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6 Plaintiff in pro se

7 <ORIGINAL>

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

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CENTRAL DISTRICT OF CALIF.  
LOS ANGELES  
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FILED

10 DAVID A. LARSON, ) CASE NO.: CV 09-01296 PA(JTLx)  
11 Plaintiff, )  
12 vs. ) (Hon. Percy Anderson)  
13 ALFRED MANN FOUNDATION, et al, ) **PLAINTIFF'S MEMORANDUM IN**  
14 Defendants. ) **OPPOSITION TO FEDERAL**  
 ) **DEFENDANT'S MOTION TO DISMISS**

15  
16  
17 Plaintiff, DAVID A. LARSON, pro se, respectfully submits this reply  
18 and Memorandum of Points and Authorities in Opposition to Federal  
19 Defendants Motion to Dismiss.

20  
21 **STATEMENT**

22  
23 Plaintiff, David A. Larson is a patriotic American citizen, has never  
24 held a passport or traveled overseas, has carried the Marine Corps  
25 League flag in recent Memorial Day and Veterans Day parades, is a  
26 member of the Yucca Valley ELK's #2314, is elected as Vice President  
27 of the Flamingo Heights Community Association of Yucca Valley, his  
28 sister was married in her Army uniform in Virginia, his father served

1 in WWII, his Mother retired after 20 years of service in the Veterans  
2 Administration, and significantly, Plaintiff was confirmed by  
3 Secretary of State Deborah Bowen as a write-in candidate for the  
4 American Independent party during 2008 Presidential Primary Election  
5 proceedings and received votes from several demographic areas and  
6 counties.

7  
8 Plaintiff Plaintiff has a well founded belief that portions of the  
9 government activities relative to the biomedical technology, and  
10 development of the intellectual property which involved Plaintiff as a  
11 research subject, may in part, be sensitive or subject to secrecy.  
12 Plaintiff does not wish to jeopardize National Security, is uncertain  
13 how to navigate the courts with respect to the sensitive information,  
14 and as such, Plaintiff's complaint in this case was crafted in a  
15 manner that is respectful of the governments interests, and thus has  
16 selectively omitted significant material fact and relevant evidence  
17 that could be relied upon to correct any deficiency found to exist in  
18 Plaintiff's complaint.

19  
20 Defendants motion to dismiss under (12) (b) (6), cites Ashcroft v.  
21 Iqbal, 556 U.S. 129 S.Ct. 1937, 1950 (2009), a ruling which held that  
22 Plaintiff's seeking accountability for the post 9/11 actions of high-  
23 level officials should be held to a higher pleading standard in order  
24 to "spare high level officials from the burdensome and costly  
25 discovery resulting from frivolous litigation".

26  
27 Plaintiff asserts here that while discovery is desirable, Plaintiff's  
28 action before this court is not wholly based on, nor dependent upon,

1 any sensitive or classified materials, and is capable of proceeding  
2 with existing evidence, and with little, or even no discovery.

3  
4 Plaintiff desperately needs injunctive relief to prevent further  
5 irreparable harm, and has chosen to proceed here cautiously to meet  
6 only the legal standard required to allow furtherance and to avoid  
7 dismissal of Plaintiff's action.

8  
9 Plaintiff hereby gives notice that should the court find deficiencies  
10 in Plaintiff's complaint, Plaintiff requests here that leave of court  
11 be granted as necessary to amend complaint and for opportunity to cure  
12 any defects found by the court.

13  
14 Plaintiff concludes that the only set of circumstance is capable of  
15 preventing furtherance on merits, or capable of depriving Plaintiff of  
16 his constitutional rights including due process, and which (arguably)  
17 provides the government with a legal defense against the mistreatment  
18 described in Plaintiff's complaint, would be if Plaintiff were  
19 declared by the Executive to be an "enemy combatant" or designated any  
20 other such "enemy" or "belligerent" status. However unlikely, such a  
21 status may be designated upon "anyone", including American Citizens,  
22 and regardless of locale (*Id.*) Military Commissions Act of  
23 2006("MCA") Pub. L. No. 109-366,120 Stat 2600.

24  
25 i) The Supreme Court on June 12, 2008, ruled that such individuals  
26 "are "entitled to the privilege of habeas corpus to challenge the  
27 legality of their detention." Boumediene v. Bush 128 S. Ct. 2229  
28 (2008).

