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

BRENT ALLAN WINTERS, et al.,

Plaintiffs,

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

v.

DELORES JORDAN, et al,

Defendants.

FINDINGS AND RECOMMENDATIONS

Presently before the court are motions to dismiss plaintiffs’ Third Amended Complaint filed by defendants Delores Jordan and David Silber (Dkt. Nos. 257, 258).¹ In addition to being named as a defendant in this action, Silber is also a private attorney who represents Jordan and two other defendants in this action, Virginia and Michael Armstrong. The court previously granted Jordan and Silber leave to file their motions to dismiss late, but also permitted plaintiffs to object to the court’s grant of such leave. (Order, Feb. 18, 2011, Dkt. No. 256.) Accordingly, these findings and recommendations address the propriety of permitting to Jordan and Silber leave to file their motions to dismiss, as well as a motion for default judgment

¹ This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). Because oral argument would not materially aid the resolution of the pending motions, these matters were submitted on the briefs and record without a hearing. See Fed. R. Civ. P. 78(b); E. Dist. Local Rule 230(g).

1 that plaintiffs filed in regards to Jordan.

2 The undersigned has considered the parties' submissions addressed to Jordan's
3 and Silber's motions to dismiss, as well as those submissions pertaining to plaintiffs' objections
4 to the grant of leave to file the motions. For the reasons that follow, the undersigned concludes
5 that it is appropriate to consider Jordan's and Silber's motions to dismiss, which were filed late
6 due to Silber's excusable neglect. Additionally, the undersigned recommends that Jordan's
7 motion to dismiss be granted in part and denied in part, as explained below. The undersigned
8 further recommends that Silber's motion to dismiss be granted and that all of plaintiff's claims
9 alleged against Silber be dismissed with prejudice. Finally, the undersigned recommends that
10 plaintiffs' motion for default judgment be denied as to Jordan.

11 I. CONSIDERATION OF JORDAN'S AND SILBER'S MOTIONS TO DISMISS

12 The court granted Jordan's and Silber's ex parte motions seeking leave to file late
13 motions to dismiss, and plaintiffs object to the granting of such leave. Under the peculiar
14 circumstances of this case, the relevant factors weighed to determine whether excusable neglect
15 warrants relief from a filing deadline support a finding that Silber's failure to timely file the
16 motions to dismiss was the result of excusable neglect. Accordingly, the undersigned concludes
17 that Silber's excusable neglect supports the grant of leave to file those motions to dismiss
18 pursuant to Federal Rule of Civil Procedure 6(b)(1)(B), and those motions will be considered on
19 the merits. Due to the long and tortured history of this case, spanning over 300 docket entries to
20 date, some relevant background is provided below.

21 On July 3, 2009, Silber appeared in this action on behalf of Jordan and filed
22 Jordan's answer to plaintiffs' Second Amended Complaint (Dkt. No. 29). On July 6, 2009,
23 Silber appeared on his own behalf and filed an answer to the Second Amended Complaint (Dkt.
24 No. 30). Silber also filed answers to the Second Amended Complaint on behalf of his clients,
25 defendants Virginia and Michael Armstrong (Dkt. Nos. 24, 28).

26 The court subsequently struck plaintiffs' Second Amended Complaint and ordered

1 plaintiffs to file a further amended complaint, which would serve as “plaintiffs’ last chance to
2 comply” with the court’s orders and relevant procedural rules. (Order, Aug. 24, 2009, Dkt.
3 No. 56.) Plaintiffs subsequently filed their Third Amended Complaint (Dkt. No. 66).

4 In November 2009, Silber filed motions to dismiss the Third Amended Complaint
5 on behalf of Virginia and Michael Armstrong (Dkt. Nos. 82-85).² However, Silber did not file
6 motions to dismiss or answers to the Third Amended Complaint at that time. Plaintiffs did not
7 seek a clerk’s entry of default against Jordan or Silber, but filed a procedurally improper motion
8 for default judgment that did encompass Jordan, among numerous other defendants (Dkt.
9 No. 189).³

10 On February 17, 2011, the undersigned held a hearing addressing numerous
11 motions, including plaintiffs’ motion for default judgment (Dkt. No. 255). Silber appeared at the
12 hearing seeking leave to file motions to dismiss the Third Amended Complaint on his and
13 Jordan’s behalf, citing his excusable neglect. That same morning, Silber filed ex parte
14 applications seeking leave to file the subject motions, which appended the proposed motions to
15 dismiss (Dkt. Nos. 253, 254). Silber’s declarations in support of his requests, signed under
16 penalty of perjury, represent that Silber had “just discovered that [he] had not filed a Responsive
17 Pleading in this matter for [his] case or for the case against Delores Jordan.” (Silber Decl. In
18 Supp. of Jordan’s Ex Parte Appl. ¶ 3 (“Silber Decl.”).)⁴ Silber further declares that he had
19 drafted responses to the Third Amended Complaint on Jordan’s behalf and his own behalf, but

20
21 ² Michael Armstrong’s motion to dismiss was granted in its entirety, and Michael Armstrong
22 has been dismissed from this action with prejudice. (Order, Sept. 13, 2010, Dkt. No. 179.) Virginia
23 Armstrong’s motion to dismiss was granted in nearly all respects, except that plaintiff Christy
Winters’s state law claim of civil battery and plaintiffs’ state law claim of breach of contract were
permitted to proceed. (Order, Sept. 13, 2010, Dkt. No. 180.)

24 ³ The court resolved the motion for default judgment as to the numerous other defendants
25 by separate order, but deferred ruling on the motion as to Jordan. (See Findings &
26 Recommendations, June 20, 2011, Dkt. No. 292, adopted by Order, Sept. 20, 2011, Dkt. No. 300.)

⁴ Silber’s declaration in support of his own ex parte application (Dkt. No. 254) is not
materially different from the declaration he filed in support of Jordan’s request for relief.

1 that “[d]ue to the amount of pleadings filed and the number of defendants [he] lost track of the
2 fact that [he] had not actually filed the pleadings despite the fact that [he] had drafted them at the
3 end of November 2009.” (*Id.* ¶5.) Moreover, Silber declares: “During the last year I have been
4 through a series of personal problems that included divorce from my wife, moving from my
5 house in Texas and a series of other unfortunate events that caused me to lose track of the events
6 in this matter.”⁵ (*Id.* ¶ 6.)

7 Relevant here, Federal Rule of Civil Procedure 6(b) provides:

8 **(b) Extending Time.**

9 **(1) *In General.*** When an act may or must be done within a specified
10 time, the court may, for good cause, extend the time:

11 **(A)** with or without motion or notice if the court acts, or if a request
is made, before the original time or its extension expires; or

12 **(B)** on motion made after the time has expired if the party failed to
13 act because of excusable neglect.

14 **(2) *Exceptions.*** A court must not extend the time to act under Rules
15 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

16 The undersigned concludes that although it presents a relatively close call, the
17 peculiar circumstances of this case justify, on the basis of excusable neglect, relief pursuant to
18 Rule 6(b)(1)(B). The undersigned considers the factors supporting such relief, and plaintiffs’
primary objections, below.

19 Plaintiffs first object to the granting of any relief on the grounds that such relief
20 would violate the limitation on extensions of time provided in Rule 6(b)(2). Plaintiffs appear to

21 ⁵ The undersigned notes that, based on the court’s independent research, Silber was the
22 subject of a publicly filed, stipulated disciplinary order entered by the State Bar Court of California.
23 (*See Stayed Suspension Order*, July 11, 2011, filed in *In Re David S. Silber*, Nos. 10-O-00366, 10-
24 O-03134 (State Bar Court of Cal.)) That order, which does not concern Silber’s representation of
any defendants here, reflects that Silber’s divorce caused him “psychological stress” during the
25 period relevant here. The district court may take judicial notice of documents filed in a state court
action where, as here, the state court proceedings have a direct relation to the matters at issue. *See*,
26 *e.g.*, *Betker v. U.S. Trust Corp. (In re Heritage Bond Litig.)*, 546 F.3d 667, 670 n.1, 673 n.8 (9th Cir.
2008); *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007); *Holder v. Holder*, 305 F.3d 854, 866
(9th Cir. 2002).

1 argue that Jordan’s and Silber’s requests for relief are premised on an assertion of “excusable
2 neglect” and thus implicate Federal Rule of Civil Procedure 60(b)(1), which permits a court to
3 “relieve a party or its legal representative from a final judgment, order, or proceeding for . . .
4 mistake, inadvertence, surprise, or excusable neglect.” In turn, Rule 60(c)(1) places a one-year
5 time limit on motions made pursuant to Rule 60(b)(1), which runs from the date of entry of the
6 subject judgment or order or the date of the subject proceeding. See Fed. R. Civ. P. 60(c)(1) (“A
7 motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3)
8 no more than a year after the entry of the judgment or order or the date of the proceeding.”).
9 Plaintiffs appear to argue that because Silber filed the requests for relief more than one year after
10 the deadline for his and Jordan’s response to the Third Amended Complaint, Silber’s requests for
11 relief violate Rule 60(c)(1).

