12B.2

Douglas A. Pettit, Esq., Bar No. 160371
Julia Dalzell, Esq., Bar No. 323335
PETTIT KOHN INGRASSIA LUTZ & DOLIN PC
11622 El Camino Real, Suite 300
San Diego, CA 92130
Telephone: (858) 755-8500
Facsimile: (858) 755-8504
E-mail: dpettit@pettitkohn.com
jdalzell@pettitkohn.com

Attorneys for Defendants
GINA M. AUSTIN and
AUSTIN LEGAL GROUP APC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual, JOE HURTADO, an individual,

Plaintiffs,

v.

LARRY GERACI, an individual; REBECCA BERRY a/k/a REBECCA ANN BERRY RUNYAN, an individual; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON APC, a California corporation; GINA M. AUSTIN, an individual; AUSTIN LEGAL GROUP APC, a California corporation; SEAN MILLER, an individual; FINCH THORTON & BAIRD, a limited liability partnership; DAVID DEMIAN, an individual; ADAM WITT, an individual; and DOES 1 through 50, inclusive,

Defendants.

CASE NO.: 3:18-cv-02751-GPC-MDD

DEFENDANTS GINA M. AUSTIN AND AUSTIN LEGAL GROUP APC'S REPLY IN SUPPORT OF MOTION TO DISMISS

Date:	**May 24, 2019**
Time:	**1:30 p.m.**
Courtroom:	2D (2nd Floor)
District Judge:	Gonzalo P. Curiel
Magistrate Judge:	Mitchell D. Dembin
Complaint Filed:	December 12, 2018
Trial Date:	None

Defendants GINA M. AUSTIN and AUSTIN LEGAL GROUP APC ("ALG Defendants") respectfully submit the following Reply in support of their Motion to Dismiss.

I.

INTRODUCTION

Plaintiffs' Darryl Cotton and Joe Hurtado ("Plaintiffs"), Opposition to Defendants' Motion to Dismiss fails to set forth the requisite facts to meet Plaintiffs' burden of stating a claim or proving an ability to amend to cure pleading defects. Plaintiffs' have not further alleged, or proven they are able to allege, additional and plausible facts to support their claims and meet the heightened pleading standards.

Further, Plaintiffs have failed to demonstrate their claims against Defendants do not arise from protected litigation activity, subject to an anti-SLAPP motion to strike. Plaintiffs have only included Defendants in this suit in an effort to punish Defendants for their representation of Plaintiff's adversary in an underlying state court proceeding. This is **exactly** the behavior public policy seeks to eliminate with the anti-SLAPP motion to strike. Plaintiffs' Opposition fails to present any sufficient, competent, or admissible evidence which could support a judgment in his favor.

Desperately, Plaintiffs make arguments about indispensable parties and dismissal of the state action. This is not related to the Motion to Dismiss and Plaintiffs' arguments are unintelligible and irrelevant. Thus, Defendants will not address Plaintiffs' arguments on indispensable parties in the state action.

For the reasons herein, Plaintiffs' Opposition fails to meet its burden in proving Plaintiffs have alleged enough facts to state a claim, fails to remedy pleading deficiencies in accordance with heightened pleading standards of various causes of action, and fails to oppose Defendants' motion to strike under California anti-SLAPP. Plaintiffs' Complaint, the third now of its kind, disrespects the legal process, wasting time and expense of all parties and this Court. Accordingly, Defendants' Motion to Dismiss should be granted.

///

II.

ARGUMENT

A. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A PROBABILITY OF PREVAILNG AGAINST DEFENDANTS' ANTI-SLAPP MOTION TO STRIKE

Plaintiffs are persistent in continuing their baseless legal onslaught, filing frivolous complaints and claims in every court against any party remotely related. Defendants should not be required to defend their proper and just actions—actions solely encompassing the representation of Plaintiffs' adversary in separate suit. Plaintiffs seek to punish Defendants for their professional status and protected litigation activities. This is exactly the sort of claim the anti-SLAPP process seeks to eliminate at any early stage.

Anti-SLAPP law provides an efficient procedural mechanism for dismissing nonmeritorious claims against public and protected participation. A lawyer's conduct in representing a client, filing, petitioning to the court, and other litigation-related actions and speech is expressly protected and privileged. Public policy favors the early and swift elimination of complaints cloaked in tort but intended to silence legitimate and necessary free speech and activity. In an effort to discourage these wasteful actions, the anti-SLAPP statute dismisses the complaint **and** awards attorney's fees.

