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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRENT ALLEN WINTERS, et al.,

Plaintiffs,
v.

No. 2:09-cv-00522 JAM KJN PS

FINDINGS AND RECOMMENDATIONS

DELORES JORDAN, et al.,

Defendants.

_____/

Presently before the court is defendant Michael Armstrong’s (“Michael Armstrong”) motion to dismiss plaintiffs’ Third Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (See Dkt. No. 82, 85.) The court submitted this matter without oral argument.¹ (Dkt. No. 102.) The undersigned has fully considered the parties’ briefs and the record in this case and, for the reasons that follow, will recommend that: (1) Michael Armstrong’s motion be granted, and (2) all of plaintiffs’ claims alleged against Michael Armstrong be dismissed with prejudice.

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¹ This action proceeds before this court pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1), and was reassigned by an order entered February 9, 2010 (Dkt. No. 105).

1 I. BACKGROUND²

2 Plaintiffs’ operative complaint, the Third Amended Complaint,³ is a wide-ranging,
3 25-page complaint that alleges, in eight-point font, 38 claims for relief against 61 defendants.
4 (Dkt. No. 66.) In dismissing plaintiffs’ Second Amended Complaint (Dkt. No. 15), which
5 spanned 163 pages and 607 numbered paragraphs, the court ordered that plaintiffs’ Third
6 Amended Complaint could not exceed 25 pages and must conform to Federal Rule of Civil
7 Procedure 8(a), including the requirement that the pleading contain a short and plain statement of
8 the claims alleged instead of recounting all of the evidence and arguments in support of those
9 claims. (Dkt. No. 56 at 3.) The court had stated that “[t]his will be plaintiffs’ last chance to
10 comply.” (Id.)

11 The allegations in the Third Amended Complaint that are specific to Michael
12 Armstrong are few. More generally, the claims against Michael Armstrong arise out of an
13 underlying internecine family dispute between the Winters family and defendant Virginia
14 Armstrong. The Third Amended Complaint alleges that in or around the year 2002, plaintiff
15 Susan Winters’ elderly parents, Joe and Virginia Armstrong, encouraged plaintiffs Susan and
16 Brent Winters to sell their house in Illinois and move to Nevada City, California, to live with the
17 Armstrongs. (Third Am. Compl. at 4.) Plaintiffs allege that before plaintiffs returned to
18 California, Joe Armstrong passed away and that Virginia Armstrong eventually transferred

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20 ² In an order dated September 24, 2009, the court ordered that all references to the minor
21 plaintiffs in this action—Joy Winters, Clark Winters, and Jill Winters—be stricken from
22 plaintiffs’ Third Amended Complaint because those minors were not represented by an attorney
or attorneys. (Dkt. No. 80; see also Dkt. Nos. 68, 89 at 2 n.1.)

23 ³ Plaintiffs filed the operative complaint under the title “Amended Complaint,”
24 notwithstanding this court’s order that it be labeled “Third Amended Complaint.” (Compare
25 Dkt. No. 66 with Dkt. No. 56 at 4.) The Third Amended Complaint supersedes plaintiffs’
26 “Second Amended Complaint.” (Dkt. No. 15.) As the court noted in a prior order, the Second
Amended Complaint represented plaintiffs’ first amendment of the original complaint (Dkt.
No. 56 at 1 n.1), and the operative Third Amended Complaint represents plaintiffs’ second
amendment of the original complaint.

1 properties, including the residence at 11318 Via Vista in Nevada City, California, from the
2 Armstrong Living Trust dated July 29, 1994, to the Virginia Armstrong Living Trust. (Id.)
3 Plaintiffs allege that Virginia Armstrong took these actions due, in part, to the undue influence of
4 defendants Valerie Logsdon, who was Virginia Armstrong’s attorney, and Michael Armstrong,
5 Virginia Armstrong’s son, who is an attorney. (Id.)

6 The relationship between Virginia Armstrong and plaintiffs resulted in several
7 proceedings in the Nevada County Superior Court. Relevant here, Logsdon, acting as Virginia
8 Armstrong’s attorney, filed an unlawful detainer action on her client’s behalf seeking to evict
9 members of the Winters family from Ms. Armstrong’s home. (Third Am. Compl. at 5; Req. for
10 Judicial Notice, Ex. 1, Dkt. No. 75.) In connection with the unlawful detainer action, and
11 relevant to claims alleged against Michael Armstrong, plaintiffs allege that an Assistant United
12 States Attorney from Illinois wrote a letter to defendant Logsdon “offering any aid to help her
13 evict the Winters from their home in Nevada City, California.” (Third Am. Compl. at 6, 21.)
14 Plaintiffs further allege that Michael Armstrong caused declarations or other documents to be
15 filed in connection with the issuance of a restraining order, which was favorable to plaintiff
16 Susan Winters, by a judge of the Nevada County Superior Court. (Id. at 6.)

