosure by the government. . . ." *Id.* (rejecting "as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes") (internal quotation marks omitted).

2. *Lack of Probable Cause*

An official has probable cause to initiate criminal proceedings if they reasonably believe that an individual "has acted or failed to act in a particular manner" and that such acts or omissions "constitute the offense that [the person] charges against the accused," or mistakenly so believed in reliance on the advice of counsel. *Westwood v. City of Hermiston*, 787 F.Supp.2d 1174, 1194 (D.Or, 2011) (citing *Gustafson v. Payless Drug Stores N.W., Inc.,* 269 Or. 354, 356–57 (1974). In other words, "probable cause" in a wrongful prosecution case "refers to the subjective and objectively reasonable belief that the defendant committed a crime." *Westwood*, 787 F.Supp.2d at 1193 (citing *Blandino v. Fischel*, 179 Or App 185, 191 (2002)). If the

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defendant lacked a reasonable basis for pursuing the prior proceeding against the plaintiff, probable cause is lacking. *Blandino*, 179 Or App at 190-91. "[P]robable cause may not always be a defense to a claim for malicious prosecution." *Ira v. Columbia Food Co.*, 226 Or. 566, 572 (1961) ("Even if a jury finds that probable cause existed at the time of the arrest, the jury is not required to find that probable cause existed at the time the defendants caused a prosecution to occur."). In determining whether probable cause existed in the underlying matter, the court considers the evidence in the light most favorable to the plaintiff. *Lambert v. Sears, Roebuck & Co.*, 280 Or 123, 128-29 (1986).

Although the law does not require complete certainty or belief beyond a reasonable doubt, "suspicion alone is not enough to constitute probable cause." *Lampos v. Bazar, Inc.*, 270 Or. 256, 267 (1974). The defendant need not verify that the information he or she relied on in initiating the underlying action was reliable; however, when a reasonable person would investigate further, the defendant may be liable for failing to do so. *Id.*, at 268-69. If appearances would "cause a reasonable person to investigate further," the defendant has a duty to make an investigation. *Lambert v. Sears,* 280 Or. at 131.

Whether the defendant had probable cause "is a question of law for the court to decide if the facts and the inferences are undisputed;" however, if the facts or inferences are in dispute, a "jury must decide the facts and the court must instruct the jury what facts constitute probable cause." *Varner v. Hoffer*, 267 Or 175, 178-79 (1973). A plaintiff may rebut a prima facie presumption of probable cause to initiate criminal proceedings "by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Puccetti v. Spencer*, Civil No. 09-6172-AA, at *10 (D Or, Sep 14, 2010) (quoting *Awabdy v. City of Adelanto*, 368 F3d 1062, 1067 (9th Cir. 2004)).

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"Typically, in constitutional tort cases the [f]iling of a criminal complaint immunizes investigating officers ... because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." *Caldwell*, 889 F.3d at 1115 (internal quotation marks omitted). But, if "a plaintiff establishes that officers either presented false evidence to or withheld crucial information from the prosecutor, the plaintiff overcomes the presumption of prosecutorial independence and the analysis reverts back to a normal causation question." *Id*., at 1116.

Here, considering the evidence in the light most favorable to plaintiff, defendants lacked a reasonable basis for pursuing the criminal proceeding against plaintiff. Additionally, plaintiff can rebut any prima facie presumption of probable cause by showing that the criminal prosecution was induced by wrongful conduct undertaken in bad faith. Once they were aware of the existence of exculpatory material, and its imminent delivery, they had a duty to investigate further. Finally, this issue should be decided by a jury because the facts and inferences related to probable cause are in dispute.

4. *Defendants Violated Plaintiff's Due Process Rights*

Because defendants unlawfully fabricated and suppressed evidence, and because defendants lacked probable cause, they also violated plaintiff's procedural and substantive Due Process rights. "The Due Process Clause forbids the governmental deprivation of substantive rights without constitutionally adequate procedure." *Shanks v. Dressel*, 540 F.3d 1082, 1090-91 (9th Cir. 2008). To prevail on a procedural due process claim, a plaintiff must establish: (1) a constitutionally protected liberty or property interest; (2) a deprivation of that interest by the government; and (3) the lack of adequate process. *Id*., at 1090. "To violate substantive due process, official conduct must 'shock[] the conscience.'" *Leon v. Tillamook Cnty. Sch. Dist.*, No.