Under section 425.16, subdivision (b)(1), the court first must determine "whether the defendant has made a threshold showing that the challenged cause of action" arises from an act in furtherance of the right of petition or free speech in connection with a public issue. Navellier v. Sletten (2002) 29 Cal.4th 82, 88. A defendant meets the burden of showing that a plaintiff's action arises from a protected activity by showing that the acts underlying the plaintiff's cause of action fall within one of the four categories of conduct described in Cal. Code Civ. Proc. § 425.16(e). Second, the court must "determine whether the plaintiff has

demonstrated a probability of prevailing on the claim." Id. If the defendant makes a threshold showing that the cause of action arises from an act in furtherance of the right of petition or free speech in connection with a public issue, and the plaintiff fails to demonstrate a probability of prevailing, then the court must strike the cause of action. C.C.P. § 425.16, subd. (b)(1).

Plaintiffs have not met this burden, again simply directing attention to the vague, conclusory, and seemingly harmless, enumerated facts. Plaintiffs' Opposition fails to refute Defendants' Motion to Strike with any persuasive explanation or amendment to their inadequacies. Plaintiffs improperly rely solely on the Complaint (a complaint already wholly deficient) in failing to provide any competent, admissible evidence to substantiate their claims and overcome Defendants showing of anti-SLAPP protection.

Plaintiffs attempt to shift their burden, stating, "Defendants have not met their initial burden" because "the cause of action for abuse of process does not stem from Austin Defendants filing of a frivolous lawsuit, but rather as part of a conspiracy to obtain a prohibited interest for Geraci." (Oppo. at 7:10-13.) In the very next sentence however, Plaintiffs state, "the co-conspirators then filed a frivolous lawsuit against Cotton in furtherance of the conspiracy." (Oppo. at 7:10-13.) This circular argument makes little sense—conspiracy and abuse of process are not one in the same. Defendants are unsure of what "process" was abused if not the litigation process. Defendants' actions as attorneys engaging in litigation related activity is protected activity under § 425.16. Plaintiffs cannot escape the anti-SLAPP statute simply by asserting the filing was "frivolous."

Moreover, Plaintiffs "illegality" argument is also unfounded. An alleged violation of a state specific business and professional code does not meet some "illegal conduct exception." (Oppo. at 7:19-24.) The anti-SLAPP statute does not protect speech or petitioning activity that is conclusively shown or conceded to be illegal as a matter of law and therefore not a valid exercise of the constitutional

right of petition or free speech. However, filing a complaint, taking a deposition, and other litigation actions are not illegal activities. Fremont Reorganizing Corp. v. Faigin, 198 Cal. App. 4th 1153 (2011).

This *Flatley* illegality exception cited by Plaintiff applies only to conduct that is *criminally* illegal, rather than merely a violation of a statute. Fremont, 198 Cal. App. 4th 1153 (2011); Mendoza v. ADP Screening & Selection Services, Inc. (2010) 182 Cal.App.4th 1644, 1654; Cabral v. Martins (2009) 177 Cal.App.4th 471, 477, 480–481 (holding litigation conduct by attorneys allegedly in violation of statutes authorizing treble damages for assisting in the evasion of child support obligations was not "illegal" within the meaning of the rule from *Flatley*. Cabral stated that even if the attorneys' conduct violated the statutes, the conduct was "neither inherently criminal nor otherwise outside the scope of normal, routine legal services," and "this is not the kind of illegality involved in Flatley.") See also G.R. v. Intelligator (2010) 185 Cal.App.4th 606, 616 (following Cabral in holding an attorney's admitted failure to redact certain information from credit reports filed with the court in a dissolution action, in violation of rule 1.20 of the California Rules of Court, was not the type of criminal activity involved in *Flatley*.) Plaintiffs have failed to show Defendants' actions were wrongful, let alone criminally illegal, and subject to exclusion under § 425.16.

Additionally, Plaintiffs assert "Austin Defendants are attempting to argue that all the extra-judicial activities they were involved in are covered by the anti-SLAPP statute." (Oppo. at 9:13-15.) However, Plaintiffs' *entire* Complaint against Defendants is based on Defendants actions as attorneys representing their client and their litigation-related speech and activity. Defendants are puzzled by what "extra-judicial" activities and "non-judicial proceedings" Defendants were allegedly involved in that would not be "covered" by the anti-SLAPP statute because Plaintiffs' Complaint is totally devoid of any such facts or allegations. Plaintiffs' Complaint seeks to punish Defendants solely for their representation of Plaintiffs'

adversary in an underlying state court proceeding—in direct violation of the anti-SLAPP statute and public policy. Plaintiffs' Complaint is wanting of any facts and blatantly disregards all pleading standards. Plaintiffs' Opposition fails to make any justification for their obvious attempt to retaliate against anybody and any act Plaintiffs dislike. Thus, because Defendants actions in representing their client fall expressly under protected activity of CCP 425.16, recognized by this court, Defendants' motion to strike should be granted with an award of attorneys' fees.