12 The undersigned finds plaintiffs’ argument premised on the interplay between
13 Rule 6(b)(2) and Rule 60(c)(1) unpersuasive. In short, Jordan’s and Silber’s requests for relief
14 do not implicate Rule 60(b) and, accordingly, the restrictions set forth in Rules 6(b)(2) and
15 60(c)(1) do not apply here. Relief granted pursuant to Rule 60(b) is relief from a “*final*
16 judgment, order, or proceeding.” Fed. R. Civ. P. 60(b) (emphasis added). The term “final”
17 modifies not only the term “judgment,” but also the terms “order” and “proceeding.” See Fed. R.
18 Civ. P. 60(b) advisory committee’s notes to 1946 amend. (“The addition of the qualifying word
19 ‘final’ emphasizes the character of the judgments, orders or proceedings from which Rule 60(b)
20 affords relief . . .”); Kapco Mfg. Co. v. C & O Enters., Inc., 773 F.2d 151, 154 (7th Cir. 1985)
21 (stating that “‘final’ in Rule 60(b) must modify ‘order, or proceeding’ as well as ‘judgment,’”
22 and that Rule 60(b) “is a method of reopening a closed case”). Here, neither Silber nor Jordan is
23 seeking relief from a final judgment, final order, or final proceeding. Accordingly, the relief
24 sought is not pursuant to Rule 60(b), and plaintiffs’ argument premised on Rules 6(b)(2)
25 and 60(c)(1) fails.

26 Plaintiffs also object on the grounds that Silber has not sufficiently demonstrated

1 excusable neglect. “The test for whether neglect is excusable under Rule 6(b)(1)(B) is the same
2 as under Rule 60(b)(1).” Molina v. Potter, No. 10-CV-454 JLS (BGS), 2011 WL 1261547, at *1
3 (S.D. Cal. Apr. 5, 2011) (unpublished) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.
4 P’ship, 507 U.S. 380, 392-93 (1993); and Comm. for Idaho’s High Desert, Inc. v. Yost, 92 F.3d
5 814, 825 n.4 (9th Cir. 1996)). The Ninth Circuit Court of Appeals has stated that:

6 In evaluating whether neglect is excusable, a district court must consider
7 the four factors established by the Supreme Court in Pioneer Investment
8 Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380,
9 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993): “(1) the danger of prejudice to the
10 non-moving party, (2) the length of delay and its potential impact on
11 judicial proceedings, (3) the reason for the delay, including whether it was
12 within the reasonable control of the movant, and (4) whether the moving
13 party’s conduct was in good faith.”

14 Mendez v. Knowles, 556 F.3d 757, 765 (9th Cir. 2009) (quoting Pincay v. Andrews, 389 F.3d
15 853, 855 (9th Cir. 2004) (en banc) (citing Pioneer Inv. Servs. Co., 507 U.S. at 395)). These four
16 factors are not the only ones the court may consider. The Supreme Court has noted that
17 “[a]lthough inadvertence, ignorance of the rules, or mistakes construing the rules do not usually
18 constitute ‘excusable’ neglect, it is clear that ‘excusable neglect’ under Rule 6(b) is a somewhat
19 ‘elastic concept’ and is not limited strictly to omissions caused by circumstances beyond the
20 control of the movant.” Pioneer Inv. Servs. Co., 507 U.S. at 392 (footnotes omitted). “The
21 determination of whether neglect is excusable ‘is at bottom an equitable one, taking account of
22 all relevant circumstances surrounding the party’s omission.’” Lemoge v. United States, 587
23 F.3d 1188, 1192 (9th Cir. 2009) (quoting Pioneer Inv. Servs. Co., 507 U.S. at 395).

24 Silber’s failure to file already-prepared motions to dismiss is unfortunate at best.
25 However, upon consideration of all four factors identified above, the undersigned concludes that
26 Silber has, even if barely so, demonstrated excusable neglect warranting relief under
27 Rule 6(b)(1).

28 First, despite plaintiffs’ generalized protests, there is an insufficient danger of
29 prejudice to plaintiffs to preclude relief. This case is still at the pleading stage due to the sheer

1 number of defendants, numerous pleadings-based motions filed by approximately 60 named
2 defendants, and multiple amendments of complaints. At most, Silber’s late-filed motions
3 decreased plaintiffs’ ability to default Jordan and Silber and obtain a quick victory—a potentially
4 un-meritorious victory—which is not sufficient to support a finding of prejudice to the non-
5 moving party. See, e.g., Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1262 (9th Cir. 2010)
6 (citing Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1225 (9th Cir. 2000)). Moreover, as stated
7 below, the undersigned recommends that any motion for default judgment be denied as to Jordan
8 on procedural and substantive grounds.

9 Second, in terms of the length of delay and its potential impact on judicial
10 proceedings, the length of the delay totaling over one year is quite substantial. However, that
11 delay has not materially impacted these proceedings, which, as noted above, are still at the
12 pleading stage. Over the course of nearly two years, the court has been addressing various
13 pleadings-based motions filed by defendants and numerous other motions filed by plaintiffs.
14 Moreover, there is no impending trial date or other deadlines that must be continued if relief is
15 granted.

16 Third, the court considers the reason for the delay and whether it was in the
17 reasonable control of the moving party. Silber’s reasons are many and of a very “human” variety,
18 and explain Silber’s failure to act. Whatever those reasons, the delay was caused by Silber and
19 was within his control. At bottom, Silber forgot to file two documents that he had already
20 prepared, apparently due to the myriad number of filings and defendants in this action that
21 confused Silber. The undersigned finds that this factor weighs against granting relief. However,
22 such a finding is not dispositive of the inquiry into excusable neglect, which must consider all of
23 the relevant factors and circumstances.

24 Fourth, the undersigned cannot conclude that Silber’s acts or omissions were the
25 result of bad faith. Silber has declared under penalty of perjury that his failures were a very
26 unfortunate oversight, and that he did not “take the actions to interfere with the proceedings in

1 this case or to cause any unnecessary delay, or to interfere with the plaintiff's [*sic*] rights." (E.g.,
2 Silber Decl. ¶ 8.) Even if Silber's declarations are viewed skeptically as containing self-serving
3 representations, the undersigned finds no other evidence in the record suggesting that Silber acted
4 in bad faith, especially where he actually filed two largely successful motions to dismiss on
5 behalf of Virginia and Michael Armstrong.

6 Although Silber's actions clearly fell below the level of conduct expected of
7 attorneys appearing before this court, the undersigned finds that the four relevant factors support,
8 on balance, a finding of excusable neglect. Accordingly, the undersigned orders that Jordan and
9 Silber are entitled to relief pursuant to Federal Rule of Civil Procedure 6(b)(1)(B). Accordingly,
10 the undersigned will consider and address the merits of Jordan's and Silber's motions to dismiss
11 plaintiffs' Third Amended Complaint.

12 Before turning to the motions to dismiss, the undersigned briefly addresses
13 plaintiffs' motion for default judgment against Jordan (Dkt. No. 189). To the extent that the
14 motion for default judgment is before the court, the undersigned recommends that it be denied on
15 procedural and substantive grounds.

16 First, plaintiffs' motion for default judgment is procedurally improper, and thus
17 subject to denial, because plaintiffs did not seek a clerk's entry of default prior to filing their
18 motion for default judgment. Federal Rule of Civil Procedure 55 governs the entry of default by
19 the clerk and the subsequent entry of default judgment by either the clerk or the district court. In
20 relevant part, Rule 55 provides:

21 **(a) Entering a Default.** When a party against whom a judgment for
22 affirmative relief is sought has failed to plead or otherwise defend, and
23 that failure is shown by affidavit or otherwise, the clerk must enter the
24 party's default.

25 **(b) Entering a Default Judgment.**

26 **(1) By the Clerk.** If the plaintiff's claim is for a sum certain or a sum
that can be made certain by computation, the clerk--on the plaintiff's
request, with an affidavit showing the amount due--must enter judgment
for that amount and costs against a defendant who has been defaulted for

1 not appearing and who is neither a minor nor an incompetent person.

2 (2) *By the Court.* In all other cases, the party must apply to the court
3 for a default judgment. . . .

4 Fed. R. Civ. P. 55(a)-(b). The Ninth Circuit Court of Appeals has stated that Rule 55 requires a
5 “two-step process” consisting of: (1) seeking a clerk’s entry of default, and (2) filing a motion for
6 the entry of default judgment. See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986) (“Eitel
7 apparently fails to understand the two-step process required by Rule 55.”); accord Symantec
8 Corp. v. Global Impact, Inc., 559 F.3d 922, 923 (9th Cir. 2009) (noting that Rules 55(a) and (b)
9 provide a two-step process for obtaining a default judgment); see also Norman v. Small, No.
10 09cv2235 WQH , 2010 WL 5173683, at *2 (S.D. Cal. Dec. 14, 2010) (unpublished) (denying
11 plaintiff’s motion for default judgment because, in part, the clerk had not yet entered a default);
12 Cramer v. Target Corp., No. 1:08-cv-01693-OWW-SKO, 2010 WL 2898996, at *1 (E.D. Cal.
13 July 22, 2010) (unpublished) (“Obtaining a default judgment in federal court is a two-step
14 process that includes: (1) entry of default and (2) default judgment.”); Bach v. Mason, 190
15 F.R.D. 567, 574 (D. Idaho 1999) (“Plaintiffs have improperly asked this court to enter a default
16 judgment without first obtaining an entry of default by the clerk. Since plaintiffs’ motion for
17 entry of default judgment is improper, it is denied.”), aff’d, 3 Fed. Appx. 656 (9th Cir. 2001),
18 cert. denied, 534 U.S. 1083 (2002).

