UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *ex rel.* ROBERT BAUCHWITZ, M.D., PH.D. Plaintiff, v. WILLIAM K. HOLLOMAN, Ph.D., *et. al.*, Defendants	CIVIL ACTION No. 04-2892 (TJS) JURY TRIAL DEMANDED

**AFFIDAVIT OF PLAINTIFF AND RELATOR
ROBERT P. BAUCHWITZ, M.D., PH.D.**

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I. PURPOSE

1. The following is based upon information provided in support of motions to recuse Judge Timothy J. Savage of the federal district court, Eastern District of Pennsylvania in the cases *Wallace v. Kmart, Stanley v. St. Criox Basic Services, Thomas v. Centennial Communications, Vitalis v. Sun Contractors, Canton v. Kmart, Ragguette v. Premier Wines and Spirits,* and *Alexis v. Hovensa*.

2. I provided this information to Attorney Leslie Rohn in order to detail my experience with Judge Timothy J. Savage, which I believe strongly supports observations made of his behavior in a separate case, *Alexis v. Hovensa*, No. 2007-91 (D. V.I. June 2, 2010) (Plaintiff's Motion to Recuse the Presiding Judge and Brief in Support).

3. The information I provided[1] has now been supplemented with additional detail beyond that originally focused on Judge Savage. I seek to have this more complete description of key events assessed in order to determine whether there was misconduct by any officer of the court. Additional concerns for possible action are discussed in the Addendum.

ROBERT P. BAUCHWITZ, M.D., Ph.D., being duly sworn, deposes and states:

I was the Plaintiff and Relator in this action. I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein. To my knowledge, all of the facts stated in this affidavit are true and correct.

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II. CASE HISTORY

A. Background

I am a research scientist who had worked for some of the defendants (William K. Holloman and Cornell University Graduate School of Medical Sciences), during which time I learned of acts of scientific misconduct. I had brought such acts to the attention of my and the defendant's supervisor, and, eventually, to the federal government (the agencies OSI and ORI).

Subsequently, a journalist (Gary A. Taubes) contacted me regarding an investigative article he was writing about the (future) defendants, for which he sought assistance. Upon completing his work (see Taubes2002Chimeraplasty_A.pdf, attached), the journalist suggested to the federal government's Office of Research Integrity (ORI) that they contact me to consider a misconduct investigation. ORI agreed to proceed on the basis of a *qui tam* suit.

[1] but not submitted as an affidavit

The case *United States ex rel Bauchwitz v. Holloman et. al.,* No. 04-2892 (E.D. Pa.) was filed under seal on June 30, 2004 in federal district court in the Eastern District of Pennsylvania (the location recommended by the ORI). The ORI was to produce a report for the Department of Justice on the science involved.

ORI (scientists John Dahlberg and Allen Price) produced a report for use by the Department of Justice (DOJ), which was received by me via DOJ on January 12, 2005. In that report, the first of what have come to be called the "**ORI documents**", ORI concluded that each of the Relator's allegations had merit. However, ORI also noted what they believed could be two primary issues in pursuing the case: 1) ORI thought there might be no additional evidence available beyond that which the Plaintiff had brought to the government, and 2) ORI claimed that it might not be possible to prove intent for one of the false claims alleged. (See the complete ORI documents at docket Doc 90 attachment 9, and Doc 90 attachment 10, dated April 16, 2008). The following are excerpts from the conclusion of ORI's first memorandum of November 23, 2004 (with emphasis added):

> i. "***Each [of the Relator's claims] has some merit***, but all lack definitive proof of being deliberate falsifications, and ***ORI does not believe that evidence is available*** to provide such proof."
>
> ii. "Dr. Bauchwitz' complaint identifies three false claims, as identified above. ***ORI notes that these false claims deal with only a very small portion of the much larger scope of possible misconduct issues that have been linked to Drs. Kmiec and Holloman*** (see footnote 8). The reason for this is that Dr. Bauchwitz has limited his claims to issues that he has direct knowledge of. He has made a solid case that the 'story' on *Ustilago maydis* recombination genes, their associated proteins and their enzymatic properties has shifted dramatically over the past 20 years. Many scientists working in this area appear to have believed that erroneous claims have been consistently published by Drs. Holloman and Kmiec."
>
> iii. "Even if it could be shown that some of the grant applications unequivocally contain the false statements described in the complaint, ORI believes that the evidence is inadequate and generally unobtainable to prove that the questioned statements are intentionally false".

With respect to the concern about no additional evidence, Plaintiff's attorney noted that ORI had made no attempt to obtain such evidence, and there was correspondence back and forth as to the general lack of investigation and what should have been done to investigate. Relevant excerpts of communications from Attorney Poserina, with emphasis added, follow:

> i. Attorney Poserina email to Assistant U.S. Attorneys David Hoffman and Gerald Sullivan, **May 26, 2005**:

> "I am presuming that we are being granted additional time to clear up the issues presented in the ORI letter. I am also concerned, however, that the only review and investigation given in this case was a scientific paper review of the complaint and disclosure; but ***there does not appear to have been any true investigation of the merits of the claims***. For instance, there has been no investigation to determine what, if anything, did occur at the Harvard lab; ***just a statement that this information may be old***, etc. As far as I can see, there has been no attempt to interview Dr. Rubin, who may provide the bulk of the information to corroborate the complaint. There were, however, comments about whether or not Dr. Rubin said these things or just suggested them; and without an interview of Dr. Rubin, even telephonically, this is just mere discussion. ***This is not an investigation, but just conjecture***."

ii. Attorney Poserina email to Relator of the same date:

> "they [DOJ and ORI] are making a decision without any investigation; with only a paper discussion of the facts. This is far short of the investigation required under the FCA".

iii. Attorney Poserina email to Relator of **July 5, 2005**:

> "Robert: either call me or let me know when and where I can call you; got a letter today from [ORI's] Dahlberg that was not good; **basically they do not feel they could ever get sufficient evidence to proceed**."

With respect to the concern about proving intent, I noted in my first response to the ORI (ORI_memo1_response_from_Plaintiff_2005_A.pdf, attached) that even if no further evidence were forthcoming, the standard for considering intent was more reasonably and broadly specified by the False Claims Act of 1986, under which this action was being taken. **Intent Standards of the False Claims Act of 1986**[2]:

> "What Congress said was "It is intended that ***persons who ignore 'red flags'*** that the information may not be accurate or those persons who deliberately choose to remain ignorant … should be held liable under the Act. This definition, therefore, enables the government not only to effectively prosecute those persons who have actual knowledge, but also those who play 'ostrich'". (Helmer, JB, False Claims Act: Whistleblower Litigation, Third Edition, Lexis-Nexis 2002). Therefore, we do not believe that the "ORI" standard for proof of "intentionally false" is relevant in this case.
>
> More specifically, the False Claims Act of 1986 states:

[2] from ORI_memo1_response_from_Plaintiff_2005 ...

> (b) Knowing and Knowingly Defined. - For purposes of this section, the terms "knowing'' and "knowingly" mean that a person, with respect to information - (1) has actual knowledge of the information; (2) acts in ***deliberate ignorance*** of the truth or falsity of the information; or (3) acts ***in reckless disregard of the truth*** or falsity of the information, and ***no proof of specific intent to defraud is required***."

Furthermore, the specific example ORI provided for their intent concern, affecting only one of the three allegations of false statements, was based upon an error of biology on their part. I brought this to their attention in a written response which is part of the ORI documents (ORI_memo1_response_from_Plaintiff_2005_A.pdf).

Nevertheless, the ORI persisted in not responding to Department of Justice (DOJ) requests for clarification as to whether they had indeed made a error of biology (with their suggestion that protein translation could be expected to begin at the 5' end of a eukaryotic RNA. It would not.)[3]

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B. Immediate Judicial Impacts: Cut-off of Time for Government Investigation in "Record Speed"; Questions as to Basis by which First Attorney was Allowed to Withdraw; Judicial Challenge of Second Attorney and Associated ORI Document Controversy

In addition to the lack of responsiveness of the ORI, a serious limitation was placed on the time for the DOJ to consider whether to pursue an investigation, much less to pursue one. From a February 23, 2009 hearing transcript:

> THE COURT: YOU SEE, LET ME TELL YOU WHAT REALLY BOTHERS ME IN THIS TYPE OF CASE. I'M REALLY LETTING THE GOVERNMENT KNOW THIS. TYPICALLY THESE CASES ARE ALL FILED UNDER SEAL. OKAY. AND THE GOVERNMENT BUYS ALL THIS TIME TO INVESTIGATE. AND IN A SENSE, IF I BUY HIS ARGUMENT, THAT MEANS WE ARE GETTING AN UNLIMITED EXTENSION OF STATUTE OF LIMITATIONS. AND MAYBE I SHOULD THINK TWICE BEFORE I GRANT THE GOVERNMENT AN EXTENSION IN ANY SEALED CASE ANYMORE. SEE, MR. RASPANTI REPRESENTS A LOT OF PLAINTIFFS AND HE IS REALLY GETTING SCARED ABOUT THAT.
>
> MR. RASPANTI[4]: YOUR HONOR, ACTUALLY THIS IS THE FIRST TIME I HAVE REPRESENTED A DEFENDANT. AND I THINK I HAVE A PRETTY GOOD SENSE OF THE POLICY REASON, BUT IN FAIRNESS TO THE UNITED STATES GOVERNMENT —

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[3] The relevant correspondence is presented in JDahlberg_ORI_to_021706_and_ORI_resp_030806_A.pdf.

[4] Marc Raspanti, lead counsel for one of the defendants, and a colleague of and recommender of my original attorney, Regina Poserina, noted this was his first defense case. His firm had billed itself as representing plaintiffs in *qui tam* actions; he was given documentation by me at his request and considered taking the case. See the Affidavit of Misconduct - Raspanti for more on concerns about Marc Raspanti.

THE COURT: OH, NOW YOU ARE DEFENDING THEM.

MR. RASPANTI: IN THIS CASE, FROM THE TIME OF THE FILING TO THE TIME OF THEIR NOTICE OF DECLINATION, IT WAS, I CAN TESTIFY UNDER OATH, **RECORD SPEED.**

THE COURT: WELL, BECAUSE I HAD TOLD THEM IT WAS NOT GOING TO GO ANY LONGER.

On August 31, 2005, the government declined to intervene in the case. AUSA David Hoffman, the Philadelphia assistant U.S. attorney recommended by ORI to handle the case, had told me that they remained supportive and would consider reentering should discovery warrant it. Hoffman retired during the summer of 2005 and was replaced by AUSA Gerald Sullivan.

Plaintiff's attorney, Regina Poserina, then withdrew from the case citing its potential high cost relative to her solo status (she claimed to have been depending upon the government to shoulder such costs), the general reduced likelihood of success without government intervention, and in particular based on her belated concern that the privileged ORI memos would be produced at trial[5]. (See endnote 3 for additional detail.[i])

Poserina was allowed out of the case before I had obtained new counsel, even though the reasons given by Poserina for withdrawal did not appear to have met the standards provided to me (*Barefoot et. al. v. Direct Marketing Concepts, Inc. et. al.*, 2004 U.S. Dist. LEXIS 27021). Specifically, *Barefoot* cited Pennsylvania law[6], in particular Local Rule 5.1(c) in stating that:

> "a client can terminate the relationship with [his] lawyer at any time; however, … a court must weigh four factors in deciding whether [counsel's] withdrawal is appropriate:
>
> (1) the reason for which withdrawal is sought,
> (2) whether withdrawal will prejudice the parties;
> (3) whether withdrawal will interfere with the administration of justice; and
> (4) the degree to which withdrawal will delay the action.

I felt that allowing my counsel to withdraw from my case before I had obtained alternate counsel prejudiced my ability to proceed[7]. (See also endnote 4)[ii].

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[5] Poserina's retainer contract had a clause which allowed her to withdraw if the government failed to intervene. Nevertheless, Poserina and I had attended a Taxpayers Against Fraud (TAF) conference in 2005 in which speakers noted that it was frowned upon in the *qui tam* bar to take FCA cases and then drop them if the government did not intervene. (This might explain why someone may have arranged to have Ms. Poserina continue to be listed as active counsel on the docket throughout the case despite her having withdrawn early on.)

[6] Pennsylvania Rule of Professional Conduct 1.16(b) and the Court's Local Rule of Civil Procedure 5.1(c), Taylor v. Stewart, 20 F.Supp.2d 882, 882 (E.D. Pa. 1998)

[7] Specifically I wrote: "you state in your motion that your withdrawal will not prejudice the case, in part because I have time to get new counsel. Unfortunately, I have found that your withdrawal has massively prejudiced my ability to get new counsel." [email to Poserina of September 30, 2005].