B. PLAINTIFFS FAIL TO PROVE THEY HAVE STATED A CLAIM AGAINST DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs' Opposition does not prove they have stated facts sufficient to state a claim, instead they cite case law and then in one conclusory sentence note, "The Complaint has met this standard." (Plaintiffs' Opposition ["Oppo."], at 5:5.) Plaintiffs' have not shown how the few facts alleged meet the pleading standards. Plaintiffs simply list ten facts they believe are enough to state a claim for relief. (Oppo. at 5-6:7-3.) However, these ten facts do no more than allege some vague and illusory harm, forcing Defendants to guess and hypothesize as to the claims against them and the grounds upon which they rest. Without any substantive allegations pled, Defendants cannot properly prepare a defense.

The ten facts extracted by Plaintiffs fail to provide Defendants with any notice of the claims. Facts such as "Austin Defendants hold themselves out to be 'cannabis experts,'" "were hired by Geraci to be responsible for the CUP Application," and "Austin Defendants were part of a team helping Geraci," do not give Defendants any notice of the specific allegations against them. (Oppo. at 5:7-24.) These vague assertions that Defendants were acting in a "team" are insufficient to meet any pleading standard and do not support a plausible inference that the Defendants engaged in any cognizable wrongdoing against Plaintiffs. Plaintiffs have not stated any plausible claims for relief and dismissal is proper.

C. PLAINTIFFS FAIL TO PROVE HOW THE FACTS ALLEGED MEET THE REQUISITE PARTICULARITY PLEADING STANDARDS OF FRAUD AND RICO

Plaintiffs justify their failure to allege particularized facts in accordance with Rule 9(b) pleading standards by claiming Defendants supposed "sophistication" as attorneys relieves them of this requirement. Plaintiffs further state, "Regarding RICO, Plaintiffs are not required to plead with particularity nonfraudulent predicate acts, or the existence of a racketeering enterprise which may be plead generally." (Oppo. at 6:16-21.) Again, Plaintiffs are mistaken. Plaintiffs' RICO allegations *are* based in fraudulent acts, and Plaintiffs have not addressed the other RICO pleading deficiencies noted in Defendants Motion to Dismiss.

1. Plaintiffs Fail to Provide Any Reasonable Excuse for the Failure to Plead Fraud with the Requisite Specificity

In order to properly state a cause of action for fraud, Plaintiffs must, at the very least, specify the alleged fraudulent representations, allege the representations were false when made, identify the speaker, state when and where the statements were made, and state the manner in which the representations were false and misleading. See In re GlenFed, Inc. Secur. Litig. 42 F3d 1541, 1547 (9th Cir. 1994). Where several defendants are sued in connection with an alleged fraudulent scheme, plaintiffs must "inform each defendant separately of the allegations surrounding his alleged participation in the fraud." Swartz v. KPMG LLP, 476 F3d 756, 764–765 (9th Cir. 2007); Destfino v. Reiswig, 630 F3d 952, 958 (9th Cir. 2011). Plaintiffs have pled none of these elements and their Opposition fails to address these deficiencies. Instead, Plaintiffs argue the Court should be "sensitive" to the fact that it is pre-discovery—suggesting Plaintiffs intend to later create their

///

///

///

case on a discovery fishing expedition.[1]

Plaintiffs maintain because Defendants were attorneys they are "sophisticated" parties and thus, Plaintiffs need not plead the details of the alleged fraud with specificity. (Oppo. at 6:10-16.) Plaintiffs' argument is unsupported by their cited law. Plaintiff cites *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (1997), a securities litigation case to come out of the third circuit. In *In re Burlington Coat Factory*, the court stated in certain instances they were willing to slightly relax pleading standards of fraud when the fraudulent acts stemmed from sophisticated and complex data and accounting practices—incomprehensible by a layman. The court relaxed pleading standards because Plaintiffs alleged the Defendants distorted data undisclosed to the public—particularly and solely within Defendants knowledge. However, courts have clarified, even under a relaxed application of Rule 9(b), boilerplate and conclusory allegations will not suffice. Plaintiffs must accompany their legal theory with factual allegations that make their theoretically viable claim plausible.

