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

BRENT ALLEN WINTERS, et al.,

Plaintiffs,

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

v.

DELORES JORDAN, et al.,

Defendants.

FINDINGS AND RECOMMENDATION

Presently before the court is defendant Virginia Armstrong’s (“Virginia Armstrong” or “Armstrong”) motion to dismiss plaintiffs’ Third Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 84.) 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) Armstrong’s motion be granted in part; (2) the civil battery claim alleged on Joy Winters’s behalf be dismissed without prejudice; and (3) all of plaintiffs’ remaining claims alleged against Armstrong, except for plaintiff Christy Winters’s civil battery claim (claim 9) and plaintiffs’ breach of contract claim (claim 22), be dismissed with prejudice.

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 claims alleged in the Third Amended Complaint arise from an underlying
12 family dispute between plaintiffs, who are part of the Winters family, and defendant Virginia
13 Armstrong. Virginia Armstrong is the mother of plaintiff Susan Winters.

14 The Third Amended Complaint alleges that in or around the year 2002, plaintiff
15 Susan Winters’s 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

20 ² The court previously ordered that all references to the minor plaintiffs in this
21 action—Joy Winters, Clark Winters, and Jill Winters—be stricken from plaintiffs’ Third
22 Amended Complaint because those minors were not represented by counsel. (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 also an attorney. (Id.) They further allege that these actions
6 violated the terms of a trust indenture and the California Probate Code. (Id.)

7 The relationship between Armstrong and plaintiffs resulted in several proceedings
8 in the Nevada County Superior Court. Relevant here, Logsdon, acting as Armstrong’s attorney,
9 filed an unlawful detainer action on her client’s behalf seeking to evict members of the Winters
10 family from Armstrong’s home. (Third Am. Compl. at 5.) In connection with the unlawful
11 detainer action, and relevant to claims alleged against Virginia Armstrong, plaintiffs allege that
12 an Assistant United States Attorney from Illinois wrote a letter to Logsdon “offering any aid to
13 help her evict the Winters from their home in Nevada City, California.” (Id. at 6, 21.) Plaintiffs
14 further allege that Virginia Armstrong caused declarations or other documents to be filed in
15 connection with the issuance of a restraining order by a Nevada County Superior Court judge that
16 was favorable to the Winters family, and that her attorney improperly sought a separate, ex parte
17 restraining order against members of the Winters family from the Superior Court. (See id. at 6,
18 13-14.)

19 Plaintiffs’ Third Amended Complaint alleges the following claims against
20 Virginia Armstrong: abuse of process (claim 6); violation of the Equal Protection Clause of the
21 Fourteenth Amendment of the U.S. Constitution (claim 7); civil battery (claim 9); trespass to
22 chattels (claim 13); violation of 42 U.S.C. § 1983 (claim 14); civil conspiracy in violation of 42
23 U.S.C. § 1983 (claim 15); civil conspiracy (claim 18); “Slander, Libel, and Slander & Libel Per
24 Se” (claim 21); breach of contract (claim 22); violation of the First Amendment of the U.S.
25 Constitution (claim 26); conspiracy to violate the Racketeer Influenced and Corrupt
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1 Organizations Act (“RICO”), 18 U.S.C. 1962(d) (claim 31); loss of consortium (claim 36); and
2 intentional infliction of emotional distress (claim 38). In response to the filing of the Third
3 Amended Complaint, Virginia Armstrong filed a motion to dismiss pursuant to Federal Rule of
4 Civil Procedure 12(b)(6). (Dkt. No. 84.)

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

12 II. LEGAL STANDARDS

13 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
14 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
15 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard
16 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
17 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
18 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “A complaint may survive a
19 motion to dismiss if, taking all well-pleaded factual allegations as true, it contains ‘enough facts
20 to state a claim to relief that is plausible on its face.’” Coto Settlement v. Eisenberg, 593 F.3d
21 1031, 1034 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). “A claim
22 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
23 reasonable inference that the defendant is liable for the misconduct alleged.” Caviness v.
24 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Iqbal, 129 S. Ct. at
25 1949).

1 The court accepts “all facts alleged as true and construes them in the light most
2 favorable to the plaintiff.” County of Santa Clara v. Astra USA, Inc., 588 F.3d 1237, 1241 n.1
3 (9th Cir. 2009). The court is “not, however, required to accept as true conclusory allegations that
4 are contradicted by documents referred to in the complaint, and [the court does] not necessarily
5 assume the truth of legal conclusions merely because they are cast in the form of factual
6 allegations.” Paulsen, 559 F.3d at 1071 (citations and quotation marks omitted). The court must
7 construe a pro se pleading liberally to determine if it states a claim and, prior to dismissal, tell a
8 plaintiff of deficiencies in his complaint and give plaintiff an opportunity to cure them if it
9 appears at all possible that the plaintiff can correct the defect.⁴ See Lopez v. Smith, 203 F.3d
10 1122, 1130-31 (9th Cir. 2000) (en banc). In ruling on a motion to dismiss pursuant to Rule
11 12(b)(6), the court “may generally consider only allegations contained in the pleadings, exhibits
12 attached to the complaint, and matters properly subject to judicial notice.” Outdoor Media
13 Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks
14 omitted).