A new attorney[8], James Moody, interested in pursuing the case even without the government's intervention, attended a hearing on December 20, 2005. At this hearing, Judge Savage sharply questioned Moody as to why he had relied on documentation provided by me, the Plaintiff, in deciding whether Moody wished to enter the case.

To the best of my recollection, there was no specification by Judge Savage of actual information missing or distorted from what I had provided to interested attorneys. (Neither the transcript nor the original record of this hearing were made available to me upon request from the Clerk's Office in December 2009; see below.) An obvious implication of what was said was that I was untrustworthy or dishonest. In addition, it seemed to me that the judge was broadcasting notice to Moody that the government did not want to bring this case and he, the judge, was not in favor of the case.

In response to the December 20, 2005 hearing, On January 3, 2006, I sent an email to the Court to[9]:

> 1) register my concern regarding the Court's statements questioning why Mr. Moody had relied upon information from me as to the case; I noted my strong impression that ***the net effect of the treatment of Mr. Moody was to highly prejudice my ability to retain new counsel***;
>
> 2) inform the Court of events following the December 20, 2005 hearing in which **Assistant U.S. Attorney Gerald Sullivan** had told Moody that the federal Office of Research Integrity (ORI) did not concede the validity of one of the scientific arguments I had raised to rebut one of its concerns[10], even though Sullivan knew that the ORI had repeatedly failed to respond to my rebuttal;
>
> 3) ***request an evidentiary hearing*** regarding the claims Mr. Sullivan appeared to be making regarding ORI, and the adequacy and completeness of the scientific information I had made available to new counsel, ***in order to eliminate any further impediments to my ability to retain new counsel***[11]; and,
>
> 4) make all of the documentation I had provided to potential counsel and experts available to the Court on password-protected websites. This information included

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[8] with an undergraduate physics major from M.I.T.

[9] It is very important to the consideration of this affidavit that any court be allowed to see as Exhibits the actual emails that I sent to the trial court (on January 3, 5, and 17, 2006), which remain under seal by Judge Savage. I believe that my statements made at the time to the this court, which is the subject of [Attorney Rohn's] recusal hearing, are highly germane to the question of whether an unreasonably biased environment was being created or condoned in Judge Savage's court. (It is also my strong interest to independently challenge the basis for this seal, as its sole purpose appears to protect the misfeasance and nonfeasance of government officials.)

[10] Specifically, ORI's apparent belief that translation of a eukaryotic mRNA could be expected to begin at the 5' end of the mRNA (see Background, above).

[11] Sullivan would play the same role in March 2010 with James J. West, a former U.S. Attorney and *qui tam* expert who was interested in joining the case.

all of that provided by the government to me, as well as, shortly thereafter, reports of two experts (see below).

On January 5, 2006, I emailed the Court to note that Mr. Moody had stopped responding to me since attending the December 20, 2005 hearing and that, consequently, I had no choice but to proceed *pro se* until new counsel could be obtained. I reiterated my request for a hearing to resolve any questions regarding the ORI documents. I further specified the topics I suggested be addressed at such a meeting. I also asked several questions about proceeding *pro se*, including requesting what the current schedule for action was, since there had been several changes to the seal duration and time for attorneys to respond to orders of the Court.

Despite my having clearly informed the Court that I had not retained Mr. Moody, the Court made a limited response by going through Mr. Moody.

On January 17, 2006, I wrote to the Court based on hearing from Mr. Moody that it wished to hear the status of my progress. At that time, ***I presented to Judge Savage the comments of two science experts who had reviewed the information disclosed to the government, as well as the ORI report***. One of the reviewers was a member of the National Academy of Science and a longtime director of a prominent biomedical research institution, the Carnegie Institution of Washington, D.C., while the other was a professor at the Mayo Clinic. As their complete reports have been produced during subsequent discovery, the comments made to the Court on January 17, 2006 are reiterated here ***in order to illustrate the information the Court had about the ORI documents***; subsequently, the ORI opinions, which were privileged (and I contend, flawed) information, would be released to the Defendants by an off-the-record order of Judge Savage (see below)[12] and, I and my attorneys believe, mischaracterized by Judge Savage in the court record[13].

i. The two scientists noted the following concerning the ORI "science" issue:

> Reviewer 1: "The [ORI] argument is ***embarrassingly flawed***. The conclusion that "regardless of who is correct on the sequence data, an initiation codon upstream of the published sequence does seem to exist" [quote from ORI memo 1] is ***not supported by the available data*** and it is both surprising and disturbing that anyone would come to such a conclusion based on the available data".

[12] We disagreed that most of the ORI documents he ordered released were germane to the issue of the statute of limitations. I also objected to release based on these documents being privileged work product. Nevertheless, Savage's irritation with our arguments made it clear how he would rule if he had to hold a hearing, and he stated that I would pay for the costs. My attorneys then requested that he produce a written order for the release of the ORI documents, which he said he would do. But in fact he never did, and my attorneys never requested it from him despite numerous requests from me to do so, as well as to place a written objection on the record regarding their release.

[13] See Savage_ORI_footnote_analysis_to_JWest_032310_A.pdf

> Reviewer 2 "There is ***no evidence*** that [Defendant] H or anyone in H's lab identified an ATG that begins an open reading frame that would produce a protein ... there are many RNAs made by cells that do not make any protein. Without the sequence of the RNA no conclusion can be made about that RNAs function. ***Why would one [the ORI] conclude that this RNA is 'initiated through a novel and abnormal mechanism'?***"

ii. Regarding their overall view of the case, as requested by the following question: "***Do you feel that the preponderance of the evidence presented indicates that scientific fraud has occurred in this case***?"

> Reviewer 1: "**Yes**. Data, facts, and descriptions thereof appear to have been manipulated. Results were willfully ignored and presented with the intent of misleading grant reviewers as well as others in the scientific community."
>
> Reviewer 2 "**Yes**. Evidence suggests that on more than one occasion experiments were never even done. These scientists have been the subject of refutation not once, not twice, but three times." [emphasis added]

Therefore, although these science experts seriously disagreed with ORI regarding the question of biology, they agreed with ORI that the allegations had merit.

Even had I not challenged the ORI's error, in reality what was at issue were lies made by the Defendants about the actual data they had in their possession, and their use of such false statements to obtain federal funding. Alternatives by which desired proteins might have been produced were irrelevant to consideration of the fraud or underlying science misconduct. Subsequent discovery strongly supported my contention about the scientific misconduct involved, as well as the availability of significant additional evidence (see section I., below and Affidavit of Merit).

Despite all my efforts to clarify by obtaining expert assessments in order to prevent further prejudice to prospective attorneys, as well as my having produced an Amended Complaint that was provided to AUSA Sullivan and would subsequently remain in effect throughout the case, I was shocked to find that Judge Savage dismissed the case on April 19, 2006. The order of involuntary dismissal stated that I had failed to prosecute. I was given no notice that I was at imminent risk of having the case dismissed[14].

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[14] It seems from the statements of others who have seen the transcript that Judge Savage told Mr. Moody that he would have until early January to obtain local counsel to get himself admitted *pro hace vice*, or the case would be dismissed based on my supposed inability to proceed *pro se*. But on January 5, 2006, I had informed the Court I had no choice but to proceed *pro se*; nevertheless, I received no direct communications from the Court. My *pro se* status was not cited in the dismissal order.

C. Case Restoration and Dismissal of Key Defendant Conspirator Without Explicit Basis Or Challenge

In spite of Moody's failure to enter an appearance, several firms around the country were interested in pursuing the case after Moody effectively declined to proceed[15].

Two of those interested firms took the case and entered a Motion to Vacate the Dismissal on May 17, 2006. Their reasoning is summarized here, as it is relevant to consider the fairness with which Judge Savage was handling the case:

> "The Third Circuit has made clear that dismissal for failure to prosecute is a 'harsh remedy and should be resorted to only in extreme cases' because ***the law favors disposition of cases on their merits***."
>
> "Here, ***Relator's claims are plainly facially meritorious***."
>
> "In the instant case, because ***Relator has not acted in bad faith or exhibited willful misconduct, and has set forth meritorious claims***, there is no need for the Court to examine the availability or potential effectiveness of alternative sanctions." [emphasis added]

The claims I made survived defense motions to dismiss. Nevertheless, upon summary judgment, most of the grants were deemed not to have fallen within the statute of limitations based on the Court's interpretation that:

> "the tolling provisions in § 3731(b)(2) does not apply to a relator when the government had not intervened, and the limitations period in 31 U.S.C. §3731(b)(1) is triggered by the earlier filing of the claim rather than the later payment." Summary Judgment Memorandum Opinion, Document No. 116.

I was told by Attorneys McNamara and Ferroni that they had been contacted in December 2009 by Sara McLean of the Department of Justice in Washington, D.C. to say that the DOJ wanted to appeal this summary judgment.

There was concern from an attorney considering entering the case to assist in the science-related aspects as to why we were not seeking: "a stay (while the other decision is appealed, in order to save judicial resources, since all discovery would have to be repeated if we prevail on appeal)". By this he did not mean solely because some grants might have been restored after an appeal. Rather, a significant issue was that two of the four defendants seemed to have been completely released from the case by Order of December 1, 2009 (Document No. 117), yet one of those defendants, Kmiec, was listed

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[15] See also March 9, 2010 hearing comments, below, which specified the responses of the firms. It was generally clear that various law firms felt that the Defendants had a public, tainted record in science. Furthermore, in addition to my own evidence, I now had experts who had provided strong support. All had been provided the complete ORI documents (as presented in the court record and cited above).

in Count VII of the Amended Complaint (Document No. 37) as a conspirator with emphasis added):

> "In order to cause the NIH to award grant funds to Cornell and Jefferson, ***Defendants Holloman and Kmiec*** knowingly and wrongfully agreed, ***combined and conspired*** to make false statements and false claims, and to cause Cornell and Jefferson to present false statements and false claims to the NIH, and in furtherance of the conspiracy made and caused Cornell and Jefferson to present the false claims, and to make the false statements, detailed above, in connection with the following grant applications and progress reports ..." of which the grant remaining in the case, as well as its Progress Reports, were listed.

In contrast, the Conclusion of the summary judgment Memorandum Opinion (Document No. 116) had stated:

> "Because all claims against the Thomas Jefferson defendants are outside the statute of limitation, judgment will be entered in their favor."

Plaintiff's attorneys McNamara and Ferroni told me they believed the release of Defendant Kmiec had been an error on the part of the Court, but in response to my inquiries they never told me that they had made an attempt to so inform the Court. McNamara did tell me that at the December 16, 2009 scheduling hearing he had requested certification to make an interlocutory appeal of the summary judgment orders, but that Judge Savage had told him he would not provide such certification. McNamara never made any written documentation in the court record of having made a request for certification to appeal.

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D. Concerns of Prejudicial Statements Arising at Summary Judgment Hearing and Scheduling Conference

My concerns about how the case was being handled were further notably raised at a summary judgment hearing held on February 23, 2009. Immediately upon exiting the courtroom, my attorneys described Savage's statements made during that hearing as "aggressive" and "provocative". An expedited transcript was ordered that day and provided within two days[16].

In the transcript, Judge Savage made the following statements which indicated his strong dislike for my use of recorded conversations in bringing my complaint:

1) The following excerpt was made in reference to my having recorded important telephone conversations which clearly revealed evidence of misconduct:

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[16] The transcript is entered into the court record as Doc 114 of May 9, 2009. It is unclear why there was such a delayed entry of a transcript that had been produced more than two months earlier.

> **THE COURT:** YES. WAS HE IN PENNSYLVANIA?
> **MR. MCNAMARA:** NO. I BELIEVE IN NEW YORK, YOUR HONOR.
> **THE COURT:** **GOOD THING.**
> **MR. MCNAMARA:** I'M SORRY?
> **THE COURT:** **GOOD THING.**

This exchange led me to ask myself, or else what? There seemed to be an implicit threat of prosecution. Such recordings were legal under federal law and also under the laws of thirty-eight states, including that in which I and most of the others involved worked and resided. (One individual I spoke to was in Japan.)

