

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 ALEXANDER GRAHAM-SULT and DAVID
5 GRAHAM,

6 Plaintiffs,

7 v.

8 NICHOLAS P. CLAINOS, an individual;
9 RICHARD L. GREENE, an individual;
10 LINDA MCCALL, an individual; GREENE
11 RADOVSKY MALONEY SHARE & HENNINGH
12 LLP, a limited liability partnership;
13 BILL GRAHAM ARCHIVES LLC, d/b/a
14 WOLFGANG'S VAULT, a limited liability
15 company; NORTON LLC, a limited
16 liability company; and WILLIAM E.
17 SAGAN, an individual,

18 Defendants.
19 _____/

No. C 10-04877 CW

ORDER GRANTING
DEFENDANT CLAINOS'S
ANTI-SLAPP MOTION
TO STRIKE AND FOR
ATTORNEYS' FEES
(Docket No. 33);
GRANTING GREENE
DEFENDANTS' ANTI-
SLAPP MOTION TO
STRIKE AND FOR
ATTORNEYS' FEES
(Docket No. 27) AND
DENYING AS MOOT
THEIR MOTION TO
DISMISS (Docket No.
28); GRANTING BGA
DEFENDANTS' MOTION
TO DISMISS (Docket
No. 23); AND
GRANTING
PLAINTIFFS' MOTION
FOR LEAVE TO
SUPPLEMENT THE
RECORD (Docket No.
85)

20 Pursuant to California Code of Civil Procedure section 425.16,
21 commonly known as California's anti-Strategic Lawsuit Against
22 Public Participation (anti-SLAPP) statute, Defendant Nicholas P.
23 Clainos and Defendants Greene Radovsky Maloney Share & Henningh LLP
24 (Greene Law Firm), Richard L. Greene and Linda McCall
25 (collectively, Greene Defendants) separately move to strike
26 Plaintiffs Alexander Graham-Sult and David Graham's claims against
27 them and move for attorneys' fees. The Greene Defendants and
28 Defendants Bill Graham Archives LLC, Norton LLC and William E.

1 Sagan (collectively, BGA Defendants) separately move to dismiss
2 Plaintiffs' claims against them. Plaintiffs oppose the motions.
3 The motions were heard on April 7, 2011. After the hearing,
4 Plaintiffs moved for leave to supplement the record. Clainos and
5 the Greene Defendants opposed Plaintiffs' motion.

6 Having considered oral argument and the papers submitted by
7 the parties, the Court GRANTS Plaintiffs' motion for leave to
8 supplement the record; GRANTS Clainos's anti-SLAPP motion to strike
9 and for attorneys' fees; GRANTS the Greene Defendants' anti-SLAPP
10 motion to strike and for attorneys' fees and DENIES as moot their
11 motion to dismiss; and GRANTS the BGA Defendants' motion to
12 dismiss.

13 BACKGROUND

14 Plaintiffs Graham-Sult and Graham, who are New York and
15 Pennsylvania citizens respectively, are sons of Bill Graham, a
16 concert promoter who worked in the San Francisco Bay Area. Bill
17 Graham was the sole owner of Bill Graham Enterprises, Inc. (BGE),
18 through which he conducted his concert promotion business.¹ On
19 October 25, 1991, Bill Graham died in a helicopter crash. At that
20 time, Plaintiffs Graham-Sult and Graham were fourteen and twenty-
21 three years old respectively. This lawsuit concerns a dispute over
22 the ownership of intellectual and tangible property Plaintiffs
23 claim their father owned before his death. The background recited

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26 ¹ BGE owned a number of subsidiary entities: Fillmore
27 Corporation; Bill Graham Presents, Inc.; Bill Graham Management,
28 Inc.; and Shoreline Amphitheatre, Ltd. Greene Decl. ¶ 2. The
Court refers to BGE and these subsidiaries collectively as "BGE."

1 below is based on evidence proffered by the parties.²

2 Clainos, an attorney licensed to practice in California, was
3 appointed executor of Bill Graham's estate under Bill Graham's Last
4 Will and Testament, dated August 2, 1976, and Second Codicil, dated
5 December 22, 1981. Bill Graham's testamentary documents also
6 created trusts for the benefit of Plaintiffs and named Clainos as
7 the trustee to serve until the trusts terminated when Plaintiffs
8 reached twenty-five years of age. Clainos retained the Greene Law
9 Firm to represent him in his role as executor of the estate and
10 trustee of the testamentary trusts. Prior to Bill Graham's death,
11 the Greene Law Firm and Greene, specifically, were counsel to Bill
12 Graham and BGE. During the probate proceedings, Plaintiffs were
13 represented by Philip B. Feldman, an attorney with the law firm
14 known then as Coblentz, Cahen, McCabe & Breyer.

15 On November 7, 1991, the Marin County Superior Court granted
16 Clainos discretionary powers over Bill Graham's estate, which
17 included BGE. Greene Decl., Ex. E. According to Clainos, he
18 served as executor until August 8, 1995, when probate closed
19 pursuant to the state court's final order of accounting. Clainos
20 Decl. ¶ 4. In his role as executor, Clainos decided that

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22 ² Generally, on a motion to dismiss, courts may consider only
23 the complaint. Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992,
24 998 (9th Cir. 2010). Courts may also consider documents "on which
25 the complaint necessarily relies if: (1) the complaint refers to
26 the document; (2) the document is central to the plaintiff's claim;
27 and (3) no party questions the authenticity of the copy attached to
28 the 12(b)(6) motion." Id. (citation and internal quotation marks
omitted). However, because this Order addresses anti-SLAPP motions
to strike, the Court also considers declarations proffered by the
parties. See Cal. Civ. Proc. Code § 425.16(b)(2); see also Mindys
Cosmetics, Inc. v. Dakar, 611 F.3d 590, 598 (9th Cir. 2010).