17 Plaintiffs’ Third Amended Complaint alleges the following claims against
18 Michael Armstrong: abuse of process (claim 6); trespass to chattels (claim 13); violation of 42
19 U.S.C. § 1983 (claim 14); civil conspiracy in violation of 42 U.S.C. § 1983 (claim 15); civil
20 conspiracy (claim 18); “Slander, Libel, and Slander & Libel Per Se” (claim 21); conspiracy to
21 violate the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. 1962(d)
22 (claim 31); loss of consortium (claim 36); and intentional infliction of emotional distress (claim
23 38). In response to the filing of the Third Amended Complaint, Michael Armstrong filed a
24 motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. Nos. 82, 85.)

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1 There are several, separately-filed motions pending before the court. Despite the
2 court's previous order that plaintiffs file a separate opposition to each pending motion (Dkt.
3 No. 89 at 6), plaintiffs filed a consolidated opposition. (See Dkt. No. 99.) Plaintiffs filed their
4 opposition on January 13, 2010, despite a court-ordered deadline of January 6, 2010.
5 (Compare Dkt. Nos. 89 with 99.) Although plaintiffs' opposition was untimely and need not be
6 considered, the undersigned has considered that opposition in arriving at the findings and
7 recommendations that follow.

8 II. LEGAL STANDARDS

9 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
10 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
11 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard
12 of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and
13 plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
14 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "A complaint may survive a
15 motion to dismiss if, taking all well-pleaded factual allegations as true, it contains 'enough facts
16 to state a claim to relief that is plausible on its face.'" Coto Settlement v. Eisenberg, 593 F.3d
17 1031, 1034 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949
18 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the
19 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
20 Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Iqbal,
21 129 S. Ct. at 1949).

22 The court accepts "all facts alleged as true and construes them in the light most
23 favorable to the plaintiff." County of Santa Clara v. Astra USA, Inc., 588 F.3d 1237, 1241 n.1
24 (9th Cir. 2009). The court is "not, however, required to accept as true conclusory allegations that
25 are contradicted by documents referred to in the complaint, and [the court does] not necessarily
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1 assume the truth of legal conclusions merely because they are cast in the form of factual
2 allegations.” Paulsen, 559 F.3d at 1071 (citations and quotation marks omitted). The court must
3 construe a pro se pleading liberally to determine if it states a claim and, prior to dismissal, tell a
4 plaintiff of deficiencies in his complaint and give plaintiff an opportunity to cure them if it
5 appears at all possible that the plaintiff can correct the defect.⁴ See Lopez v. Smith, 203 F.3d
6 1122, 1130-31 (9th Cir. 2000) (en banc). In ruling on a motion to dismiss pursuant to Rule
7 12(b)(6), the court “may generally consider only allegations contained in the pleadings, exhibits
8 attached to the complaint, and matters properly subject to judicial notice.” Outdoor Media
9 Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks
10 omitted).

11 III. DISCUSSION

12 A. Plaintiffs’ Section 1983 Claims Against Michael Armstrong

13 Plaintiffs sued “All Defendants” for violation of 42 U.S.C. § 1983 (claim 14), for
14 engaging in a conspiracy to violate 42 U.S.C. § 1983 (claim 15), and for “civil conspiracy,”
15 which appears to be an additional claim alleging a conspiracy to violate Section 1983. (See
16 Third Am. Compl. at 19-20.) Michael Armstrong moves to dismiss these claims for failure to
17 state a claim on the grounds that: (1) plaintiffs have not alleged that he participated in any act that
18 deprived plaintiffs of their constitutional or statutory rights, and (2) plaintiffs have alleged no
19 specific facts that he acted under the color of law. His arguments, although tersely stated, are
20 persuasive.

21 “Section 1983 imposes civil liability upon an individual who ‘under color [of state
22 law]... subjects or causes to be subjected, any citizen of the United States...to the deprivation of
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24 ⁴ Although plaintiffs are proceeding without counsel in this action, the undersigned notes
25 that plaintiff Brent Winters is alleged to be a licensed, practicing attorney. (Third Am. Compl. at
26 21 (referring to Brent Allan Winters as “a licensed attorney”); see also Dkt. No. 89 at 13
(alleging damage to “Brent Allan Winters’s law practice”).)

1 any rights, privileges or immunities secured by the Constitution and laws.” Franklin v. Fox,
2 312 F.3d 423, 444 (9th Cir. 2002) (citing 42 U.S.C. § 1983). “To state a claim under § 1983, a
3 plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of
4 the United States was violated, and (2) that the alleged violation was committed by a person
5 acting under the color of State law.” Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th
6 Cir. 2006) (citing West v. Atkins, 487 U.S. 42, 48 (1988)); accord Nurre v. Whitehead, 580 F.3d
7 1087, 1092 (9th Cir. 2009). Conclusory allegations of a violation of Section 1983 or a
8 conspiracy to violate Section 1983 will not survive a motion to dismiss. See, e.g., Simmons v.
9 Sacramento County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003) (affirming dismissal of
10 plaintiff’s second amended complaint as a result of plaintiff’s “conclusory allegations” of a
11 conspiracy to deprive him of his constitutional rights in violation of Section 1983).