2) The topic was further brought up by Judge Savage with the following comments:

> **THE COURT:** DID HE TELL THOSE PEOPLE HE WAS RECORDING THOSE CONVERSATIONS?
> **MR. MCNAMARA:** I BELIEVE HE TESTIFIED THAT HE DID NOT AS TO MOST OF THEM. THERE MAY HAVE BEEN A FEW THAT HE DID. BUT I THINK SEVERAL OF THEM HE TESTIFIED AT HIS DEPOSITION HE DID NOT.
> **THE COURT:** **HOW DO YOU THINK THOSE FOLKS FEEL ABOUT THAT?**
> **MR. MCNAMARA:** I'M SORRY, YOUR HONOR?
> **THE COURT:** HOW DO YOU THINK THOSE FOLKS THAT WERE RECORDED SURREPTITIOUSLY FEEL ABOUT THAT?
> **MR. MCNAMARA:** I CAN ONLY IMAGINE, YOUR HONOR. I DON'T KNOW.

It seemed quite apparent that Judge Savage had a strong hostility to the use of surreptitious recordings, though it was not clear why. What I would later learn was that in the 1980's, he himself had defended a Philadelphia police officer, George Katz, adjudged to have been corrupt, who had been convicted on the basis of such recordings. Attorney Savage then lost the appeal against the use of such information. *United States v. De Peri et. al.*, 778 F.2d 963 (1985). In particular, Attorney Savage appealed his client's conviction for racketeering, upon which the Third Circuit noted:

> "We believe that **the most serious issue in this appeal** concerns the introduction of coconspirators' statements against some of the appellants, **particularly those statements contained in the taped conversations** between Alvaro and Martin and Alvaro and DePeri. Murphy and **Katz** raise the same issue." *UNITED STATES OF AMERICA v. KATZ, GEORGE*, 778 F.2d 963 (3rd Cir. 1985).

The immediately preceding comments by Judge Savage during the February 23, 2009 hearing also raised serious concerns on my part about the integrity of the court record, as I was convinced that I had heard him say in the immediately preceding dialogue quoted from the hearing transcript that ~"***I wouldn't have felt good about that***". See ***"28 U.S.C. 753"*** section, below.

2) In addition to seeming hostility against my use of recordings despite those

being allowed under federal law, I became even more seriously concerned that when Judge Savage also gave clear indications that he had already made up his mind about the case:

> THE COURT: YOU ARE JUST TRYING TO GIVE ME A LITTLE FLAVOR OF **WHY I SHOULD DUMP THIS CASE NOW INSTEAD OF LATER?**

I cannot emphasize enough just how unfair and dishonest I felt the whole process was after hearing statements like this from the judge. In fact, he had previously "dumped" the case and would indeed do so again later.

The above comment to defense counsel was followed not long after with a rejoinder from Judge Savage to the Plaintiff's counsel: "**Of course you don't**" – as if it were we who would say anything:

> MR. MCNAMARA: I THINK YOUR HONOR UNDERSTANDS THIS, BUT JUST SO THE RECORD IS CLEAR, *WE DISAGREE ABOUT THE PROVABILITY OF THE CLAIM AND WE ARE -- WHILE IN MANY RESPECTS WE AGREE WITH THE ORI POSITION ON CERTAIN THINGS, THIS IS AN AREA THAT WE DO NOT AGREE.*
> THE COURT: **OF COURSE YOU DON'T.**

To me, this statement also indicated that as far as he was concerned, the government had come to some sort of definitive conclusion about what evidence could be recovered and we were proceeding baselessly. In fact, ORI was completely wrong and there was quite a bit of important evidence that would be recovered in the limited time that Judge Savage allowed us for discovery (see below).

3) I also grew increasingly concerned that **Judge Savage seemed to accept claims from the Defense without evidence and then aggressively argue from them on the Defendants' behalf**.

For example, when Plaintiff's attorney, Tom McNamara, noted that the Defendants had not supplied the payment grant information as ordered by the Court in January, instead of demanding that the defendants provide the information required, Judge Savage proceeded as follows:

> MR. [DEFENSE COUNSEL] GRUGAN: YOUR HONOR, ***I THINK*** THAT WE DO HAVE THE FSR'S, AND THERE WAS NO MONEY LEFT AT THE EXPIRATION OF ANY PERIOD EXCEPT FOR AT THE EXPIRATION OF THE PERIOD 6/30/06, 2006. THAT WAS THE LAST GRANT THAT IS AT ISSUE HERE. AND AT THAT POINT I THINK THAT THERE WAS A SMALL AMOUNT OF MONEY THAT WAS LEFT OVER. BUT WITH RESPECT TO EVERY OTHER GRANT, ALL OTHER 14 THAT ARE AT ISSUE HERE, WHETHER THE PROGRESS REPORTS OR THE GRANT APPLICATIONS, THERE WAS NO MONEY LEFT.
> THE COURT: **CAN YOU DISPUTE THAT?**
> MR. MCNAMARA: YOUR HONOR, THAT IS PRECISELY ONE OF THE ISSUES.
> THE COURT: **CAN YOU DISPUTE THAT?**
> MR. MCNAMARA: **I CAN'T AGREE WITH IT.**

THE COURT: **CAN YOU DISPUTE IT?**
MR. MCNAMARA: **I HAVE NO EVIDENTIARY BASIS TO DISPUTE IT,** YOUR HONOR, BUT I DON'T BELIEVE THAT THE DEFENDANT –
THE COURT: **IS IT UNCONTROVERTED?**
MR. MCNAMARA: **NO, IT'S VERY MUCH CONTROVERTED.**
THE COURT: **GIVE ME THE PROOF.**
MR. MCNAMARA: YOUR HONOR, **THEY HAVE NOT PRESENTED ANY EVIDENCE ON THE RECORD OTHER THAN MR. GRUGAN GETTING UP AND SAYING THAT,** THAT THERE WAS NO MONEY.

This same sort of behavior, *in which Judge Savage seemed to take whatever the defense counsel said without any proof* (at least not shown to us) *and use it aggressively against us* would appear in a more malignant and damaging form later in the case during a scheduling/*de facto* settlement conference, on December 16, 2009 (see below).[17]

At the **December 16, 2009 scheduling conference**, in which the Plaintiff's and Defendants' attorneys primarily met separately with Judge Savage, ***defense counsel apparently asserted to the judge, out of our view, that they had vital evidence which would controvert the substantial information I had already presented to the government*** regarding one of the three false statements used by the defendants in their grants. It turned out during general discovery *they had no such evidence*, but ***the Court's acceptance of those representations without factual support was conveyed to my counsel as if it was supported and true***. I also believe that **severe bias** was shown by Judge Savage in his use of that "information" against me, as specified in the following section.

The following statements were made by Judge Savage and relayed by Plaintiff's attorneys McNamara and Ferroni to me in Judge Savage's chambers, or outside them in a meeting room, on Wednesday December 16, 2009 at a pretrial scheduling conference. As my attorneys spoke to me, my notes indicate I wrote the following:

> Ferroni: "One of the things **he mentioned was our good doctor's reputation if he loses** … They [potential employers of mine] would look at the case if this is the kind of guy I want in my lab." McNamara: "***I'm not vouching for his [Savage's] behavior***".

McNamara noted that Judge Savage said, "**They believe in their position as strongly as you do yours**". Which begged the question (as I responded): How does he really know that? The defendants have not produced any evidence in defense against the claims. The individual defendants have never been in court or written any declarations.

My attorneys then returned yet again to relay a message from Judge Savage about a state statute called "**Dragonetti**" – which apparently he had also brought up earlier in

[17] In his memorandum opinion of December 1, 2009, Judge Savage seemed to use defense attorneys' claims without directly checking the information that had been presented in the court record. He did so as a significant, and very public, part of his argument that I had already made allegations of fraud related to this case in 1995. However, I believe that the statements I actually made, which were available to Savage, showed something very different. See the endnote, **Quotes from Gilbert Letter**, for details.

the meeting. This case allows the recovery of costs for **frivolous litigation**. Judge Savage was stating that I was at risk of such a suit (and it would later turn out, according to my attorneys, at risk of Savage himself awarding defendant costs against me if I lost this case). Yet no evidence to counter anything I had claimed or presented to the court had been made available to us in order to substantiate the basis for such a threat. I had evidently had my involuntary dismissal vacated and had prevailed upon motions to dismiss.

Also, I was told that whatever defense counsel Grugan had said to Savage, a lot of emphasis was on the "**sequence**" (presumably, according to McNamara, a DNA sequence relevant to some of the claims). In other words, ***there had apparently been a one-sided (essentially ex parte) claim of evidence by defense counsel Grugan to Savage***.

If in fact they had claimed to have DNA sequence which disagreed with that which I had given to the government, and that which the defendant's student had claimed in a recorded interview, this would substantiate an assertion they had been making since the start of the case, when defense counsel raised the issue that my allegation of data falsification was merely a dispute of scientific results.

Therefore, defense counsel were apparently claiming to Judge Savage that this particular allegation was a matter of difference in scientific results and thus, purportedly ***frivolous*** and subject to countersuits.

I could not believe that the appropriate course for Judge Savage upon receiving this claim was ***to uncritically accept it and even transmit it as part of a threat towards one of the parties***.

Nevertheless, I continued to resist making a settlement prior to conducting more discovery. I did not believe that an alternate DNA sequence existed, as both I and an employee of the defendants had obtained the same results[18].

Judge Savage then asked my attorneys what I was doing now. I wrote down that I was told: "The judge's assumption was that I had nothing better to do than focus on this case." … "And ***that I had a lack of an income source***".

The statements about my income were untrue. More importantly, they were completely outside any facts the judge could have learned in his official capacity. McNamara told me that he and Ferroni believed that this information must have come from the defendants, i.e. presumably through their counsel and certainly not in the presence of my counsel or me.

Furthermore, the judge stated to my attorneys that I had asked to remain longer in Defendant Holloman's lab, but Holloman declined and that I was therefore disgruntled. The judge's claim was not true, and my attorneys told me they believed that Judge Savage had to have obtained this information from Holloman (presumably via his attorneys).

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[18] Indeed, subsequent limited discovery would prove me correct.

Again, there was no point in the case by which this information had been presented in the presence of my attorneys or me.

I believe that the statements relayed to me from Judge Savage were meant to intimidate me into a settlement, and to make it very clear to my attorneys that he was so biased against my case that we stood little chance of prevailing.

After the scheduling conference (on December 22, 2009), one of my attorneys, Richard Ferroni, told me that he had been "pissed off" and "furious" when he got home after the meeting with Savage. My notes indicate that I wrote down as he spoke that he said that ***Savage had been very condescending, apparently questioning whether he and McNamara understood the facts of the case*** (as opposed to Savage himself ignoring them). He felt that ***Savage had "crippled" the case*** by dismissing much of it as a way to get an "infinitesimal settlement". Furthermore, he called Savage ***a "loose cannon"*** who <u>had already come to the meeting with a predetermined discovery period, without having considered the one agreed upon by the parties</u>.

Another major obstacle to proceeding, as noted above by Attorney Ferroni, was that Judge Savage had unilaterally curtailed discovery, to a total of only four months. Upon reporting this to me at the December 16, 2009 meeting, Attorney McNamara had stated that "We're going to embark on an almost impossible task" (as referenced in an email of December 17, 2010).

Despite our view that Judge Savage had crippled our ability to perform thorough discovery by restricting the time to which we had agreed with the defendants, Judge Savage would also repeatedly use the length of time the case was taking to suggest that I was somehow responsible for serious delays. This issue is addressed in the following section.

Back to TOC.

E. "History of the Case" - Duration and Limitation of Discovery

Judge Savage did not rule on the motion to vacate the involuntary dismissal until April 4, 2007, ***almost 11 months after it had been submitted, at which time he granted the motion***. He would subsequently place the case under two long "**suspensions**" which totaled ***more than one and a half years***:

> On March 13, 2008, Judge Savage issued an order to transfer the case to the "***civil suspense file***" (docket record 81). I was not able to obtain an explanation from any of several attorneys I consulted as to the reason for the "suspense". Activity in the case nevertheless continued until Plaintiff's attorneys requested oral argument on April 25, 2008 (docket record 100). After that, there was no response from the judge until an order of January 28, 2009 – apparently ***more than three quarters of a year without activity due to the judge***.

> On March 30, 2009, the motions for summary judgment were placed in suspense for reasons again unclear. It was not until one day after Savage issued his summary judgment memorandum on December 1, 2009, that he issued an order transferring the case to the "*active trial list*". Consequently, he had kept the case in "suspense" for ***another 8 months***.
>
> Therefore, altogether, ***Judge Savage delayed the case for 2 1/3 years without noticeable activity***.

Judge Savage would later repeatedly contend, including in a March 10, 2010 hearing (see excerpts, below), that it was I who had somehow caused this case to extend over many years. He would also more than once refer to the "***history***" of the case, including as justification for not allowing multiple motions to extend discovery from three law firms; this effectively ended the case.