1 Plaintiffs, among other beneficiaries named in Bill Graham's
2 testamentary documents, would receive Bill Graham's "personal
3 possessions located at his home in Corte Madera, commonly known as
4 'Masada.'" Greene Decl. ¶ 17. Allegedly among these possessions
5 were ten scrapbooks, which contained original prints of posters
6 used in concerts promoted by Bill Graham. Neither Clainos nor
7 Greene conducted an inventory of these personal effects.

8 On December 9, 1991, Greene investigated the intellectual
9 property rights owned by Bill Graham's estate. Greene met with
10 Jerry Pompili, one of BGE's vice presidents, who informed Greene
11 that "The Fillmore" trademark and copyrights for most of the
12 posters produced by BGE were registered in Bill Graham's personal
13 name. Greene Decl. ¶ 16. However, according to Greene, Pompili
14 represented that "BGE paid for all application and registration
15 fees" and "BGE received all revenues from the sales and licensing
16 of the intellectual property." Id. Based on Pompili's
17 representations, Greene concluded that BGE owned the intellectual
18 property registered in Bill Graham's name.

19 In January 1994, Clainos brokered a deal to sell BGE to BGE's
20 so-called "key employees." Greene Decl. ¶ 18. Clainos claims that
21 he did so to placate these employees, who threatened to leave BGE
22 if they were not given the opportunity to purchase it. According
23 to Clainos, this action was necessary to preserve the value of BGE.
24 Plaintiffs' trusts were signatories to the sale.

25 To consummate the transaction, the employees formed BG
26 Presents, Inc. (BGP), which acquired all shares of BGE. As part of
27 the sale, Plaintiffs' respective testamentary trusts each received

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1 a ten-percent share of BGP. Clainos acquired a thirteen-percent
2 stake. The transaction also encompassed an agreement concerning
3 the BGE Archives, which were defined to include "all posters,
4 handbills, tickets, photographs, slides, videos, audio tapes and
5 other archival material produced or obtained prior to October 25,
6 1991 in connection with [BGE] prior to October 25, 1991." Greene
7 Decl., Ex. 0, at 4. The agreement provided that, in the event of a
8 third-party offer to purchase BGE or the BGE archives, Plaintiffs,
9 along with other beneficiaries, had the option "to purchase all,
10 but not less than all, of the Remaining Archives on the same terms
11 and conditions as offered by the third party." Id. at 4-5. The
12 documents related to the transaction, including the BGE Archives
13 agreement, did not specifically identify the intellectual property
14 held by BGE.

15 On August 8, 1995, the state court entered its final order of
16 distribution.

17 On or about August 31, 1995, Richard Idell, who was apparently
18 "special counsel to BGE," wrote Greene to inquire about "how the
19 transfer/assignment of copyrights and trademarks was handled in the
20 sale of [BGE] to the key employees." Greene Decl., Ex. 0, at 1.

21 In a letter dated September 1, 1995, Greene responded as follows:

22 1. As I presume you are aware, most of the
23 tradenames/trademarks/copyrights have always been owned
24 by and in the name of BGE since I understand from Jerry
Pompili that BGE paid all the expenses for the
applications that he filed.

25 2. Apparently, on some occasions, Jerry put some of the
26 above items in Bill's name. Thus, to solve that problem
27 we prepared and sent yesterday to Jerry for Nick and
Gregg to sign the enclosed Assignment and Acceptance of
Assignment. Once that is done, this should solve any

1 title problems.

2 Greene Decl., Ex. O, at 2.

3 The assignment was "executed as of August 1, 1995" by Clainos,
4 in his role as executor of Bill Graham's estate. Compl., Ex. B, at
5 CTR01212. The preamble stated that intellectual property used by
6 BGE was registered in Bill Graham's name and that the assignment's
7 purpose was to "confirm BGE's ownership of" the intellectual
8 property. Id. The assignment provided,

9 Assignor hereby assigns, transfers and conveys to BGE
10 ("Assignee") any and all right, title and interest of the
11 Decedent in any and all copyrights, tradenames,
12 trademarks and servicemarks claimed by or registered in
13 the name of the Decedent, other than the copyright to the
14 Decedent's autobiography.

15 Id. On July 29, 1996, the assignment was recorded in the U.S.
16 Copyright Office.

17 In December 1997, BGP was sold to SFX Broadcasting, Inc. In
18 accordance with the BGE Archives agreement explained above, SFX's
19 offer to purchase BGP triggered Plaintiffs' right of first refusal,
20 which Plaintiffs declined to exercise. The parties' statement of
21 intent regarding the sale, to which Plaintiffs' trusts were
22 signatories, recited that SFX's acquisition of BGP included "all
23 intellectual property rights used in the operation of BGP's
24 business (including the rights to the names 'Fillmore' and 'Bill
25 Graham Presents.')." Greene Decl., Ex. S, at 3. Section 3.18 of
26 the SFX Purchase Agreement, entitled "Intellectual Property;
27 Software," provided,

28 Schedule 3.18 attached hereto contains, to each Selling
Shareholder's Knowledge, a true and complete list of all
trade names, trademarks, trade dress, domain names,
service marks, logos, copyrights, patents, and/or similar

1 rights (including registrations and applications to
2 register or renew the registration of any of the
3 foregoing), trade secrets, inventions, know-how,
4 specifically developed computer software and other
5 intellectual property rights or other proprietary rights
6 or confidential information ("Intellectual Property")
7 owned or used by the Company or material to the conduct
8 of the Company's business, including whether such
9 Intellectual Property is owned or licensed by the
10 Company.