15 III. DISCUSSION

16 A. Plaintiffs’ Section 1983 Claims Against Armstrong

17 Plaintiffs have alleged five claims against Virginia Armstrong that constitute
18 claims brought pursuant to 42 U.S.C. § 1983. First, plaintiffs allege that Virginia Armstrong
19 violated plaintiffs’ Fourteenth Amendment rights of equal protection under the law (claim 7), and
20 allege that: “Without any notice or opportunity to be heard allowed to Plaintiffs, Judge Anderson
21 and attorney David Silber, together, by ex parte agreement, imposed a restraining order against
22 Susan Winters, Cacey Winters, and Christy Winters.” (Third Am. Compl. at 14.) Second,
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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 plaintiffs allege generalized, non-specific claims against “All Defendants” for violation of 42
2 U.S.C. § 1983 (claim 14), for engaging in a conspiracy to violate 42 U.S.C. § 1983 (claim 15),
3 and for “civil conspiracy,” which appears to be an additional claim alleging a conspiracy to
4 violate Section 1983. (See id. at 19-20.) Finally, plaintiffs allege that Virginia Armstrong
5 violated plaintiffs’ First Amendment right to petition for the redress of grievances insofar as
6 plaintiffs were prevented from responding to “false statements” in proceedings before the Nevada
7 County Superior Court. (See id. at 23.)

8 Virginia Armstrong challenges all of these claims as failing to state a claim on
9 which relief can be granted. The undersigned will first address plaintiffs’ generalized Section
10 1983 claims and then address the more specifically alleged constitutional violations.

11 1. Express Section 1983 Claims (Claims 14, 15 and 18)

12 Virginia Armstrong moves to dismiss claims 14, 15, and 18, which expressly
13 allege violations of Section 1983, for failure to state a claim on the grounds that: (1) plaintiffs
14 have not alleged that she participated in any act that deprived plaintiffs of their constitutional or
15 statutory rights, and (2) plaintiffs have alleged no specific facts that she acted under the color of
16 law. Her arguments, although tersely stated, are persuasive.

17 “Section 1983 imposes civil liability upon an individual who ‘under color [of state
18 law] . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation
19 of any rights, privileges or immunities secured by the Constitution and laws.’” Franklin v. Fox,
20 312 F.3d 423, 444 (9th Cir. 2002) (quoting 42 U.S.C. § 1983). “To state a claim under § 1983, a
21 plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of
22 the United States was violated, and (2) that the alleged violation was committed by a person
23 acting under the color of State law.” Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th
24 Cir. 2006) (citing West v. Atkins, 487 U.S. 42, 48 (1988)); accord Nurre v. Whitehead, 580 F.3d
25 1087, 1092 (9th Cir. 2009). Conclusory allegations of a violation of Section 1983 or a
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1 conspiracy to violate Section 1983 will not survive a motion to dismiss. See, e.g., Simmons v.
2 Sacramento County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003) (affirming dismissal of
3 plaintiff's second amended complaint as a result of plaintiff's "conclusory allegations" of a
4 conspiracy to deprive him of his constitutional rights in violation of Section 1983).

5 Plaintiffs' allegations in support of their Section 1983 claims alleged in claims 14,
6 15, and 18 are conclusory and, on this basis alone, these claims should be dismissed as to
7 Virginia Armstrong. For example, plaintiffs do not allege which of their specific constitutional
8 rights were violated and specifically how Virginia Armstrong participated in such alleged
9 violations. Nevertheless, the undersigned will address additional grounds why plaintiffs' claims
10 fail as alleged against Armstrong.

11 As to claim 14, alleging that "All Defendants," including Virginia Armstrong,
12 individually violated plaintiffs' constitutional rights, plaintiffs allege:

13 Paragraphs above incorporated by reference. Defendants, by their actions
14 and acting under the color of law, subjected Plaintiffs, and caused
15 Plaintiffs to be subjected, to the deprivations of their rights, privileges, and
16 immunities secured by the Constitution and laws of the State of California
17 and of the United States of America. Plaintiffs claim damages under 42
18 U.S.C. § 1983 for their injuries set forth above.

17 (Third Am. Compl. at 19.) In addition to the conclusory nature of plaintiffs' allegations, their
18 claim that Virginia Armstrong, as an individual, violated plaintiffs' rights fails because plaintiffs
19 have not alleged any constitutional right that was purportedly violated.⁵ Moreover, dismissal is
20 warranted because Armstrong is a private actor and thus was not acting under color of state law.
21 To determine whether a private actor acts under color of state law, the court must evaluate

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23 ⁵ Although plaintiffs incorporate the remainder of their complaint by reference, the rest
24 of the Third Amended Complaint and plaintiffs' opposition to the pending motion do not suggest
25 exactly how Virginia Armstrong individually violated plaintiffs' civil rights. To the extent that
26 plaintiffs are alleging that Armstrong's alleged violations of plaintiffs' First and Fourteenth
Amendment rights are the basis for the express Section 1983 claims, their claims would be
redundant. In any event, plaintiffs' First Amendment and Fourteenth Amendment equal
protection claims are subject to dismissal for the reasons stated below.