12 Plaintiffs’ allegations in support of their Section 1983 claims are conclusory and,
13 on this basis alone, claims 14, 15 and 18 should be dismissed as to Michael Armstrong. For
14 example, plaintiffs do not allege which of their specific constitutional rights were violated and
15 how specifically Michael Armstrong participated in such a violation. Nevertheless, the
16 undersigned will address additional grounds why plaintiffs’ claims fail as alleged against Michael
17 Armstrong.

18 As to claim 14, alleging that all defendants, including Michael Armstrong,
19 individually violated plaintiffs’ constitutional rights, plaintiffs allege:

20 Paragraphs above incorporated by reference. Defendants, by their actions
21 and acting under the color of law, subjected Plaintiffs, and caused
22 Plaintiffs to be subjected, to the deprivations of their rights, privileges, and
23 immunities secured by the Constitution and laws of the State of California
24 and of the United States of America, Plaintiffs claim damages under 42
25 U.S.C. § 1983 for their injuries set forth above.

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1 (Third Am. Compl. at 19.)⁵ In addition to the conclusory nature of plaintiffs’ allegations, their
2 claim that Michael Armstrong, as an individual, violated plaintiffs’ rights fails because plaintiffs
3 have not alleged any constitutional right that was purportedly violated. Moreover, dismissal is
4 warranted because Michael Armstrong is a private actor and thus was not acting under color of
5 state law. “To determine whether a private actor acts under color of state law, [the court] must
6 evaluate whether the alleged infringement of federal rights is ‘fairly attributable’ to the
7 government even though committed by private actors.” Florer v. Congregation Pidyon
8 Shevuyim, 603 F.3d 1118, 1122 (9th Cir. 2010) (citation omitted) (stating, in addition, that
9 “[t]here must be such a close nexus between the State and the challenged action that seemingly
10 private behavior may be fairly treated as that of the State itself” (citation and quotation marks
11 omitted)). Nothing in the Third Amended Complaint or plaintiffs’ written opposition suggests as
12 much. Insofar as his individual acts are concerned, Michael Armstrong is alleged to have unduly
13 influenced his mother, Virginia Armstrong, to transfer certain trust assets from one trust to
14 another. (Third. Am. Compl. at 4.) This is the act of a private individual, not a state actor.
15 Accordingly, plaintiffs’ fourteenth claim should be dismissed with prejudice as to Michael
16 Armstrong.

17 Plaintiffs’ Section 1983 conspiracy claims, claims 15 and 18, are also fatally
18 flawed. In their fifteenth claim, plaintiffs allege that “Defendants Logsdon, Michael Armstrong,
19 Jordan, Wade, Harpainter and Ford worked in concert with Defendants from the Nevada County
20 Superior Court, Sheriff’s Department, Adult Protective Services, and other agencies.” (Third
21 Am. Compl. at 20.) However, they also allege that a state court judge entered a restraining order
22 “on his own motion.” (Id.) Additionally, plaintiffs allege that defendants Logsdon and
23 Harpainter “worked in concert with” with defendants Chelsey and Frooman. (Id.) Elsewhere in

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25 ⁵ Although plaintiffs incorporate the remainder of their complaint by reference, the rest
26 of the Third Amended Complaint and plaintiffs’ opposition to the pending motion do not suggest
exactly how Michael Armstrong individually violated plaintiffs’ civil rights.

1 the Third Amended Complaint, defendant Harpainter is alleged to have been an attorney that the
2 Nevada County Superior Court appointed for Virginia Armstrong in connection with certain
3 restraining order proceedings before that court. (Id. at 7.) Defendants Chelsey and Frooman are
4 alleged to be Assistant United States Attorneys in Illinois who were prosecuting plaintiff Brent
5 Winters, an attorney, on criminal charges and wrote a letter to defendant Logsdon offering
6 assistance with the unlawful detainer action. (Id. at 6, 24.) Plaintiffs' eighteenth claim is largely
7 redundant of the fifteenth claim, at least as it relates to allegations against Michael Armstrong.