11 Id., Ex. T § 3.18. Schedule 3.18 was labeled "Intellectual
12 Property and Software Owned or Used by the Company." Id. at ii.
13 It contained a copy of Clainos's 1995 Assignment and the
14 recordation of the assignment in the U.S. Copyright Office, and
15 indicated that various copyrights and "The Fillmore" trademark were
16 owned by BGP. Id., Ex. T.

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Feldman, who also represented Plaintiffs during the SFX sale,
was given a copy of the SFX Purchase Agreement. Greene Decl. ¶ 29;
Greene Supp. Decl. ¶ 6 and Ex. SC.³ However, Feldman has "no
recollection of seeing or receiving Schedule 3.18, which contains
the Assignment, prior to 2011." Am. Feldman Decl. ¶ 2. He does

³ Plaintiffs object to Exhibit SC of the Greene Supplemental
Declaration, which contains a December 11, 1997 letter faxed by
Greene to Feldman concerning the SFX Purchase Agreement.
Plaintiffs argue that, because the letter is unsigned, it lacks
relevance. Plaintiffs, however, do not object to paragraph six of
the Greene Supplemental Declaration, in which Greene states that
Exhibit SC "is a true and correct copy of correspondence I faxed to
Plaintiffs' attorney, Philip Feldman, on or about December 11, 1997
(the same day the SFX Acquisition Agreement was signed), following
a conversation we had on that day." Greene Supp. Decl. ¶ 6.
Greene also states that he sent Feldman "certain excerpts from the
Agreement relating to intellectual property . . . , including the
intellectual property representations and warranties, which
incorporate by reference the liability-limiting disclosure schedule
setting forth a description of the intellectual property owned by
BGE." Id. For his part, Feldman does not deny that he had this
conversation with Greene or that he received Greene's faxed letter.
Because Exhibit SC is relevant, Plaintiffs' objection is OVERRULED.

1 with a public issue shall be subject to a special motion
2 to strike, unless the court determines that the plaintiff
has established that there is a probability that the
3 plaintiff will prevail on the claim.

4 Cal. Civ. Proc. Code § 425.16(b)(1). California anti-SLAPP motions
to strike are available to litigants proceeding in federal court.
5 Thomas v. Fry's Elecs., Inc., 400 F.3d 1206, 1206 (9th Cir. 2005).

6 Courts analyze these motions in two steps. "First, the
7 defendant must make a prima facie showing that the plaintiff's suit
8 arises from an act in furtherance of the defendant's rights of
9 petition or free speech." Mindys, 611 F.3d at 595 (citation and
10 internal quotation marks omitted). "Second, once the defendant has
11 made a prima facie showing, the burden shifts to the plaintiff to
12 demonstrate a probability of prevailing on the challenged claims."
13 Id.

14 "At [the] second step of the anti-SLAPP inquiry, the required
15 probability that [a party] will prevail need not be high." Hilton
16 v. Hallmark Cards, 580 F.3d 874, 888-89 (9th Cir. 2009). A
17 plaintiff must show "only a 'minimum level of legal sufficiency and
18 triability.'" Mindys, 611 F.3d at 598 (quoting Linder v. Thrifty
19 Oil Co., 23 Cal. 4th 429, 438 n.5 (2000)). The plaintiff need only
20 "state and substantiate a legally sufficient claim." Mindys, 611
21 F.3d at 598 (citation and internal quotation marks omitted). In
22 conducting its analysis, the "court 'does not weigh the credibility
23 or comparative probative strength of competing evidence,' but
24 'should grant the motion if, as a matter of law, the defendant's
25 evidence supporting the motion defeats the plaintiff's attempt to
26 establish evidentiary support for the claim.'" Id. at 599 (quoting

1 Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 821 (2002)).

2 Unless an action is brought pursuant to certain sections of
3 the California Government Code, "a prevailing defendant on a
4 special motion to strike shall be entitled to recover his or her
5 attorney's fees and costs." Cal. Civ. Proc. Code § 425.16(c); see
6 also Bernardo v. Planned Parenthood Fed. of Am., 115 Cal. App. 4th
7 322, 360-367 (2004) (explaining policy behind mandatory fees and
8 costs provision of anti-SLAPP statute).

9 A. Clainos's Motion to Strike

10 Against Clainos, Plaintiffs bring claims for breach of
11 fiduciary duty, breach of trust, conversion, intentional
12 misrepresentation, negligent misrepresentation, fraudulent
13 concealment, promissory estoppel and unjust enrichment.

14 1. Arising From a Protected Activity

15 Clainos argues that Plaintiffs' claims arise from his actions
16 as the executor of Bill Graham's estate, all of which he contends
17 were in the furtherance of his right to petition.

18 Under the anti-SLAPP statute, an act in the furtherance of an
19 individual's right to petition includes "any written or oral
20 statement or writing made before . . . judicial proceeding" and
21 "any written or oral statement or writing made in connection with
22 an issue under consideration or review by a . . . judicial body."
23 Cal. Civ. Proc. Code § 425.16(e). The "anti-SLAPP statute's
24 definitional focus is . . . the defendant's activity that gives
25 rise to his or her asserted liability -- and whether that activity
26 constitutes protected speech or petitioning.'" Martinez v.
27 Metabolife Int'l, Inc., 113 Cal. App. 4th 181, 187 (2003) (quoting

1 Navellier v. Slatten, 29 Cal. 4th 82, 92 (2002); emphasis by
2 Navellier court). The "principal thrust or gravamen of the
3 plaintiff's cause of action . . . determines whether the anti-SLAPP
4 statute applies." Martinez, 113 Cal. App. 4th at 188 (citation
5 omitted; emphasis in original). Where a claim is based on
6 "protected activity and unprotected activity, it is subject to
7 section 425.16 unless the protected conduct is merely incidental to
8 the unprotected conduct." Haight Ashbury Free Clinics, Inc. v.
9 Happening House Ventures, 184 Cal. App. 4th 1539, 1551 (2010)
10 (citation and internal quotation marks omitted).