///

1 ii).. a "citizen-detainee seeking to challenge his classification as  
2 an enemy combatant must receive notice of the factual basis for his  
3 classification, and a fair opportunity to rebut the Government's  
4 factual assertions before a neutral decisionmaker". Hamdi v.  
5 Rumsfeld, 542 U.S. 507, 533 (2004)

6  
7 In the extraordinary event that Plaintiff is subject to such  
8 provisions, Plaintiff requests a "meaningful opportunity" to challenge  
9 his status and legality of his detention and to rebut the government's  
10 assertions.

11  
12 **ARGUMENT**

13  
14 The Defendant's Motion to Dismiss seeks to dismiss Plaintiff's civil  
15 action entirely without leave to amend, citing 12(b)(1), 12(b)(6) and  
16 41(b) of the Federal Rules of Civil Procedure. Plaintiff submits the  
17 following memorandum of points and authorities and exhibits to assist  
18 the court in applying it's discretion;

19  
20 **A) The Defendant's Motion to Dismiss due to lack of subject matter**  
21 **jurisdiction under 12(b)(1) should be denied on the following grounds:**

22  
23 (1) Dismissal of Plaintiff's case under rule 12(b)(1) for lack of  
24 subject-matter jurisdiction is inappropriate because Plaintiff's  
25 complaint alleges facts which are legally sufficient to establish  
26 subject matter jurisdiction by this court due to, among others,  
27 the inclusion of federal defendants, federal questions raised  
28 under Article III of the federal Constitution, 5 U.S.C. Sec. 552a,

1 and 28 U.S.C. Secs. 1331, 1343 and 1361, and claims that  
2 governmental defendants that have deprived Plaintiff of  
3 constitutional rights and liberties, including his right to due  
4 process and equal protection.

5  
6 (2) The Supreme Court has cautioned against dismissing complaints for  
7 lack of subject matter jurisdiction when unstated questions of  
8 federal law may underlie a complainant's cause of action. Hagans  
9 v. Lavine, 415 U.S. 538 (1974)

10  
11 **B) The Defendant's Motion to Dismiss Plaintiff's entire action under**  
12 **Rules 12(b) (1) and 12(b) (6) should be denied on the following grounds:**

13  
14 (3) Pleading standard; Federal Rules of Civil Procedure require only  
15 that plaintiff include a "short and plain statement" of the claim  
16 and do not require him to set out in detail the facts of his  
17 claim. Conley v. Gibson, 355 U.S. 41, 47 (1957), see also; Bell  
18 Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

19  
20 (4) In it's motion to dismiss, Defendants bait plaintiff with  
21 inflammatory language which categorize his factual allegations as  
22 "frivolous" and "fantastic speculation", and then follows in an  
23 effort to dismiss Plaintiff's action entirely unless he introduces  
24 evidence substantiating his allegations. Plaintiff, if held to an  
25 elevated pleading statute as defined in Ashcroft v. Iqbal, could  
26 easily introduce evidence already in his possession which both  
27 substantiates beyond the legal requirement of the elevated  
28 pleading standard, and additionally, shows participation by

1 Federal defendants who are complicit in depriving Plaintiff's  
2 constitutional right to due process, however Plaintiff believes  
3 doing so will result in dismissal of his case due to an executive  
4 privilege. The scenario employed by the government here is  
5 creative, but could be used in bad faith to continue efforts by  
6 high level officials to avoid judicial review of activities which  
7 are both criminal and unconstitutional. As such, Plaintiff  
8 introduces the following which he knows not to be classified:  
9

10 i) Letter from the Dept. of the NAVY, Space Warfare Center  
11 (SPAWAR), dated January 22, 2009, stating as fact that work  
12 performed under SPAWAR Contract #N66001-06-C-8005 "does not  
13 involve access to or handling of classified material"  
14 submitted as **Exhibit 16**

15  
16 ii) Curriculum Vitae (5 pages) of Defendant Gerald Loeb which  
17 lists under the heading "Recent and Current Research Funding"  
18 a "DARPA - Revolutionizing Prosthetics, contract to Johns  
19 Hopkins University Applied Physics Laboratory -subcontract  
20 P.I. (2006-2010) (Id. 17-4) submitted as **Exhibit 17**

21  
22 iii) Page from University of Southern California Viterbi  
23 School of Medicine stating the Revolutionizing Prosthetics  
24 contracts are "phase one" valued at "30.4 million dollars"  
25 submitted as **Exhibit 18**

26  
27 iiiii) Letter dated 22, Mar 2008 from Will Kammer, department  
28 of Defense stating that the Revolutionizing Prosthetics

