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14 RACHEL M. PRENDERGAST and FERRIS & BRITTON APC

15 **UNITED STATES DISTRICT COURT**

16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 ANDREW FLORES, an individual,
18 AMY SHERLOCK, on her own behalf
19 and on behalf of her minor children, T.S.
20 and S.S., JANE DOE, an individual,
21 Plaintiffs,

22 vs.

23 GINA M. AUSTIN, an individual;
24 AUSTIN LEGAL GROUP APC, a
25 California Corporation; JOEL R.
26 WOHLFEIL, an individual;
27 LAWRENCE (AKA LARRY) GERACI,
28 an individual; TAX & FINANCIAL
CENTER, INC., a California
Corporation; REBECCA BERRY, an
individual; JESSICA MCELFFRESH, an
individual; SALAM RAZUKI, an
individual; NINUS MALAN, an
individual; MICHAEL ROBERT
WEINSTEIN, an individual; SCOTT
TOOTHACRE, an individual; ELYSSA
KULAS, an individual; RACHEL M.
PRENDERGAST, an individual;
FERRIS & BRITTON APC, a California

Case No.: 3:20-cv-00656-BAS-DEB

**NOTICE OF MOTION AND
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT BY
DEFENDANTS MICHAEL
WEINSTEIN, SCOTT H.
TOOTHACRE, ELYSSA KULAS,
RACHEL M. PRENDERGAST, AND
FERRIS & BRITTON APC;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: August 24, 2020

Time: 10:00 a.m.

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

District Judge: Cynthia A. Bashant

Magistrate Judge: Daniel E. Butcher

Courtroom: 4B (4th Floor)

Complaint Filed: April 3, 2020

Trial Date: None

1 Corporation; DAVID S. DEMIAN, an
 2 individual, ADAM C. WITT, an
 3 individual, RISHI S. BHATT, an
 4 individual, FINCH, THORTON, and
 5 BAIRD, a Limited Liability Partnership,
 6 JAMES D. CROSBY, an individual;
 7 ABHAY SCHWEITZER, an individual
 8 and dba TECHNE; JAMES (AKA JIM)
 9 BARTELL, an individual; BARTELL &
 10 ASSOCIATES, a California Corporation;
 11 MATTHEW WILLIAM SHAPIRO, an
 12 individual; MATTHEW W. SHAPIRO,
 13 APC, a California corporation;
 14 NATALIE TRANGMY NGUYEN, an
 15 individual, AARON MAGAGNA, an
 16 individual; A-M INDUSTRIES, INC., a
 17 California Corporation; BRADFORD
 18 HARCOURT, an individual; ALAN
 19 CLAYBON, an individual; SHAWN
 20 MILLER, an individual; LOGAN
 21 STELLMACHER, an individual;
 22 EULENTHIAS DUANE ALEXANDER,
 23 an individual; BIANCA MARTINEZ; an
 24 individual; THE CITY OF SAN DIEGO,
 25 a municipality; 2018FMO, LLC, a
 26 California Limited Liability Company;
 27 FIROUZEH TIRANDAZI, an individual;
 28 STEPHEN G. CLINE, an individual;
 JOHN DOE, an individual; and DOES 2
 through 50, inclusive,

Defendants,

JOHN EK, an individual;
 THE EK FAMILY TRUST, 1994 Trust,
 Real Parties In Interest.

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1 **TO PLAINTIFFS ANDREW FLORES, AMY SHERLOCK, T.S. and**
2 **S.S, JANE DOE AND THE COURT:**
3 **NOTICE**

4 PLEASE TAKE NOTICE that on August 24, 2020 at 10:00 a.m. or as soon
5 thereafter as this motion may be heard in courtroom 4B of the United States Court
6 for the Southern District of California, Edward J. Schwartz U.S. Courthouse, 221
7 W. Broadway, San Diego, California 92101. Defendants Michael Weinstein, Scott
8 H. Toothacre, Elyssa Kulas, Rachel M. Prendergast, and Ferris & Britton
9 (Collectively “F&B Defendants”) will and hereby do move this Court for an Order
10 dismissing them from this litigation with Prejudice. Further, Plaintiffs Andrew
11 Flores, Amy Sherlock, T.S. and S.S, Jane Doe (Collectively “Plaintiffs”) causes of
12 action for Violations of Civil Rights §§1983, 1985, 1986, and Declaratory Relief
13 should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Oral
14 argument will not be heard unless requested by the Court.