11 Plaintiffs' claims are based, in part, on statements made in
12 the probate proceedings. They contend that Clainos misrepresented
13 the nature of their father's estate in documents filed in state
14 court. And, as discussed further below, they complain that
15 Clainos's fraud infected the state court's judgment. Clainos's
16 conduct before the state court is more than incidental to this
17 case.

18 Because Plaintiffs' claims are based, in substantial part, on
19 statements Clainos made in connection with an issue under
20 consideration by a judicial body, they fall within the scope of the
21 anti-SLAPP statute. The burden therefore shifts to Plaintiffs to
22 state and substantiate their claims against Clainos.

23 2. Probability of Success

24 a. Statute of Limitations

25 Clainos contends that Plaintiffs' claims are barred by the
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1 relevant statutes of limitations.⁵ Plaintiffs do not dispute that,
2 because they brought their case in October 2010, their claims are
3 time-barred unless they have a basis for tolling relevant
4 limitations periods.

5 Under California law, a limitations period may be tolled until
6 the basis of a claim "is discovered or with reasonable diligence
7 could have been discovered." Elec. Equip. Express, Inc. v. Donald
8 H. Seiler & Co., 122 Cal. App. 3d 834, 855 (1981). However, where
9 a fiduciary relationship between the parties exists at the time the
10 claim arose, a plaintiff's duty of diligence is relaxed because "'a
11 fiduciary has a duty to make a full and fair disclosure of all
12 facts which materially affect the rights and interest of the
13 parties, and, where a fiduciary relationship exists, facts which
14 would ordinarily require investigation may not excite suspicion.'"'
15 Id. (quoting Bennett v. Hibernia Bank, 47 Cal. 2d 540, 559-60
16 (1956)). In such circumstances, "a plaintiff need not disprove
17 that an earlier discovery could have been made upon a diligent
18 inquiry but need show only that he made an actual discovery of
19 hitherto unknown information within the statutory period before

21 ⁵ Plaintiffs' claims other than for breach of fiduciary duty
22 must have been brought within three years of the date they accrued.
23 See Cal. Civ. Proc. Code § 338(d); Cal. Prob. Code § 16460.
24 California courts have reached varying conclusions regarding the
25 limitations period applicable to claims for breach of fiduciary
26 duty. Compare David Welch Co. v. Erskine & Tulley, 203 Cal. App.
27 3d 884, 893 (1988) (applying four-year limitations period) with
28 City of Vista v. Robert Thomas Secs., Inc., 84 Cal. App. 4th 882,
889 (2000) (concluding that three-year limitations period applies
because plaintiff's breach of fiduciary duty claim was grounded in
fraud). Even under the more generous four-year limitations period,
Plaintiffs' breach of fiduciary duty claim would be barred, unless
they can justify the tolling of the statute.

1 filing the action." Bennett, 47 Cal. 2d at 563. However, a
2 plaintiff "does have a duty to investigate even where a fiduciary
3 relationship exists when 'he has notice of facts sufficient to
4 arouse the suspicions of a reasonable man.'" Elec. Equip., 122
5 Cal. App. 3d at 855 (quoting Bennett, 47 Cal. 2d at 563).

6 Plaintiffs assert that their claims concerning the disputed
7 intellectual property did not accrue until they discovered the 1995
8 Assignment. See Pls.' Opp'n to Clainos Mot. to Dismiss 5:16-17.
9 Clainos claims that Plaintiffs had notice of the 1995 Assignment in
10 1997, through the SFX sale. He cites Greene's declaration that
11 Feldman was provided a copy of the SFX Purchase Agreement, which
12 referred to Schedule 3.18 that contained the 1995 Assignment. In
13 response, Plaintiffs state that they were not aware of the 1995
14 Assignment before discovering it in the Schedule 3.18 section of
15 the SFX Sales Binder they discovered in February 2009. Plaintiffs
16 and Fabert state that, prior to that time, they never saw the
17 binder, Schedule 3.18 or the 1995 Assignment. Plaintiffs' current
18 counsel represents that she, along with other legal staff, reviewed
19 "documents from various sources, including plaintiffs and"
20 Feldman's law firm. Cannata Am. Decl. ¶ 3. In particular, counsel
21 states that none of the "correspondence" from Feldman's firm that
22 she reviewed made reference to the intellectual property at issue
23 in this action or to the 1995 Assignment. Id. ¶ 4. Feldman
24 represents that he does not recall whether he saw or received
25 Schedule 3.18 prior to 2011.