8 “A private individual may be liable under § 1983 if [he] conspired or entered joint
9 action with a state actor.” Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002); see also Kirtley v.
10 Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003) (“While generally not applicable to private parties, a
11 § 1983 action can lie against a private party when he is a willful participant in joint action with
12 the State or its agents” (citation and quotation marks omitted).). “To establish liability for a
13 conspiracy in a § 1983 case, a plaintiff must demonstrate the existence of an agreement or
14 meeting of the minds” to violate constitutional rights.” Crowe v. County of San Diego, 593 F.3d
15 841, 875 (9th Cir. 2010) (citation and quotation marks omitted). Although the Supreme Court
16 has articulated several alternative tests for determining whether a private individual's actions
17 amount to state action, Franklin, 312 F.3d at 445, the “joint action” test is relevant here. The
18 joint action test applies where, as here, state officials and private parties are alleged to have acted
19 in concert to effectuate a particular deprivation of constitutional rights and “focuses on whether
20 the state has so far insinuated itself into a position of interdependence with the private actor that
21 it must be recognized as a joint participant in the challenged activity.” Id. (citation, quotation
22 marks, and modifications omitted). “The plaintiff must show ‘an agreement or meeting of the
23 minds to violate constitutional rights,’ and ‘[t]o be liable, each participant in the conspiracy need
24 not know the exact details of the plan, but each participant must at least share the common
25 objective of the conspiracy.’” Crowe, 593 F.3d at 875 (quoting Franklin, 312 F.3d at 441).

1 As an initial matter, it bears repeating that plaintiffs’ allegations regarding a
2 conspiracy between state actors and private actors are vague and conclusory and, for that reason
3 alone, cannot survive the motion to dismiss. See Simmons, 318 F.3d at 1161 (“Plaintiff’s
4 conclusory allegations that the lawyer was conspiring with state officers to deprive him of due
5 process are insufficient.”); Degrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000)
6 (stating that “a bare allegation of . . . joint action will not overcome a motion to dismiss” (citation
7 and quotation marks omitted)); Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991) (stating
8 that “[c]onclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a
9 claim under the Civil Rights Act” (citation and quotation marks omitted, modifications in
10 original)). It also bears repeating that plaintiffs have not alleged which of their constitutional
11 rights has been violated.

12 Plaintiffs have not alleged facts constituting a plausible claim of a conspiracy
13 between Michael Armstrong and state actors to deprive them of their constitutional rights.
14 Although, plaintiffs vaguely allege that Michael Armstrong conspired with others, the allegations
15 in the Third Amended Complaint indicate a lack of interdependence between state and private
16 actors. As far as the unlawful detainer action is concerned, plaintiffs only allege that Assistant
17 United States Attorneys Frooman and Chelsey offered aid to defendant Logsdon. An offer of
18 assistance does not suggest the level of interdependence that will support a Section 1983
19 conspiracy under a joint action theory. In terms of joint action related to the entry of certain
20 restraining orders, plaintiffs allege joint action, but also allege that Judge Anderson of the
21 Nevada County Superior Court acted on his “own motion.” None of plaintiffs allegations
22 suggest a common goal of depriving plaintiffs of their rights, or any interdependence among the
23 alleged members of the conspiracy. Taken together with the conclusory and vague allegations in
24 the Third Amended Complaint, plaintiffs’ conspiracy claims alleged against Michael Armstrong
25 should be dismissed.

1 B. Plaintiffs’ RICO Conspiracy Claim

2 Michael Armstrong also moves to dismiss plaintiffs’ thirty-first claim for relief,
3 which alleges that “All Defendants”—over sixty defendants including private actors, state court
4 judges and employees, law enforcement, and local agencies—conspired to commit racketeering
5 activity in violation of the RICO statute, see 18 U.S.C. §§ 1962(d), 1964(c). (See Third Am.
6 Compl. at 24.) Plaintiffs allege that all defendants in this case conspired to “maintain a federal
7 prosecution against Plaintiff Brent Winters in Illinois.” (Id.) They further allege that on July 9,
8 2002, defendant Jan Paul Miller agreed with an individual named Michael McCuskey and
9 defendant Assistant United States Attorney Frooman “to investigate and prosecute Brent Winters
10 on false charges” knowing that the presiding judge was biased. (Id.) They also allege that
11 “Agent Pogue,” who is not a defendant here, contributed to the conspiracy by testifying based on
12 “conjecture” at Brent Winters’s sentencing hearing. (Id.) In addition, they vaguely allege an
13 undefined “pattern of misrepresentation” intended to “defraud the Winters of their rights and
14 their property.” (Id.) Moreover, plaintiffs allege the “concealment of critical data,” including a
15 memorandum drafted by Judge Anderson of the Nevada County Superior Court. (Id.) Plaintiffs
16 do not allege any specific facts with respect to Michael Armstrong.