19 Here, plaintiffs did not request or obtain a clerk’s entry of default from the Clerk
20 of Court upon a showing by affidavit or otherwise that defendants failed to plead or otherwise
21 defend themselves. Instead, they simply filed their motion for default judgment. Accordingly,
22 the undersigned recommends that plaintiffs’ motion for default judgment be denied as to Jordan
23 on procedural grounds.

24 Were the motion for default judgment properly before the court, the undersigned
25 would further recommend that it be denied as a substantive matter. One of the factors to be
26 considered in evaluating a motion for default judgment is “the strong policy underlying the

1 Federal Rules of Civil Procedure favoring decisions on the merits.” See Eitel, 782 F.2d at 1471-
2 72. Moreover, defaults judgments are generally disfavored. See id. at 1472; United States v.
3 Signed Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010)
4 (“Crucially, . . . judgment by default is a drastic step appropriate only in extreme circumstances;
5 a case should, whenever possible, be decided on the merits.”) (citation and quotation marks
6 omitted); Westchester Fire Ins. Co. v. Mendez, 585 F.3d 1183, 1189 (9th Cir. 2009) (“As a
7 general rule, default judgments are disfavored; cases should be decided upon their merits
8 whenever reasonably possible.”). The undersigned concludes that these policies favor denying
9 plaintiffs’ motion for default judgment. Such a conclusion is warranted especially where Jordan
10 had actually appeared in the action and answered the Second Amended Complaint.

11 Based on the foregoing, the undersigned affirms the grant of Jordan’s and Silber’s
12 requests for extensions to file their motions to dismiss, and deems those motions timely filed.
13 Additionally, the undersigned recommends that plaintiffs’ motion for default judgment be denied
14 as to Jordan to the extent it is properly before the court. The undersigned next addresses Jordan’s
15 and Silber’s motions to dismiss.

16 II. BACKGROUND RE: MOTIONS TO DISMISS⁶

17 Plaintiffs’ operative complaint, the Third Amended Complaint,⁷ is a wide-ranging,
18

19 ⁶ The court previously ordered that all references to three minor plaintiffs in this action—Joy
20 Winters, Clark Winters, and Jill Winters—be stricken from plaintiffs’ Third Amended Complaint
21 because those minors were not represented by an attorney or attorneys. (Order, Sept. 24, 2009, Dkt.
22 No. 68; see also Order, Nov. 12, 2009, at 2 & n.1, Dkt. No. 89.) The court subsequently dismissed
23 those minors from this action. (Order, Feb. 1, 2011, Dkt. No. 221.) Additionally, plaintiff Jeremiah
Winters was dismissed from this action at his request, subject to certain judgments and attorneys’
fees awards. (Findings & Recommendations, Apr. 15, 2011, Dkt. No. 281, adopted by Order, July
1, 2011, Dkt. No. 295.)

24 ⁷ Plaintiffs filed the operative complaint under the title “Amended Complaint,”
25 notwithstanding this court’s order that it be labeled “Third Amended Complaint.” (See Order and
26 Findings and Recommendations, Aug. 24, 2009, at 4, Dkt No. 56.) The Third Amended Complaint
supersedes plaintiffs’ “Second Amended Complaint.” As the court noted in a prior order, the Second
Amended Complaint represented plaintiffs’ first amendment of the original complaint (Id. at 1 n.1),
and the operative Third Amended Complaint represents plaintiffs’ second amendment of the original

1 25-page complaint that alleges, in eight-point font, over two dozen claims for relief against over
2 60 defendants. Several of plaintiffs' claims are alleged against "All Defendants," with no
3 differentiation in regards to the alleged conduct of each defendant that supports each such claim.
4 In dismissing plaintiffs' Second Amended Complaint (Dkt. No. 15), which spanned 163 pages
5 and 607 numbered paragraphs, the court ordered that plaintiffs' Third Amended Complaint could
6 not exceed 25 pages and must conform to Federal Rule of Civil Procedure 8(a), including the
7 requirement that the pleading contain a short and plain statement of the claims alleged instead of
8 recounting all of the evidence and arguments in support of those claims. (Order and Findings
9 and Recommendations, Aug. 24, 2009, at 3.) The court stated that "[t]his will be plaintiffs' last
10 chance to comply." (Id.)

11 The claims alleged in the Third Amended Complaint against Jordan and Silber
12 arise from an underlying family dispute between plaintiffs, who are part of the Winters family,
13 and defendant Virginia Armstrong. Virginia Armstrong is the mother of plaintiff Susan Winters
14 and grandmother to other plaintiffs.

15 The Third Amended Complaint alleges that in or around the year 2002, plaintiff
16 Susan Winters's elderly parents, Joe and Virginia Armstrong, encouraged plaintiffs Susan and
17 Brent Winters to sell their house in Illinois and move to Nevada City, California, to live with the
18 Armstrongs. (Third Am. Compl. ¶ 12.) Plaintiffs allegedly visited Joe and Virginia Armstrong
19 between October and December of 2003, and then apparently returned to Illinois. (Id. ¶ 13.)
20 Plaintiffs allege that before plaintiffs permanently moved to California, Joe Armstrong passed
21 away and that Virginia Armstrong eventually transferred properties, including the residence at
22 11318 Via Vista in Nevada City, California, from the Armstrong Living Trust dated July 29,
23 1994, to the Virginia Armstrong Living Trust. (Id. ¶¶ 18, 21.) Plaintiffs allege that Virginia
24 Armstrong took these actions in 2007, due, in part, to the undue influence of defendants Valerie
25 _____
26 complaint.

1 Logsdon, who was Virginia Armstrong’s attorney, and Michael Armstrong, Virginia Armstrong’s
2 son. (Id. ¶ 21.)

3 The relationship between Virginia Armstrong and plaintiffs, which appears to
4 have given rise to allegations of possible elder abuse committed by plaintiffs against Virginia
5 Armstrong, resulted in several proceedings in the Nevada County Superior Court. Relevant here,
6 plaintiffs allege that on October 15, 2007, Nevada County Adult Protective Services (“APS”)
7 filed a petition for a temporary restraining order in Virginia Armstrong’s name and “against her
8 daughter Susan Winters and her son-in-law Brent Winters.” (Third Am. Compl. ¶ 22.) Plaintiffs
9 allege that APS was assisted by defendant Delores Jordan, who was “unduly influencing”
10 Virginia Armstrong. (Id.) The next day, Susan Winters filed a petition for a restraining order
11 against Jordan. (Id. ¶ 23.) These dueling petitions led to ongoing proceedings in the Nevada
12 County Superior Court, which are generally recounted below. (See id. ¶¶ 23-26.)

13 Plaintiffs allege that on October 18, 2007, the Nevada County Superior Court
14 entered a permanent restraining order in favor of plaintiffs and against Jordan. (Third Am.
15 Compl. ¶ 26.) However, they allege that Jordan thereafter directed a “handyman” to change the
16 locks to Virginia Armstrong’s home without permission from plaintiffs and in violation of the
17 restraining order. (Id. ¶ 27.) As discussed further below, plaintiffs allege that on February 10,
18 2008, May 26, 2008, and June 2, 2008, Jordan trespassed onto the home while plaintiffs were
19 living there with Virginia Armstrong, also allegedly in violation of the restraining order against
20 Jordan. (See, e.g., id. ¶¶ 28, 58-61, and at p. 19.)⁸ Plaintiffs allege that on August 8, 2008, a
21 judge of the Nevada County Superior Court ultimately vacated the restraining order against
22 Jordan and “dismissed” the trespass committed by Jordan. (Id. ¶ 74.)

23
24 ⁸ Additionally, on April 21, 2008, a judge of the Nevada County Superior Court, Judge
25 Thomas Anderson, “instituted proceedings for restraining orders” against plaintiffs Susan Winters,
26 Brent Winters, and all of their children, and such restraining order was allegedly for the protection
of Virginia Armstrong. (Third Am. Compl. ¶ 46.) That same day, Judge Anderson, on his own
motion, appointed an attorney, defendant Dewey Harpainter, to represent Virginia Armstrong “to
prosecute the restraining orders.” (Id. ¶ 47.)