Nevertheless, my calculations, presented in the following, suggest a different source for the extensive time over which the case ran:

> The case began with its filing under seal on June 30, 2004. The case ended at the end of March 2010. Therefore, the case's total duration was 6 years minus 3 months, or 69 months. ***Of those 69 months, I was represented by counsel who were responsible for prosecuting the case from 2006 through 2010*** (less than 4 years or, at most, **48 months**)[19].
>
> As noted previously ***Judge Savage was responsible for lack of case activity for approximately 2 1/3 years (28 months)*** of the time I was represented by counsel who actually litigated the case, i.e. in the absence of the government's "investigation". Thus, 28/48, or over **58%** of the time during which the case was being handled by attorneys who were responsible for prosecuting it, there was seemingly no activity based solely on the actions of Judge Savage. The case did not advance because Judge Savage had placed it in "suspense" or was taking whatever time he apparently felt necessary to produce his decisions. ***Only for 20 months, a minority of the time, was the case being actively litigated***. During those periods of active litigation, I was not responsible for any significant delays.

Yet although the preceding facts suggest that it was actually Judge Savage who had taken substantial amounts of time to act during the case, it was also he who would place severe time constraints on us when we were required to act.

Most critically, as noted above, Judge Savage curtailed discovery in a complex subject to much less than had been agreed to by the parties:

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[19] The government purported to "investigate" until declining to intervene in August, 2005 (14 months). The case was first dismissed in April of 2006 (after 7 months, of which essentially all was without counsel at Judge Savage's discretion. Had Savage really been concerned about delays in the case, he could have turned down Attorney Poserina's request to withdraw). The case resumed in April of 2007.

> "The parties … respectfully request 120 days to complete fact discovery. The parties request an additional 60 days for expert discovery, for a total of 180 days. Due to the extremely complex nature of the science at issue, the parties anticipate needing the full 60 days to complete the expert phase of discovery." (Report of the Rule 26(f) Meeting of December 11, 2009, docket document 120).

The scheduling order on December 16, 2009, issued by Judge Savage, however, stated:

> "All fact discovery shall be completed by April 9, 2010. Counsel for each party shall serve upon counsel for every other party the information referred to in Federal Rule of Civil Procedure 26(a)(2)(B) **by expert report or answer to expert interrogatory no later than April 9, 2010**. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, counsel shall serve the information on counsel for every other party no later than April 23, 2010. **Expert depositions, if any, shall be concluded no later than May 7, 2010**. (docket document 122 of December 16, 2009).

Furthermore, at the scheduling meeting my attorneys told me that Judge Savage had imparted to them that *the deadline he had unilaterally set* was "***in stone***". This point was further emphasized by Attorney McNamara in an email to me on January 10, 2010, in response to my question as to whether he was planning to ask for an extension of time to perform fact discovery, given serious delays in his serving written discovery:

> "As to requesting additional time for discovery, ***I thought that Rich and I had made it clear to you that Judge Savage made it abundantly clear to us that he will not be granting any additional time***."

Judge Savage's purported basis for restricting discovery without recourse (as he proved was the case – see below) was that the defendants deserved their day in court – an attitude he never evinced towards me, the Plaintiff.

> Judge Savage: The defendants need their day in court (December 16, 2009). (From my notes.)

> The Court: "That ***serves the purpose of no further delay for these defendants***". (Hearing transcript of March 9, 2010).

Thus, the judge's stated basis for placing severe time restrictions on my attorneys, especially during discovery, was that he was protecting the defendants' rights to a speedy trial. Yet the reality of how the time was allotted suggested to me an unfair attempt to impair our ability to investigate our case, while at the same time actually delaying the defendants' day in court – I believe to their benefit, in particular because it helped the

line of incessantly made argument that the frauds had occurred years earlier[20], and it allowed more statute of limitations to pass with respect to filing new claims[21].

Back to TOC.

F. Access to Original Records Withheld Despite Apparent Rights Under 28 U.S.C. 753

Upon review of the March 23, 2009 transcript, serious concerns were raised regarding the absence in the transcript of an entire sentence I believed I had heard made by Judge Savage, as well as the presence of several bizarre non-sequiturs. During the hearing, I had sat in the back and taken notes. The statements Judge Savage made were memorable; as my attorneys had noted immediately afterwards, Judge Savage had been "aggressive", (only towards us), and "provocative" in what he said, (again only towards us).

As part of what one of my attorneys called his "aggressive" and "provocative" performance, Savage insinuated that my own research in the laboratory of the defendants had been a "***faulty foundation***" that put those of the defendants accused of fraud on "shifting sands". Even the Defendants had never brought up such a counter-allegation, it was so baseless.

Most important among the several statements at issue in the transcript was one that was completely missing and another that seemed to have been modified from that which I had noted:

1) With as near certainty as memory allows, the transcript, which was received within two days of the hearing, was not a verbatim record of what had been stated in court. Most notably, Judge Savage had stated that ***he*** would not have liked being recorded:

> Judge Savage: ~'***I wouldn't have felt good about that***' is my close paraphrase/quote recollection.

Savage's comment made a significant impression on me and I discussed it with some animation in speaking with both of my attorneys immediately after the hearing. However, that statement was not in the transcript.

2) What I took to be another instance of attempted attorney intimidation:

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[20] Actually, we asserted that false statements being alleged were relevant to grants as late as 2007.

[21] This was particularly of note with respect to claims made by Defendant Holloman to the NIH in Progress Reports associated with the most recent of the grants, GM42482-12A2, that he had never been able to purify soluble Rec2, and that therefore proceeding to do so might be beneficial in overcoming the failure of the Bennett Rec2 purification procedure[21]. However, information from a thesis by one of Holloman's graduate students showed extensive tests of soluble Rec2 produced in bacteria; most importantly, after the student instituted some significant controls, they obtained a "major shock" when they learned that the purified, soluble Rec2 was inactive in their assays.

SAVAGE: "MR. GRUGAN, WE ARE NOT THERE NOW. I SEE ALL THIS COMING. **Mr McNamara must decide to continue.**"

> That is the quote I recorded in my notes. It should be considered a very close if not completely accurate record of the actual statement. (My notes show it to be an exact quote.) It made a very large impression on me at the time, and was quite short – not very difficult to write down.

Instead, a different statement was in the transcript:

> **THE COURT:** BUT, MR. GRUGAN, WE ARE NOT THERE NOW. I SEE ALL THIS COMING.
> **THE COURT: I MEAN, THAT IS IN THE FOOTNOTE ABOUT ORI. THAT IS FINE.** IF MR. MCNAMARA WANTS TO CONTINUE PURSUING IT, THAT IS HIS CHOICE.

> Note that ***two*** "THE COURT" designations are now juxtaposed, suggesting that something said by someone else may have originally been interposed, or that the comment was inserted, as I suspect, to provide cover to the comment about McNamara going to have to decide to continue as not being related to the entire case, but only to an ORI footnote.

Under federal law (28 U.S.C. 753), it was my right, and in fact any member of the public's right, to obtain an "***original record***" of such a hearing from the Clerk of Court's office.

As I wrote to my attorneys: "If there is an innocent explanation for all the above concerns (and others not detailed here) about significant changes to the record, then ***the simplest way to regain my confidence in the proceedings (at least in some part) would be for the Court to release the electronic record.*** ... Most courts, including federal courts, already acknowledge the benefits of so doing; hence the electronic file (usually audio) is available for purchase.

On December 22, 2009, I wrote in my notes while speaking with Attorney McNamara that he said to me,

> "I know you expressed some concerns about what was in the transcriptions. And you may be right."

Nevertheless, my attorneys did not pursue obtaining the official transcripts record because of their view, expressed to me, that they wanted to avoid antagonizing Judge Savage.

Though in reality he should not have been involved. The judge should have no role in public access to such records, so far as I had been told by the U.S. Court Administration, nor would it make sense for his stenographer to bring my request for

such records to the judge's attention if it were merely a question of her error. Certainly, if I were in error with respect to my immediate recollection or notes, it would have been very much in their interest to provide the original record to demonstrate that.

After the court reactivated the case at the start of December 2009, I returned to the Clerk's office to review the original record of the February 23, 2009 hearing. In addition, I made a request to review the transcript/original record of the December 20, 2005 hearing at which I believed that Attorney Moody had been discouraged by Judge Savage from representing me. I was told there was no record of the December 20, 2005 hearing available[22].

While at the PAED federal district court Clerk's Office on December 16, 2009, I was also told that **the courtrooms were equipped for sound recordings (ESR)** and that most judges used this method to produce an "**original record**" with respect to U.S.C. Title 28 Section 753. However, Savage and three other judges did not use the ESR systems. If they had, then it would have taken 15 – 20 minutes to prepare a disk of the hearing for purchase. Even so, Judge Savage's stenographer wrote in the transcripts that we did have that she had used a stenotype-computer[23]; such files were also considered original record. The public was allowed to inspect those in lieu of audio files.

I left the Clerk's Office after being told they had to contact the court reporter involved to obtain the original record. Upon obtaining it, they would use the phone number I had left to call me. I had had no negative interactions whatsoever with anyone present at the Clerk's Office, or in fact anyone associated with it, including the court reporter who had made the record. However, I was never given any original records by the Clerk's Office.

Instead, on December 24, 2009, I received a telephone call from my attorneys who told me that they had received a call from a law clerk in Judge Savage's chambers. ***The judge wanted to relay to counsel that I was to go through them to get original records from the Clerk's office***.

Neither attorney involvement nor explanations, to the best of my understanding, were required under the law. My notes indicate that I had written that my attorneys stated to me, **"We don't disagree with you"**. I apologized for any trouble this may have caused them. The reply was **"You don't have to apologize, but don't kill the messenger."** (I took the messenger to be them.)

From this it seemed to me that Judge Savage may have been attempting to coerce my attorneys and, through them, me, by implicit threat – the latter would be consistent with their feeling that my making a request in a Clerk's office could be seen as getting

[22] That transcript was also not provided to me by the Clerk's Office; it had been transcribed on May 30, 2006, and then unsealed on March 14, 2008.

[23] "Proceedings recorded by stenotype-computer. Transcript produced by computer-aided transcription." (March 9, 2010 transcript first page).

them hurt.

My overall feeling was that it was very difficult not to come to an adverse inference, as it seemed as though the records were being improperly sequestered. What was there to hide? None of this made me less certain of the accuracy of my memory and notes.

I remain deeply concerned that my rights under federal law were denied, and that Judge Savage was to some extent involved in obstructing my access to court records.

Back to TOC.

G. Release of the ORI Documents and a "Devastating" Comment Attributed to Them

Concerns about the court record extended beyond interactions with or influence on the Clerk's Office.

In a March 11, 2009 email from me to my attorneys I wrote:

> "I cannot find [on the docket] the order that Savage told all three of us at my deposition last year he would issue with respect to his demanding the release of the ORI documents. … The absence of such an order is especially disturbing to me in the context of Savage having coerced us to release the ORI documents – ***off the record***[24] – by threatening me with having to pay the costs of a hearing, including defense attorney fees, if he had the hearing on the topic as we requested and he still ordered us to release them. ***It was very clear from the way he spoke, for example from his irritation, that the decision had already been made***. As it now appears from the record, the ORI documents were simply provided to the defense in some undetermined way. That was not the case". [excerpted; emphasis added]

Furthermore, my attorneys had told me immediately after the ORI document release that they were perplexed by the judge's having done so, as a few days earlier they had had a conference with Judge Savage in which this topic was discussed. He had agreed that only the ORI timeline had relevance to the statute of limitations issues that were then the subject of discovery (with respect to summary judgment, which had been

[24] This occurred during my first deposition. When Judge Savage was brought on the telephone regarding defense counsel insistence that we provide the ORI documents, the first thing Judge Savage did was to demand that the recording equipment be turned off. Thus, Attorney Rohn's note of Judge Savage placing his hand over the microphone to avoid production of a record resonates strongly with me: "during the Vitalis trial, Judge Savage, *sua sponte*, called a side bar in violation of his own Trial Procedure No. 3 and attempted to block the microphone with his hand to prevent his comments from appearing on the record." Motion to Recuse the Presiding Judge, *Alexis v. Hovensa et. al.*, cv 2009/91 (District Court of the Virgin Islands).

limited to the question of the statute of limitations). Yet now, all the documents were ordered released.