1 contract is a DARPA contract, that Navy SPAWAR is the  
2 cognizant authority, and is contract #N66001-06-C-8005  
3 submitted as Exhibit 19  
4

5 (5) Recent Medical Findings from August 20, 2008. Plaintiff's General  
6 Practice Physicians have removed only some of the medical devices  
7 implanted by Defendant Alfred Mann Foundation and is well  
8 documented in Plaintiff medical records, however residual devices  
9 remain implanted, their removal is problematic, and has presented  
10 new challenges to medical personnel, creating the possibility that  
11 some devices may remain implanted indefinitely. Complications from  
12 remaining residual medical devices have caused Plaintiff's  
13 Physicians to treat Plaintiff as recently as August 20, 2008 for  
14 infection and inflammation. (*Id.* Exhibits 9-11, 9-12). Plaintiff's  
15 Medical Records are submitted as Plaintiff Exhibit 9, and  
16 substantiates factual basis and merit of claims beyond a  
17 "speculative" level.  
18

19 (6) Defendants possess the ability to interact with remaining,  
20 residual medical devices everyday using FCC regulated wireless  
21 spectrum. Government Defendant Federal Communications Commission  
22 (FCC), has provided Defendant Alfred Mann Foundation (AMF), with  
23 an experimental FCC license (FCC File No.0255-EX-PL-2004, call-  
24 sign WD2XLW) for the explicit purpose of allowing Defendants to  
25 use FCC regulated wireless spectrum to interact with biomedical  
26 devices such as those implanted in Plaintiff. Defendants have  
27 continued to use the FCC license to interact with medical devices  
28 residually implanted in Defendant, without Plaintiff's consent,

1 and in a harmful and life threatening manner, even after Plaintiff  
2 was confirmed by Secretary of State Deborah Bowen as a write in  
3 candidate during 2008 Presidential Primary election proceedings,  
4 and after Plaintiff became a party to this federal proceeding.  
5 Defendant AMF's application for FCC license provided as **Exhibit 10**  
6

7 (7) Based on Exhibits listed above, and in Plaintiff's memorandum in  
8 opposition to non-government defendants (Docket No. 36), the  
9 factual claims of Plaintiff are clearly not "so unsubstantial or  
10 implausible as to be devoid of merit...".  
11

12 **C) The Defendant's Motion to Dismiss under rule 41(b) is also easily**  
13 **addressed and should be denied on the following grounds:**  
14

15 (8) Here, Defendants continue efforts to cite the date in which the  
16 non government defendants placed the biomedical devices in  
17 Plaintiff, and a state court ruling from years past as a basis to  
18 erroneously argue the timeliness of Plaintiff's action before this  
19 court. This point, to which Defendants desperately cling to, is of  
20 little importance to this argument. The FCC license of the  
21 Defendants introduced above as **Exhibit 10** shows that Defendants  
22 possess the ability to interact with medical devices such as those  
23 implanted in Plaintiff everyday using FCC regulated wireless  
24 spectrum. This license is provided to them by government  
25 officials, who have willfully ignored more than 100 complaints  
26 submitted through appropriate channels. Further, Plaintiff'S  
27 medical records, introduced as **Exhibit 9** substantiate as fact and  
28 record that Plaintiff has suffered irreparable harm, and is

1 likely to continue to suffer in the absence of injunctive relief.

2  
3 (9) Although the court may dismiss a complaint for failure to state a  
4 claim if it is clear that no relief could be granted under any set  
5 of facts, it has been established that dismissal without leave to  
6 amend is appropriate only when "deficiencies of the complaint  
7 cannot be cured by amendment...". Plaintiff confidently asserts  
8 that facts and evidence in his possession, but not introduced due  
9 to mitigating circumstance, are easily capable of curing any  
10 deficiencies found by the court.

11  
12 (10) Denial of leave to amend where leave is necessary and requested  
13 is itself appealable for abuse of discretion. See, e.g. Schreiber  
14 Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th  
15 Cir.1986)

16  
17 (11) **The previous vexatious ruling against Plaintiff contributed to**  
18 **untimeliness was obtained after Defendant's counsel failed to**  
19 **serve Plaintiff notice of a hearing,** which denied Plaintiff any  
20 opportunity for opposition, and resulted in a default judgment and  
21 dismissal prior to the introduction of any evidence or pleading by  
22 Plaintiff. Plaintiff previously submitted the original pink copy  
23 of the process server's dispatch orders as **Article 8**, in  
24 Plaintiff's memorandum in opposition to non-government defendants  
25 (Docket No. 36) and which includes the process server's **hand-**  
26 **written notes detailing the failed attempt to serve Plaintiff**  
27 **notice as required by law.**