26 Plaintiffs' evidence does not contradict Clainos's showing
27 that, in 1997, the SFX Purchase Agreement was sent to Feldman and
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1 the Agreement included the 1995 Assignment. Plaintiffs do not
2 dispute that Feldman was their attorney for the purposes of the SFX
3 sale. Nor do they offer a declaration from Feldman stating that he
4 did not receive the SFX Purchase Agreement in 1997. That Feldman,
5 approximately fourteen years later, does not recall seeing or
6 receiving Schedule 3.18 and the 1995 Assignment is not inconsistent
7 with Greene's declaration that the SFX Purchase Agreement was
8 provided to Feldman and an inference that he received it. Under
9 general agency principles, "an attorney is his client's agent, and
10 . . . the agent's knowledge is imputed to the principal even where
11 . . . the agent does not actually communicate with the principal,
12 who thus lacks actual knowledge of the imputed fact." Herman v.
13 L.A. Cnty. Metro. Transp. Auth., 71 Cal. App. 4th 819, 828 (1999);
14 see also Stalberg v. W. Title Ins. Co., 230 Cal. App. 3d 1223,
15 1230-31 (1991) (concluding that law firm's knowledge of fact was
16 imputed to clients); Cal. Civ. Code § 2332 ("As against a
17 principal, both principal and agent are deemed to have notice of
18 whatever either has notice of, and ought, in good faith and the
19 exercise of ordinary care and diligence, to communicate to the
20 other."). This principle of constructive notice is irrebutable.
21 Herman, 71 Cal. App. 4th at 828. Because the SFX Sales Agreement
22 was provided to Feldman, and this Agreement referred to and
23 incorporated Schedule 3.18 by reference, Plaintiffs are charged
24 with notice of the 1995 Assignment as of 1997.

25 Furthermore, Section 3.18 of the SFX Sales Agreement stated
26 that, by signing the document, Plaintiffs warranted through their
27 respective trusts that BGP owned the intellectual property listed
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1 in Schedule 3.18. This warranty imposed on Plaintiffs a duty to
2 investigate the intellectual property owned by BGP, notwithstanding
3 Clainos's role as their fiduciary, because they were affirmatively
4 representing that BGP owned the copyrights and trademark at issue
5 in this case. Indeed, even if the 1995 Assignment were not sent to
6 Feldman, an investigation into the facts underlying the warranty in
7 Section 3.18 would have revealed the 1995 Assignment, which was
8 recorded with the Copyright Office. Thus, Feldman's receipt of the
9 SFX Sales Agreement bars Plaintiffs' claims against Clainos for the
10 disputed intellectual property.

11 In addition, Fabert signed the SFX Sales Agreement as trustee
12 of Plaintiff David Graham's trust. As noted above, in doing so,
13 Fabert represented to Clear Channel that BGP owned the poster
14 copyrights and "The Fillmore" trademark. Although Fabert asserts
15 that he never received a copy of Schedule 3.18, the 1995 Assignment
16 or the SFX Sales Binder, he does not contend that anyone prevented
17 him from obtaining a copy of Schedule 3.18, which was incorporated
18 by reference in the SFX Sales Agreement. Under California law,
19 "one who assents to a contract is bound by its provisions and
20 cannot complain of unfamiliarity with the language of the
21 instrument." Madden v. Kaiser Found. Hosps., 17 Cal. 3d 699, 710
22 (1976); see also Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198,
23 1200 (9th Cir. 2002). Had Fabert investigated the facts underlying
24 the warranty he made, he would have discovered the 1995 Assignment.
25 Thus, Plaintiff David Graham's claims against Clainos based on the
26 disputed intellectual property are time-barred based on both
27 Feldman's receipt of the SFX Sales Agreement and Fabert's assent to
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1 it.

2 Finally, many of the posters contained the notice, "© Bill
3 Graham." Nimmer Decl. ¶¶ 14, 39-43. This should have put
4 Plaintiffs on notice, at the time of the probate proceedings, that
5 their father may have registered intellectual property in his name.
6 Indeed, Plaintiffs acknowledge that Bill Graham had registered the
7 copyrights and "The Fillmore" trademark with the Copyright Office
8 and the U.S. Patent and Trademark Office respectively. See, e.g.,
9 Compl. ¶ 20; Nimmer Decl. ¶¶ 14-16. And, as Plaintiffs recognize,
10 a search of publically-available records would have shown that this
11 intellectual property was registered in Bill Graham's name. See,
12 e.g., Graham-Sult Decl. ¶ 4 (noting that an investigation at the
13 Copyright Office led to his "realization" that his father held
14 "over 300 poster copyrights"). All this further supports a
15 conclusion that Plaintiffs' claims against Clainos concerning the
16 intellectual property are time-barred.

17 Plaintiffs' claims against Clainos concerning the scrapbooks
18 fare no better. Plaintiffs do not dispute that, during the probate
19 period, they were responsible for identifying the personal property
20 of their father to which they were entitled. And, at the time that
21 BGE was sold to the key employees in 1994, Plaintiffs knew that
22 anything claimed by BGE would be included in the sale. This
23 distinction -- between Bill Graham's personal scrapbooks and the
24 BGE archives -- should have put Plaintiffs, who were represented by
25 counsel, on notice that they should investigate the nature of Bill
26 Graham's personal holdings. They did not do so. Although a
27 specific item-by-item inventory was never undertaken, Plaintiffs do

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1 not contend that they requested one and were denied.

2 Accordingly, Plaintiffs' claims against Clainos were time-
3 barred by the time they brought their lawsuit in October 2010.

4 b. Res Judicata

5 Clainos also asserts that Plaintiffs' action lacks merit
6 because, based on the state court's final order, it is barred by
7 the doctrine of res judicata.

8 The final order of a probate court "releases the personal
9 representative and the sureties from all claims of the heirs or
10 devisees and of any persons affected thereby based upon any act or
11 omission directly authorized, approved, or confirmed in the
12 judgment or order." Cal. Prob. Code § 7250(a). This rule does
13 "not apply where the judgment or order is obtained by fraud or
14 conspiracy or by misrepresentation contained in the petition or
15 account or in the judgment as to any material fact." Id.
16 § 7250(c). Such a misrepresentation may include "the omission of a
17 material fact." Id.