Many law firms had reviewed the ORI documents and all had come to a conclusion similar to the following, which I reported to Regina Poserina:

> "**James A. Moody** also said, in an email to me and Joe Black of November 27, 2005: "**Re ORI, first, their docs back and forth to you and the US Attys would not normally be discoverable. They would be treated as work product or attorney-client communications and privileged.**"

Indeed, there seemed to be very good policy reasons for such privilege, as articulated by Michael D. Granston of the Department of Justice in a 2005 Taxpayers Against Fraud talk in which according to my notes he said that **the seal is "indefinite for the government's documents on the case"**. He also stated that this was "good for the relator who wants to proceed despite problems with the case in the government's view".[25]

However, no written order was ever provided by Judge Savage for the release of the ORI documents.

Judge Savage would reference the ORI documents in a footnote of his December 1, 2009 memorandum opinion on summary judgment. In that note, he made a claim as to what the ORI had concluded that my attorneys and I did not agree was correct.[26]

Furthermore, he stated that the ORI documents could be used at trial. Judges can be correct or incorrect on conclusions they reach; this might be considered a "merit"-based aspect of the case subject to argument and, as necessary, appeal. However, the issue here[27] is less what Judge Savage wrote as opposed to how he used what he wrote.

According to what I wrote at the December 16, 2009 pretrial conference that McNamara said Savage told him and Ferroni:

> "You guys have a long road to hoe – ***have you considered all the hurdles to continue?***"

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[25] A major premise of *qui tam* legislation such as the False Claims Act of 1986 is that **government officials are neither infallible nor incorruptible**. That is why Relators are valuable and should be allowed to have their evidence presented in court, ***regardless of statements made by the government***. If my allegations had really had no merit, the ORI would have said that (they stated the opposite) and the case might have been dismissed upon the Motions to Dismiss.

[26] Both the judge's ORI footnote and the complete ORI documents are in the court record, so a full comparison can be made by anyone so interested.

[27] Though the judge's claims were very damaging, both by seeming to provide support for subsequent claims by defense counsel that I had brought a frivolous lawsuit (including by reference on a web page), and to my reputation, since the opinion appears within a pdf that is of high ranking in internet searches of my name.

This led me to wonder, is that really a fair and impartial statement to make to a party's counsel? Were comparable statements made to the Defense counsel?

Judge Savage emphasized one of those hurdles to my attorneys repeatedly. Again, from my notes:

> McNamara said that ***Savage made multiple references to his ORI footnote*** at the end of the summary judgment opinion, i.e. that it could be used in the trial. … Ferroni then stated that Savage had told them, "I'm just telling you it is devastating[28]".

Regardless of Judge Savage's accuracy with respect to the underlying documents, the way he used of what he wrote seemed to me to be a serious attempt to make his opposition clear and to intimidate my attorneys yet again, to make them understand just how hopeless their cause was.[29]

Back to TOC.

H. Failure to Pursue Timely Discovery - Termination of One Firm

After the December 16, 2009 scheduling conference with Judge Savage, my lead attorney, Tom McNamara, seemed to give up on the case. In a January 7, 2010 email I wrote to him regarding my concerns that he was not serving discovery:

> "It is my strong impression that you have written off this case, and based on the judge's behavior, and your apparent belief there is nothing realistic to do about it, I can see your point of view. However, you need to try to see things from my perspective as well. This case means a lot to me, and I want to prosecute it vigorously. We need to resolve just how we can proceed in a mutually beneficial manner."
>
> Robert

Although the judge had ordered that discovery begin "**immediately**" on December 1, 20009, and my attorneys had written in the Rule 26(f) report that they would begin serving written discovery by December 16, 2009, the first document request was not served until January 20, 2010. The first interrogatories were not served until

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[28] There is no real dispute that a federal judge could produce statements on the record which could be "devastating" at trial. One question is whether the statements were warranted and true, and the other, at issue here, is whether they should have been used in multiple attempts to influence my attorneys.

[29] Also very significantly, defense counsel Grugan would use the judge's ORI footnote along with the concept, first relayed by Judge Savage, that I had somehow brought a frivolous claim, in a letter and motion made to new counsel interested in entering the case. It was, and remains, difficult not to see Savage and Grugan as seeming to work in tandem, despite the unfounded basis for what was being claimed. (See Affidavit of Misconduct - Grugan.)

February 4, 2010. Furthermore, no depositions had been noticed by that date and none ever concluded.[30]

One attorney who had watched the discovery process in "real time"[31] became sufficiently alarmed that he wrote a letter for me to send to my attorneys to inquire of them just what they saw happening with the discovery and how it could be completed successfully. In particular, he noted in a letter of January 21, 2010:

> "b) what is the exact schedule you are proposing for discovery; meaning, what are the dates for filing motions, scheduling and conducting depositions, and who will staff these discovery proceedings, along with an estimate of the costs. When will they be scheduled, when will transcripts be completed, when will we have access to critical discovery materials in order to adequately prepare for trial. ***Time is beyond critical, and it appears you have not undertaken any actions in weeks. This is compromising my rights and my case.*** Do you disagree? If so, I would like you to explain why that is the case."

McNamara had also previously lost important documents, failed to file other documents on time, had not inquired as to the basis for the case suspensions or lack of promised orders, etc. Later, the lead attorney from the firm who entered the case to replace McNamara, Boldin, and Ferroni stated in writing to me that, after review of the record, including correspondence between me and my attorneys during discovery, he had come to the conclusion that I should consider **a legal malpractice action** based on: "***the utter lack of pursuit of proper discovery by your final attorneys*** *[McNamara, Bolden, and Ferroni]*".[32]

I attempted to have McNamara replaced as lead attorney by Ferroni, who with Attorney Bolden were members of the original law firm I had retained, and not in the same firm as McNamara, in a letter of January 12, 2010:

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[30] Nor had any informal discovery had been performed by my attorneys prior to the December 1, 2009 order, which claimed to assume that discovery had already been undertaken. I questioned why my attorneys had not brought up to Judge Savage their contention that they could not have performed any formal discovery previously since discovery had been limited to the issue of statute of limitations, which bore on what I and the government knew and when we knew it, but not on the date on which defendants knew information.

[31] (as he had been asked by me to consider joining the case to provide an ability to ask science-related questions during depositions)

[32] There may have been more than mere "malpractice" occurring. The FOIA documents which McNamara claimed had been lost in his office, included the most recent grant progress reports that would have provided additional information relevant to filing a new, fourth claim of false statements to the government - in this case with respect to defendant Holloman claiming he had never been able to obtain "soluble" Rec2 to study (see Affidavit of Merit). It remains very troubling that in addition to this loss of important documents, and the failure to reorder them for well over a year, McNamara also unilaterally altered an interrogatory to the defendants directly questioning of whether the they had at any time informed the NIH about earlier work done in their laboratories on soluble Rec2. For more detail see Affidavit of Plaintiff re Concerns of Attorney Malpractice.

> "I am hereby formally asking that you now become the lead attorney representing me in this case. Let Tom hang back and attend to whatever he needs to do."

However, there was no real change (see "Discovery timing quotes 020710_A.pdf"), so in mid-February 2010, I dismissed McNamara.

I did not terminate Ferroni and Bolden, who were members of a separate law firm (Fell and Spalding) from that of McNamara (Indik and McNamara). However, they argued that they had "***relied***" upon McNamara to share costs and efforts, upon which basis they applied to the Court to withdraw.

I wrote to Ferroni and Bolden to state that I did not feel they had appropriate basis to withdraw, and on the contrary, I had relied upon them to manage their association with McNamara so as to not jeopardize the case. They had been continuously informed and aware of the issues, and on occasion apparently even tried to motivate McNamara, but until I dismissed McNamara, they did very little themselves. In any case, I noted to them, it was my intention to retain counsel to replace McNamara who would assertively pursue the case.

Back to TOC.

I. Only Limited Fact Discovery Performed

Responses to the written Request for Production of Documents (served January 20, 2010) and Interrogatories (served February 4, 2010) were received on March 1 and March 8, 2010, respectively.

Attorney Ferroni of the Fell and Spalding firm issue a subpoena duces tecum to Harvard University on February 18, 2010. The responses were received in four waves between approximately March 18 and March 30, 2010.

A subpoena was also issued to the Rockefeller University for sequence records on March 12, 2010. Rockefeller's counsel requested modifications to the subpoena, which were provided by me to Attorney Ferroni on March 17, 2010. However, Ferroni failed to return the modified subpoena to the university prior to the termination of the case.

The Defendants only agreed to be deposed on the last day of discovery (April 9, 2010), claiming a variety of attorney and party vacations. Former Defendant Kmiec, still apparently being represented by Attorney Raspanti, was issued a deposition request on March XX, 2010. Through his attorney, Marc Raspanti, Kmiec claimed he could not be deposed until after the scheduled end of fact discovery. Similarly, a vital third party witness, Dr. Brian Rubin, apparently similarly claimed unavailability until after the scheduled end of fact discovery on April 9, 2010. Several other important deponents either were not responsive or were not contacted.

Therefore, only one deposition was scheduled by my attorneys for the last day of the discovery period, and not a single deposition of any party or witness was ever taken on my behalf.

I noted to Attorneys Ferroni and Bolden that the interrogatory answers and documents which were received from Defendants Holloman and Cornell were highly non-responsive or withheld information that we knew was available. In an email to Richard Ferroni (copied to Steven Bolden) on the topic: "**Subject:** challenging non-responsiveness to discovery", I raised the following concerns:

> Rick,
>
> There is important information we requested that the defendants did not respond to or objected to provide. I believe that we must challenge their non-compliance on the record.
>
> For example, there is no direct DNA sequence across the rec2-1 deletion break points, even though it is clear that notebooks of the time do exist. It seems obvious that data were selectively provided to us by Holloman. (Fortunately, at least one of the documents that was provided is highly damaging to the defendant.)
>
> As I noted to you previously, I think it would be best to demand an on-site examination of the relevant records. But at the very least, we need to insist that they provide the complete record or let us examine the notebooks directly.
>
> The other major issue is that no records were produced for Bennett prior to 1997. This will make it impossible for me to properly evaluate KCH1994 and B&H2001. This non-compliance, which is asserted in their objections, must be challenged on the record. I think we have to do so prior to my deposition so that I can refer to the challenge.
>
> A third obvious omission is that nothing from Arai was produced. Holloman appears to lie in the interrogatory by seeming to assert that only Bennett used the Rec2 bacterial expression plasmids. Rubin made them and used at least one in his thesis. Arai was recorded stating that he had used the other without success; hence the reason Holloman is trying to hide even mentioning his efforts, I would think. I hope that we can use the transcripts at Holloman's deposition since it will be important to challenge him on his truthfulness. …

Nevertheless, Harvard University produced a very complete data set which very strongly supported my allegations that a serious fraud had been committed with respect to published claims by the Defendants that critical work had been done at Harvard's Microchemistry Laboratory. (See section III., below, and Affidavit of Merit.)

Furthermore, a set of DNA sequencing summary documents had been found among those produced by the Defendants which completely substantiated my claims of a DNA (*rec2-1* deletion breakpoint) sequence as it had been produced by Holloman's student, Rubin. These same documents also showed marginalia that were intended, apparently, to provide an excuse for this particular fraud.

Therefore, as minimal as fact discovery had been, it was nevertheless highly supportive of the allegations made in two of the three categories of fraud. No information

could be obtained with respect to the third claim. At several points, it was apparent from the Defendants' answers to written discovery that known information had been withheld by them, or dishonest answers given. For example, they provided no responses with respect to the attempted purification of Rec2 protein from *E. coli* by Dr. Naoto Aria, not even to acknowledge that such had occurred (see preceding letter).

Back to TOC.

J. Misrepresentations by Former Defendant's Counsel during Discovery

Although my counsel, particularly McNamara, had significantly delayed serving written discovery, this did not seem to inhibit the production of related information from a defense counsel who had seemingly already left the case.

Prior to the receipt of any discovery responses, on January 29, 2010, Marc Raspanti, former counsel for Defendants Kmiec and Thomas Jefferson University, sent to my attorneys and the Court what he purported to be documents he and his firm had received from Harvard University in 2007. He had apparently obtained these documents as part of his own informal discovery.

Raspanti purported to produce an accurate and complete set of documents obtained from Harvard. He used these to insinuate that I had somehow made baseless allegations against the Defendants, i.e. that they had in fact performed work at Harvard (without noting that the same evidence, had it been presented in its entirety, showed that they had fraudulently reported the results), or that Harvard was asserting that some records were not likely to be found, so the complete story could not be known. I argue that Raspanti made serious misrepresentations to the Court of what he knew or should have known. (See Affidavit of Misconduct - Raspanti).