17 “The elements of a civil RICO claim are as follows: (1) conduct (2) of an
18 enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’)
19 (5) causing injury to plaintiff’s ‘business or property.’” Living Designs, Inc., E.I. Dupont de
20 Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (citation and quotation marks omitted). “To
21 state a RICO claim, one must allege a ‘pattern’ of racketeering activity, which requires at least
22 two predicate acts.” Clark v. Time Warner Cable, 523 F.3d 1110, 1116 (9th Cir. 2008) (citations
23 omitted). Furthermore, a plaintiff must also show that the injury to his business or property was
24 proximately caused by the prohibited conduct and that he has suffered a concrete financial loss.
25 Chaset v. Flee/Skybox Int’l, L.P., 300 F.3d 1083, 1086 (9th Cir. 2002).

1 Plaintiffs’ RICO conspiracy claim should be dismissed for several reasons. First,
2 the allegations are of such a vague and conclusory nature that they do not state a plausible claim
3 for relief under the RICO statute. Second, plaintiffs have not pled two predicate acts of
4 “racketeering activity,” as that term is defined in 18 U.S.C. § 1961(1). Third, plaintiffs have not
5 alleged a “concrete financial loss” or injury to business or property proximately caused by the
6 conspiracy. At most, plaintiffs’ opposition to Michael Armstrong’s motion to dismiss alleges
7 that the purported RICO conspiracy damaged plaintiff Brent Winters’s law practice, but provides
8 no information about the nature of the injury or a concrete financial loss. Nothing contained in
9 plaintiffs’ Third Amended Complaint or opposition brief suggests that they can amend their
10 pleading to state a plausible claim for relief. Accordingly, plaintiffs’ thirty-first claim for relief
11 should be dismissed with prejudice.

12 C. Plaintiffs’ State Law Claims for Abuse of Process and Slander/Libel

13 Plaintiffs allege that Michael Armstrong, defendant Logsdon, and several
14 defendants employed in the clerk’s office of the Nevada County Superior Court “abused process
15 of the court,” by “improperly and with malice causing false allegations to be filed in Nevada
16 County (case file #73025 *Winters v. Jordan*) against Plaintiffs.”⁶ (Third Am. Compl. at 13.) In
17 essence, plaintiffs allege that Michael Armstrong and others, who were not parties to a case
18 pending in the Nevada County Superior Court, interfered with that case by filing “declarations
19 and pleadings” in order to paint plaintiffs in a bad light. (See id.) In addition, plaintiffs allege in
20 their twenty-first claim for relief that Michael Armstrong, among others, committed “Slander,

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23 ⁶ As alleged in the Third Amended Complaint, this action in Nevada County Superior
24 Court involved plaintiffs Brent and Susan Winters’ application for a restraining order against
25 defendant Delores Jordan, a friend of defendant Virginia Armstrong. Jordan is alleged to have
26 trespassed on the residence at 11318 Via Vista, which is part of the trust property for which
Michael Armstrong is trustee, and paid to have the locks on the doors changed in order to keep
the Winters’ family members away from Virginia Armstrong. (See Third Am. Compl. at 5-6.)

1 Libel, Slander & Libel Per Se” through “false accusations, both spoken and written to the court.”
2 (Id. at 21.)

3 Michael Armstrong argues that plaintiffs’ claims for abuse of process and
4 slander/libel should be dismissed with prejudice as to him because his conduct is protected by
5 California’s absolute litigation privilege. That privilege, found at California Civil Code § 47(b),
6 provides, in part, that a publication or broadcast made as part of a judicial proceeding is
7 privileged. See also Action Apartment Ass’n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232,
8 1241, 163 P.3d 89, 95 (Cal. 2007). The California Supreme Court recently summarized this
9 litigation privilege as follows:

10 This privilege is absolute in nature, applying to all publications,
11 irrespective of their maliciousness. The usual formulation is that the
12 privilege applies to any communication (1) made in judicial or
13 quasi-judicial proceedings; (2) by litigants or other participants authorized
14 by law; (3) to achieve the objects of the litigation; and (4) that [has] some
15 connection or logical relation to the action. The privilege is not limited to
16 statements made during a trial or other proceedings, but may extend to
17 steps taken prior thereto, or afterwards.

18 Id. (citations and internal quotation marks omitted, modification in original). The California
19 Supreme Court has given this privilege “a broad interpretation” in furtherance of the purpose of
20 the privilege, which is “to afford litigants and witnesses . . . the utmost freedom of access to the
21 courts without fear of being harassed subsequently by derivative tort actions.” Id. “Any doubt as
22 to whether the privilege applies is resolved in favor of applying it.” Adams v. Superior Court,
23 2 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49, 53 (Ct. App. 1992); accord Sengchanthalangsy v.
24 Accelerated Recovery Specialists, Inc., 473 F. Supp. 2d 1083, 1087 (S.D. Cal. 2007); Lambert v.
25 Carneghi, 158 Cal. App. 4th 1120, 1138, 70 Cal. Rptr. 3d 626, 639 (Ct. App. 2008). Thus,
26 although the privilege was originally enacted with reference to claims of defamation, “the
privilege is now held applicable to any communication, whether or not it amounts to a
publication . . . , and all torts except malicious prosecution.” Rusheen v. Cohen, 37 Cal. 4th