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3:17-440-PK, at *25 (D.Or, May 11, 2018) (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)). Whether official conduct shocks the conscience "depends on context." *Gantt v. City of L.A.*, 717 F.3d 702, 707 (9th Cir. 2013).

As noted above, there is "a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux*, 263 F.3d at 1074–75. Additionally, whether official conduct shocks the conscience "depends on context." *Gantt v. City of L.A.*, 717 F.3d 702, 707 (9th Cir. 2013). "Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Wilkinson v. Torres,* 610 F.3d 546, 554 (9th Cir. 2010). Acting with "deliberate indifference to or reckless disregard for an accused's rights" is "consistent with the standard imposed in the substantive due process context, in which government action may violate due process if it 'shocks the conscience.'" *Gantt v. City of L.A.*, 717 F3d 702, 707-08 (9th Cir 2013)

5. *Defendants Violated Plaintiff's Fourth Amendment Right To Be Free From Unlawful Search & Seizure*

Because defendants unlawfully fabricated and suppressed evidence, and because defendants lacked probable cause, they also violated plaintiff's Fourth Amendment right to be free from unlawful search and seizure. A claim for unlawful arrest or imprisonment is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification. *See Larson v. Neimi*, 9 F.3d 1397, 1400 (9th Cir. 1993). A plaintiff may maintain a Fourth Amendment false arrest claim where "the officer who applied for the arrest warrant 'deliberately or recklessly made false statements or omissions that were material to the finding of probable cause.'" *Smith v. Almada*, 640 F.3d 931, 937 (9th Cir. 2011) (quoting *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004)).

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6. *Defendants Maliciously Prosecuted Plaintiff*

The elements of a malicious prosecution claim in Oregon are: (1) the institution or continuation of the original criminal proceedings by or at the insistence of the defendant; (2) termination of such proceedings in the plaintiff's favor; (3) malice in instituting the proceedings; (4) lack of probable cause for the proceeding; and (5) injury or damage because of the prosecution. *Blandino*, 179 Or App at 190-91. Courts look to state law when analyzing claims of malicious prosecution under 42 USC § 1983. *Puccetti*, at *9. The latter two elements, lack of probable cause and causation of harm, are addressed above.

A. *Institution or Continuation (Active Participation) of Criminal Proceeding:*

For purposes of the tort of malicious prosecution, a defendant initiates or causes criminal proceedings to be initiated against another, if the defendant:

> "makes or causes a third person to make a charge to a public official who has discretion to initiate criminal proceedings, and:
>
> "(1) the person's desire to have the proceedings initiated, expressed by direction, request, or pressure of any kind, was the determining factor in the official's decision to commence the prosecution; or
>
> "(2) the information furnished by the person upon which the official acted was known to be false; or
>
> "(3) the person knowingly failed to furnish information that the person knew was material to the action by the official."

Oregon Uniform Civil Jury Instruction ("UCJI") 41.05.[5] A person who plays an active role in continuing an unfounded criminal proceeding may also be liable for malicious prosecution.

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[5] Although the UCJI are not binding, courts in this district have frequently looked to the UCJI as persuasive authority when interpreting Oregon law. *See, e.g., Cidone v. Pinnacle Prop. Mgmt. Servs.*, 3:20-cv-01133-AC, at *7 (D.Or, May 21, 2021); *Siring v. Or. State Bd. of Higher Educ. ex rel. E. Or. Univ.*, 977 F.Supp.2d 1058, 1061 (D.Or 2013); *and Preston v. BNSF Ry. Co.*, No. CV 08-3045-CL, at *10 (D.Or, Aug 28, 2009).

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Rogers v. Hill, 281 Or. 491, 500 (1978); *Checkley v. Boyd*, 170 Or App 721, 736 (2000) (a claim for malicious prosecution "can be based on a theory of active participation in a proceeding and is not limited to direct initiation or prosecution"). "As with the initiation of a prosecution, the defendant must have had some influence on the prosecutor's decision to continue the prosecution." *Waldner v. Dow*, 128 Or App 197, 202 (1994).

Kalanges initiated the criminal proceedings here. He referred his investigation and analysis to DHS and the IRS. Glenn is a third person whom Kalanges caused to make a charge to the DA, who is an official who has discretion to initiate criminal proceedings. The record shows that Kalanges's analysis was the determining factor in the DHS and, therefore DA's, investigations. Kalanges knew his analysis was "false" (?). Finally, Kalanges knowingly failed to furnish the IRS material to DHS and the DA, and the record shows that material was "material."