After he had been dismissed by me, McNamara released into the court record, without my agreement, the Raspanti Harvard documents. He did this without any notice or agreement from me, despite knowing in writing that I was very suspicious of the accuracy with which the documents from Raspanti had been presented. My concerns particularly include the publication of Raspanti's cover letter by McNamara concerning what Raspanti purported to be accurate and complete documents he received from Harvard, and his implied claims that there was no basis to my allegations.

It is of serious concern to me that McNamara released these records in an apparent attempt to make it appear as though he had some reasonable basis for "withdrawing" (while in fact he had been terminated for the reasons as noted above), e.g. that I had somehow made unfounded allegations. I believe that Raspanti and McNamara actions with respect to presentation and publication in the court record of the purported Harvard documents very likely constitutes misconduct as defined under the Pennsylvania Rules of Professional Conduct (PRPC), which is based on the ABA's Model Rules of

Professional Conduct. Violations of the Federal Rules of Civil Procedure, Rule 11(b), may also be involved.[33] (See Affidavit of Misconduct - Raspanti).

I assert that the limited discovery that was performed clearly show that my allegations were not unfounded (see also III. Case Merits, below).

Back to TOC.

K. Termination of Discovery and the Case

Despite the value of the limited paper discovery that was completed (see Affidavit of Merits), only a single deposition was scheduled on my behalf as of March 15, 2010 by my erstwhile attorneys. This deposition was to be of one defendant on the last day of discovery, April 9, 2010.

Motions to extend pretrial deadlines had been filed by Plaintiff's attorneys on March 8, 2010 (Document No. 127).

On March 9, 2010, a hearing concerning the motions to withdraw by Attorneys Bolden and Ferroni was held. In this hearing, the issues of time to perform discovery and failure of Plaintiff's present counsel to properly do so were discussed.

Excerpts from the March 9, 2010 withdrawal hearing:

> The Court: ***What makes you think that somebody would be willing to represent him?***"
> Mr. McNamara: Your Honor, my withdrawal does not – is not intended to denigrate the merits of the case in any way, and in fact –"
> The Court: I'm not suggesting that and I'm not drawing any conclusions from that.
> Mr. McNamara: I understand from –"
> The Court: You understand the ***history of the case***?
> Mr. McNamara: I certainly do, Your Honor.
> The Court: ***You understand the number of lawyers that have been consulted?***
> Mr. McNamara: I have a sense, Your Honor. I think I have some idea. My understanding from brief conversations with Dr. Bauchwitz this morning, and I'm sure he can relate to the court, that he has been – has been diligently seeking to obtain substitute counsel and has made some progress on that front and –
> The Court: ***I have heard that before.***
> Mr. McNamara: ***Well, Your Honor, I would point out to the Court that when you heard it before, it proved to be correct***.

[33] It is my intention to have an expert assessment of misconduct in this case be made, and as appropriate, appropriate complaints filed.

This excerpt raises the issue of the "**history**" of the case, which would be cited again subsequently by Judge Savage in declining to extend discovery (or any other) deadlines so that new counsel could enter the case (below). The facts, presented above in section **E. "History of the Case"**, indicate that the "history" of the case, both in terms of the time over which it extended and the view of it by Plaintiff's attorneys, actual, consulting, and prospective, was overwhelmingly controlled by Judge Savage and not the Plaintiff.

If all this implied bias about attorneys having made judgment against my case, or me, weren't clear enough, Judge Savage made the following statement:

> The Court: ***Dr. Bauchwitz, tell me why you can't get along with these lawyers?***

To me, this question was clearly stated in a way that indicated that it was I who could not properly "get along with" others. It was a line of attack, but one largely promoted by the pressures imposed by Savage himself.

I noted that there had been no personal or financial issues between me and my attorneys, but rather this was an issue of professional performance:

> "I get along with them just fine. I like them. I think, however, when you have a professional relationship we need to make sure that there's a plan so that what needs to be obtained by the end of the discovery period, including the depositions, handling all that information, can be done. ... It's not a personal issue. It's not a financial issue."

Ultimately, the Court grasped the primary, most pressing concern which had arisen:

> The Court: That he [Attorney McNamara] was not moving fast enough for you? Is that summarizing what you are saying?

In reality, I would not have cared about McNamara's speed had Judge Savage not curtailed discovery to such a severe degree. In other words, I was actually trying to comply with Judge Savage's discovery deadline, ***even though I completely agreed with my attorneys that it was unreasonable given the complexity of the material and inconsistent with their agreements with the defendants***. Amazingly, all of this concern about my trying to keep things on schedule came from the same judge claiming he had to act against my causing delays harmful to the defendants (see below).

Later, we returned to the same issue to which I replied:

> Dr. Bauchwitz: I would say that there were just very serious and continuing delays in serving discovery.

And shortly thereafter:

> The Court: What depositions have been taken, Mr. McNamara?
> Mr. McNamara: None to date in the current discovery phase.
> The Court: None?
> Mr. McNamara: None, Your Honor. There have been –
> The Court: Why not?
> Mr. McNamara: Because we have been waiting for responses to paper discovery, documents, and –
> The Court: When is the discovery deadline?
> Mr. McNamara: April 9th.
> …
> The Court: I guess you guys had better get working.

Even the defendants had made note of the lack of depositions in their motions:

> "Plaintiff only served the Cornell Defendants with his first discovery request on January 20, 2010, more then seven weeks after the Court ordered the parties to commence discovery "**immediately,**" Document No. 115, (emphasis in original); Exhibit B), and Plaintiff has failed to notice a single deposition to date." (Doc. No. 125).

Therefore, there was universal acknowledgment from Judge Savage, the opposing counsel, and attorneys consulting on the case, that delays in serving written discovery and the lack of depositions having been scheduled by my attorneys were a critical issue. It simply had gotten to the point that I believed I could not get my attorneys to act, so I needed to take action myself or else there would never be any depositions – except of me. (This is precisely what ended up occurring.)

Nevertheless, in an amazingly one-sided display of bias, after having himself confirmed my serious concerns about the lack of any depositions having been performed by my attorneys, Judge Savage took "corrective" action by scheduling a SECOND deposition of me but NONE on my behalf!

> The Court: Are you prepared to take the deposition?
> Ms Spagnuolo: [A defense attorney] We are, Your Honor.
> The Court: Why don't you do it soon?
> Ms Spagnuolo: We would be willing to do it when Dr. Bauchwitz is available.
> The Court: He will be available. What date do you want?
> Ms Spagnuolo: Your Honor, March 23rd.
> The Court: All right.

Therefore, even though a major concern was supposedly that my attorneys had failed to conduct any depositions, Savage then neglected to schedule any for me, but did so for the Defendants.

Judge Savage at one point seemed to realize the inevitable, appropriate, course of action:

> The Court: He has not discharged Bolden and Ferroni. He discharged you.
> Mr. McNamara: That's true, Your Honor. But he has made it clear to me and to Mr. Bolden and Mr. Ferroni that he is in the process of attempting to retain new counsel, and that is his preference[34].
> The Court: Perhaps. **But until he does so, we will leave Mr. Bolden and Mr Ferroni in the case**.

But moments later, he relapsed:

> The Court: Do I sense a plea?
> Mr. Bolden: No, Your Honor.
> The Court: I can see it.

Which eventually led to the following "alternative":

> The Court: There are two of you [remaining Plaintiff's attorneys.] One of you can handle it.
> ***The alternative*** is this, that I grant Mr. McNamara's motion. I grant yours. And stay execution of my order until the close of factual discovery, and in the meantime, Dr. Bauchwitz can get a new lawyer. And if by the end of the discovery he does not have one then I will hear from the government on its motion to dismiss because I will permit you out of the discovery phase, okay. That ***serves the purpose of no further delay for these defendants*** and gives us the time for him to get an attorney. And if he does not, then the government will move to dismiss. And, in the meantime, he won't be prejudiced while he is looking for a lawyer. How is that?

Such a situation would be a severe prejudice against obtaining new counsel. Who would take on the case under such onerous conditions? Therefore, I proceeded to try to get some clarification on timing from Judge Savage:

> **Dr. Bauchwitz:** My concern would be in reporting back to these firms is that if discovery still is going to end on April 9th, this portion of discovery, they will almost certainly, I can predict, find that would not be consistent with their ability to become involved in the case.
> **The Court:** Well, you can tell them that if they, after talking to counsel, ***including counsel who have been discharged***, as well as current counsel,

[34] I did not ask the second law firm to leave. I disagreed with it. I only intended to replace McNamara, in order to address Fell and Spalding's claim that they had "relied" upon him. The reality is that I had relied on Fell and Spalding to cover any deficits in performance by McNamara.

> ***they feel that there is a need for further discovery, perhaps they can move to do so*** once they get in the case.

I believed that this requirement was highly unfair. I would have had to risk bias to my case by having to have a person I fired be able to influence his replacement. Furthermore, it was unclear to me why Judge Savage was allowed to dictate the terms with which I retain attorneys.

> The Court: But ***it would not be a long period of time***. Lawyers know what to do and what to request.

On March 19, 2010, Plaintiff's attorneys sent a letter to the Court to make a more specific request for an extension of pretrial deadlines so another attorney could enter the case:

> "Our client, Dr. Bauchwitz, has spoken with James West, Esquire, a Harrisburg attorney who is a former assistant Attorney General with considerable experience in handling qui tam cases. We have spoken to Mr. West, who is a single practitioner. He is willing to enter his appearance for Dr. Bauchwitz if the court would grant a ninety day delay on all pretrial depositions and court deadlines."

In response, the Court apparently offered only 60 days.

In addition to the judge not providing the time requested, Defense Counsel Grugan took advantage of the remarkable bias and disinterest in factual accuracy of Judge Savage to send to Mr. West, and the Court, a letter which threatened to sue West or any other counsel who entered the case because my charges were frivolous. The number of what I believe were knowing falsehoods made by Grugan in the letter were astounding to me (see Affidavit of Misconduct - Grugan). Former US attorney West told me he had never seen anything like this in his nearly 40 years of practice. He decided not to get involved, not only because of the inadequate time offered, but also since ***he said it what was written made it appear that it could be ethically improper to represent me***.

These same charges by Grugan were placed by motion into the court record when a second firm, Owens, Barcavage, and McInroy, entered their appearance on my behalf on March 30, 2010. At the same time that Owens, Barcavage, and McInroy made their appearance, they made a motion to enlarge case management deadlines. (docket Doc. 132).

The case effectively ended the next day, on March 31, 2010, following an order by Judge Savage denying an extension of discovery deadlines, citing objections of the defendants. Those objections were made in the motion noted above by Defense Counsel Grugan, who asserted, echoing the judge, that my claims were brought frivolously and improperly. Grugan had even threatened, in a letter issued just prior to the motion, to sue any counsel who entered the case on my behalf (see above). Yet the bases for Grugan's statements were strongly contradicted in the court record or otherwise misrepresented

(see Affidavit of Misconduct Concerning Defense Counsel John C. Grugan). Therefore, it seemed as though the judge and defense counsel were working in concert, most importantly with respect to making unfounded claims that the case was frivolous.

In my discussions in the days prior to March 31, 2010, with the Owens firm as they considered the case, it had been noted that the minimum depositions we would need to proceed (in very nonideal fashion) would be those of former Defendant Kmiec and of Defendant Holloman's former student, Dr. Brian Rubin. As those two parties had delayed making themselves available for depositions until just after the close of fact discovery on April 9, 2010, we believed that with a minimum of a two-week extension, we would have been able to obtain those two depositions.

It would have been very highly desirable to conduct other depositions, e.g. of several of Defendant Holloman and Kmiec's personnel, officials at former Defendant Thomas Jefferson University, and others, so more time was requested. It was also discussed that were we not to get the minimum time necessary to proceed with a minimal discovery, we would withdraw the case.

However, given Judge Savage's statements during the March 9, 2010 hearing that some time extension would be provided to new attorneys, as well as the apparent offer of 60 days to Attorney West, there was absolutely no reason to believe that we would not be able to proceed with the case, including with depositions beyond the minimal.

Nevertheless, on March 31, 2010, Judge Savage issued an Order which stated (emphasis added):

> "AND NOW, this 31st day of March, 2010, upon consideration of the Motion of Plaintiff, Robert Bauchwitz, M.D., Ph.D., to Enlarge Case Management Deadlines (Document No. 132), ***the defendant's objection*** and ***the history of this case***, it is ORDERED that the motion is DENIED."