1 whether the alleged infringement of federal rights is “fairly attributable” to the government even
2 though it is alleged to have been committed by private actors. See Kirtley v. Rainey, 326 F.3d
3 1088, 1092 (9th Cir. 2003). The Supreme Court has explained that “state action may be found if,
4 though only if, there is such a close nexus between the State and the challenged action that
5 seemingly private behavior may be fairly treated as that of the State itself.” Brentwood Academy
6 v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295 (2001) (citation and quotation marks
7 omitted)). Nothing in the Third Amended Complaint or plaintiffs’ written opposition suggests as
8 much. Accordingly, plaintiffs’ fourteenth claim should be dismissed with prejudice as to
9 Virginia Armstrong.

10 Plaintiffs’ Section 1983 conspiracy claims, claims 15 and 18, are also fatally
11 flawed. In their fifteenth claim, plaintiffs allege that “Defendants Logsdon, Michael Armstrong,
12 Jordan, Wade, Harpainter, and Ford worked in concert with Defendants from the Nevada County
13 Superior Court, Sheriff’s Department, Adult Protective Services, and other agencies.” (Third
14 Am. Compl. at 20.) These claims make no specific reference to Virginia Armstrong. Moreover,
15 they allege that a state court judge, Judge Anderson, entered a restraining order “on his own
16 motion.” (Id.; see also id. at 7) Additionally, plaintiffs allege that defendants Logsdon and
17 Harpainter “worked in concert with” with defendants Chelsey and Frooman. (Id.) Elsewhere in
18 the Third Amended Complaint, defendant Harpainter is alleged to be an attorney that the Nevada
19 County Superior Court appointed for Virginia Armstrong in connection with certain restraining
20 order proceedings before that court. (Id. at 7.) Defendants Chelsey and Frooman are alleged to
21 be Assistant United States Attorneys in Illinois who were prosecuting plaintiff Brent Winters, an
22 attorney, on criminal charges and wrote a letter to defendant Logsdon offering assistance with the
23 unlawful detainer action. (Id. at 6, 24.) Plaintiffs’ eighteenth claim is largely redundant of the
24 fifteenth claim, at least as it relates to allegations against Virginia Armstrong.

25 “A private individual may be liable under § 1983 if [he] conspired or entered joint
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1 action with a state actor.” Franklin, 312 F.3d at 441; see also Kirtley, 326 F.3d at 1092 (“While
2 generally not applicable to private parties, a § 1983 action can lie against a private party when he
3 is a willful participant in joint action with the State or its agents.” (citation and quotation marks
4 omitted)). “To establish liability for a conspiracy in a § 1983 case, a plaintiff must ‘demonstrate
5 the existence of an agreement or meeting of the minds’ to violate constitutional rights.” Crowe
6 v. County of San Diego, 608 F.3d 406, 440 (9th Cir. 2010) (quoting Mendocino Env'tl. Ctr. v.
7 Mendocino County, 192 F.3d 1283, 1301 (9th Cir. 1999)). Although the Supreme Court has
8 articulated several alternative tests for determining whether a private individual’s actions amount
9 to state action, Franklin, 312 F.3d at 445, the “joint action” test is relevant here. The joint action
10 test applies where, as here, state officials and private parties are alleged to have acted in concert
11 to effectuate a particular deprivation of constitutional rights and “focuses on whether the state
12 has so far insinuated itself into a position of interdependence with the private actor that it must be
13 recognized as a joint participant in the challenged activity.” Id. (citation, quotation marks, and
14 modifications omitted). “The plaintiff must show ‘an agreement or meeting of the minds to
15 violate constitutional rights,’ and ‘[t]o be liable, each participant in the conspiracy need not know
16 the exact details of the plan, but each participant must at least share the common objective of the
17 conspiracy.’” Crowe, 608 F.3d at 440 (modification in original) (quoting Franklin, 312 F.3d at
18 441).

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

5 Plaintiffs have not alleged facts constituting a plausible claim of a conspiracy
6 between Virginia Armstrong and state actors to violate plaintiffs’ constitutional rights.

7 Although, plaintiffs vaguely allege that Virginia Armstrong’s lawyers conspired with others, the
8 allegations in the Third Amended Complaint indicate a lack of interdependence between state
9 and private actors. As far as the unlawful detainer action is concerned, plaintiffs only allege that
10 Assistant United States Attorneys Frooman and Chelsey offered aid to defendant Logsdon, one of
11 Virginia Armstrong’s attorneys. An offer of assistance does not suggest the level of
12 interdependence that will support a Section 1983 conspiracy under a joint action theory. In terms
13 of joint action related to the entry of certain restraining orders, plaintiffs conclusorily allege joint
14 action, but also that Judge Anderson of the Nevada County Superior Court acted on his “own
15 motion.” None of plaintiffs allegations suggests a common goal of depriving plaintiffs of their
16 rights, or any interdependence among the alleged members of the conspiracy. Taken together
17 with the conclusory and vague allegations in the Third Amended Complaint, plaintiffs’
18 conspiracy claims alleged against Virginia Armstrong should be dismissed.