18 Plaintiffs contend that the order closing probate was based on
19 Clainos's misrepresentations and omissions concerning the nature of
20 their father's estate. However, Plaintiffs' claims against Clainos
21 regarding the disputed scrapbooks are precluded by the state
22 court's final order. To make out their claim of fraud, Plaintiffs
23 contend that the scrapbooks did not appear on any inventory
24 compiled by Clainos or the Greene Law Firm. However, Clainos and
25 Greene state, and Plaintiffs do not dispute, that no specific
26 inventory of Bill Graham's personal memorabilia was ever made.
27 And, as noted above, Plaintiffs do not contend that they sought

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1 such an inventory, only to be denied. Plaintiffs assert that
2 Clainos "controlled our access as well as the definition of what
3 specific Archive items we could have" and that they "were never
4 given complete access to the Archives." Graham-Sult Decl. ¶ 7.
5 Even if this were true and even if it prevented them from
6 discovering items in their father's personal collection, Plaintiffs
7 were represented by counsel and could have objected in the probate
8 proceedings. Indeed, they do not dispute that they were
9 responsible for "going through" their father's personal items.
10 Greene Decl. ¶ 17. Plaintiffs, however, did not raise their
11 concerns before the state court.

12 Accordingly, to the extent they are based on the disputed
13 scrapbooks, Plaintiffs' claims are barred by the state court's
14 final order. For this additional reason, Plaintiffs' claims
15 against Clainos regarding the scrapbooks lack merit.

16 c. Litigation Privilege

17 California Civil Code section 47(b) provides that
18 communications made in or related to judicial proceedings are
19 absolutely immune from tort liability. The California Supreme
20 Court explains that the purpose of the privilege is "to afford
21 litigants . . . the utmost freedom of access to the courts without
22 fear of being harassed subsequently by derivative tort actions."
23 Silberg v. Anderson, 50 Cal. 3d 205, 213 (1990). "The litigation
24 privilege applies to any communications (1) made in a judicial
25 proceeding; (2) by litigants or other participants authorized by
26 law; (3) to achieve the objects of the litigation; (4) that have
27 some connection or logical relation to the action." Sharper Image

1 Corp. v. Target Corp., 425 F. Supp. 2d 1056, 1077 (N.D. Cal. 2006)
2 (citing Silberg, 50 Cal. 3d at 212). Once these requirements are
3 met, § 47(b) operates as an absolute privilege. Silberg, 50 Cal.
4 3d at 216. "Any doubt about whether the privilege applies is
5 resolved in favor of applying it." Kashian v. Harriman, 98 Cal.
6 App. 4th 892, 913 (2002).

7 As noted above, a substantial portion of Plaintiffs' action is
8 based on statements Clainos made in the probate proceedings. See,
9 e.g., Compl. ¶ 59. Thus, to the extent that Plaintiffs' claims are
10 based on these statements, the litigation privilege immunizes
11 Clainos from liability. Plaintiffs' reliance on Action Apartment
12 Association, Inc. v. City of Santa Monica, 41 Cal. 4th 1232 (2007),
13 is unavailing. Action Apartment teaches that the litigation
14 privilege is trumped by statutes that are "more specific than the
15 litigation privilege" and that "would be significantly or wholly
16 inoperable" if the privilege were asserted. Id. at 1246. These
17 requirements are met by criminal statutes penalizing perjury and
18 subornation of perjury and statutes related to state bar
19 discipline. Id. Plaintiffs, however, do not cite any authority
20 that their claims arise under statutes to which the litigation
21 privilege does not apply. Indeed, following Action Apartment,
22 state courts have recognized the continued breadth of the
23 litigation privilege, reaffirming that it "immunizes defendants
24 from virtually any tort liability (including claims for fraud),
25 with the sole exception of causes of action for malicious
26 prosecution." Olsen v. Harbison, 191 Cal. App. 4th 325, 333 (2010)
27 (citation omitted).

28

1 Because Plaintiffs have not otherwise stated claims against
2 Clainos, their action is stricken as a SLAPP. Although leave to
3 amend may be granted,⁶ Plaintiffs present no evidence or argument
4 suggesting that amendment would change the outcome. Thus, leave to
5 amend is denied as futile. As a prevailing defendant, Clainos is
6 entitled to attorneys' fees and costs. Cal. Civ. Proc. Code
7 § 425.16(c).

8 B. Greene Defendants' Motion to Strike

9 Against the Greene Defendants, Plaintiffs bring claims for
10 aiding and abetting a breach of fiduciary duty, conversion,
11 intentional misrepresentation, negligent misrepresentation and
12 fraudulent concealment. Plaintiffs state that these claims are
13 based on the Greene Defendants' "wrongful participation in the
14 conversion of estate assets and coverup." Pls.' Opp'n to Greene
15 Firm Defs.' Mot. to Strike 14:10.

16 1. Arising from Protected Activity

17 Plaintiffs' claims against the Greene Defendants are subject
18 to the anti-SLAPP statute for the same reasons that their claims
19 against Clainos are. Plaintiffs plead that some of the alleged
20 misrepresentations and non-disclosures of which they complain were
21 contained in documents these Defendants prepared and filed in state
22

23 ⁶ California law prohibits state courts from affording leave
24 to amend following a grant of a motion to strike under the anti-
25 SLAPP statute. See, e.g., Simmons v. Allstate Ins Co., 92 Cal.
26 App. 4th 1068, 1073-74 (2001). However, federal district courts
27 retain discretion to grant leave to amend, notwithstanding such a
28 motion. See Greensprings Baptist Christian Fellowship Trust v.
Cilley, 629 F.3d 1064, 1066 n.1 (9th Cir. 2010) (citing Verizon
Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir.
2004)).