1 1048, 1057, 128 P.3d 713, 718 (2006) (quoting Silberg v. Anderson, 50 Cal. 3d 205, 212, 786
2 P.2d 365 (1990)); see also Action Apartment Ass’n, Inc., 41 Cal. 4th at 1241-42 (noting that the
3 litigation privilege applies to claims of slander, libel, and abuse of process, among other types of
4 claims). The privilege applies “regardless whether the communication was made with malice or
5 the intent to harm” and “does not depend on the publisher’s motives, morals, ethics or intent.”
6 Kashian v. Harriman, 98 Cal. App. 4th 892, 913, 120 Cal. Rptr. 2d 576, 592 (Ct. App. 2002)
7 (citation and quotation marks omitted).

8 The litigation privilege applies to the abuse of process and slander/libel claims
9 against Michael Armstrong. Plaintiffs’ allegations in support of these claims reveal that Michael
10 Armstrong’s acts consist of communications with the Superior Court made in connection with a
11 judicial proceeding, whether by filing of declarations or documents or making statements to that
12 court.⁷ (See Third Am. Compl. at 13, 21.) The undersigned concludes that the privilege applies
13 notwithstanding plaintiffs’ objection that Michael Armstrong was not a party to the state court
14 proceedings. Although Michael Armstrong’s moving papers are not the model of clarity and do
15 not explain in great detail his role in the underlying state court litigation, application of
16 California’s litigation privilege does not turn on whether the person asserting the privilege was a
17 party to the underlying litigation; he or she need only be connected or related to the proceedings.
18 See, e.g., Castaline v. Aaron Mueller Arts, No. C 09-02543 CRB, 2010 WL 583944, at *4 (N.D.
19 Cal. Feb. 16, 2010) (unpublished) (stating that the phrase “other participants authorized by law”
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21 ⁷ For example, under California law, the “tort of abuse of process arises when one uses
22 the court’s process for a purpose other than that for which the process was designed.” Rusheen,
23 37 Cal. 4th at 1056, 128 P.3d at 718. “To succeed in an action for abuse of process, a litigant
24 must establish that the defendant (1) contemplated an ulterior motive in using the process, and
25 (2) committed a willful act in the use of the process not proper in the regular conduct of the
26 proceedings.” Id. Here, plaintiffs allege that Michael Armstrong abused the Nevada County
Superior Court’s process by filing “false allegations” contained in declarations and pleadings in a
pending case. The California Supreme Court has specifically held that the litigation privilege
applies to an abuse of process claim “alleging the filing of false or perjurious testimony or
declarations.” Id. at 1058, 128 P.3d at 719 (collecting cases).

1 includes non-parties who have a “substantial interest in the outcome of the pending litigation”)
2 (citing Costa v. Superior Court, 157 Cal. App. 3d 673, 677-78, 204 Cal. Rptr. 1, 4 (Ct. App.
3 1984)); Adams, 2 Cal. App. 4th at 529, 3 Cal. Rptr. 2d at 52 (stating that “the privilege is not
4 restricted to the actual parties to the lawsuit but need merely be connected or related to the
5 proceedings”). Here, Michael Armstrong was connected to and participated in the underlying
6 litigation, which related to the protection and well-being of his mother, by allegedly filing
7 declarations or making statements to the court. Thus, he had a logical connection to that
8 litigation.⁸ The conclusion that the privilege applies under the facts presented is further
9 supported by the fact that the California Supreme Court has given the privilege a broad
10 interpretation, and any doubt regarding whether the privilege applies should be resolved in favor
11 of applying the privilege. Accordingly, the undersigned will recommend that Michael
12 Armstrong’s motion to dismiss plaintiffs’ claims for abuse of process and slander/libel be
13 granted and that these claims be dismissed with prejudice.

14 D. Plaintiffs’ State Law Claim for Trespass to Chattels

15 Plaintiffs further allege that all defendants, including Michael Armstrong,
16 committed the tort of trespass to chattels. (Third Am. Compl. at 19.)

17 “[T]he tort of trespass to chattels allows recovery for interferences with
18 possession of personal property not sufficiently important to be classed as conversion, and so to
19 compel the defendant to pay the full value of the thing with which he has interfered.” Intel Corp.
20 v. Hamidi, 30 Cal. 4th 1342, 1350, 71 P.3d 296, 302 (2003). The California Supreme Court has
21 stated that “[t]respass remains as an occasional remedy for minor interferences, resulting in some
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23 ⁸ Michael Armstrong’s moving papers state: “Any actions taken by MICHAEL
24 ARMSTRONG were in support of the efforts taken to alleviate the Elder Abuse, Domestic
25 Violence, and other harassment and illegal acts taken by plaintiffs against his mother, VIRGINIA
26 ARMSTRONG. All actions taken by this answering defendant should be deemed legal,
privileged or based on a duty.” (Memo. of P. & A. in Supp. of Michael Armstrong’s Motion to
Dismiss at 6, Dkt. No. 85.)