15 F&B Defendants bring this Motion on the grounds that the First Amended
16 Complaint does not— and could never— state a claim upon which relief may be
17 granted. This Motion is based on this Notice of Motion, the accompanying
18 Memorandum of Points and Authorities, Request for Judicial Notice with attached
19 Exhibits, and all pleadings, records and files herein, such matters of which the
20 Court may take judicial notice, and any such further documents and argument that
21 may be offered to this court before or at the hearing of this motion.

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1 F&B Defendants also join in any motions by the other Defendants
2 challenging Plaintiffs' First Amended Complaint, to the extent those motions
3 support the dismissal of the First Amended Complaint as to F&B Defendants.
4

5 Dated: July 20, 2020

KJAR, McKENNA & STOCKALPER LLP

6

7

By: /s/ Gregory B. Emdee

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JAMES J. KJAR

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Weinstein, Scott H Toothacre,

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Elyssa Kulas, Rachel M. Prendergast,

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and Ferris & Britton

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TABLE OF AUTHORITIES

CASES

Aetna Life Ins. Co. of Hartford v. Haworth
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Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.
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Cabral v. Martins
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Chahal v. Paine Webber Inc.
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Contreras v. Dowling
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 21 Cal.App.5th 91, 108–109 (2018) 31

Deveraturda v. Globe Aviation Security Services
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 9 No. 3:18-CV-2434-GPC-MSB) 2019 WL 446251, at *4 (S.D. Cal., Feb. 5, 2019)
 1032
 11 *Gomez v. Bidz.com, Inc.*
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 20 *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*
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 28 *Kottle v. Nw Kidney Ctrs. supra*
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McCalden v. California Library Ass'n
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MEMORANDUM OF POINTS AND AUTHORITIES

1.0 INTRODUCTION

In this action, Plaintiffs, Andrew Flores, Amy Sherlock, T.S. and S.S, Jane Doe (Collectively “Plaintiffs”) attempt to jump into the fray of this ongoing litigation saga after Darryl Cotton (hereinafter “Cotton”) lost his jury trial in San Diego Superior Court and Cotton abandoned his appeal in the California Court of Appeal. Am. Compl. ¶¶ 18, 236, 237. Rather than accept the outcome, Plaintiffs have named everyone remotely connected to Cotton’s state court litigation, claiming a grand conspiracy.

The moving Defendants, Michael Weinstein, Scott Toothacre, Elyssa Kulas, Rachel M. Prendergast (a former paralegal), and Ferris & Britton, APC (hereinafter collectively “F&B Defendants”) were involved in the representation of Larry Geraci and Rebecca Berry in *Geraci v. Cotton*, Case No.: 37-2017-00010073-CU-BC-CTL in San Diego Superior Court (hereinafter “state court action”). Plaintiff Andrew Flores specially appeared and represented Cotton in various proceedings in the underlying state court action and over time became personally invested in the outcome of that state court action. Am. Compl. ¶¶ 182, 184, 192, 227. In retaliation for the loss of the underlying state court action, Plaintiffs bring this suit against the F&B Defendants for their litigation acts in the state court action i.e. “filing and/or maintaining a lawsuit”. Am. Compl. ¶¶ 130, 158, 161, 167, 168, 199, 236, 290. Despite Plaintiffs’ First Amended Complaint being 45 pages with 37 pages of exhibits attached, it is inadequately pled. The First Amended Complaint is vague, unintelligible, and barred. Thus, Plaintiffs’ First Amended Complaint should be dismissed.

2.0 PROCEDURAL HISTORY

This action arises out of an unsuccessful underlying agreement for the purchase and sale of real property between Cotton and Co-Defendant Larry Geraci (hereinafter “Geraci”), which resulted in a state court lawsuit.

1 Specifically, on March 21, 2017, Geraci, through the legal representation of the
2 F&B Defendants, filed a complaint against Plaintiff in San Diego Superior Court
3 (hereinafter “state court action”) *Geraci v. Cotton*, Case No.: 37-2017-00010073-
4 CU-BC-CTL, alleging, among other things, that Cotton breached their contract;
5 Cotton cross-complained for, among other things, breach of contract and fraud.
6 Am. Compl., ¶¶ 130, 133 (Defendant’s Request for Judicial Notice, **Exhibit “1”**,
7 **Exhibit “5”**, and **Exhibit “6”**.) Plaintiff Andrew Flores filed a motion to intervene
8 in the state court action, but it was denied. Am. Compl. ¶ 182.