19 2. Fourteenth Amendment Equal Protection Claim (Claim 7)

20 Virginia Armstrong also moves to dismiss plaintiffs’ claim that she violated
21 plaintiffs’ rights under the Equal Protection Clause of the Fourteenth Amendment on the ground
22 that she could not have violated plaintiffs’ equal protection rights because she is not a “state
23 actor.” As to Virginia Armstrong, plaintiffs’ seventh claim for relief alleges, in relevant part:
24 “**02/05/08**—Without any notice or opportunity to be heard allowed to Plaintiffs, Judge Anderson
25 and attorney David Silber, [Virginia Armstrong’s attorney,] together, by ex parte agreement,
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1 imposed a restraining order against Susan Winters, Cacey Winters, and Christy Winters.”⁶

2 (Third Am. Compl. at 14 (emphasis in original).)

3 Plaintiffs’ claim is fairly characterized as alleging a “joint action” conspiracy
4 under 42 U.S.C. § 1983⁷ to enter an ex parte restraining order between a private actor, Virginia
5 Armstrong or her attorney, and a state court judge. The undersigned is skeptical of this claim at
6 the outset because it appears that plaintiffs are alleging no more than that Virginia Armstrong’s
7 attorney applied for an ex parte restraining order on her behalf and that the Nevada County
8 Superior Court granted the request. Even assuming that there is a factual basis to apply the joint
9 action test as to plaintiffs’ claim, plaintiffs’ conspiracy claim fails because there is no allegation
10 regarding how the conspiracy effectuated a violation of plaintiffs’ equal protection rights.

11 There are several ways in which a plaintiff may state a cognizable equal protection

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13 ⁶ The undersigned notes that plaintiffs’ claim that Judge Anderson and Silber entered
14 into an ex parte agreement to enter a restraining order against some of the plaintiffs on
15 February 5, 2008, appears at odds with the remainder of the Third Amended Complaint.
16 Nowhere else in the operative pleading, which details numerous restraining orders entered by the
17 Nevada County Superior Court, is it alleged that Judge Anderson entered a restraining order on
18 or around February 5, 2008. Instead, plaintiffs allege that on April 21, 2008, Judge Anderson
19 instituted proceedings regarding a restraining order against several members of the Winters
20 family to protect Virginia Armstrong from them, and that he entered a temporary restraining
21 order on April 25, 2008. (See Third Am. Compl. at 7.)

22 ⁷ To the extent that plaintiffs’ equal protection claim is based on 42 U.S.C. § 1985(3), it
23 fails. “To state a cause of action under § 1985(3), a complaint must allege (1) a conspiracy,
24 (2) to deprive any person or a class of persons the equal protection of the laws, or of equal
25 privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of
26 the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or
privilege of a citizen of the United States.” Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir.
1980) (citing Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)). “The language requiring
intent to deprive equal protection . . . means that there must be some racial, or perhaps otherwise
class-based, invidiously discriminatory animus behind the conspirators’ action.” Griffin, 403
U.S. at 102; see also Holgate v. Baldwin, 425 F.3d 671, 676 (9th Cir. 2005) (“We have extended
§ 1985(3) to protect non-racial groups only if ‘the courts have designated the class in question a
suspect or quasi-suspect classification requiring more exacting scrutiny or . . . Congress has
indicated through legislation that the class require[s] special protection’” (citation omitted,
modifications in original).) Because plaintiffs’ Third Amended Complaint does not set forth
facts sufficient to support conclusions that defendants engaged in a conspiracy to violate
plaintiffs’ rights based on their membership in any class, any conspiracy claim under 42 U.S.C. §
1985(3) fails.

1 claim. For example, a plaintiff show that “defendants acted with an intent or purpose to
2 discriminate against the plaintiff based upon membership in a protected class.” Lee v. City of
3 L.A., 250 F.3d 668, 686 (9th Cir. 2001) (citations and quotation marks omitted). More relevant
4 here, a plaintiff may also establish a “class of one” equal protection claim by showing that a state
5 actor “intentionally, and without rational basis, treated the plaintiff differently from others
6 similarly situated.” N. Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008)
7 (stating also that “[a] class of one plaintiff must show that the discriminatory treatment was
8 intentionally directed just at him, as opposed . . . to being an accident or a random act” (citation
9 and quotation marks omitted, modification in original)). Here, plaintiffs’ Third Amended
10 Complaint does not allege facts, as opposed to mere conclusions, that they are members of a
11 protected class or that they were intentionally treated differently than others who were similarly
12 situated. Thus, plaintiffs have not alleged a plausible equal protection claim against Virginia
13 Armstrong. Nor does it appear that plaintiffs could allege facts that would support such a claim
14 if given the opportunity to do so. Accordingly, plaintiffs’ equal protection claim should be
15 dismissed with prejudice.