1 Plaintiffs' Third Amended Complaint alleges the following claims against Jordan:
2 abuse of process (claim 6); violation of plaintiffs' rights of equal protection of the law secured by
3 the Fourteenth Amendment of the U.S. Constitution (claim 7); civil battery (claim 9); civil
4 assault (claim 10); trespass to land (claim 12); trespass to chattels, alleged against "All
5 Defendants" (claim 13); violation of 42 U.S.C. § 1983, alleged against "All Defendants"
6 (claim 14); civil conspiracy in violation of 42 U.S.C. § 1983, alleged against "All Defendants"
7 (claim 15); civil conspiracy, alleged against "All Defendants" (claim 18); "Slander, Libel, and
8 Slander & Libel Per Se" (claim 21); invasion of privacy (claim 25); conspiracy to violate the
9 Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1962(d), alleged
10 against "All Defendants" (claim 31); loss of consortium, alleged against "All Defendants"
11 (claim 36); and intentional infliction of emotional distress, alleged against "All Defendants"
12 (claim 38).

13 Plaintiffs allege the following claims against Silber, who is only alleged to have
14 acted as Jordan's attorney: abuse of process (claim 6); violation of plaintiffs' rights of equal
15 protection of the law secured by the Fourteenth Amendment of the U.S. Constitution (claim 7);
16 violation of plaintiffs' rights of due process secured by the Fifth and Fourteenth Amendment of
17 the U.S. Constitution (claim 8); trespass to chattels, alleged against "All Defendants" (claim 13);
18 violation of 42 U.S.C. § 1983, alleged against "All Defendants" (claim 14); civil conspiracy in
19 violation of 42 U.S.C. § 1983, alleged against "All Defendants" (claim 15); civil conspiracy,
20 alleged against "All Defendants" (claim 18); invasion of privacy (claim 25); violation of
21 plaintiffs' rights secured by the First Amendment of the U.S. Constitution (claim 26); violation
22 of plaintiffs' rights secured by the Second Amendment of the U.S. Constitution (claim 28);
23 conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18
24 U.S.C. 1962(d), alleged against "All Defendants" (claim 31); loss of consortium, alleged against
25 "All Defendants" (claim 36); and intentional infliction of emotional distress, alleged against "All
26 Defendants" (claim 38).

1 III. LEGAL STANDARDS, FED. R. CIV. P. 12(b)(6)

2 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
3 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
4 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard
5 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
6 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
7 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “A complaint may survive a
8 motion to dismiss if, taking all well-pleaded factual allegations as true, it contains ‘enough facts
9 to state a claim to relief that is plausible on its face.’” Coto Settlement v. Eisenberg, 593 F.3d
10 1031, 1034 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). “A claim
11 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
12 reasonable inference that the defendant is liable for the misconduct alleged.” Caviness v.
13 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Iqbal, 129 S. Ct. at
14 1949). The court accepts all of the facts alleged in the complaint as true and construes them in
15 the light most favorable to the plaintiff. Corrie v. Caterpillar, 503 F.3d 974, 977 (9th Cir. 2007).
16 The court is “not, however, required to accept as true conclusory allegations that are contradicted
17 by documents referred to in the complaint, and [the court does] not necessarily assume the truth
18 of legal conclusions merely because they are cast in the form of factual allegations.” Paulsen,
19 559 F.3d at 1071 (citations and quotation marks omitted). In ruling on a motion to dismiss
20 pursuant to Rule 12(b)(6), the court “may generally consider only allegations contained in the
21 pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.”
22 Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and
23 quotation marks omitted).

24 The court must construe a pro se pleading liberally to determine if it states a claim
25 and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an
26 opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See

1 Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica
2 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally
3 construed, particularly where civil rights claims are involved”).

4 IV. DISCUSSION

5 A. Plaintiffs’ Federal Claims Against Jordan and Silber

6 1. Plaintiffs’ Generic and Conclusory Section 1983 Claims (Claims 14, 15,
7 and 18)

8 Plaintiffs’ fourteenth, fifteenth, and eighteenth claims for relief allege that “All
9 Defendants” violated plaintiffs’ constitutional rights. (Third Am. Compl. at 19-20.) These
10 claims, which are expressly or impliedly brought pursuant to 42 U.S.C. § 1983, are subject to
11 dismissal with prejudice.⁹

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

24
25 ⁹ Plaintiffs allege additional claims against Jordan and Silber pursuant to 42 U.S.C. § 1983
26 elsewhere in the Third Amended Complaint. (See Third Am. Compl. at 14-151, 23-24.) The undersigned separately addresses those claims in these findings and recommendations.

1 Plaintiffs' allegations in support of their fourteenth, fifteenth, and eighteenth
2 claims for relief are so conclusory that they should be dismissed. With respect to plaintiffs'
3 fourteenth claim, alleging that "All Defendants" individually violated plaintiffs' constitutional
4 rights, plaintiffs only allege the following:

5 Paragraphs above incorporated by reference. Defendants, by their actions
6 and acting under the color of law, subjected Plaintiffs, and caused
7 Plaintiffs to be subjected, to the deprivations of their rights, privileges, and
8 immunities secured by the Constitution and laws of the State of California
9 and of the United States of America, Plaintiffs claim damages under 42
10 U.S.C. § 1983 for their injuries set forth above.

11 (Third Am. Compl. at 19.) These allegations consist of bare legal conclusions, and not factual
12 allegations that state a plausible claim under Section 1983. Plaintiffs do not allege which
13 particular constitutional right of which particular plaintiff was purportedly violated. Moreover,
14 plaintiffs have not alleged how Jordan, Silber, or any other defendant was specifically involved
15 in the purported deprivation of each plaintiff's civil rights at issue in claim fourteen. See, e.g.,
16 James v. Rowlands, 606 F.3d 646, 653 n.3 (9th Cir. 2010) ("Of course, § 1983 imposes liability
17 on a defendant only if he or she personally participated in or directed a violation."); Jones v.
18 Williams, 297 F.3d 930, 934 (9th Cir. 2002) ("In order for a person acting under color of state
19 law to be liable under section 1983 there must be a showing of personal participation in the
20 alleged rights deprivation . . ."); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) ("A
21 plaintiff must allege facts, not simply conclusions, that show that an individual was personally
22 involved in the deprivation of his civil rights. Liability under § 1983 must be based on the
23 personal involvement of the defendant."). Accordingly, plaintiffs' fourteenth claim should be
24 dismissed.

25 Plaintiffs' conspiracy claims alleged in claims fifteen and eighteen are also fatally
26 flawed. Again, plaintiffs do not allege that they were deprived of any specific constitutional
right. They simply incorporate the rest of their complaint by reference and leave it to defendants
and the court to sort out. Additionally, plaintiffs' allegations of an agreement among "All

1 Defendants” to commit a violation of plaintiffs’ rights is conclusory so as to be legally
2 insufficient. See Simmons, 318 F.3d at 1161 (“Plaintiff’s conclusory allegations that the lawyer
3 was conspiring with state officers to deprive him of due process are insufficient.”); Burns v.
4 County of King, 883 F.2d 819, 821 (9th Cir. 1989) (per curiam) (“Burns’ claims against all the
5 defendants for a conspiracy to violate his constitutional rights under section 1983 also fail
6 because they were supported only by conclusory allegations.”); see, cf., Degrassi v. City of
7 Glendora, 207 F.3d 636, 647 (9th Cir. 2000) (stating that “a bare allegation of . . . joint action
8 will not overcome a motion to dismiss” (citation and quotation marks omitted)); Price v. Hawaii,
9 939 F.2d 702, 707-08 (9th Cir. 1991) (stating that “[c]onclusionary allegations, unsupported by
10 facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act” (citation and
11 quotation marks omitted, modifications in original)). Plaintiffs simply allege a series of distinct
12 acts committed by different defendants and attempt to tie those acts together in an alleged
13 conspiracy through the use of empty buzzwords such as “in concert” and “colluding.”

14 In light of the deficient nature of plaintiffs’ allegations in claims fourteen, fifteen,
15 and eighteen, the undersigned recommends that these claims be dismissed as to Jordan and
16 Silber. Nothing in plaintiffs’ Third Amended Complaint suggests that these pleading
17 deficiencies could be cured through amendment and, accordingly, the undersigned recommends
18 that these claims be dismissed with prejudice.

19 2. Plaintiffs’ Remaining Constitutional Claim Against Jordan (Claim 7)

20 Plaintiffs allege one additional, specific claim for relief against Jordan pursuant to
21 42 U.S.C. § 1983. Plaintiffs’ seventh claim for relief alleges that fourteen defendants, including
22 Jordan, violated plaintiffs’ rights of equal protection provided in the Fourteenth Amendment to
23 the U.S. Constitution. (See Third Am. Compl. at 14.) In essence, plaintiffs allege that APS and
24 two of its employees arbitrarily provided assistance to certain individuals in regards to the
25 protection of Virginia Armstrong, but refused to provide assistance to plaintiff Susan Winters in
26 her attempts to allegedly protect Virginia Armstrong. In relevant part, plaintiffs allege:

1 **04/08**— Paragraphs above incorporated by reference. In violation of equal
2 protection of the laws, Plaintiff Susan Winters called APS to report the
3 physical (medication), financial, and emotional abuse and undue influence
4 of Delores Jordan and attorney Valerie Logsdon over her elderly mother
5 Virginia Armstrong. In response, Nevada County Adult Protective
6 Services instructed Susan that she must obtain conservatorship of Virginia
7 Armstrong before Susan could allege abuse and undue influence of others
8 over her mother Virginia Armstrong. Susan had the right to the assistance
9 of Adult Protective Services to stop the abuse of her mother by Delores
10 Jordan and Valerie Logsdon. Adult Protective Services was assisting
11 Delores Jordan against Susan, but APS refused to assist Susan in her
12 lawful complaint against Jordan and Logsdon. . . .