9 Following a jury trial in the state court action, judgment was entered in favor
10 of Geraci and against Cotton on both the complaint and the cross-complaint.
11 (Defendant’s Request for Judicial Notice, **Exhibit “3”** & **Exhibit “4”**). Cotton
12 attempted to appeal the state court decision, but his appeal was dismissed for
13 procedural failures. Compl. ¶¶ 644, 654. (Defendant’s Request for Judicial Notice,
14 **Exhibit “8”**.)

15 Unhappy with the adverse ruling in the state court action, Cotton and
16 Plaintiff Andrew Flores, filed their respective lawsuits in federal court. Am.
17 Compl., ¶¶ 215, 216, 236, 237 (Defendant’s Request for Judicial Notice, **Exhibit**
18 **“7”**). On May 13, 2020, Cotton filed a First Amended Complaint in his federal
19 suit, which refers to the initial Complaint and events in this matter. Cotton Federal
20 Suit First Am. Compl., ¶¶ 119, 122-124, 127-129, 133 (Defendant’s Request for
21 Judicial Notice, **Exhibit “2”**.)

22 Plaintiff’s First Amended Complaint adds a fourth cause of action against
23 the F&B Defendants, Plaintiffs now assert claims for Violation of Federal Civil
24 Rights pursuant to 42 U.S.C. §§ 1983, 1985, & 1986 and declaratory relief. Am.
25 Compl., ¶¶ 266-302; 309-314. Despite Plaintiffs amending their Complaint,
26 Plaintiffs’ allegations still only claim that F&B Defendants represented Geraci in
27 the underlying state court action. Am. Compl., ¶¶ 130, 136-140, 152, 153, 158,
28 161, 162, 167, 168, 197, 199, 202, 236. In fact, Defendant Rachel Prendergast is

1 not even mentioned once in the First Amended Complaint. *See* Am. Compl.
2 Defendant Elyssa Kulas is only mentioned as being a defendant in this suit and as a
3 part of the law firm Ferris & Britton APC. Am. Compl. ¶¶ 34, 37. As such, all
4 F&B Defendants’ alleged conduct arises from their lawful litigation activities i.e.
5 “filing and/or maintaining a lawsuit”. Am. Compl. ¶¶ 236, 290.

6 Plaintiffs admit that they initiated this matter to re-litigate the existence of
7 the same November 2, 2016 contract that was subject of the state court action and
8 re-litigate the state court action. Am. Compl. ¶¶ 19, 236, 237, 270; Compl. ¶¶ 5-6.
9 Plaintiffs also seek to have the federal courts improperly intervene and act as an
10 appellate court for the state court’s judgments and ruling. Am. Compl. ¶ 311;
11 Compl., ¶¶ 2-3. The First Amended Complaint is mostly unintelligible and devoid
12 of any facts sufficient to adequately support any of Plaintiffs’ causes of action
13 against F&B Defendants. As such, F&B Defendants are entirely unable to
14 determine what facts support the allegations against them.

15 Plaintiffs’ improper use of the federal system as an appellate court should be
16 halted. Therefore, F&B Defendants respectfully request this Court dismiss
17 Plaintiffs’ entire First Amended Complaint against F&B Defendants, with
18 prejudice. Further, this Court should not grant Plaintiffs leave to amend.

19 **3.0 LEGAL STANDARD FOR MOTION TO DISMISS**

20 Fed. R. Civ. P. 12(b)(6) provides this Court’s authority to dismiss Plaintiffs’
21 First Amended Complaint for “failure to state a claim upon which relief can be
22 granted.” Dismissal of a complaint can be based on either a lack of a cognizable
23 legal theory or the absence of sufficient facts alleged under a cognizable legal
24 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). As a
25 result of the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, a
26 complaint must indicate more than mere speculation of a right to relief. *Bell*
27 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A complaint is subject to
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1 dismissal unless it alleges “enough facts to state a claim to relief that is plausible
2 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

3 In ruling on a Rule 12(b)(6) motion, a court should not accept legal
4 conclusions cast in the form of factual allegations if those conclusions cannot
5 reasonably be drawn from the facts alleged.¹ Moreover, “conclusory allegations of
6 law and unwarranted inferences are not sufficient to defeat a [Rule 12(b)(6)]
7 motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). Courts will
8 not assume plaintiffs “can prove facts which [they have] not alleged, or that the
9 defendants have violated ... laws in ways that have not been alleged.” *Associated*
10 *General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526
11 (1983). However, this Court may take “judicial notice of ‘matters of public
12 record,’” i.e. documents filed in Darryl Cotton’s lawsuits, which are attached to the
13 concurrently filed request for judicial notice.²