16 3. First Amendment Claim (Claim 26)

17 In their twenty-sixth claim for relief, plaintiffs allege that judges and court staff at
18 the Nevada County Superior Court and Virginia Armstrong violated plaintiffs’ First Amendment
19 rights to petition for the redress of grievances by preventing their access to the Superior Court to
20 file papers and otherwise respond to written and spoken allegations in proceedings before that
21 court. (Third Am. Compl. at 23.) Although a plaintiff may allege that his access to the courts
22 was impeded and thus caused a deprivation of his First Amendment right to petition the
23 government, see, e.g., BE & K Constr. Co. v. NLRB, 536 U.S. 516, 525 (2002), plaintiffs here
24 have simply failed to allege any facts demonstrating how Virginia Armstrong, a private
25 individual who is not a member of the Superior Court’s staff, effectuated or participated in such a
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1 deprivation. Accordingly, plaintiffs have failed to allege a plausible First Amendment claim
2 against Virginia Armstrong, and their twenty-sixth claim for relief should be dismissed with
3 prejudice.

4 B. Plaintiffs' Federal RICO Conspiracy Claim (Claim 31)

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

20 "The elements of a civil RICO claim are as follows: (1) conduct (2) of an
21 enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts')
22 (5) causing injury to plaintiff's 'business or property.'" Living Designs, Inc., E.I. Dupont de
23 Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (citation and quotation marks omitted). "To
24 state a RICO claim, one must allege a 'pattern' of racketeering activity, which requires at least
25 two predicate acts." Clark v. Time Warner Cable, 523 F.3d 1110, 1116 (9th Cir. 2008) (citations
26

1 omitted). Furthermore, a plaintiff must also show that the injury to his business or property was
2 proximately caused by the prohibited conduct and that he has suffered a concrete financial loss.
3 Chaset v. Flee/Skybox Int'l, L.P., 300 F.3d 1083, 1086 (9th Cir. 2002).

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

15 C. Plaintiffs' State Law Claims for Abuse of Process and Slander/Libel (Claims 6
16 and 21)

17 In their sixth claim for relief, plaintiffs allege that Virginia Armstrong is liable for
18 the state law tort of abuse of process. (Third Am. Compl. at 13-14.) Specifically, they allege
19 that Virginia Armstrong, and defendants Logsdon and Jordan, violated California law by filing
20 an unlawful detainer action seeking to evict members of the Winters from Virginia Armstrong's
21 home. (Id. at 13.) In addition, plaintiffs allege that Virginia Armstrong, her attorney, defendant
22 Silber, and defendants who are judges or staff at the Nevada County Superior Court "abused the
23 court's judicial process" by: (1) hiding from the Winters family "all knowledge of a hearing of
24 David Silber before biased Judge Anderson" related to an application for a restraining order, and
25 (2) "improperly and with malice assert[ing] false allegations against Plaintiffs without evidence
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1 in order to impose restraining orders on the Winters.” (Id.) Moreover, plaintiffs allege in their
2 twenty-first claim for relief that Virginia Armstrong, among others, committed “Slander, Libel,
3 Slander & Libel Per Se” through “false accusations, both spoken and written to the court”
4 between December 2007 and the present. (Id. at 21.)

5 Virginia Armstrong argues that plaintiffs’ claims for abuse of process and
6 slander/libel should be dismissed with prejudice as to her because her conduct is protected by
7 California’s absolute litigation privilege. That privilege, found at California Civil Code § 47(b),
8 provides, in part, that a publication or broadcast made as part of a judicial proceeding is
9 privileged. See also Action Apartment Ass’n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232,
10 1241, 163 P.3d 89, 95 (Cal. 2007). The California Supreme Court recently summarized this
11 litigation privilege as follows:

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

17 Id. (citations and internal quotation marks omitted, modification in original). The California
18 Supreme Court has given this privilege “a broad interpretation” in furtherance of the purpose of
19 the privilege, which is “to afford litigants and witnesses . . . the utmost freedom of access to the
20 courts without fear of being harassed subsequently by derivative tort actions.” Id. “Any doubt as
21 to whether the privilege applies is resolved in favor of applying it.” Adams v. Superior Court, 2
22 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49, 53 (Ct. App. 1992); accord Sengchanthalangsy v.
23 Accelerated Recovery Specialists, Inc., 473 F. Supp. 2d 1083, 1087 (S.D. Cal. 2007); Lambert v.
24 Carneghi, 158 Cal. App. 4th 1120, 1138, 70 Cal. Rptr. 3d 626, 639 (Ct. App. 2008). Thus,
25 although the privilege was originally enacted with reference to claims of defamation, “the
26

1 privilege is now held applicable to any communication, whether or not it amounts to a
2 publication . . . , and all torts except malicious prosecution.” Rusheen v. Cohen, 37 Cal. 4th
3 1048, 1057, 128 P.3d 713, 718 (2006) (quoting Silberg v. Anderson, 50 Cal. 3d 205, 212, 786
4 P.2d 365 (1990)); see also Action Apartment Ass’n, Inc., 41 Cal. 4th at 1241-42 (noting that the
5 litigation privilege applies to claims of slander, libel, and abuse of process, among other types of
6 claims). The privilege applies “regardless whether the communication was made with malice or
7 the intent to harm” and “does not depend on the publisher’s motives, morals, ethics or intent.”
8 Kashian v. Harriman, 98 Cal. App. 4th 892, 913, 120 Cal. Rptr. 2d 576, 592 (Ct. App. 2002)
9 (citation and quotation marks omitted).