1 court. See, e.g., Compl. ¶ 42(a)-(d). These Defendants' conduct
2 before the state court was more than incidental to Plaintiffs'
3 claims.

4 Because Plaintiffs' claims are based, in substantial part, on
5 the Greene Defendants' statements made in connection with an issue
6 under consideration by a judicial body, they fall within the scope
7 of the anti-SLAPP statute. The burden therefore shifts to
8 Plaintiffs to state and substantiate their claims against the
9 Greene Defendants.

10 2. Probability of Success

11 Plaintiffs' claims against the Greene Defendants are barred by
12 the statute of limitations and the litigation privilege⁷ for the
13 reasons stated above. Because Plaintiffs have not otherwise stated
14 claims against the Greene Defendants, their action is stricken as a
15 SLAPP. Although leave to amend may be granted, Plaintiffs present
16 no evidence or argument suggesting that amendment would change the
17 outcome. Thus, leave to amend is denied as futile. As prevailing
18 defendants, the Greene Defendants are entitled to attorneys' fees
19 and costs. Cal. Civ. Proc. Code § 425.16(c).

20 The Greene Defendants' motion to dismiss is denied as moot.

21 II. BGA Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6)

22 A complaint must contain a "short and plain statement of the
23 claim showing that the pleader is entitled to relief." Fed. R.

24 ⁷ Plaintiffs' claims against the Greene Defendants concerning
25 the disputed scrapbooks are based on these Defendants' "preparing
26 and filing false inventories and accountings with the Probate
27 Court" and "making intentionally false representations to
28 plaintiffs and the Probate Court." This conduct clearly falls
within the scope of the litigation privilege.

1 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
2 claim is appropriate only when the complaint does not give the
3 defendant fair notice of a legally cognizable claim and the grounds
4 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
5 (2007). In considering whether the complaint is sufficient to
6 state a claim, the court will take all material allegations as true
7 and construe them in the light most favorable to the plaintiff. NL
8 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

9 However, this principle is inapplicable to legal conclusions;
10 "threadbare recitals of the elements of a cause of action,
11 supported by mere conclusory statements," are not taken as true.
12 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
13 (citing Twombly, 550 U.S. at 555).

14 When granting a motion to dismiss, the court is generally
15 required to grant the plaintiff leave to amend, even if no request
16 to amend the pleading was made, unless amendment would be futile.
17 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
18 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
19 would be futile, the court examines whether the complaint could be
20 amended to cure the defect requiring dismissal "without
21 contradicting any of the allegations of [the] original complaint."
22 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

23 Leave to amend should be liberally granted, but an amended
24 complaint cannot allege facts inconsistent with the challenged
25 pleading. Id. at 296-97.

26 Against the BGA Defendants, Plaintiffs bring claims for
27 conversion, promissory estoppel, unjust enrichment, copyright

1 infringement and declaratory relief. They seek a declaration that
2 they "and/or the Estate of Bill Graham are the rightful owners of"
3 the copyrights discussed above and "approximately ten (10)
4 scrapbooks." Compl. ¶ 102. Plaintiffs do not identify the
5 scrapbooks at issue in their complaint.

6 A. Conversion

7 Under California law, a claim for conversion requires a
8 plaintiff to allege (1) "ownership or right to possession of
9 property;" (2) a defendant's wrongful act toward the property,
10 causing interference with the plaintiff's possession; and
11 (3) damage to the plaintiff. PCO, Inc. v. Christensen, Miller,
12 Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384,
13 394 (2007).

14 The 1995 Assignment precludes Plaintiffs' claim against the
15 BGA Defendants for the alleged conversion of copyrights.⁸
16 Plaintiffs do not allege any facts indicating that they had any
17 right to possession of the disputed copyrights in July 2002, the
18 month the BGA Defendants acquired them. By that time, even under
19 Plaintiffs' allegations, the copyrights already had been
20 transferred from Bill Graham's estate to BGE to BGP to SFX to Bill
21 Graham Archives. Furthermore, Plaintiffs do not plead facts
22 suggesting that the BGA Defendants engaged in wrongdoing. Although
23 they contend that Sagan should have known that the 1995 Assignment

24
25 ⁸ As noted above, the Court generally may consider only the
26 complaint on a motion to dismiss. However, the 1995 Assignment is
27 properly before the Court on the BGA Defendants' motion because
28 Plaintiffs' complaint refers to the document, it is central to
Plaintiffs' claim, and no party questions its authenticity. See
Daniels-Hall, 629 F.3d at 998.

1 was defective, they plead no facts to support this contention.

2 Similarly, Plaintiffs do not allege facts suggesting that they
3 had an ownership interest in the ten scrapbooks. Like the
4 copyrights, Plaintiffs allege that these items were transferred
5 between several entities before the BGA Defendants acquired them in
6 July 2002. Furthermore, Plaintiffs do not allege how the BGA
7 Defendants acted improperly with respect to the ten scrapbooks.

8 Accordingly, Plaintiffs' conversion claim against the BGA
9 Defendants is dismissed. Because amendment would be futile, the
10 Court does not afford leave to amend.