14 **4.0 ARGUMENT**

15 Plaintiffs are attempting to circumvent the proper appeals process. Further,
16 Plaintiffs’ First Amended Complaint must be dismissed as it does not meet the
17 stringent pleading requirements. As further evidenced by Plaintiff’s First Amended
18 Complaint, Plaintiffs will not be able to cure these defects:

19 **First**, Plaintiffs’ claims must fail because F&B Defendants are immune from
20 liability under the *Noerr-Pennington* Doctrine for any litigation-related activity as
21 it relates to the state court action.

22 ¹ *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing
23 *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *United States ex rel. Chunie v.*
24 *Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.), cert. denied, 454 U.S. 1031 (1981)).
25 ² Fed.R.Evid. 201; *Longacre v. Kitsap County*, 744 Fed.Appx. 450, 451 (9th Cir.
26 2018) (“The district court did not abuse its discretion by taking judicial notice of
27 documents from the state court action”); *Reyn’s Pasta Bella, LLC v. Visa USA,*
28 *Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (“We may take judicial notice of court
filings”); *Gomez v. Bidz.com, Inc.*, No. CV 09-3216 CBM (EX) 2011 WL
13190130, at *1 (C.D. Cal., Feb. 2, 2011) (“The Court takes judicial notice of
Exhibits B, C, and D, because they are public court filings”).

1 **Second**, even accepting Plaintiffs allegations as true, Plaintiffs have failed to
2 state facts sufficient to constitute any cause of action against F&B Defendants.
3 Plaintiffs’ 47-page First Amended Complaint is unintelligible, vague, and
4 ambiguous, lacks any facts with the requisite specificity to support any of their
5 causes of action. It also fails to even substantively mention Defendants Prendergast
6 or Kulas.

7 **Third**, Plaintiffs cannot allege that F&B Defendants were state actors.

8 **Fourth**, Plaintiffs’ allegations against F&B Defendants arise entirely out of
9 protected activity and all pendant state law claims must be stricken as a violation
10 of the applicable California anti-SLAPP statute.

11 **Fifth**, Plaintiffs lack standing to sue.

12 **4.1 PLAINTIFFS’ FIRST AMENDED COMPLAINT MUST BE**
13 **DISMISSED BECAUSE F&B DEFENDANTS ARE IMMUNE**
14 **FROM LIABILITY UNDER THE NOERR-PENNINGTON**
15 **DOCTRINE.**

16 “The Noerr-Pennington doctrine shields individuals from, inter alia, liability
17 for engaging in litigation.”³ Noerr-Pennington immunity applies to claims under
18 civil rights statutes (*see, e.g.*, 42 U.S.C. § 1983) that are based on the petitioning of
19 public authorities, such as the courts.⁴ Moreover, “the Noerr-Pennington doctrine
20 sweeps broadly” and applies to any claims that are based upon “advocacy before
21 any branch of either federal or state government.” *Kottle v. Nw Kidney Ctrs.*,
22 *supra*, 146 F.3d at 1059.

23 _____
24 ³ *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1047 (9th Cir. 2015) (emphasis
25 in original, internal citations omitted); *accord Kaiser Found. Health Plan, Inc. v.*
Abbott Labs., Inc., 552 F.3d 1033, 1044 (9th Cir. 2009).

26 ⁴ *Boulware v. Nevada Dep’t of Human Resources*, 960 F.2d 793, 800 (9th Cir.
27 1992); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 930 (9th Cir. 2006) (holding that the
28 Supreme Court has held that the Noerr-Pennington principles “apply with full force
in other statutory contexts” outside antitrust); *see Evers v. County of Custer*, 745
F.2d 1196, 1204 (9th Cir. 1984).

1 “[B]ecause Noerr-Pennington protects federal constitutional rights, it applies
 2 in all contexts, even where a state law doctrine advances a similar goal. [Citation.]
 3 There is no reason that Noerr-Pennington and California privilege law cannot both
 4 apply to [plaintiff’s] intentional interference claims, and we hold that the district
 5 court properly considered both doctrines.” *Theme Promotions, Inc. v. News Am.*
 6 *Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008).