10 The litigation privilege bars the abuse of process and slander/libel claims against
11 Virginia Armstrong. Plaintiffs’ allegations in support of these claims reveal that Virginia
12 Armstrong’s acts occurred in the context of: (1) filing an unlawful detainer action to evict
13 individuals from her home, (2) appearing through her attorney at a court hearing at which she
14 sought a restraining order, and (3) communicating with the Superior Court in connection with
15 judicial proceedings, whether by filing declarations or documents or making statements to that
16 court. (See Third Am. Compl. at 13, 21.) All of this conduct was made in judicial or
17 quasi-judicial proceedings by a party or her attorney to achieve the objects of the litigation, and it
18 has some connection or logical relation to the action. See Action Apartment Ass’n, Inc., 41 Cal.
19 4th at 1241-42. Accordingly, California’s absolute litigation privilege applies to Virginia
20 Armstrong’s conduct, and plaintiffs’ sixth and twenty-first claims for relief should be dismissed
21 with prejudice as to Virginia Armstrong.

22 D. Plaintiffs’ State Law Claim for Civil Battery (Claim 9)

23 In their ninth claim for relief, plaintiffs allege that Virginia Armstrong committed
24 civil battery against Joy Winters and Christy Winters on December 14, 2007. (Third Am.
25 Compl. at 17.) They allege, in relevant part:
26

1 **12/14/07**—Virginia Armstrong was in the hallway of 11318 Via Vista
2 talking with Joy Winters Virginia Armstrong struck Joy Winters in
3 the face. Joy Winters did not authorize the offensive touch of Virginia
4 Armstrong. Christy Winters saw the battery by Virginia Armstrong of Joy
5 Winters and said, “Grandma, don’t hit Joy.” Virginia Armstrong then
6 attempted to hit Christy Winters in the face, lost her balance and began
7 falling backwards. Virginia grabbed Christy Winters’s long hair to break
8 her fall. Christy Winters experienced great pain from Virginia Armstrong
9 putting the weight of her whole body on Christy Winters’s hair. Christy
10 Winters did not authorize the offensive touch of Virginia Armstrong.

11 (Id.) Virginia Armstrong moves to dismiss this claim on the grounds that: (1) “there are no
12 factual allegations concerning any actual physical contact between moving parties and
13 Plaintiffs”; and (2) “[i]t is ridiculous to think or believe that Virginia Armstrong could or would
14 commit a battery against any of the Plaintiffs.” (Doc. No. 84-1 at 14.)

15 Under California law, “[t]he elements of civil battery are: (1) defendant
16 intentionally performed an act that resulted in a harmful or offensive contact with the plaintiff’s
17 person; (2) plaintiff did not consent to the contact; and (3) the harmful or offensive contact
18 caused injury, damage, loss or harm to plaintiff.” Brown v. Ransweiler, 171 Cal. App. 4th 516,
19 526-27, 89 Cal. Rptr. 3d 801, 811 (Ct. App. 2009); accord Tekle v. United States, 511 F.3d 839,
20 855 (9th Cir. 2007) (same).

21 As an initial matter, the undersigned will recommend the dismissal, without
22 prejudice, of the claim of civil battery alleged on behalf of Joy Winters. The court previously
23 ordered that “all references to the minor plaintiffs are stricken from plaintiffs’ Third Amended
24 Complaint” because those minors are not represented by counsel. (See Dkt. No. 68; see also Dkt.
25 Nos. 68, 80, and 89 at 2 n.1.) Joy Winters is one of three such minor plaintiffs who may not
26 appear in this action without counsel. Accordingly, any claim of civil battery alleged on Joy
Winters’s behalf should be dismissed without prejudice.

 The undersigned will also recommend dismissal, with prejudice, of plaintiffs’
civil battery claim as to all plaintiffs other than Joy Winters, whose dismissal will be

1 recommended without prejudice, and Christy Winters, whose civil battery claim is discussed
2 below. Plaintiffs' Third Amended Complaint does not allege any facts that could possibly
3 support a plausible claim of battery committed by Virginia Armstrong against any of the other
4 plaintiffs.

5 Contrary to Virginia Armstrong's arguments, plaintiff Christy Winters has
6 sufficiently alleged a claim of civil battery against Virginia Armstrong. She alleges that Virginia
7 Armstrong intentionally grabbed her hair while falling, after Armstrong had attempted to hit her
8 in the face. Christy Winters also alleges that the contact was offensive and harmful, and caused
9 her "great pain." These allegations are sufficient at the pleading stage. Accordingly, plaintiff
10 Christy Winters's civil battery claim survives Virginia Armstrong's motion to dismiss.