Glenn also initiated the criminal proceedings here when he referred plaintiff to the DA for criminal prosecution. Glenn's report was the determining factor in the DA's decision to commence criminal proceedings. Glenn knew his report was false. *See also* Glenn Depo at 168:6-10 (Q: "Would you say that she was arrested when she was arrested because of your investigation?" A: "Yes. My investigation was heard by a grand jury who decided to indict, and from the indictment Ms. Rubin was arrested."); 166:9-167:1 (Q: "Did you initiate criminal proceedings against Ms. Rubin? A: I would say no. That was the DA. Q: And did your May 2017 criminal report play a role in that? A: Yes. …. Q: [D]id the DA know about…Ms. Rubin and the alleged wrongdoing before you submitted your criminal report? A: … [N]o, I don't think so. …. [b]ecause remember I submitted a case to the senior prosecutor, who then accepted it and assigned it to another prosecutor to run with. So it was pretty much unbeknownst to them

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until they read my report."); 170:10-11 ("I believe my report was the catalyst to the – to the charging[.]").

Glenn also "continued to be involved with the case" after referring it to the County. Glenn Depo at 99:5-101:24. He "was involved with the DDA requests, the grand jury, the meetings that Ms. Rubin's attorneys requested" and he also monitored and kept notes about plaintiff's social media. Glenn Depo at 99:5-101:24.

B. *Termination in Plaintiff's Favor:*

In an action for malicious prosecution, the plaintiff must plead and prove that the prior criminal proceeding terminated in the plaintiff's favor. This element may be satisfied even if the prosecuting lawyer or the complaining witness abandons the prosecution. *Gowin v. Heider*, 237 Or 266, 276 (although the criminal charge against the plaintiff was dismissed after the parties reached a settlement, the settlement may have been the result of duress). The "[d]ismissal of an indictment at the request of the district attorney is generally sufficient to satisfy the requirement that the criminal proceeding has terminated in favor of plaintiff" *Rose v. Whitbeck*, 277 Or 791, 788-799 (1977). Here, the criminal prosecution terminated in plaintiff's favor when the County dismissed all charges.

C. *Malice:*

Malice in this context means "the existence of a primary purpose other than that of securing an adjudication of the claim." *Perry v. Rein*, 215 Or App 113, 125 (2007). A plaintiff must prove the existence of malice by a preponderance of the evidence. *Crouter v. United Adjusters, Inc.*, 266 Or 6, 10 (1973). Unlike probable cause, malice is always a question for the jury. *Gustafson*, 269 Or 354, 366 (1974). A jury may infer an improper purpose from proof of a lack of probable cause. *Crouter*, 266 Or at 10. *See Hoefer v. Cope*, 40 Or App 275, 281 (1979).

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Here, defendants' knowing withholding of exculpatory evidence is enough to infer malice on his part. There is also evidence in the record sufficient to permit a reasonable juror to conclude that plaintiff was targeted by the lead industry and that one or more defendants initiated or continued plaintiff's prosecution in service of that effort. As noted, plaintiff was one of the most prominent childhood lead poisoning advocates at a time when that subject was headline news. Defendants scoff at the idea of an industry "hit job." But Professor Howard Mielke of Tulane University School of Medicine, who has firsthand experience with lead industry opposition to his work, stated that plaintiff was a "lightning rod" and that it was possible that the defendants' probe was the result of a corporate conspiracy to silence plaintiff. *See* Exhibit 13 ("The lead industry is a very powerful industry," Mielke said. "I don't think that's unbelievable at all….In my opinion, the board hasn't done their homework to find out what Lead Safe America is really up against and facing[.]"). Other prominent childhood lead poisoning advocates were also targeted for retaliation and professional discrediting during this period. Dr. Ruth Etzel, the Director of the US Office of Children's Health Protection, for example, filed a Whistleblower Protection Act complaint after she was terminated for attempting to develop a more robust federal lead policy. *See* Exhibit 14.

7. Abuse of Process

Abuse of process is defined as "the perversion of legal procedure to accomplish an ulterior purpose when the procedure is commenced in proper form and with probable cause." *Kelly v. McBarron*, 258 Or 149, 154 (1971). The three elements of the tort of abuse of process are: (1) an "ulterior purpose, unrelated to process"; (2) a "willful act in the use of the process that is not proper in the regular course of the proceeding"; and (3) "an actual arrest or a seizure

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of property." *Columbia Cty. v. Sande*, 175 Or App 400, 408 (2001); *Lee v. Mitchell*, 152 Or App 159, 179 (1998). Abuse of process does not require completion of a prior proceeding.