13 (Id.)

14 Jordan moves to dismiss plaintiffs’ equal protection claim on the ground that
15 Jordan is not a state actor and did not act under color of state law. Although it presents a close
16 call, the undersigned construes plaintiffs’ allegations liberally and concludes that plaintiffs’
17 seventh claim for relief should proceed against Jordan insofar as it is alleged by Susan Winters.

18 As noted above, “[t]o state a claim under § 1983, a plaintiff must allege two
19 essential elements: (1) that a right secured by the Constitution or laws of the United States was
20 violated, and (2) that the alleged violation was committed by a person acting under the color of
21 State law.” Long, 442 F.3d at 1185. Although “[a] civil rights plaintiff suing a private
22 individual under § 1983 must demonstrate that the private individual acted under color of state
23 law,” Franklin, 312 F.3d at 444, it is well-settled that “even a private entity can, in certain
24 circumstances, be subject to liability under section 1983,” Villegas v. Gilroy Garlic Festival
25 Ass’n, 541 F.3d 950, 954 (9th Cir. 2008) (en banc). “A private individual may be liable under
26 § 1983 if she conspired or entered joint action with a state actor.” Crowe v. County of San
Diego, 608 F.3d 406, 440 (9th Cir. 2010) (citation and quotation marks omitted); see also Kirtley
v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003) (“While generally not applicable to private
parties, a § 1983 action can lie against a private party when he is a willful participant in joint
action with the State or its agents.”) (citation and quotation marks omitted). Although the United
States Supreme Court has articulated several alternative tests that may be used to determine

1 whether a private individual's actions amount to state action, see Franklin, 312 F.3d at 445, the
2 "joint action test" is appropriate here. The joint action test applies where, as here, state officials
3 and private parties are alleged to have acted in concert to effectuate a deprivation of
4 constitutional rights, and "focuses on whether the state has so far insinuated itself into a position
5 of interdependence with the private actor that it must be recognized as a joint participant in the
6 challenged activity." Id. (citation, quotation marks, and modifications omitted).

7 At the pleading stage, and construing plaintiffs' allegations liberally, the
8 undersigned concludes that the joint action test supports plaintiffs' equal protection claim.
9 Plaintiffs have specifically alleged that APS was assisting Jordan in regards to substantiating that
10 Susan Winters and other plaintiffs were abusing Virginia Armstrong. They allege that APS
11 assisted Jordan and filed reports relating Jordan's allegedly false statements about Susan and
12 Brent Winters, denied any assistance to Susan Winters in regards to her allegations that Jordan
13 was abusing Virginia Armstrong, and that this disparate treatment deprived Susan Winters of
14 equal protection of the law. At this early stage of the proceedings, the undersigned finds that
15 plaintiffs have alleged enough facts to satisfy the joint action test, and recommends that Susan
16 Winters's equal protection claim proceed against Jordan. However, the undersigned
17 recommends that this claim be dismissed with prejudice as to every other plaintiff because
18 plaintiffs have not alleged any facts substantiating that any other plaintiff was deprived of equal
19 protection of the law.

20 3. Plaintiffs' Remaining Constitutional Claims Against Silber (Claims 7, 8,
21 26, and 28)

22 In regards to their remaining constitutional claims alleged against Silber, plaintiffs
23 allege that Silber violated plaintiffs' equal protection rights as provided in the Fourteenth
24 Amendment (claim 7), plaintiffs' due process rights as provided in the Fifth and Fourteenth
25 Amendments (claim 8), plaintiffs' First Amendment rights as provided in the First Amendment,
26 and plaintiffs' right to bear arms as provided in the Second Amendment (claim 26). (See Third

1 Am. Compl. at 14-15, 23-24.) The undersigned recommends that all of these claims be
2 dismissed as to Silber on the grounds that he is not a state or federal actor, that he did not act
3 under color of state law, and that the joint action test does not support plaintiffs' claims.

4 At the outset, plaintiffs' Fifth Amendment claim fails because plaintiffs have not
5 alleged, and in no way appear to be able to allege, that Silber is a federal actor. The Ninth
6 Circuit Court of Appeals has plainly held that "[t]he Due Process Clause of the Fifth Amendment
7 . . . [applies] only to actions of the federal government—not to those of state or local
8 governments." Lee v. City of L.A., 250 F.3d 668, 687 (9th Cir. 2001); see also Bingue v.
9 Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008) ("The Fifth Amendment's due process clause
10 only applies to the federal government."); Castillo v. McFadden, 399 F.3d 993, 1002 n.5 (9th Cir.
11 2005) ("The Fifth Amendment prohibits the federal government from depriving persons of due
12 process, while the Fourteenth Amendment explicitly prohibits deprivations without due process
13 by the several States."). Here, plaintiffs have not alleged facts suggesting that Silber, a private
14 attorney representing private individuals, was at any relevant time a federal actor. Accordingly,
15 the undersigned recommends that plaintiffs' eighth claim for relief be dismissed with prejudice
16 to the extent that it is premised on the Fifth Amendment.

17 In regards to plaintiffs' remaining equal protection, due process, First
18 Amendment, and Second Amendment claims, plaintiffs have not plausibly alleged that Silber
19 was a state actor or acted under color of state law. Moreover, plaintiffs have not alleged facts
20 that support a finding of joint action between Silber and a state actor. At most, plaintiffs suggest
21 in connection with their seventh claim for relief that the Nevada Superior Court entered or
22 modified a restraining order following an ex parte hearing at which Silber was present and of
23 which plaintiffs lacked notice. These facts are insufficient to establish joint action. Accordingly,
24 the undersigned recommends that plaintiffs' seventh, eighth, twenty-sixth, and twenty-eighth
25 claims for relief be dismissed with prejudice.

26 ///

1 4. Plaintiffs RICO Conspiracy Claim (Claim 31)

2 Jordan and Silber move to dismiss plaintiffs’ thirty-first claim for relief, which
3 alleges that “All Defendants”—over sixty defendants including private actors, state court judges
4 and employees, law enforcement, and local agencies—conspired to commit racketeering activity
5 in violation of the RICO statute, see 18 U.S.C. §§ 1962(d), 1964(c). (See Third Am. Compl.
6 at 24; see also Defs.’ Memo. at 12-13.) Plaintiffs allege that all defendants in this case conspired
7 to “maintain a federal prosecution against Plaintiff Brent Winters in Illinois.”¹⁰ (Id.) They
8 further allege that on July 9, 2002, defendant Jan Paul Miller agreed with an individual named
9 Michael McCuskey and defendant Assistant United States Attorney Frooman “to investigate and
10 prosecute Brent Winters on false charges” knowing that the presiding judge was biased. (Id.)
11 They also allege that “Agent Pogue” 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 a judge of the Nevada County Superior Court. (Id.) Other than
16 including Jordan’s name in a laundry list of over 40 defendants, plaintiffs do not allege any
17 specific facts with respect to Jordan’s or Silber’s participation in this alleged, vast conspiracy.

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

25 ¹⁰ Plaintiff Brent Allan Winters was convicted of tax fraud in an Illinois federal court. See
26 generally United States v. Hills, 618 F.3d 619 (7th Cir. 2010).

1 proximately caused by the prohibited conduct and that he has suffered a concrete financial loss.
2 Chaset v. Fleer/Skybox Int'l, L.P., 300 F.3d 1083, 1086 (9th Cir. 2002).

3 Plaintiffs' RICO conspiracy claim should be dismissed for several reasons. First,
4 the allegations are of such a vague and conclusory nature that they do not state a plausible claim
5 for relief under the RICO statute. Second, plaintiffs have not pled two predicate acts of
6 "racketeering activity," as that term is defined in 18 U.S.C. § 1961(1). Third, plaintiffs have not
7 alleged a "concrete financial loss" or injury to business or property proximately caused by the
8 conspiracy. Nothing contained in plaintiffs' Third Amended Complaint suggests that they could
9 amend their pleading to state a plausible claim for relief. Accordingly, plaintiffs' thirty-first
10 claim for relief should be dismissed with prejudice as to Jordan and Silber.