11 E. Plaintiffs' State Law Claim for Trespass to Chattels (Claim 13)

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

14 "[T]he tort of trespass to chattels allows recovery for interferences with
15 possession of personal property not sufficiently important to be classed as conversion, and so to
16 compel the defendant to pay the full value of the thing with which he has interfered." Intel Corp.
17 v. Hamidi, 30 Cal. 4th 1342, 1350, 71 P.3d 296, 302 (2003). The California Supreme Court has
18 stated that "[t]respass remains as an occasional remedy for minor interferences, resulting in some
19 damage, but not sufficiently serious or sufficiently important to amount to the greater tort" of
20 conversion." Id. at 1351, 71 P.3d at 302 (citation omitted, modification in original).

21 As to Virginia Armstrong, and indeed as to all defendants, plaintiffs have not
22 specified the chattel or chattels with which each defendant interfered, which in turn proximately
23 caused them harm. See id. at 1350-51, 71 P.3d at 302 ("Under California law, trespass to
24 chattels lies where an intentional interference with the possession of personal property has
25 proximately caused injury" (citation and quotation marks omitted)). Insofar as any property is
26

1 concerned, plaintiffs have only alleged that Virginia Armstrong transferred a piece of *real*
2 *property* from one trust to another. (Third Am. Compl. at 4.) This is not an interference with
3 “possession of personal property,” which appears to be the crux of the tort of trespass to chattels.⁸
4 Accordingly, plaintiffs’ claim for trespass to chattels should be dismissed with prejudice as to
5 Virginia Armstrong.

6 F. Plaintiffs’ State Law Claim for Breach of Contract (Claim 22)

7 In their twenty-second claim for relief, plaintiffs allege that Virginia Armstrong
8 breached a contract with plaintiffs with respect to ownership of the real property at 11318 Via
9 Vista in Nevada City, California. (Third Am. Compl. at 22.) In essence, plaintiffs allege that
10 Virginia Armstrong orally promised to convey or transfer that real property, which resides in a
11 trust, to plaintiffs Brent and Susan Winters if they moved to California from Illinois and “being
12 available to Virginia,” and that this constituted a contract. (*Id.*)

13 Under California law, “[t]he standard elements of a claim for breach of contract
14 are (1) the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s
15 breach, and (4) damage to plaintiff therefrom.” *See, e.g., Abdelhamid v. Fire Ins. Exch.*, 182
16 Cal. App. 4th 990, 999, 106 Cal. Rptr. 3d 26, 32-33 (Ct. App. 2010) (citations and quotation
17 marks omitted).

18 In seeking dismissal of this state law breach of contract claim, Virginia Armstrong
19 only argues that plaintiffs have failed to “set forth the contract between the parties with sufficient
20 certainty to show any right on the plaintiff’s part to performance on the defendant’s part.”
21 (Memo. of P. & A. in Supp. of Mot. to Dismiss at 17 (citing *Hays v. Temple*, 23 Cal. App. 2d
22 690, 694, 73 P.2d 1248, 1250 (Ct. App. 1937)).) Contrary to Virginia Armstrong’s argument,
23

24 ⁸ 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 however, the purported contract between her and plaintiffs Brent and Susan Winters is alleged
2 with sufficient certainty to show plaintiffs' right to performance on Armstrong's part. The
3 contract, as alleged, is simple: The Winters family agreed to sell their house in Illinois and move
4 to Nevada City, California to be "available" to Virginia Armstrong in exchange for transfer of the
5 home at 11318 Via Vista in Nevada City, California to plaintiffs Brent and Susan Winters.
6 Plaintiffs allege that this oral agreement was entered into, that plaintiffs fulfilled their obligation
7 to move to Nevada City, that Virginia Armstrong breached this agreement by transferring the
8 property from one trust to another so as to preclude transfer to Brent and Susan Winters, and that
9 plaintiffs suffered damages in the form of loss of an ownership of the property.

10 Although Virginia Armstrong might have other defenses to formation or
11 enforcement of the purported contract, she has not identified them in her moving papers.
12 Without more than the thin, unexplained argument offered in the moving papers, the undersigned
13 cannot conclude that dismissal of plaintiffs' breach of contract is warranted.

14 G. Plaintiffs' State Law Claim for Loss of Consortium (Claim 36)

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

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

21 (Id.)

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

24 (1) a valid and lawful marriage between the plaintiff and the person
25 injured at the time of the injury;

26 (2) a tortious injury to the plaintiff's spouse;

1 (3) loss of consortium suffered by the plaintiff; and

2 (4) the loss was proximately caused by the defendant's act.