7 A three-part test determines whether the defendant’s conduct is immunized
 8 under Noerr-Pennington: (1) identify whether the lawsuit imposes a burden on
 9 petitioning rights, (2) decide whether the alleged activities constitute protected
 10 petitioning activity, and (3) analyze whether the statutes at issue may be construed
 11 to preclude that burden on the protected petitioning activity. *Kearney v. Foley &*
 12 *Lardner*, 566 F.3d 826, 832 (9th Cir. 2009). Application of this test renders F&B
 13 Defendants immune from any liability in this case under Noerr-Pennington.

14 As Plaintiffs admit in their pleadings, Plaintiffs’ claims against F&B
 15 Defendants in this action arise entirely out of F&B Defendants’ alleged
 16 participation in the state court action in 2017 i.e. “filing and /or maintaining a
 17 lawsuit”. Am. Compl., ¶¶ 130, 136-140, 152, 153, 156, 158, 160-162, 167, 168,
 18 197, 199, 202, 236, 290. Plaintiffs allege that “[t]his suit is the fifth suit to be filed
 19 that alleges that Geraci and his conspirators have committed a fraud on the court
 20 by filing and/or maintaining a lawsuit . . .”. Am. Compl. at ¶¶ 130, 236, 290.
 21 Plaintiffs also allege that the F&B Defendants filed a demurrer. Am. Compl. ¶¶
 22 136-140, 158, 160-162. Plaintiffs further allege that F&B Defendant’s made
 23 arguments Plaintiffs deem baseless. Am. Compl. ¶ 197. Plaintiffs additionally
 24 allege that the F&B Defendants entered into a stipulation with Cotton’s counsel.
 25 Am. Compl. ¶ 152. Moreover, Plaintiffs allege that F&B Defendants asserted
 26 motions in limine and raised affirmative defenses. Am. Compl. ¶¶ 156, 202.

27 In total, Plaintiffs simply allege that F&B Defendants represented Geraci in
 28 the state court action, such representation and litigation conduct falls squarely

1 within the protection of the Noerr-Pennington Doctrine. Furthermore, to the extent
2 that F&B Defendants were involved in the state court action at all—whether in a
3 pre-litigation context or otherwise—such conduct remains protected by the Noerr-
4 Pennington Doctrine as “incidental to the prosecution of the suit.”⁵

5 “The Noerr-Pennington doctrine can be applied in tandem with the
6 California litigation privilege.” *UMG Recordings, Inc. v. Global Eagle*
7 *Entertainment, Inc.*, 117 F.Supp.3d 1092, 1113 (C.D. Cal. 2015). “The [litigation]
8 privilege in section 47, subdivision 2 of the Civil Code, however, is based on the
9 desire of the law to protect attorneys in their primary function – the representation
10 of a client.” *Friedman v. Knecht*, 248 Cal.App.2d 455, 462 (1967). “Without the
11 litigation privilege, attorneys would simply be unable to do their jobs properly.”⁶

12 Ultimately, it is well-established that Noerr-Pennington provides F&B
13 Defendants with a complete defense to Plaintiffs’ claims. Plaintiffs cannot satisfy
14 any of the exceptions to the applicability of the Noerr-Pennington Doctrine.
15 Consequently, Plaintiffs’ First Amended Complaint should be dismissed.

16 **4.2 PLAINTIFFS’ FIRST AMENDED COMPLAINT FAILS TO**
17 **STATE ANY CLAIMS AGAINST F&B DEFENDANTS UPON**
18 **WHICH RELIEF CAN BE GRANTED.**

19 To survive a motion to dismiss, the First Amended Complaint “must contain
20 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
21 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atlantic*
22 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A formulaic recitation of the

23 ⁵ See *Western Sugar Cooperative v. Archer-Daniels-Midland Co.*, No. CV
24 1134739-CBM (MANx) 2013 WL 12123307, at *1 (C.D. Cal., Sept. 16, 2013)
25 (“The Ninth Circuit has explained that ‘in the litigation context, not only petitions
26 [such as a complaint, answer, or other documents and pleadings] sent directly to
27 the court in the course of litigation, but also “conduct incidental to the prosecution
28 of the suit [like discovery communications and settlement demands]” is protected
by the Noerr-Pennington doctrine.””).

⁶ *Finton Construction, Inc. v. Bidna & Keys, APLC*, 238 Cal.App.4th 200, 212
(2015); see also *Rupert v. Bond*, 68 F.Supp.3d 1142 (2014).