> To avoid dismissal in these circumstances, a complaint must delineate at least the nature and scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity. This requirement is intended to ensure that plaintiffs thoroughly investigate all possible sources of information, including but not limited to all publicly available relevant information, before filing a complaint.

Shapiro v. UJB Fin. Corp., 964 F.2d 272, 285 (1992) (superseded on other grounds).

Plaintiffs have not only misconstrued this "sophistication" principal, but have also incorrectly applied this narrow exception to the facts at hand. Plaintiffs claim, "Defendants are attorneys and a law firm, and if they are involved in defrauding

[1] Plaintiffs' argument that discovery has not yet been conducted, and thus not all facts are known, is senseless. Plaintiff has litigated related state court actions—*based on the same facts*—for nearly two years. Any argument that liberal pleading is necessary due to ongoing fact-finding is absurd when assumingly, Plaintiff has taken depositions, conducted written discovery, and received ample documentation in his practically identical state court actions.

Plaintiffs, the Court should consider them "sophisticated" for these purposes. Plaintiffs have not stated that similarly to complex data fraud, Defendants have used their legal skills for actions so covert and complex that Plaintiffs are entirely unable to articulate Defendants alleged wrongdoing with specificity. This is not the case. There are no actions allegedly taken by Defendants that would be too complex for Plaintiffs to so state. Simply because Defendants are sophisticated in the sense that they are educated professionals, does not provide Plaintiffs with the freedom to utterly fail to allege any facts supporting fraud.

Further, unlike instances of internal corporate fraud and securities litigation, here there is no knowledge that is exclusively within Defendants control; undisclosed or unobtainable through normal discovery processes. Because this unconvincing argument is Plaintiffs' sole opposition to their failure to plead fraud with the requisite particularity, Defendants Motion to Dismiss for failure to meet requirements of Federal Rule 9(b) should be sustained.

2. Plaintiffs Fail to Provide Any Reasonable Excuse for the Failure to Adequately Plead RICO

A RICO claim with fraudulent predicate acts must be pled with the same particularity as fraud. As stated, Plaintiffs have failed to do so and their Opposition does not provide any additional facts or support evidencing an ability to cure these defects. Additionally, Plaintiffs' Opposition fails to even address additional RICO pleading defects, such as failure to show an "enterprise," and failure to show a "pattern of racketeering activity." Plaintiffs again point to their ten delineated facts to support their assertion that "Plaintiffs have met their burden." (Oppo. at 6:20-21.) Plaintiffs' assertions that Defendants "were part of a team" and "hired by Geraci" do not meet the standards for proving an enterprise or pattern under RICO. Thankfully, hiring an attorney does not constitute a conspiracy.

Plaintiffs' Opposition excuses their deficiencies by stating the RICO claim is not, in fact, based in fraud. However, only activities set forth in 18 U.S.C.

§ 1961(1) may serve as a basis of a RICO claim. Plaintiffs have vaguely alleged Defendants conspired and ***defrauded*** Plaintiffs. Plaintiffs have not alleged "nonfraudulent" RICO acts such as drug trafficking, murder, kidnapping, arson, or robbery. Therefore, the speculative racketeering acts alleged are fraudulent, and as such, must be pled with the particularity required by Rule 9(b). Lewis on behalf of National Semiconductor Corp. v. Sporck, 612 F. Supp. 1316, 1325 (1985)

Plaintiffs' RICO cause of action is nothing more than a nexus for federal jurisdiction, unable to allege particulars demonstrating a pattern of corruption by an organized enterprise. Plaintiffs' lack of opposition proves Plaintiffs possess no facts to support this RICO claim, and therefore Defendants Motion to Dismiss should be sustained.

III.

CONCLUSION

Plaintiffs' Complaint is replete with speculative and imagined theories of conspiracy. Instead of accepting the results of the state litigation, Plaintiffs continue their persecution, adding any and all parties, no matter how attenuated the relationship. Defendants respectfully request this Court strike Plaintiffs' causes of action against Defendants in violation of anti-SLAPP statute, award attorneys' fees, and dismiss Plaintiffs' Complaint against Defendants with prejudice.