28 ///

1 (12) More importantly, the need for injunctive relief, and the  
2 consequence and potential harm caused to Plaintiff **if denied such**  
3 **relief**, greatly outweighs the need of the Defendant to circumvent  
4 civil liability and to avoid a "burdensome" civil action.  
5

6 **CONCLUSION**

7  
8 The above facts make a clear showing that the courts power of  
9 discretion in this matter should clearly be applied so as to permit  
10 furtherance and judicial review of Plaintiff's case, not only in  
11 response to the bad faith application of vexatious law by Defendants  
12 as described above, but additionally, and perhaps more importantly,  
13 because of the consequence and potential harm caused to Plaintiff if  
14 denied such relief.


15 Plaintiff's case is extremely well supported with direct evidence,  
16 medical records, pathology reports, laboratory reports, copies of  
17 Defendants government contracts and mandatory quarterly progress  
18 reports, U.S. Patent Office filings, law enforcement crime reports,  
19 declarations and affidavits, well kept records and receipts, and  
20 copies of applications to the Federal Communications Commission (FCC)  
21 which state as fact that the nature of Defendants government  
22 contractual obligations do in fact rely on FCC regulated wireless  
23 spectrum for biomedical device research and telemetry. Costly  
24 discovery is not of concern. Plaintiff case should be allowed to  
25 continue on it's merits.  
26

27 Alternatively, Plaintiff asserts that he possesses the ability to  
28 easily amend the complaint to correct any deficiencies should the

1 court find any, however Plaintiff's primary need for injunctive  
2 relief and protective order is paramount. If Plaintiff must amend his  
3 complaint in order to overcome deficiencies cited by this court,  
4 Plaintiff hereby gives notice of his desire to do so and requests  
5 leave of court as deemed necessary and appropriate.  
6

7 Clearly, dismissal without such leave is grossly unjust and continues  
8 a pattern in which Plaintiff is deprived of Constitutional rights.  
9

10  
11  
12  
13  
14 DATED: June 21, 2009



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28



DEPARTMENT OF THE NAVY  
OFFICE OF THE GENERAL COUNSEL

5720  
Ser SSCP/9012A  
January 22, 2009

COUNSEL  
SPACE AND NAVAL WARFARE  
SYSTEMS CENTER PACIFIC  
53580 HULL STREET  
SAN DIEGO, CA 92152-5001

Mr. Dave Larson  
1377 Tahoe Avenue  
Yucca Valley, CA 92284

Dear Mr. Larson:

This responds to your Freedom of Information Act (FOIA) request of November 14, 2008 in which you are seeking:

- Copies of any DD Form 254 with the name Gerald Loeb appearing on the document
- Copies of any DD Form 254 with the name Alfred Mann appearing on the document
- Copies of any DD Form 254 with the name Stuart Harshbarger appearing on the document

The date range for search should include January 1997 to present.

In your letter of November 29, 2008, you narrowed the scope of your request to only the DD Form 254s relevant to contract N66001-06-C-8005. Your request was assigned FOIA serial file number SSCP/9012.

The Federal Acquisition Regulation states we "shall" use a DD Form 254 (Contract Security Classification Specifications) for classified contracts. The DD Form 254 informs the contractor of the level of information they will be required to access, the level of security clearance the contractors will need, and how they will process, store, transmit, and destroy the classified information when the contract is complete. Please be advised that the work to be performed under contract N66001-06-C-8005 does not involve access to or handling of classified material. Therefore, there are no DD Form 254s associated with this contract.

16-1

5720  
Ser SSCP/9012A  
January 22, 2009

If you believe that an adequate search was not conducted, you may consider this an adverse determination of your request that may be appealed, in writing to:

Department of the Navy  
Office of the General Counsel  
ATTN: FOIA Appeals  
Room 4E635  
1000 Navy Pentagon  
Washington, DC 20350-1000

Your appeal must be postmarked within 60 calendar days from the date of this letter to be considered. A statement as to why you believe a diligent search was not conducted should be included and the enclosed copy of this letter should be attached. Both the appeal letter and the envelope should bear the notation, "Freedom of Information Act Appeal."

Should you have any questions regarding this matter, please contact me at (619) 553-4720.

  
LIZ VANHORN  
FOIA Coordinator