Here, plaintiff's complaint alleges, and the evidence summarized above supports, that defendants pursued the criminal prosecution and administrative punishment of plaintiff with the intention of (1) silencing plaintiff's advocacy on behalf of children potentially exposed to lead poisoning, and (2) covering up the fact that their proceedings were based on Mr. Kalanges's false and unsubstantiated analysis, rather than trying to discover the truth or recoup monies from plaintiff. Defendants argue that plaintiff has no evidence of defendants' purported ill motives and the idea that the State was trying to silence plaintiff or cover up something is nothing more than speculation. The evidence regarding lead industry retaliation against perceived threats, however, is sufficient to create a genuine issue of fact as to ulterior purpose, and the other two elements have been addressed in the analysis of other claims above.

C. IMMUNITY

Defendants assert that Kalanges and Glenn are immune from claims based on grand jury testimony because such testimony is subject to absolute immunity and all of plaintiff's claims rest in part on the proposition that Kalanges and Glenn gave false or incomplete testimony to the grand jury. Defendants also assert that all defendants are protected by qualified immunity. Defendants are incorrect.

1. *Absolute Witness Immunity:*

Witnesses, including government official witnesses, are accorded absolute immunity from liability for testimony before a grand jury. *Lisker v. City of Los Angeles*, 780 F.3d 1237, 1241 (9th Cir. 2015) (citing *Rehberg v. Paulk*, 566 US 356, 359 (2012)). *See also Briscoe v. LaHue,* 460 U.S. 325, 326 (1983); *Paine v. City of Lompoc*, 265 F.3d 975, 980 (9th Cir. 2001);

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Gregory v. City of Louisville, 444 F.3d 725, 741 (6th Cir. 2006); *Spurlock v. Satterfield,* 167 F.3d 995, 1001–04 (6th Cir. 1999); *Keko v. Hingle,* 318 F.3d 639, 642–44 (5th Cir. 2003); *Ricciuti v. N.Y. City Transit Auth.,* 124 F.3d 123, 127, 130 (2d Cir.1997). Absolute witness immunity also extends to preparatory activities "inextricably tied" to testimony, such as conspiracies to testify falsely. *Lisker*, 780 F.3d at 1241.

Immunity for pre-testimony conduct, however, "is not limitless." *Id.*, at 1242 (quoting *Paine*, 265 F.3d at 981). "Absolute witness immunity does not shield an out-of-court, pretrial conspiracy to engage in non-testimonial acts such as fabricating or suppressing physical or documentary evidence or suppressing the identities of potential witnesses." *Paine* 265 F.3d at 983. A government official does not acquire absolute immunity for unprotected conduct by later testifying before a grand jury. "The detectives' ultimate testimony does not serve to cloak these actions with absolute testimonial immunity; if it did, they would be rewarded for compound[ing] a constitutional wrong." *Lisker*, 780 F.3d at 1243 (internal quotation marks and citations omitted); *accord Spurlock*, 167 F.3d at 1001 ("[W]hen defendants have dual roles as witness and fabricator, extending protection from the testimony to the fabricated evidence would transform the immunity from a shield to ensure candor into a sword allowing them to trample the statutory and constitutional rights of others.") (internal quotation marks and citations omitted).

Here, witness immunity does not protect defendants' "non-testimonial acts such as fabricating or suppressing physical or documentary evidence or suppressing the identities of potential witnesses." *Paine*, 265 F.3d at 983.

2. *Qualified Immunity:*

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and

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(2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011) (citation omitted). Plaintiff has argued above that defendants violated various of plaintiff's constitutional rights. Regarding the "clearly established prong," the fact that state investigators have "a duty to disclose material impeachment evidence to prosecutors….is not an open question in our Circuit." *Mellen v. Winn*, 900 F3d 1085, 1103 (9th Cir 2018). In *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (per curiam), the court observed that "[s]ince the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure."

CONCLUSION

For the reasons above, defendants' Motion for Summary Judgment should be denied.

Dated: January 29, 2022

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I served Plaintiff's Opposition to Defendants' Motion for Summary Judgment and supporting Declaration of Zack Duffly (with accompanying exhibits) on Defendants' Counsel, Tracy I. White, on the date set forth below by email to tracy.i.white@doj.state.or.us.

Dated this 29th of January 2022.

/s/ Zack Duffly

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