PETTIT KOHN INGRASSIA LUTZ & DOLIN PC

Dated: May 3, 2019

By: s/ Julia Dalzell
Douglas A. Pettit, Esq.
Julia Dalzell, Esq.
E-mail: dpettit@pettitkohn.com
jdalzell@pettitkohn.com
Attorneys for Defendants
GINA M. AUSTIN and AUSTIN LEGAL GROUP APC

Douglas A. Pettit, Esq., Bar No. 160371
Julia Dalzell, Esq., Bar No. 323335
PETTIT KOHN INGRASSIA LUTZ & DOLIN PC
11622 El Camino Real, Suite 300
San Diego, CA 92130
Telephone: (858) 755-8500
Facsimile: (858) 755-8504
E-mail: dpettit@pettitkohn.com
jdalzell@pettitkohn.com

Attorneys for Defendants
GINA M. AUSTIN and
AUSTIN LEGAL GROUP APC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual, JOE HURTADO, an individual,

Plaintiffs,

v.

LARRY GERACI, an individual; REBECCA BERRY a/k/a REBECCA ANN BERRY RUNYAN, an individual; MICHAEL R. WEINSTEIN, an individual; SCOTT TOOTHACRE, an individual; FERRIS & BRITTON APC, a California corporation; GINA M. AUSTIN, an individual; AUSTIN LEGAL GROUP APC, a California corporation; SEAN MILLER, an individual; FINCH THORTON & BAIRD, a limited liability partnership; DAVID DEMIAN, an individual; ADAM WITT, an individual; and DOES 1 through 50, inclusive,

Defendants.

CASE NO.: 3:18-cv-02751-GPC-MDD

CERTIFICATE OF SERVICE

Date:	**May 24, 2019**
Time:	**1:30 p.m.**
Courtroom:	2D (2nd Floor)
District Judge:	Gonzalo P. Curiel
Magistrate Judge:	Mitchell D. Dembin
Complaint Filed:	December 12, 2018
Trial Date:	None

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s):

DEFENDANTS GINA M. AUSTIN AND AUSTIN LEGAL GROUP APC'S REPLY IN SUPPORT OF MOTION TO DISMISS

was served on this date to counsel of record:

[ ] **BY MAIL:** By placing a copy of the same in the United States Mail, postage prepaid, and sent to their last known address(es) listed below.

[ ] **BY E-MAIL DELIVERY:** Based on an agreement of the parties to accept service by e-mail or electronic transmission, I sent the above document(s) to the person(s) at the e-mail address(es) listed below. I did not receive, within a reasonable amount of time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[X] **BY ELECTRONIC TRANSMISSION:** I electronically filed the above document(s) with the Clerk of the Court using the CM/ECF system. The CM/ECF system will send notification of this filing to the person(s) listed below.

Jacob P. Austin, Esq.
THE LAW OFFICE OF JACOB AUSTIN
1455 Frazee Road, Suite 500
San Diego, CA 92108
Tel: (619) 357-6850
Fax: (888) 357-8501
Email: JPA@jacobaustinesq.com
jacobaustinesq@gmail.com
Attorney for Plaintiff
DARRYL COTTON

Joe Hurtado, Pro Se
P.O. Box 2334
La Mesa, CA 91943-2334
Tel: (646) 867-9542
Email: j.hurtado@gmail.com
Plaintiff Pro Se

James D. Crosby, Esq.
James D. Crosby, Attorney at Law
550 W. C Street, Suite 790
San Diego, CA 92101
Tel: (619) 450-4149
Email: crosby@crosbyattorney.com
Attorney for Defendants
LARRY GERACI and REBECCA BERRY
aka REBECCA ANN BERRY RUNYAN

Eric R. Deitz, Esq.
Tatiana R. Dupuy, Esq.
GORDON & REES LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101-3370
Tel.: (619) 696-6700
Fax: (619) 696-7124
Email: edeitz@gordonrees.com
tdupuy@grsm.com
Attorneys for Defendants
MICHAEL R. WEINSTEIN; SCOTT TOOTHACRE; and FERRIS & BRITTON APC

Kenneth C. Feldman, Esq.
Tim J. Vanden Heuvel, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
701 B Street, Suite 1900
San Diego, CA 92101
Tel: (619) 233-1006
Fax: (619) 233-8627
Email: feldman@lbbslaw.com
tim.vandenheuval@lewisbrisbois.com
Attorneys for Defendants
FINCH THORNTON & BAIRD; DAVID DEMIAN; and ADAM WITT

Executed on May 3, 2019, at San Diego, California.

Patricia L. Green

Patricia L. Green