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

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

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

20 The undersigned will recommend that plaintiffs’ loss of consortium claim be
21 dismissed with prejudice because they have failed to allege a plausible claim for relief. First,
22 plaintiffs have not alleged any facts that would suggest that any conjugal or marital relationship
23 has been more than superficially affected. Second, plaintiffs have not alleged any facts regarding
24 how the acts of Virginia Armstrong proximately caused any loss of consortium. Plaintiffs’
25 allegations of causation are general as to all defendants and are conclusory in nature. Third,
26 under California law, parents may not pursue a claim loss of filial consortium, and children may
not pursue a claim for loss of parental consortium. See Baxter v. Superior Court, 19 Cal. 3d 461,
466, 563 P.2d 871, 874 (1977); Borer v. Am. Airlines, Inc., 19 Cal. 3d 441, 453, 563 P.2d 858,
866 (1977); Meighan v. Shore, 34 Cal. App. 4th 1025, 1034, 40 Cal. Rptr. 2d 744, 749 (Ct. App.

1 1995). Fourth, plaintiffs have improperly re-pled claims on behalf of Joy, Clark, and Jill
2 Winters, as the court previously ordered that references to these minors be stricken from the
3 Third Amended Complaint. Finally, it would appear facially improper that plaintiffs could
4 recover for loss of consortium with Virginia Armstrong, “their grandmother,” who they have
5 named as a defendant in this case. Plaintiffs have failed to meet the pleading requirements to
6 state a plausible claim for relief, and the undersigned has no reason to believe that these
7 deficiencies could be cured through amendment.

8 H. Plaintiffs’ State Law Claim for Intentional Infliction of Emotional Distress
9 (Claim 38)

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

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

19 (Id.)

20 To state a claim for intentional infliction of emotional distress under California
21 law, a plaintiff must satisfactorily allege the following elements: “(1) extreme and outrageous
22 conduct by the defendant with the intention of causing, or reckless disregard of the probability of
23 causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and
24 (3) actual and proximate causation of the emotional distress by the defendant’s outrageous
25 conduct.” Hughes v. Pair, 46 Cal. 4th 1035, 1050, 209 P.3d 963, 976 (2009) (citations and
26

1 quotation marks omitted). The California Supreme Court has explained that “outrageous”
2 conduct is that which is so “extreme as to exceed all bounds of that usually tolerated in a
3 civilized community,” and that “the defendant’s conduct must be intended to inflict injury or
4 engaged in with the realization that injury will result.” *Id.* (citations and quotation marks
5 omitted).

6 As noted above, plaintiffs’ IIED claim is a collection of legal conclusions and bare
7 factual allegations that incorporate the remainder of the Third Amended Complaint by reference.
8 Plaintiffs do not allege facts demonstrating that Virginia Armstrong’s acts rose to the level of
9 “extreme and outrageous” behavior as defined under California, that any of plaintiffs suffered
10 severe or extreme emotional distress, or that Virginia Armstrong’s conduct proximately caused
11 any particular plaintiff’s emotional distress. Accordingly, the undersigned will recommend that
12 this claim be dismissed as to Virginia Armstrong. The undersigned will recommend dismissal
13 with prejudice because nothing in the Third Amended Complaint or plaintiffs’ written opposition
14 brief suggests that the identified pleading deficiencies can be cured through amendment. In their
15 consolidated opposition brief, plaintiffs continue their conclusory allegations regarding the IIED
16 claim as to all “Responding Defendants.” (Dkt. No. 89 at 10.) In an attempt to substantiate that
17 the Responding Defendants’ engaged in outrageous conduct, plaintiffs explain that they “were
18 unlawfully thrown out of their lawfully possessed home, [and were] physically abused in the
19 middle of the night.” (*Id.*) Yet there is no suggestion in the opposition brief or the Third
20 Amended Complaint that the elderly Virginia Armstrong’s physically abused plaintiffs in the
21 middle of the night. Moreover, as to Virginia Armstrong, any claim arising out of her act of
22 filing an unlawful detainer action in the Nevada County Superior Court is barred by California’s
23 absolute litigation privilege. *See, e.g., Silberg*, 50 Cal. 3d at 215, 786 P.2d at 371 (recognizing
24 that the absolute litigation privilege found in California Civil Code § 47 applies to tort liability
25 premised on a claim of intentional infliction of emotional distress).

1 IV. CONCLUSION

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

3 1. Defendant Virginia Armstrong's motion to dismiss the Third Amended
4 Complaint (Dkt. No. 84) be granted in part.

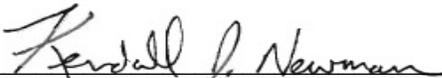
5 2. The civil battery claim alleged on Joy Winters's behalf be dismissed
6 without prejudice.

7 3. All of the remaining claims alleged against Virginia Armstrong, except for
8 plaintiff Christy Winters's civil battery claim (claim 9) and plaintiffs' breach of contract claim
9 (claim 22), be dismissed with prejudice.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a
14 document should be captioned "Objections to Magistrate Judge's Findings and
15 Recommendations." Any response to the objections shall be filed with the court and served on
16 all parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file
17 objections within the specified time may waive the right to appeal the District Court's order.
18 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57
19 (9th Cir. 1991).

20 IT IS SO RECOMMENDED.

21 DATED: July 26, 2010

22
23
24 
KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE
26