11 B. Plaintiffs' State Law Claims Against Jordan and Silber

12 1. Plaintiffs' Abuse of Process Claim Against Jordan and Silber (Claim 6),
13 and Defamation Claim Against Jordan (Claim 21)

14 In their sixth claim for relief, plaintiffs allege that Jordan and Silber are liable for
15 the state law tort of abuse of process. (Third Am. Compl. at 13-14.) In regards to Jordan,
16 plaintiffs allege that on February 13, 2008, defendants Virginia Armstrong, Valerie Logsdon, and
17 Jordan violated California law by causing an unlawful detainer action to be filed seeking to evict
18 members of the Winters from Virginia Armstrong's home. (Id. at 13.) In addition, plaintiffs
19 allege that on March 21, 2008, several named defendants—*not including Jordan or Silber*—filed
20 declarations and other documents containing false or malicious statements in a restraining order
21 action filed by the Winters against Jordan. (Id.) Plaintiffs also allege in their twenty-first claim
22 for relief that Jordan, among others, committed "Slander, Libel, Slander & Libel Per Se" through
23 "false accusations, both spoken and written to the court" between December 2007 and the
24 present. (See id. at 21.) As to Silber, plaintiffs allege that Silber, acting in his capacity as
25 Virginia Armstrong's attorney, along with several other defendants who are judges or staff at the
26 Nevada County Superior Court "abused the court's judicial process" on February 5, 2009, by:

1 (1) hiding from the Winters family “all knowledge of a hearing of David Silber before biased
2 Judge Anderson” related to an application for a restraining order; and (2) “improperly and with
3 malice assert[ing] false allegations against Plaintiffs without evidence in order to impose
4 restraining orders on the Winters.” (Id. at 13-14.)

5 Jordan and Silber argue that plaintiffs’ claims for abuse of process and defamation
6 should be dismissed with prejudice as to them because their respective 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 (2007). The California Supreme Court has summarized the litigation
11 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). “[W]here the
18 gravamen of the complaint is a privileged communication . . . the privilege extends to necessarily
19 related noncommunicative acts. . . .” Rusheen v. Cohen, 37 Cal. 4th 1048, 1062, 128 P.3d 713,
20 722 (2006). The California Supreme Court has given this privilege “a broad interpretation” in
21 furtherance of the purpose of the privilege, which is “to afford litigants and witnesses . . . the
22 utmost freedom of access to the courts without fear of being harassed subsequently by derivative
23 tort actions.” Id. “Any doubt as to whether the privilege applies is resolved in favor of applying
24 it.” Adams v. Superior Court, 2 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49, 53 (Ct. App. 1992);
25 accord Sengchanthalangsy v. Accelerated Recovery Specialists, Inc., 473 F. Supp. 2d 1083, 1087
26 (S.D. Cal. 2007); Lambert v. Carneghi, 158 Cal. App. 4th 1120, 1138, 70 Cal. Rptr. 3d 626, 639

1 (Ct. App. 2008). Thus, although the privilege was originally enacted with reference to claims of
2 defamation, “the privilege is now held applicable to any communication, whether or not it
3 amounts to a publication . . . , and all torts except malicious prosecution.” Rusheen v. Cohen,
4 37 Cal. 4th 1048, 1057, 128 P.3d 713, 718 (2006) (quoting Silberg v. Anderson, 50 Cal. 3d 205,
5 212, 786 P.2d 365 (1990)); see also Action Apartment Ass’n, Inc., 41 Cal. 4th at 1241-42 (noting
6 that the litigation privilege applies to claims of slander, libel, and abuse of process, among other
7 types of claims). The privilege applies “regardless whether the communication was made with
8 malice or the intent to harm” and “does not depend on the publisher’s motives, morals, ethics or
9 intent.” Kashian v. Harriman, 98 Cal. App. 4th 892, 913, 120 Cal. Rptr. 2d 576, 592 (Ct. App.
10 2002) (citation and quotation marks omitted).

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

26 ///

1 2. Plaintiffs’ Claim of Battery Against Jordan (Claim 9)

2 Plaintiffs allege several acts of civil battery committed by Jordan on various
3 plaintiffs on various dates. (Third Am. Compl. at 16.) Four alleged acts of battery are relevant
4 here.¹¹ First, plaintiffs allege that on October 14, 2007, Jordan battered plaintiff Cacey Winters
5 by physically pushing Cacey Winters out of her way so that Jordan could enter the family room
6 of the home where Virginia Armstrong and the Winters were living. (Id. at 16.) Second,
7 plaintiffs allege that on November 19, 2007, Jordan battered plaintiff Susan Winters while
8 Jordan’s handyman was changing the locks in the home. They allege that Jordan aggressively
9 shoved or pushed past Susan Winters. (Id.) Third, plaintiffs allege that on November 19, 2007,
10 Jordan “shove[d] Cacey and Christy out of her way” several times while Jordan tried to enter
11 Cacey and Christy Winters’s bedroom in violation of a restraining order. (Id.) Fourth, plaintiffs
12 allege that on November 21, 2007, Jordan intentionally ran a shopping cart into the back of
13 plaintiff Jennifer Winters, who was then working at the market and assisting a customer. (Id.)

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

20 Jordan simply moves to dismiss plaintiffs’ assorted battery claims on the grounds
21 that: (1) “there are no factual allegations concerning any physical contact between moving parties
22 [*sic*] and Plaintiffs”; and (2) “[i]t is ridiculous to think or believe that [Jordan] could or would
23 commit a battery against any of the Plaintiffs.” (Jordan’s Memo. of P. & A. at 13.) The
24

25 ¹¹ The undersigned does not address plaintiffs’ allegations that concern Jordan’s alleged
26 battery of Jill, Clark, and Joy Winters because Jill, Clark, and Joy Winters have been dismissed from
this action. (See Third Am. Compl. at 16-17; Order, Feb. 1, 2011.)

1 undersigned addresses Jordan’s first argument below, but need not address her second argument,
2 which is legally and factually unsupported in any way.

3 In short, Jordan’s argument that plaintiffs have not alleged any physical contact
4 between Jordan and any of the plaintiffs is entirely meritless. In each of the four incidents
5 addressed above, plaintiffs alleged physical contact between Jordan and Susan, Cacey, Christy, or
6 Jennifer Winters. Accordingly, the battery claims alleged by Susan, Cacey, Christy, and Jennifer
7 Winters should be permitted to proceed.

8 3. Plaintiffs’ Claim of Assault Against Jordan (Claim 10)

9 In regards to their claims of civil assault, plaintiffs allege that each battery alleged
10 to have been committed by Jordan in their ninth claim for relief also gives rise to a claim for civil
11 assault. (Third Am. Compl. at 17-18.) In short, Jordan’s argument in support of dismissal of
12 plaintiffs’ assault claims is indecipherable. (See Jordan’s Memo. of P. & A. at 13-14.) Although
13 Jordan argues that “the assault claim lacks adequate supporting facts,” it is unclear which
14 element or elements of an assault claim Jordan believes is factually unsupported.¹² Accordingly,
15 the undersigned recommends that Jordan’s motion be denied in this respect and that the assault
16 claims alleged by Susan, Cacey, Christy, and Jennifer Winters should be permitted to proceed,
17 consistent with their associated battery claims.

18 4. Plaintiffs’ Claim of Trespass to Land Against Jordan (Claim 12)

19 Plaintiffs allege that Jordan trespassed onto Virginia Armstrong’s property at
20 11318 Via Vista in Nevada City on three occasions while plaintiffs were residing in that home.

21
22 ¹² “A civil action for assault is based upon an invasion of the right of a person to live
23 without being put in fear of personal harm.” Thing v. La Chusa, 48 Cal. 3d 644, 649, 771 P.2d 814,
24 816 (1989) (quoting Lowry v. Standard Oil Co. of Cal., 63 Cal. App. 2d 1, 7, 146 P.2d 57, 60 (Ct.
25 App. 1944)). “Generally speaking, an assault is a demonstration of an unlawful intent by one person
26 to inflict immediate injury on the person of another then present.” Lowry, 63 Cal. App. 2d at 6-7,
146 P.2d at 60. “The tort of assault is complete when the anticipation of harm occurs.” Kiseskey
v. Carpenters’ Trust for S. Cal., 144 Cal. App. 3d 222, 232, 192 Cal. Rptr. 492, 498 (Ct. App. 1983).
“Mere words, however threatening, will not amount to an assault.” B.E. Witkin et al., 5 Witkin
Summ. of Cal. Law (Torts) § 383 (10th ed. 2005 & 2009 Supp.) (citing Restatement (Second) of
Torts § 31 (2010)).

1 (Third Am. Compl. ¶¶ 28, 58, and at p. 19.) As noted above, plaintiffs allege that on
2 February 10, 2008, May 26, 2008, and June 2, 2008, Jordan entered the home to either check on
3 Virginia Armstrong’s condition, accuse the Winters of wrongdoing, or “find evidence to use in
4 retaliation against Susan Winters for asking for an obtaining a restraining order against her.”
5 (See *id.* at 19.) Plaintiffs further allege that Jordan entered the home without invitation or
6 permission. (*Id.*) Although plaintiffs allege that these trespasses were in violation of a
7 restraining order entered against Jordan, they also allege that the restraining order precluded
8 Jordan from entering the premises “in any way except through Virginia’s sliding glass door to her
9 bedroom, and only at Virginia’s permission.” (*Id.* ¶ 58.) Jordan moves to dismiss plaintiffs’
10 trespass to land claim on the grounds that: (1) the land entered upon “is owned, possessed and
11 occupied by” Virginia Armstrong; and (2) Jordan had the “express consent” of Virginia
12 Armstrong to enter the property. (Jordan’s Memo. of P. & A. at 14.)