1 elements of a cause of action will not suffice. *Bell Atlantic Corp. v. Twombly*,
2 *supra*, 550 U.S. at 555. Labels and conclusions are insufficient to meet the
3 plaintiff's obligation to provide the grounds of his entitlement to relief. *Id.*
4 "Factual allegations must be enough to raise a right to relief above the speculative
5 level." *Id.*

6 Plaintiffs' First Amended Complaint, on its face, fails to allege any facts
7 sufficient to state a claim for relief. Evidenced by Plaintiffs' repetitive and
8 unintelligible pleadings, motion work, and other requests, no amount of
9 amendment will cure the significant deficiencies in the First Amended Complaint.
10 The First Amended Complaint contains no factual allegations to support its alleged
11 causes of action against F&B Defendants, neglects to state the necessary elements
12 of each cause of action, and is based entirely on vague, ambiguous, and conclusory
13 statements. The few F&B Defendant specific facts included in the First Amended
14 Complaint are implausible conjectures insufficient to support any claim for relief.
15 F&B Defendants are vaguely mentioned in their capacity as attorneys and firm,
16 however due to the lack of substantive and identifying allegations, F&B
17 Defendants' involvement and wrongdoing is left to pure speculation.

18 **4.21 Plaintiffs Have Failed to Provide "Fair Notice" of the Claims Being** 19 **Asserted and the Grounds Upon Which They Rest**

20 Plaintiffs cannot allege some vague and speculative wrong has been
21 committed and demand relief. Instead, the pleading must give "fair notice" of the
22 claims asserted and the "grounds upon which it rests." *Bell Atlantic Corp., supra*,
23 550 U.S. at 555. Without any substantive allegations pled, F&B Defendants cannot
24 properly prepare a defense. *Bell Atlantic Corp., supra*, 550 U.S. at 565, n. 10. F&B
25 Defendants should not be dragged into court, forced to prepare an answer by
26 guesswork, on meritless and baseless allegations alone. This requirement of "fair
27 notice" also serves to "prevent costly discovery on claims with no underlying
28 factual or legal basis." *Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F3d 321, 328

1 (4th Cir. 2001).

2 Here, Plaintiffs’ First Amended Complaint fails to allege, with any amount
3 of specificity, facts that give “fair notice” of the claims asserted against F&B
4 Defendants. Plaintiffs vaguely allege that “attorneys ... committed multiple acts
5 that constitute a fraud on the court”. Am. Compl., at ¶ 17. The only other reference
6 to F&B Defendants is that they represented Geraci in the underlying state court
7 action. Am. Compl., ¶¶ 130, 136-140, 152, 153, 156, 158, 160-162, 167, 168, 197,
8 199, 202.

9 There are no facts to support how these vague assertions relate or support
10 any of the causes of action against F&B Defendants. Notwithstanding that
11 litigation activities are protected, F&B Defendants are unsure of what harm, if any,
12 their alleged conduct might have caused because it is not pled.

13 Plaintiffs’ First Amended Complaint is nothing more than a recitation of
14 Plaintiffs’ version of the history regarding the underlying contract between Geraci
15 and Cotton—the exact matters already decided in the state court action. The First
16 Amended Complaint is devoid of any factual allegations that would provide F&B
17 Defendants fair notice of the claims asserted against them because Plaintiffs
18 possess no actual facts to support their allegations.

19 **4.22 Plaintiffs Have Failed to Allege Enough Facts to State a Claim for**
20 **Relief Plausible on Its Face**

21 The rule set forth in *Bell Atlantic Corp.* requires that a party demonstrate the
22 plausibility, as opposed to the conceivability, of its causes of action in the
23 complaint. *Bell Atlantic Corp., supra*, 550 U.S. at 936. While “fair notice” and
24 “plausibility” are related concepts, they are analyzed as separate issues: “When
25 evaluating a complaint, we ask whether the pleading gives the defendant fair notice
26 of the claim and includes sufficient ‘factual matter’ to state a plausible ground for
27 relief.” *Kirkpatrick v. County of Washoe*, 792 F.3d 1184, 1191 (9th Cir. 2015).
28 Plausibility asks for more than a “sheer probability” that a defendant has acted
unlawfully. *Ashcroft, supra*, 556 U.S. at 678.