At the time I learned of the Court's denial of the second motion to extend the case management deadlines, on March 31, 2010, I was at the law firm of the remaining defense counsel, Ballard Spahr, and about to start my second deposition in the case. This second deposition had been initially scheduled, *sua sponte*, by Judge Savage (see above). The shock and surprise to me and my attorneys from the denial of *any* extension of discovery deadlines was very substantial.

On March 31, 2010, immediately upon learning of the Motion to Extend Case Deadlines having been denied, I wrote in my notes as Attorney Bolden spoke that he considered this to be a sign of ***extreme prejudice against the plaintiff***.[35]

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[35] Consistent with their earlier argument in a motion to extend discovery deadlines:

> "Moving counsel respectfully submit that, under the circumstances, imposing the drastic sanction of dismissal with prejudice on the basis that Plaintiff cannot proceed *pro se*, without affording him a reasonable opportunity to retain new counsel, upon the withdrawal of existing counsel, would

Attorney Owens told me that he and his partner were so shocked by Judge Savage's having denied the motions to extend the case deadlines that they did searches to determine if there was any connection between Savage and [defendant] Cornell. Owens later told me "***You got a bad judge***".

I believed that what Judge Savage had done was an abuse of discretion and should be appealed, but both law firms argued against continuing with the case. As I noted in a subsequent letter to Attorney Owens to summarize the events of March 31, 2010:

> "Bolden and the other three attorneys representing the Plaintiff strongly advised the Plaintiff to withdraw the case based upon the reasoning that even if an appeal were won on the basis of "abuse of discretion" by the judge, his willingness to act in so biased a fashion made it seem almost inevitable that he would rule against the Plaintiff at the next summary judgment opportunity. Furthermore, if the judge was able to produce by any means an outcome in which the Plaintiff had lost the case, the defendants could apply for relief of their legal costs, which all four attorneys for Plaintiff felt certain he would grant. The amount was estimated in the hundreds of thousands of dollars.
>
> Therefore, attorneys Owens, McInroy, Bolden, and Ferroni all strongly counseled Plaintiff on March 31, 2010 to immediately withdraw the case, as it would be better to have no real result than one which would be very likely damaging to the Plaintiff. Based on this advice, Plaintiff withdrew the case."

Instead of a second deposition, I was questioned as to the "voluntary" dismissal. Two points are of note:

> i. First, I stated, "In light of the Court's recent decision, I am left with no alternative. And I have decided to withdraw the case."
>
> ii. Defense counsel Grugan thereafter stated, "Do you understand that you are not going to be able to proceed with any of those claims in any form thereafter?" To this I answered, "Yes".

It was apparent that the decision to proceed was in fact not "voluntary", as I cited the action by the Court, which I considered then and now to have been coercive and an abuse of discretion. More importantly, at no time thereafter, until I spoke with another attorney (Rohn) in January of 2011 who was bringing motions to recuse against Judge Savage, was I aware of the possibility that I could attempt to have the "voluntary" case

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amount to ***a manifest injustice***, particularly given that a timely request for modification of the Scheduling Order has been made." (Document No. 127, p.2, of March 8, 2010).

dismissal vacated so that its merits could be heard. More troubling is that neither my attorneys nor Defense Counsel Grugan told me on March 31, 2010 or any time thereafter anything about, not only **Fed. R. Civ Proc. 60(b)**, but also not **PAED local civil Rule 41.1(b)**, which concerns dismissals of exactly the type at issue here. The latter rule states:

> (b) Whenever in any civil action counsel shall notify the Clerk or the judge to whom the action is assigned that the issues between the parties have been settled, the Clerk shall, upon order of the judge to whom the case is assigned, enter an order dismissing the action with prejudice, without costs, pursuant to the agreement of counsel. Any such order of dismissal may be vacated, modified, or stricken from the record, for cause shown, upon the application of any party served within ninety (90) days of the entry of such order of dismissal.

Later in April, 2010, I contacted Attorney Ferroni and told him that I did not think the settlement had been the correct decision. He told me that those who settle often feel that way, but he did *not* tell me about any option by which I could consider vacating the settlement.

Therefore, I would characterize what was stated by Defense Counsel Grugan as an "understanding" on March 31, 2010, to have been, at best, a misunderstanding, and most likely a very deliberate withholding of important information regarding my options.

What concerned me greatly after the dismissal was why the Court would have completely prevented any further discovery, despite its statements on the record that it would allow some time, and its apparently willingness to have done so for Attorney West. I wrote the following to Attorney Owens to ask if at any time in communicating with the Court prior its release of its Order of March 31, 2010, his firm had informed the Court that if no time (or less than a minimal time, as specified below) were given we had planned to withdraw:

> "I still do not understand how Savage came to provide absolutely no time for additional discovery when his clerk led West to believe he could have 60 days, and when Savage was on the record telling me in a hearing that he would negotiate to provide some additional discovery time to new attorneys. The reality is that even a one to two week extension might have allowed the depositions of Kmiec and Rubin. Could Savage have feared your entry that much compared to West? Alternatively, was Savage ever given any indication there might be conditions under which I would withdraw the case?"

To which Attorney Owens responded:

> "I cannot possibly fathom any reason whatsoever why additional time was not granted. I cannot speak to statements made or promises given before I

was involved. Savage WAS NOT given any indication of any conditions whereby you would be withdrawing the case."

The question as to why no time for new counsel to perform depositions was provided remains unanswered.

The case was dismissed pursuant to Court Order of April 1, 2010.

Back to TOC.

III. CASE MERIT

What I believe was lost in the longstanding bias by Judge Savage against this case was a reasonable opportunity to make an assessment of its merits. Based on the information that I was able to obtain from the very limited paper discovery that had been performed, the original experts reassessed the case (see **Expert_Report_1.pdf** and **Expert_Report_2.pdf**)[36]. Both have served as NIH grant reviewers and neither was paid for any of their reviews. To summarize their final assessment of the merits of the case[37]:

1. Based on the evidence and the standards of intent provided in this document, ***do the allegations in your judgment have merit***? In other words, ***does the preponderance of the evidence suggest that the defendants have fabricated or falsified scientific claims***?

    Expert Reviewer 1: Yes.
    Expert Reviewer 2: **YES. Clearly the data presented includes a demonstration of data fabrication and falsification of scientific claims. I would suggest that there is a dangerous mix going on here: Out and out fraud together with ignorance of the truth and selective use of facts for the expressed purpose of substantiating a story(ies) that allowed the perpetrators to secure tangible assets (e.g., grant funding) as well intangible assets (e.g., standing in the scientific community).**

2. Do you believe that it is more likely than not that H and K were ***acting in concert or conspiring***[38] to portray their claimed "R1" K-specific strand exchange protein as emanating from the *R2* gene?

[36] For a more complete presentation of the merits including the new evidence, see Affidavit of Merit.
[37] With respect to the first two allegations only. There was no opportunity under the circumstances to obtain new evidence regarding the third allegation, so these experts did not review it again here.
[38] Of great concern to me was that Judge Savage had dismissed two defendants from the case based on his summary judgment analysis that their grant submissions had fallen outside the statute of limitations; ***yet one of those defendants, Eric Kmiec, was named as a conspirator in the remaining grant at issue***.

Expert Reviewer 1: This seems likely.
Expert Reviewer 2: **This is a difficult question to resolve with the data available. Several possibilities exist: (1) H[39] was clearly in a position of power and, in turn, seniority relative to K. Did H coerce K into doing things with threats or implied retribution? (2) Did H recognize K's willingness (either out of fear, stupidity, or simply bad judgment) to do what H wanted and took advantage of this situation at K's expense. (3) Both H and K are perpetrators with motives unlinked to each other. That is, they didn't work in concert but each perpetrated fraud for their own self interests. (4) The data doesn't rule out the grand conspiratory theory that H and K commited fraud and/or fabrication together in an organized and deliberate fashion. As I noted earlier, the available data would support all of these possibilities. My opinion is that the relationship between H and K started out as (2) and progressed to either (3) or (4).**

3. If you were a member of an NIH scientific review committee (study section) and you were made aware of any of the information presented here as a grant reviewer, ***would it have had a significant negative impact on your scoring of the grants*** at issue from the applicants/defendants, H and K?

Expert Reviewer 1: Yes.
Expert Reviewer 2: **YES. This level of evidence would sway me not to even score such a grant in the current funding climate. That is, the level of apparent malfeasance and/or open questions regarding the data and prospective conclusion would immediate disqualify this grant for further review.**

4. If the evidence presented were true and complete, would you find that the preponderance of the evidence indicated that the defendants had more likely than not made ***intentional false claims*** to the government?

Expert Reviewer 1: Yes.
Expert Reviewer 2: **Again, clearly the preponderance of evidence suggests that the defendants on more than one occasion made intentional false and misleading statements to the government.**

Therefore, I believe that Judge Savage became so biased against my case ***"that his fair and impartial judgment was impossible***", as Attorney Rohn has argued in her Motion to Recuse. I do not believe that such judicial prejudice serves the interests of justice.

---

[39] Discovery evidence was anonymized prior to expert review. "H" was defendant William K. Holloman and "K" was his former student Eric B. Kmiec.

I, Robert P. Bauchwitz, signed this affidavit on __________ at Hershey, PA.

____

Robert P. Bauchwitz

SUBSCRIBED AND SWORN TO BERFORE ME on __________ at Hershey, PA.

Back to TOC.

ADDENDUM

The above was initially written in January 2011 to be of assistance to an attorney who was presenting to Judge Savage a motion to recuse himself from involvement with several of her cases. However, ***it is important to note*** that in my action, what appeared to be unprofessional or improper behavior was not solely the province of Judge Savage.

Regarding the very first attorney I had contacted in Philadelphia about taking the case, **Marc Raspanti**, after review of the case, Attorney Owens wrote:

> "Raspanti clearly took information from you that was confidential. You obviously had the belief that the information was confidential and privilege[d]. Raspanti ultimately referred your case to another attorney [Poserina] and later, possessing what was labeled and concluded to be confidential information, ***took it upon himself and his firm to defend a Defendant on the very claims he reviewed with you as Plaintiff***. This is unethical and clearly if the information you have supplied is accurate, amounts to a violation of the Professional Rules of Attorney Conduct."[40]

Judge Savage released Raspanti's clients from the case in his December 1, 2009 orders. This action remained inexplicable to me, since those Defendants were ***still listed as defendant conspirators on the remaining claims***, i.e. those which had not been dismissed based on the statute of limitations. My attorneys did not disagree this was a problem, but nevertheless never made any attempt known to me to address this with

[40] His conclusion that Attorneys McNamara, Bolden, and Ferroni had likely committed malpractice, at least to the extent that **I should consider bringing an action** against them, was noted in footnote 39 and is reprised here: Attorney Owens stated in writing to me that, after review of the record, including correspondence between me and my attorneys during discovery, he had come to the conclusion that I should consider **a legal malpractice action** based on: "***the utter lack of pursuit of proper discovery by your final attorneys [McNamara, Bolden, and Ferroni]***". "Tom McNamara, of course, would be a target for a legal malpracice action". [emphasis added]

Judge Savage. This left me with the concern that, at a minimum, we might have to try the case twice. It would also allow the remaining defendants to attempt to offload guilt to parties no longer seen as defendants and co-conspirators.

Even after Raspanti's clients had been released from the case, he inserted himself in a very damaging way in January 2010, by submitting what I believe were ***serious written misrepresentations to the Court***. I describe the details of the misrepresentations in the document: "Raspanti Harvard Document Misrepresentations to Court and McNamara to ct record A.pdf".[41]

It should also be noted that the attorney to whom Raspanti referred me, **Regina Poserina**, became my first attorney in the case. Although she initially tried to press the government, especially the DOJ, to act appropriately (see above and endnotes), once the government declined to intervene, she took some very troubling actions which seemed to me designed to dissuade other attorneys from taking the case[42]. Then, when I did find attorneys who were interested in taking the case but who needed her to act as temporary local counsel to get them admitted *pro hac vice*, she backed out just before one of them was to appear in court with me[43]. Despite having withdrawn, over a period of several years thereafter she continued to be noticed and appear on the docket as if active in the case.