13 California Courts of Appeal have summarized the tort of trespass onto land as
14 follows: “The essence of the cause of action for trespass is an ‘unauthorized entry’ onto the land
15 of another. Such invasions are characterized as intentional torts, regardless of the actor’s
16 motivation. Where there is a consensual entry, there is no tort, because lack of consent is an
17 element of the [theory underlying the tort]. . . .” Church of Christ in Hollywood v. Superior
18 Court, 99 Cal. App. 4th 1244, 1252, 121 Cal. Rptr. 2d 810, 815-16 (Ct. App. 2002); accord
19 Mangini v. Aerojet-General Corp., 230 Cal. App. 3d 1125, 1141, 281 Cal. Rptr. 827, 837 (Ct.
20 App. 1991); Civic W. Corp. v. Zila Indus., Inc., 66 Cal. App. 3d 1, 16-17, 135 Cal. Rptr. 915,
21 925 (Ct. App. 1977). As derived from an applicable California jury instruction, the elements of
22 the intentional tort of trespass can be stated as follows in this case: (1) plaintiffs owned, leased,
23 occupied, or controlled the property; (2) Jordan intentionally, recklessly, or negligently entered
24 plaintiffs’ property; (3) Jordan lacked permission for the entry or Jordan exceeded the scope of
25 such permission; (4) plaintiffs were actually harmed; and (5) Jordan’s entry was a substantial
26 factor in causing plaintiffs’ harm. See Judicial Council of Cal. Civ. Jury Instruction 2000 (Fall

1 2011). However, at least one California Court of Appeal has held “that an action for trespass
2 will support an award of nominal damages where actual damages are not shown.” Staples v.
3 Hoefke, 189 Cal. App. 3d 1397, 1406, 235 Cal. Rptr. 165, 171 (Ct. App. 1987).

4 Here, taking plaintiffs’ allegations as true, plaintiffs have alleged a prima facie
5 case of trespass against Jordan. Plaintiffs allege that on three occasions, Jordan intentionally
6 entered the home or areas in a manner prohibited by the restraining order then in effect, that
7 plaintiffs were lawfully residing in the home, and that Jordan entered the home without
8 permission or invitation.

9 The undersigned finds that Jordan’s two arguments in favor of dismissal lack
10 merit, at least at the pleading stage. First, Jordan essentially argues that plaintiffs lack standing
11 to pursue a trespass claim because they do not own the property. Such an argument is presently
12 unavailing because a plaintiff’s actual ownership of the property at issue is not an essential
13 element of a claim of trespass. See Capogeannis v. Superior Court, 12 Cal. App. 4th 668, 674,
14 15 Cal. Rptr. 2d 796, 799 (Ct. App. 1993) (“California has adhered firmly to the view that [the]
15 cause of action for trespass is designed to protect *possessory*—not necessarily ownership—interests
16 in land from unlawful interference.”) (citation and quotation marks omitted); Smith v. Cap
17 Concrete, Inc., 133 Cal. App. 3d 769, 774, 184 Cal. Rptr. 308, 310 (Ct. App. 1982) (“The proper
18 plaintiff in an action for trespass to real property is the person in actual possession; no averment
19 or showing of title is necessary.”); see also 5 Witkin, Cal. Proc., Pleading, §§ 631-32 (5th ed.
20 2008). Jordan offers no authority to the contrary; indeed, her argument is entirely unsupported
21 by legal authority.

22 Second, Jordan argues in conclusory fashion that she entered the property with
23 Virginia Armstrong’s consent or permission. However, the allegations in the Third Amended
24 Complaint, taken as true, do not support that Jordan entered the property with Virginia
25 Armstrong’s consent. Jordan has pointed to no supporting allegations in the Third Amended
26 Complaint, and has not requested that the court take judicial notice of any facts, that support her

1 argument regarding consent. Accordingly, the undersigned recommends that plaintiffs' trespass
2 to land claim be allowed to proceed against Jordan.

3 5. Plaintiffs' Claim of Trespass to Chattels Against Jordan and Silber
4 (Claim 13)

5 In their thirteenth claim for relief, plaintiffs allege that "All Defendants"
6 committed the tort of trespass to chattels. (Third Am. Compl. at 19.) "[T]he tort of trespass to
7 chattels allows recovery for interferences with possession of personal property not sufficiently
8 important to be classed as conversion, and so to compel the defendant to pay the full value of the
9 thing with which he has interfered." Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1350, 71 P.3d 296,
10 302 (2003). The California Supreme Court has stated that "[t]respass remains as an occasional
11 remedy for minor interferences, resulting in some damage, but not sufficiently serious or
12 sufficiently important to amount to the greater tort" of conversion." Id. at 1351, 71 P.3d at 302
13 (citation omitted, modification in original).

14 As to Jordan and Silber, and indeed as to all defendants, plaintiffs have not
15 specified the chattel or chattels with which each defendant interfered, which in turn proximately
16 caused them harm. See Intel Corp., 30 Cal. 4th at 1350-51, 71 P.3d at 302 ("Under California
17 law, trespass to chattels lies where an intentional interference with the possession of personal
18 property has proximately caused injury" (citation and quotation marks omitted)). Accordingly,
19 plaintiffs' claim for trespass to chattels should be dismissed with prejudice as to Jordan and
20 Silber.

21 6. Plaintiffs' Claim of Invasion of Privacy Claims Against Jordan and Silber
22 (Claim 25)

23 Plaintiffs allege that Jordan and Silber each invaded plaintiffs' privacy in
24 violation of California law. The undersigned addresses the generally applicable law and then
25 addresses Jordan's and Silber's respective, alleged acts in turn.

26 The California Supreme Court has stated that California common law generally

1 recognizes four types of acts that can give rise to a claim of invasion of privacy: “(1) intrusion
2 into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false
3 light; and (4) misappropriation of a person’s name or likeness.” Hill v. Nat’l Collegiate Athletic
4 Ass’n, 7 Cal. 4th 1, 24, 865 P.2d 633, 647 (1994); accord Forsher v. Bugliosi, 26 Cal. 3d 792,
5 808, 608 P.2d 716, 725 (1980) (“Our courts have dealt with four distinct factual settings under
6 the heading of invasion of privacy.”). Relevant here, the elements of the “intrusion” tort are:
7 “(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a
8 reasonable person.” Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 231, 955 P.2d 490
9 (1998); accord Hernandez v. Hillside, Inc., 47 Cal. 4th 272, 286, 211 P.3d 1063, 1072 (2009).
10 In regards to the first element, the California Supreme Court has held that “[t]o prove actionable
11 intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory
12 privacy surrounding, or obtained unwanted access to data about, the plaintiff.” Shulman, 18 Cal.
13 4th at 232, 955 P.2d at 490. As to the second element of an intrusion claim, “[t]he tort is proven
14 only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the
15 place, conversation or data source.” Id., 955 P.2d at 490. The California Supreme Court has
16 further stated that “[t]he second common law element essentially involves a ‘policy’
17 determination as to whether the alleged intrusion is ‘highly offensive’ under the particular
18 circumstances,” and “[r]elevant factors include the degree and setting of the intrusion, and the
19 intruder’s motives and objectives.” Hernandez, 47 Cal. 4th at 287, 211 P.3d at 1073.
20 California’s high court has further stated that this “cause of action recognizes a measure of
21 personal control over the individual’s autonomy, dignity, and serenity,” and that the “gravamen is
22 the mental anguish sustained when both conditions of liability exist.” Id. at 286, 211 P.3d
23 at 1072.

24 In regards to Jordan, plaintiffs allege that Jordan invaded plaintiffs’ privacy on
25 October 14, 2007, May 26, 2008, and June 2, 2008. (Third Am. Compl. at 23.) The latter two
26 dates correspond to dates that plaintiffs allege Jordan trespassed on Virginia Armstrong’s home

1 while the Winters were living there, and in violation of a restraining order. The undersigned
2 recommended above that the trespass claims corresponding to those dates be permitted to
3 proceed against Jordan. Similarly, the undersigned recommends that plaintiffs' invasion of
4 privacy claim should also proceed as to those alleged intrusions because plaintiffs' allegations
5 concerning the trespasses plausibly support an invasion of privacy claim, at least at this point in
6 the proceedings. Plaintiffs allege that Jordan unlawfully entered a home in which they had a
7 possessory interest and reasonable expectation of privacy, and in a manner offensive to them. As
8 to Jordan's alleged invasion of privacy on October 14, 2007, however, such alleged invasion of
9 privacy occurred prior to the alleged entry of a restraining order against Jordan. Plaintiffs have
10 not otherwise substantiated an invasion of privacy claim as to that date. Accordingly, the
11 undersigned recommends that plaintiffs' invasion of privacy claims proceed against Jordan as to
12 the alleged intrusions occurring on May 26, 2008, and June 2, 2008, but not as to October 14,
13 2007.