11 B. Promissory Estoppel

12 To state a claim for promissory estoppel, a plaintiff must
13 plead "(1) a promise clear and unambiguous in its terms;
14 (2) reliance by the party to whom the promise is made; (3) the
15 reliance must be both reasonable and foreseeable; and (4) the party
16 asserting the estoppel must be injured by his reliance." US
17 Ecology, Inc. v. State, 129 Cal. App. 4th 887, 901 (2005) (citation
18 and internal quotation and editing marks omitted).

19 Plaintiffs' promissory estoppel claim against the BGA
20 Defendants is based on Clainos's and the Greene Defendants' alleged
21 promises to give them all of Bill Graham's scrapbooks. Plaintiffs
22 do not contend that the BGA Defendants ever made them a promise.
23 Because Plaintiffs fail to allege that the BGA Defendants promised
24 them anything, Plaintiffs' promissory estoppel claim against the
25 BGA Defendants is not cognizable.

26 Neither Powers v. Pacific Diesel Engine Company, 206 Cal. 334
27 (1929), nor Burgess v. California Mutual Building and Loan

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1 Association, 210 Cal. 180 (1930), require a contrary conclusion.
2 Powers stands for the proposition that an original owner may be
3 estopped from asserting ownership over property in light of a bona
4 fide purchaser's claim if the original owner negligently entrusted
5 the property to a third party who sold the property to the
6 purchaser. 206 Cal. at 341; see also Reynolds v. Reynolds, 54 Cal.
7 2d 669, 675 (1960) (explaining that Powers reflects the principle
8 of "upholding claims of bona fide purchasers when any basis of
9 estoppel could be found to exist"). The Powers court relied on the
10 precept that, "where one of two innocent persons must suffer by the
11 act of a third, he, by whose negligence it happened, must be the
12 sufferer." 206 Cal. at 339 (citation omitted). This principle is
13 not applicable to the promissory estoppel claim in this case. The
14 BGA Defendants did not originally own the scrapbooks, nor did they
15 negligently entrust them to Clainos. Burgess concerned a third
16 party enforcing a promise made by a promisor to another party. 210
17 Cal. at 186-88. Here, as noted above, Plaintiffs have failed to
18 allege any promise by the BGA Defendants.

19 Accordingly, Plaintiffs' promissory estoppel claim against the
20 BGA Defendants is dismissed. Because this claim is based on
21 alleged promises made by Clainos and the Greene Defendants and
22 there is no indication that amendment would save this claim, this
23 dismissal is without leave to amend.

24 C. Unjust Enrichment

25 Plaintiffs' unjust enrichment claim is based on their
26 allegations that the BGA Defendants "wrongfully acquired the
27 copyrights and the scrapbooks." Compl. ¶ 93. However, assuming
28

1 that unjust enrichment is a cognizable cause of action under
2 California law, Plaintiffs allege no facts to suggest that the BGA
3 Defendants acted improperly. As stated above, Plaintiffs do not
4 plead how the BGA Defendants knew or should have known that SFX's
5 ownership of the copyrights and the scrapbooks was improper.

6 Accordingly, Plaintiffs' unjust enrichment claim against the
7 BGA Defendants is dismissed. Because there is no indication that
8 amendment would save this claim, this dismissal is without leave to
9 amend.

10 D. Copyright Infringement

11 To bring a claim for copyright infringement, a plaintiff must
12 be the "legal or beneficial owner of an exclusive right under a
13 copyright" and allege "infringement of that particular right
14 committed while he or she is the owner of it." 17 U.S.C. § 501(b).
15 As already stated, based on the 1995 Assignment and the alleged
16 subsequent transfers of the disputed copyrights, Plaintiffs do not
17 own the copyrights at issue. Accordingly, their copyright
18 infringement claim against the BGA Defendants is dismissed.
19 Because amendment would not save this claim, this dismissal is
20 without leave to amend.

21 E. Declaratory Judgment

22 The Declaratory Judgment Act (DJA) permits a federal court to
23 "declare the rights and other legal relations" of parties to "a
24 case of actual controversy." 28 U.S.C. § 2201; see Wickland Oil
25 Terminals v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986). The
26 "actual controversy" requirement of the Declaratory Judgment Act is
27 the same as the "case or controversy" requirement of Article III of
28

1 the United States Constitution. Am. States Ins. Co. v. Kearns, 15
2 F.3d 142, 143 (9th Cir. 1994).

3 Plaintiffs' declaratory judgment claim against the BGA
4 Defendants fails because they have not alleged facts showing that
5 there is an actual case or controversy. Accordingly, this claim is
6 dismissed. Because there is no indication that amendment would
7 save any of their claims and permit them to show an actual case or
8 controversy, this dismissal is without leave to amend.

9 CONCLUSION

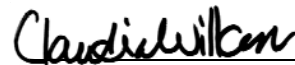
10 For the foregoing reasons, the Court GRANTS Plaintiffs' motion
11 for leave to supplement the record; GRANTS Clainos's anti-SLAPP
12 motion to strike and for attorneys' fees; GRANTS the Greene
13 Defendants' motion to strike and for attorneys' fees and DENIES as
14 moot their motion to dismiss; and GRANTS the BGA Defendants' motion
15 to dismiss. Plaintiffs' actions against Clainos and the Greene
16 Defendants are stricken as SLAPPs. Their claims against the BGA
17 Defendants are dismissed without leave to amend.

18 As noted above, under the anti-SLAPP statute, Clainos and the
19 Greene Defendants are entitled to attorneys' fees and costs. These
20 Defendants may seek fees and costs in accordance with Civil L.R.
21 54-1 and 54-5.

22 The Clerk shall enter judgment and close the file.

23 IT IS SO ORDERED.

24 Dated: 6/24/2011



CLAUDIA WILKEN
United States District Judge

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