1 Here, Plaintiffs have not alleged a “sheer probability” of wrongdoing, let
 2 alone a coherent set of facts to support a plausible claim. The First Amended
 3 Complaint’s claims against F&B Defendants are vague, conclusory, speculative,
 4 and implausible. The bare allegations, which hardly ever refer to F&B Defendants,
 5 simply do not give rise to a “plausibl[e] suggest[ion of] an entitlement to relief.”
 6 *Ashcroft*, supra, 556 U.S. at 681. In other words, the First Amended Complaint’s
 7 factual allegations do not support a plausible inference that F&B Defendants
 8 engaged in any cognizable wrongdoing against Plaintiffs.

9 Plaintiffs blithely note that the F&B Defendant’s arguments, lawsuit and
 10 opposition argument was made “without justification”, Plaintiffs were unhappy
 11 with the outcome, and thus, F&B Defendants must have schemed with Geraci to
 12 deprive Cotton of the subject property. Am. Compl. ¶¶ 138-140, 153, 197.
 13 Plaintiffs allege absolutely no facts that remotely demonstrate the plausibility of
 14 these allegations of civil rights violations. The First Amended Complaint lays out
 15 Thirty-Five (35) pages of “facts,” and then lists each cause of action with
 16 incomplete legal elements. No cause of action asserted against F&B Defendants
 17 relates any facts to support the claims. Plaintiffs solely blame F&B Defendants for
 18 filing the state court action and making arguments Plaintiffs deems to be “without
 19 justification” in F&B Defendants’ role as Geraci’s attorneys. Am. Compl., ¶¶ 13,
 20 14, 17, 138-140, 153, 197. Therefore, Plaintiffs have not “nudged” their claims
 21 “across the line from conceivable to plausible.” *Bell Atlantic Corp*, supra, 550 U.S.
 22 at 570. As the First Amended Complaint fails to allege any facts to state a claim for
 23 relief that is plausible on its face, dismissal is proper. *See Bell Atlantic Corp.*,
 24 supra, 550 U.S. at 555–56.

25 **4.3 THIS COURT SHOULD NOT ENTERTAIN PLAINTIFFS’** 26 **BASELESS CLAIMS**

27 Plaintiffs’ second, third, and fourth causes of action are for violations of
 28 civil rights. Plaintiffs’ sixth cause of action is for “declaratory relief”. As explained
 below, each are invalid as to the F&B Defendants.

4.31 Plaintiffs’ Causes of Action for Declaratory Relief are an Improper Attempt to Circumvent the California Court of Appeals

A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III, section 2 of the United States Constitution. *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 239–40, 57 S.Ct. 461, 463–64, 81 L.Ed. 617 (1937); A ‘controversy’ in this sense must be one that is appropriate for judicial determination. *Osborn v. Bank of United States*, 9 Wheat. 738, 819, 6 L.Ed. 204. It must also fulfill statutory jurisdictional prerequisites. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672, 70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950). If the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate. This determination is discretionary, for the Declaratory Judgment Act is “deliberately cast in terms of permissive, rather than mandatory, authority.” *Public Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 250, 73 S.Ct. 236, 243–44, 97 L.Ed. 291 (1952) (J. Reed, concurring). The Act “gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.” *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 581–82, 7 L.Ed.2d 604 (1962).

Here, in the declaratory relief cause of action, Plaintiffs improperly seek the state court action’s judgement declared void and vacated because of an alleged fraud upon the court and judicial bias. Am. Compl. ¶ 311; p.45 line 6-7. Plaintiffs also seek this Court’s declaration that Plaintiffs able to intervene in an already adjudicated and closed matter and declare that defendants have violated some amorphous rights of Plaintiffs. Am. Compl. p.45 line 8-10. These are not Article III “controversies” appropriate for this Court’s determination. Such matters should be decided via the California court of appeal. This matter has already been adjudicated and seeks a pseudo appeal of the state court action. Thus, Plaintiffs’ declaratory relief causes of action are inappropriate for this Court’s determination.

1 **4.32 Plaintiffs’ Causes of Action for Violations of Sections 1983, 1985**
 2 **& 1986 Must Be Dismissed Because They Cannot Allege That**
 3 **F&B Defendants Acted Under Color of State Law.**

4 F&B Defendants are private attorneys, a private paralegal, and a private law
 5 firm representing private citizens. Am. Compl. ¶¶ 22, 210; Compl., ¶¶ 2, 29, 708.
 6 State action is a prerequisite of federal civil rights claims.⁷ Plaintiffs’ failure to
 7 plead state action, i.e a cognizable claim under §1983, mandates dismissal of their
 8 claims under §1983, §1985⁸ and §1986.⁹ Plaintiffs are unable to plead any facts
 9 that attribute any action of F&B Defendants as state actions. Therefore, Plaintiffs’
 10 claim for Violation of Civil Rights pursuant to 42 U.S.C. §§ 1983, 1985 & 1986
 11 must be dismissed.