14 As to Silber, plaintiffs' allege that Silber, among other defendants, invaded
15 plaintiffs' privacy by serving Susan, Cacey, and Christy Winters with a court-issued restraining
16 order that led to the eviction of some of the plaintiffs from Virginia Armstrong's home. (See
17 Third Am. Compl. at 23.) Silber's alleged act of serving a restraining order on three of the
18 plaintiffs constitutes a communication or related non-communicative act that is absolutely
19 privileged pursuant to the litigation privilege contained in California Civil Code § 47(b). See
20 Jacob B. v. County of Shasta, 40 Cal. 4th 948, 962, 154 P.3d 1003, 1012 (2007) ("Section
21 47(b)'s litigation privilege bars a privacy cause of action whether labeled as based on common
22 law, statute, or Constitution."); see also Hagberg v. Cal. Fed. Bank, FSB, 32 Cal. 4th 350, 361,
23 81 P.3d 244, 249 (2004) ("In its application to communications made in a "judicial proceeding,"
24 section 47(b) is not limited to statements made in a courtroom."); Heller v. Norcal Mut. Ins. Co.,
25 8 Cal. 4th 30, 45, 876 P.2d 999, 1007 (1994) ("We have consistently held that communications
26 occurring during the course of litigation are absolutely privileged under section 47(b) and cases

1 interpreting the statute.”); see also, cf., GeneThera, Inc. v. Troy & Gould Prof. Corp., 171 Cal.
2 App. 4th 901, 909-10, 90 Cal. Rptr. 3d 218, 223-24 (Ct. App. 2009) (holding that a letter sent in
3 furtherance of settlement among litigants and counsel was subject to California’s absolute
4 privilege). Accordingly, plaintiffs’ invasion of privacy claim should be dismissed with prejudice
5 as alleged against Silber.

6 7. Plaintiffs’ Claim of Loss of Consortium Against Silber and Jordan
7 (Claim 36)

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

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

14 (Id.)

15 One California court has cited with approval a California practice manual that
16 defines the tort of loss of consortium as consisting of the following four elements:

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

22 Hahn v. Mirda, 147 Cal. App. 4th 740, 746 & n.2, 54 Cal. Rptr. 3d 527, 530 & n.2 (Ct. App.
23 2007) (citation omitted). Additionally, “[a] cause of action for loss of consortium is, by its
24 nature, dependent on the existence of a cause of action for tortious injury to a spouse.” Id. at
25 746, 54 Cal. Rptr. 3d at 531 (Ct. App. 2007). Additionally, the Ninth Circuit Court of Appeals
26 has explained:

1 To support a loss of consortium claim, marital spouses must allege that
2 their partner suffered an injury that is “sufficiently serious and disabling to
3 raise the inference that the conjugal relationship is more than superficially
4 or temporarily impaired.” Molien v. Kaiser Found. Hosp., 27 Cal.3d 916,
5 167 Cal.Rptr. 831, 616 P.2d 813, 823 (1980); Anderson v. Northrop Corp.,
6 203 Cal.App.3d 772, 250 Cal.Rptr. 189, 195 (1988) (same). The injury
7 may be physical or psychological, but psychological injury must “rise [] to
8 the level of a ‘neurosis, psychosis, chronic depression, or phobia’ [to be]
9 sufficient to substantially disturb the marital relationship.” Anderson, 250
10 Cal.Rptr. at 195, quoting Molien, 167 Cal.Rptr. 831, 616 P.2d at 813.

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

13 The undersigned recommends that plaintiffs’ loss of consortium claim be
14 dismissed with prejudice because they have failed to allege a plausible claim for relief. First,
15 plaintiffs have not alleged any facts that would suggest that any conjugal or marital relationship
16 has been more than superficially affected. Second, plaintiffs have not alleged or identified any
17 facts regarding how Jordan’s or Silber’s acts proximately caused any loss of consortium.
18 Plaintiffs’ allegations of causation are general as to all defendants and are conclusory in nature.
19 Third, under California law, parents may not pursue a claim loss of filial consortium, and
20 children may not pursue a claim for loss of parental consortium. See Baxter v. Superior Court,
21 19 Cal. 3d 461, 466, 563 P.2d 871, 874 (1977); Borer v. Am. Airlines, Inc., 19 Cal. 3d 441, 453,
22 563 P.2d 858, 866 (1977); Meighan v. Shore, 34 Cal. App. 4th 1025, 1034, 40 Cal. Rptr. 2d 744,
23 749 (Ct. App. 1995). Fourth, plaintiffs have improperly re-pled claims on behalf of Joy, Clark,
24 and Jill Winters, as the court previously ordered that references to these minors be stricken from
25 the Third Amended Complaint, and those plaintiffs have been dismissed from this action.
26 Finally, it would appear facially improper that plaintiffs could recover for loss of consortium
with Virginia Armstrong, “their grandmother,” who they have named as a defendant in this case.
Plaintiffs have failed to meet the pleading requirements to state a plausible claim for relief, and
the undersigned has no reason to believe that these deficiencies could be cured through
amendment.

1 8. Plaintiffs' Claim of Intentional Infliction of Emotional Distress Against
2 Silber and Jordan (Claim 38)

3 Finally, Jordan and Silber move to dismiss plaintiffs' thirty-eighth claim for relief,
4 which seeks damages for intentional infliction of emotional distress ("IIED") against "All
5 Defendants." (Third Am. Compl. at 25.) As with their loss of consortium claim, plaintiffs' IIED
6 claim contains only bare factual allegations and legal conclusions, which are stated generally
7 against all defendants:

8 Paragraphs above incorporated by reference. All [*sic*] Defendants acted
9 with reckless and intentionally [*sic*] disregard of Plaintiffs' rights.
10 Defendants' conduct on dates referenced above was extreme and
11 outrageous. Defendants' conduct is the proximate cause of their distress.
12 Each Plaintiff suffers severe emotional distress as a result of all
13 Defendants' conduct.

14 (Id.)

15 To state a claim for intentional infliction of emotional distress under California
16 law, a plaintiff must satisfactorily allege the following elements: "(1) extreme and outrageous
17 conduct by the defendant with the intention of causing, or reckless disregard of the probability of
18 causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and
19 (3) actual and proximate causation of the emotional distress by the defendant's outrageous
20 conduct." Hughes v. Pair, 46 Cal. 4th 1035, 1050, 209 P.3d 963, 976 (2009) (citations and
21 quotation marks omitted). The California Supreme Court has explained that "outrageous"
22 conduct is that which is so "extreme as to exceed all bounds of that usually tolerated in a
23 civilized community," and that "the defendant's conduct must be intended to inflict injury or
24 engaged in with the realization that injury will result." Id. (citations and quotation marks
25 omitted).

26 As noted above, the specific portion of the Third Amended Complaint pertaining
to plaintiffs' IIED claim is a collection of legal conclusions and bare factual allegations that
incorporate the remainder of the Third Amended Complaint by reference. Plaintiffs do not allege

1 facts demonstrating that Jordan's or Silber's respective acts rose to the level of "extreme and
2 outrageous" behavior as defined under California, that any of plaintiffs suffered severe extreme
3 emotional distress, or that Jordan's or Silber's conduct proximately caused any particular
4 plaintiff's emotional distress. Accordingly, the undersigned recommends that this claim be
5 dismissed as to Jordan and Silber. The undersigned recommends dismissal with prejudice
6 because nothing in the Third Amended Complaint suggests that the identified pleading
7 deficiencies can be cured through amendment.

8 V. CONCLUSION

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

10 1. Defendant Delores Jordan's motion to dismiss (Dkt. No. 257) be granted
11 in part and denied in part. Specifically, the following claims should be permitted to proceed:

12 a. Plaintiffs' seventh claim for relief (violation of rights of Equal
13 Protection), only to the extent that it is alleged by plaintiff Susan Winters against defendant
14 Delores Jordan;

15 b. Plaintiffs' ninth claim for relief (civil battery), only to the extent
16 that it is alleged by plaintiffs Susan, Cacey, Christy, and Jennifer Winters against defendant
17 Delores Jordan;

18 c. Plaintiffs' tenth claim for relief (civil assault), only to the extent
19 that it is alleged by plaintiffs Susan, Cacey, Christy, and Jennifer Winters against defendant
20 Delores Jordan;

21 d. Plaintiffs' twelfth claim for relief (trespass); and

22 e. Plaintiffs' twenty-fifth claim for relief (invasion of privacy), only
23 to the extent that it concerns alleged intrusions on May 26, 2008, and June 2, 2008.

24 Plaintiffs' remaining claims alleged against Jordan should be dismissed with prejudice in all
25 other respects.

26 2. Defendant David Silber's motion to dismiss (Dkt. No. 258) be granted,

1 that all of plaintiffs' claims alleged against Silber be dismissed with prejudice, and that Silber be
2 dismissed from this action.

3 3. Plaintiffs' motion for default judgment (Dkt. No. 189) be denied as to
4 defendant Delores Jordan.

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

15 IT IS SO RECOMMENDED.

16 DATED: February 1, 2012

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18 
19 KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE
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