1 damage, but not sufficiently serious or sufficiently important to amount to the greater tort” of
2 conversion.” Id. at 1351, 71 P.3d at 302 (citation omitted, modification in original).

3 As to Michael Armstrong, and indeed as to all defendants, plaintiffs have not
4 specified the chattel or chattels with which each defendant interfered, which in turn proximately
5 caused them harm. See id. at 1350-51, 71 P.3d at 302 (“Under California law, trespass to
6 chattels lies where an intentional interference with the possession of personal property has
7 proximately caused injury” (citation and quotation marks omitted).). Insofar as any property is
8 concerned, plaintiffs have only alleged that Michael Armstrong influenced Virginia Armstrong to
9 transfer a piece of *real property* from one trust to another. (Third Am. Compl. at 4.) This is not
10 an interference with “possession of personal property,” which appears to be the crux of the tort of
11 trespass to chattels.⁹ Accordingly, plaintiffs’ claim for trespass to chattels should be dismissed
12 with prejudice as to Michael Armstrong.

13 E. Plaintiffs’ State Law Claim for Loss of Consortium

14 In their thirty-sixth claim for relief, plaintiffs allege that “All Defendants” are
15 liable for loss of consortium. (Third Am. Compl. at 25.) Although plaintiffs incorporate the
16 remainder of their complaint by reference, their allegations are limited to the following:

17 Paragraphs above incorporated by reference. Plaintiffs Brent, Susan,
18 Jeremiah, Cacey, Jennifer, Christy, Joy, Clark, and Jill Winters suffered
19 loss of consortium with each other and their grandmother as a result of the
actions of the Defendants.

20 (Id.)

21 One California court has cited with approval a California practice manual that
22 defines the tort of loss of consortium as having the following four elements:

23
24 ⁹ The term “chattel” is defined as “[m]ovable or transferable property; esp., personal
25 property.” Black’s Law Dictionary at 229 (7th ed. 1999). To the extent that a real property
26 interest is concerned, the term “chattel real” is defined as “a real-property interest that is less than
a freehold or fee, such as a leasehold.” Id.

- 1 (1) a valid and lawful marriage between the plaintiff and the person
injured at the time of the injury;
- 2 (2) a tortious injury to the plaintiff's spouse;
- 3 (3) loss of consortium suffered by the plaintiff; and
- 4 (4) the loss was proximately caused by the defendant's act.

5
6 Hahn v. Mirda, 147 Cal. App. 4th 740, 746 & n.2, 54 Cal. Rptr. 3d 527, 530 & n.2 (Ct. App.
7 2007) (citation omitted). Additionally, “[a] cause of action for loss of consortium is, by its
8 nature, dependent on the existence of a cause of action for tortious injury to a spouse.” Id. at
9 746, 54 Cal. Rptr. 3d at 531 (Ct. App. 2007). Additionally, the Ninth Circuit Court of Appeals
10 recently explained:

11 To support a loss of consortium claim, marital spouses must allege that
12 their partner suffered an injury that is “sufficiently serious and disabling to
13 raise the inference that the conjugal relationship is more than superficially
14 or temporarily impaired.” Molien v. Kaiser Found. Hosp., 27 Cal.3d 916,
15 167 Cal.Rptr. 831, 616 P.2d 813, 823 (1980); Anderson v. Northrop Corp.,
16 203 Cal.App.3d 772, 250 Cal.Rptr. 189, 195 (1988) (same). The injury
17 may be physical or psychological, but psychological injury must “rise [] to
18 the level of a ‘neurosis, psychosis, chronic depression, or phobia’ [to be]
19 sufficient to substantially disturb the marital relationship.” Anderson, 250
20 Cal.Rptr. at 195, quoting Molien, 167 Cal.Rptr. 831, 616 P.2d at 813.

21 Estate of Tucker ex rel. Tucker v. Interscope Records, Inc., 515 F.3d 1019, 1039 (9th Cir. 2008)
22 (modifications in original).