At the end of the case, when I again had attorneys who were interested in entering, Defense counsel **John Grugan** sent a letter threatening to sue me, and according to one of the interested attorney, James J. West, him as well for bringing a frivolous lawsuit[44] if he made an appearance in the case. In a letter of March 25, 2010 to Attorneys Bolden and Ferroni I noted:

> [Former U.S. Attorney West's] reading of the most recent Ballard Spahr letter [from Grugan of March 22, 2010 to him and the Court] is that ***they are going to sue not only me but also any attorneys who represent me***. He said that alone is not worth it, even if we were to win. I said I strongly believed it was a bluff but he replied that if so, "they've succeeded" … He also noted that ***he has been litigating for 40 years and that this was not normal behavior in a suit.***
>
> West said Grugan's letter made it appear as if representing me would be ***unethical***, and to determine this he would need to review my case files in Philadelphia for several days.

[41] It seemed to me that McNamara took advantage of Raspanti's misrepresentations to the Court by inserting them into the court record after his dismissal by me, most likely to provide a seeming basis for why he was "withdrawing". This issue is also presented in the "Raspanti_Harvard …" document.
[42] Interested counsel would cease to communicate with me after contacting Poserina.
[43] At which time he was challenged by Savage and Sullivan as to why he had relied upon information from me. See "Poserina_emails_1205.doc"
[44] Grugan based his novel assertion – made years after case litigation had been underway - not only on serious misrepresentations of the case facts, but also by reference to Savage's ORI footnote.

Grugan's clear misrepresentations, threats and outright falsehoods, too, have raised serious questions of misconduct in my mind. (See "Affidavit of Misconduct - Grugan 031011.pdf".)

Thus, I found myself in ***a very corrosive environment***. From my perspective, the case was handled in a completely one-sided manner. The extreme bias of the judge was so clear that attorneys for me seemed to give up on it, while some of the defense counsel apparently felt increasingly unencumbered to write, say, or do just about anything they wished without apparent fear of consequence. If, in fact, various attorneys did engage in misconduct or malpractice, I believe that they should be held responsible. Ultimately, however, it was Judge Savage who was the controlling factor, the person whom I believe set the tone and had the responsibility to handle the case professionally, but did not do so.

Throughout the case, lay observers had the impression that it had been "rigged". In that respect, it is worth noting how the federal government has handled prior instances of alleged science misconduct, in particular the **Gallo-Pasteur Institute** affair. Suzanne Hadley, the head of OSI stated to journalist John Crewdson of the Chicago Tribune, that:

> "There was never an iota of chance that NIH would do the honest thing. Before anything had even happened, ***the die was cast***, the decision was made. After that it was simply a matter of crafting a litigation strategy."

Thus, to a large extent, what I experienced appeared to be more of the same. In my case, that strategy seemed to be largely geared towards denial of effective or any counsel. Judge Savage was critical in this effort.[45]

The message I felt was being sent in my case was that the government would have the final say in whether to pursue science fraud cases, and that the False Claims Act would not be a likely avenue to get around government misfeasance, nonfeasance (or in the case of breaking the seal[46] by ORI, possible malfeasance).[47]

Congress seemed to be of the belief that by merely taking the OSI out from the control of NIH that efforts against science fraud would somehow function in an adequate manner. However, I believe that this case, and the general function of ORI (the successor to OSI), shows that this action by Congress did not adequately address the inherent conflict of interest of having an agency serve clients, such as the universities, for whom they would also be required to provide misconduct oversight functions[48]. Repeatedly, the response of ORI, including in my case, was to transmit questions about misconduct to the

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[45] It may be worth noting, however, how closely Savage seemed to work with Philadelphia Assistant U.S. attorney Gerald Sullivan towards this end.

[46] By contacting the Defendants.

[47] It appeared to be selective prosecution based on the self-interest of the supposed regulators; ORI would not take a risk of challenging their "client" Cornell unless Cornell agreed. Today such regulators are often described as "captured".

[48] The massive financial losses from allowing accounting firms to serve dual functions for corporations has already been well described and to some extent addressed by the Sarbanes-Oxley and related law.

potential defendants[49]. If the institution decided not to act, in general, the matter would die, as apparently was the case not only after I contacted OSI in 1990, but also after I contacted ORI in 1995. The results, it seemed to me, would almost entirely depend on the integrity of the institution[50].

Regardless of any government dysfunction, I believe that Judge Savage was of central importance in my case because he was in the primary position of responsibility to ensure that a fair hearing was made of the merits of the case. Instead, he seemed to act with, or on, the attorneys in ways which corrupted the process and made it essentially impossible for me to get a fair hearing.

Therefore, if the information presented here, or anywhere in the court record, or in any other location or form[51], provide adequate support to reopen my case, then I want to do that. Attorney Rohn told me that this might be accomplished by Fed R. Civ. Proc. Rule 60(b), but I feel that it will be important to obtain the assessment of counsel who are expert in judicial (and attorney) misconduct to determine how such factors might impact reconsideration of the case.

I believe that the case, if aggressively pursued, will settle for a reasonable sum (meaning hundreds of thousands of dollars rather than the tens of thousands apparently offered), and if appeals are taken successfully based on the statute of limitations and inappropriate release of conspirators, much more. It should be noted that the DOJ ("main justice") contacted my attorneys to note their interest in appealing the case with respect to the statute of limitations. Therefore, from a legal standpoint, I believe that there would be federal government support for the case; they had previously written several briefs in support[52].

Furthermore, should there be a possibility of reopening the case, I would very much wish to have strong consideration given to having Judge Savage recused from it.

If there is no way to make a legitimate case to reopen the action, then I wish to proceed with misconduct and malpractice claims to the extent those are appropriate.

Finally, and very importantly, I have a substantial interest in obtaining the original records of the hearings described above, should that be my right under federal law (28 U.S.C. 753).

[49] Including apparently to a potential defendant researcher (Holloman) when the case was under seal, as well as the universities upon contacts from me and other whistleblowers.
[50] as well as the publicity surrounding the case and the rank/value to the university of the individuals involved
[51] All my emails and notes are available, as are all documents produced during discovery.
[52] In general, I believe that for those interested in *qui tam* cases, in particular those involving science fraud and government grants, pursuit of this case will be valuable. I believe that Judge Savage's memorandum opinion about the statute of limitations, and also the need to explicitly repeat false statements in Progress Reports, are very flawed and worth challenging.

In conclusion, I believe that this case was brought against defendants with a long track record of concern about their veracity. Since the ORI has been played as such an important determinant as to whether I (or perhaps any other scientist) can proceed with a False Claims Act case[53], perhaps it would be appropriate with end with their words on the scientists involved in this case:

> "Dr. Bauchwitz' complaint identifies three false claims, as identified above. ***ORI notes that these false claims deal with only a very small portion of the much larger scope of possible misconduct issues that have been linked to Drs. Kmiec and Holloman*** (see footnote 8). The reason for this is that Dr. Bauchwitz has limited his claims to issues that he has direct knowledge of. He has made a solid case that the 'story' on *Ustilago maydis* recombination genes, their associated proteins and their enzymatic properties has shifted dramatically over the past 20 years. Many scientists working in this area appear to have believed that erroneous claims have been consistently published by Drs. Holloman and Kmiec."[54] [emphasis added]

I have obtained the most solid evidence to date of the fraudulent behavior of these people, such that it would well serve the interests of justice for me to have my day in court to present what I have learned.

Thank you.

Robert Bauchwitz M.D., Ph.D.
Hershey, PA

January 31, 2011

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[i] **Correspondence with Attorney Poserina regarding release of the ORI documents**

Poserina (letter of July 29, 2005: "I think this case could be severely hampered by the ORI memos. … They could be wrong, ***and probably are wrong,*** but these memos will be insurmountable hurdles in the hands of the defense attorneys." [emphasis added]

> To which I responded: "Until the TAF conference (October 26 – 28, [2005]), I felt that these memos would be part of the prosecutors' "work product" or other confidential information provided to them. Even if they were released in court, I have repeatedly told you that given my response to the ORI memos, and the testimony from experts in biology and fraud investigation

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[53] A position which I believe eviscerates the purpose of that act. Nevertheless, note that in this particular case, I argue that the ORI did not conclude what the judge claimed it did.

[54] For a more general overview, see Plaintiff's_First_Declaration_081507.pdf.

which I have also repeatedly told you I intend to introduce at trial, I am not overly concerned about the ORI memos.

"Indeed, at the most recent TAF conference, you and I were both in the audience when Michael D. Granston of the Department of Justice gave a talk in which he said that **the seal is "indefinite for the government's documents on the case".** He noted that this was "good for the relator who wants to proceed despite problems with the case in the government's view" – that will NOT come out from under seal".

"[Attorney] **James A. Moody** also said, in an email to me and Joe Black of November 27, 2005: "**Re ORI, first, their docs back and forth to you and the US Attys would not normally be discoverable. They would be treated as work product or attorney-client communications and privileged.**"

…
To the above, I added:

""P.S. Did you see the 60 Minutes piece on Vioxx last night? **Where would that case have gone if the plaintiffs were required to submit their claim to the FDA for review and approval (as we have had to do with ORI)?** I am making no judgment about the result in the Vioxx case here **except to point out how dramatically different a conclusion a jury produced than what the FDA official stated on the program.**" (email from R. Bauchwitz, August 29, 2005)."

[ii] In addition, the Court in *Barefoot* cited the Pennsylvania Rules of Professional Conduct, Rule 1.16(b) indicating that an attorney can withdraw if:

"withdrawal can be accomplished without material adverse effect on the interest of the client, or if:
(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services …
(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(6) other good cause for withdrawal exists.

There were no obligations to Poserina that I failed to complete, nor was there any animosity, (although the written record shows that I did not agree with her claimed reasons for wanting to withdraw; see also above). As for an "unreasonable" financial burden, it would seem that she should have stated from the beginning that if the government declined to intervene she would be financially unable to proceed. Had this been made clear to me, I would not have retained her.

What was clear was that Ms. Poserina was willing to remain in the case if the government had intervened. By this I concluded that, aside from the financial benefit to her, she understood that if the government did stay directly involved with the case, the ORI documents most likely

would not have been released, or if they had, they would not have played a major role in the case.

Nevertheless, I remained certain of the validity of my claims and also highly skeptical that additional evidence would not be found. Therefore, I endeavored to proceed.

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[iii] **Quotes from Gilbert Letter concerning constructive knowledge and acceptance of defense claims when direct evidence was available**

The following is quoted from the Judge Savage's memorandum opinion on summary judgment of December 1, 2009:

> "***Just five days later, on February 18, 1995***, Bauchwitz made the same allegations of fraud that he is now raising when he drafted a letter to his former employer, Dr. Gilbert. ***Specifically, in the letter***, Bauchwitz stated that Holloman omitted this relevant rec2-1 sequence from the 1994 article so that he could report that the rec2-1 gene produced an active protein." (Citing a defense memorandum in footnote 74; the actual letter was available as Exhibit Q of docket document 86.) [Emphasis added.]

However, the letter I wrote, which was introduced into the court record as an exhibit (see immediately preceding), showed the following (with emphasis added):

1) I wrote the letter to Dr. Gilbert **in 1997** (dated May 27), ***not five days after speaking to Rubin in 1995***.

2) What I actually wrote to Gilbert about my *rec2-1* DNA sequence:

"Since my conversations with the M.D./Ph.D. student referred to above, I have sequenced the region upstream of the 5' deletion breakpoint of the rec2-1 allele. There are no in-frame methionines upstream of the breakpoint before stop codons are found, ***substantially reducing*** the likelihood that a protein is expressed from the rec2-1 allele." [It should say "an active protein", as the defense counsel intuited, but I did not allege a fraud from this finding, nor did I make mention of anything ommitted from a publication.]

3) What I stated about potential fraud:

"I need your assistance on a matter which ***may*** involve scientific fraud ... it is not clear that a university investigation would be seriously pursued since **no evidence of fabricated data has been revealed ...**" [The topic of the letter was the entire "Rec1 is Rec2" situation.]

4) What I proposed:

"several of the claims made by Kmiec and Holloman should be amenable to **independent scientific testing ...** I do not have the money or time to do this alone ... I do not believe that this situation should continue as it has now for almost a decade without **an unreproachably independent assessment ...**" [In particular, I focussed on reproducing the claimed biochemical activities.]

5) The possible outcomes I noted:

"Furthermore, I believe that if the results are controversial, a single contrary voice will be easily overwhelmed in the current environment in which allegations of impropriety in science are handled **... If the results are supportive of Kmiec and Holloman, the results should also be communicated publicly; if what they say is true, this effort certainly cannot hurt them.**"

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"An application of judicial power that does not rest on facts is worse than mindless, it is inherently dangerous."

District Judge Jed S. Rakoff in rejecting a settlement agreement between Citigroup and the S.E.C. (S.E.C. v Citigroup Global Markets, as quoted from the New York Times, Edward Wyatt, November 28, 2011).