23 The undersigned will recommend that plaintiffs’ loss of consortium claim be
24 dismissed with prejudice because they have failed to allege a plausible claim for relief. First,
25 plaintiffs have not alleged any facts that would suggest that any conjugal or marital relationship
26 has been more than superficially affected. Second, plaintiffs have not alleged any facts regarding
how the acts of Michael Armstrong proximately caused any loss of consortium. Plaintiffs’
allegations of causation are general as to all defendants and are conclusory in nature. Third,
under California law, parents may not pursue a claim loss of filial consortium, and children may

1 not pursue a claim for loss of parental consortium. See Baxter v. Superior Court, 19 Cal. 3d 461,
2 466, 563 P.2d 871, 874 (1977); Borer v. Am. Airlines, Inc., 19 Cal. 3d 441, 453, 563 P.2d 858,
3 866 (1977); Meighan v. Shore, 34 Cal. App. 4th 1025, 1034, 40 Cal. Rptr. 2d 744, 749 (Ct. App.
4 1995). Fourth, plaintiffs have improperly re-pled claims on behalf of Joy, Clark and Jill Winters,
5 as the court previously ordered that references to these minors be stricken from the Third
6 Amended Complaint. Finally, it would appear facially improper that plaintiffs could recover for
7 loss of consortium with “their grandmother,” Virginia Armstrong, whom they have named as a
8 defendant in this case. Plaintiffs have failed to meet the pleading requirements to state a
9 cognizable claim for relief, and the undersigned has no reason to believe that these deficiencies
10 could be cured through amendment.

11 F. Plaintiffs’ State Law Claim for Intentional Infliction of Emotional Distress

12 Finally, Michael Armstrong seeks to dismiss plaintiffs’ thirty-eighth claim for
13 relief, which seeks damages for intentional infliction of emotional distress (“IIED”) against “All
14 Defendants.” (Third Am. Compl. at 25.) As with their loss of consortium claim, plaintiffs’ IIED
15 claim contains only bare factual allegations and legal conclusions, which are stated generally
16 against all defendants:

17 Paragraphs above incorporated by reference. All [*sic*] Defendants acted
18 with reckless and intentionally [*sic*] disregard of Plaintiffs’ rights.
19 Defendants’ conduct on dates referenced above was extreme and
20 outrageous. Defendants’ conduct is the proximate cause of their distress.
Each Plaintiff suffers severe emotional distress as a result of all
Defendants’ conduct.

21 (Id.)

22 To state a claim for intentional infliction of emotional distress under California
23 law, a plaintiff must satisfactorily allege the following elements: “(1) extreme and outrageous
24 conduct by the defendant with the intention of causing, or reckless disregard of the probability of
25 causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and
26

1 (3) actual and proximate causation of the emotional distress by the defendant’s outrageous
2 conduct.” Hughes v. Pair, 46 Cal. 4th 1035, 1050, 209 P.3d 963, 976 (2009) (citations and
3 quotation marks omitted). The California Supreme Court has explained that “outrageous”
4 conduct is that which is so “extreme as to exceed all bounds of that usually tolerated in a
5 civilized community,” and that “the defendant’s conduct must be intended to inflict injury or
6 engaged in with the realization that injury will result.” Id. (citations and quotation marks
7 omitted).

8 As noted above, plaintiffs’ IIED claim is a collection of legal conclusions and bare
9 factual allegations that incorporate the remainder of the Third Amended Complaint by reference.
10 Plaintiffs do not allege facts demonstrating that Michael Armstrong’s acts rose to the level of
11 “extreme and outrageous” behavior as defined under California, that any of the plaintiffs suffered
12 severe or extreme emotional distress, or that Michael Armstrong’s conduct proximately caused
13 any particular plaintiff’s emotional distress. Accordingly, the undersigned will recommend that
14 this claim be dismissed as to Michael Armstrong. The undersigned will recommend dismissal
15 with prejudice because nothing in the Third Amended Complaint or plaintiffs’ written opposition
16 brief suggests that the identified pleading deficiencies can be cured through amendment. In their
17 consolidated opposition brief, plaintiffs continue their conclusory allegations regarding the IIED
18 claim as to all “Responding Defendants.” (Dkt. No. 89 at 10.) In an attempt to substantiate that
19 the Responding Defendants’ engaged in outrageous conduct, plaintiffs explain that they “were
20 unlawfully thrown out of their lawfully possessed home, [and were] physically abused in the
21 middle of the night.” (Id.) Yet there is no suggestion in the opposition brief or the Third
22 Amended Complaint that this was Michael Armstrong’s conduct.

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1 IV. CONCLUSION

2 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

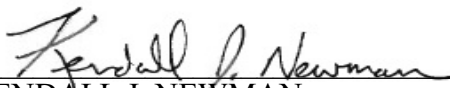
3 1. Defendant Michael Armstrong’s motion to dismiss the Third Amended
4 Complaint (Dkt. No. 82, 85) be granted; and

5 2. All of plaintiffs’ claims alleged against Michael Armstrong be dismissed
6 with prejudice.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a
11 document should be captioned “Objections to Magistrate Judge’s Findings and
12 Recommendations.” Any response to the objections shall be filed with the court and served on
13 all parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file
14 objections within the specified time may waive the right to appeal the District Court’s order.
15 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57
16 (9th Cir. 1991).

17 IT IS SO RECOMMENDED.

18 DATED: July 19, 2010

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21 
22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE
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