12 “To state a claim under §1983, a plaintiff must: (1) allege the violation of a
 13 right secured by the Constitution and laws of the United States; and (2) *show that*
 14 *the alleged deprivation was committed by a person acting under color of state*
 15 *law.*”¹⁰ Courts must “start with the presumption that conduct by private actors is
 16 not state action.”¹¹ It is Plaintiffs’ burden to allege facts sufficient to show that

17 ⁷ See, e.g., *Naffe v. Frey*, 789 F.3d 1030 (9th Cir. 2015); *West v. Atkins*, 487 U.S.
 18 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Tsao v. Desert Palace, Inc.*, 698
 19 F.3d 1128, 1139 (9th Cir. 2012).

20 ⁸ *Turner v. Larsen*, 536 Fed.Appx. 748, 748 (9th Cir. 2013) (“The district court
 21 properly dismissed Turner’s §1983 claim because Turner failed to allege facts
 22 showing that defendants acted under color of state law”); *Olsen v. Idaho State Bd.*
 23 *Of Med.*, 363 F.3d 916, 930 (9th Cir. 2004) (“to state a claim for conspiracy under
 24 §1985, a plaintiff must first have a cognizable claim under §1983”)

25 ⁹ *McCalden v. California Library Ass’n*, 955 F.2d 1214, 1219 (9th Cir.), cert.
 26 denied, 504 U.S. 957, 112 S.Ct. 2306 (1992) superseded by rule on other grounds
 27 as stated in *Harmston v. City and County of San Francisco*, 627 F.3d 1273, 1279–
 28 80 (9th Cir. 2010) (Claim can be stated under §1986 only if complaint states valid
 claim under §1985).

29 ¹⁰ *Naffe v. Frey*, 789 F.3d 1030, 1035-1036 (9th Cir. 2015)(emphasis added);
 30 quoting *West v. Atkins*, 487 U.S. 42, 48, (1988); *Tsao v. Desert Palace, Inc.*, 698
 31 F.3d 1128, 1139 (9th Cir. 2012).

32 ¹¹ *Florer v. Congregation Pidyon Shevuyim*, 639 F.3d 916, 922 (9th Cir. 2011);
 33 *Sutton v. Providence Saint Joseph Medical Center*, 192 F.3d 826, 836 (9th Cir.

1 F&B Defendants were state actors. *Florer*, at 922; *Flagg Bros., Inc. v. Brooks*, 436
 2 U.S. 149, 156 (1978). “Dismissal of a section 1983 claim following a Rule
 3 12(b)(6) motion is proper if the complaint is devoid of factual allegations that give
 4 rise to a plausible inference of either element.” *Naffe* at 1036; citing, *inter alia*,
 5 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). Consistent with the presumption
 6 against deeming private conduct to constitute governmental action, in *Price v.*
 7 *Hawaii*, 939 F.2d 702 (9th Cir. 1991), in the context of a purported § 1983 claim
 8 against private parties, the Court explained the limitations upon the liberal federal
 9 pleading standards, stating, “private parties are not generally acting under color of
 10 state law, and we have stated that conclusionary allegations, unsupported by facts
 11 [will be] rejected as insufficient to state a claim under the Civil Rights Act.”
 12 *Price v. Hawaii*, 939 F.2d 702, 707-708 (9th Cir. 1991), citations omitted.

13 Regarding the need to scrutinize the sufficiency of allegations that private
 14 parties are subject to §1983 liability, *Price* recounted: “Careful adherence to the
 15 ‘state action’ requirement preserves an area of individual freedom by limiting the
 16 reach of federal law and federal judicial power. It also avoids imposing on the
 17 State, its agencies or officials, responsibility for conduct for which they cannot be
 18 fairly blamed. A major consequence is to require the courts to respect the limits of
 19 their own power as directed against state governments and private interests.” *Price*
 20 *v. Hawaii*, *supra*, 939 F.2d at 708, citing *Lugar v. Edmondson Oil Co.*, 457 U.S.
 21 922, 936-937 (1982).

22 The law is settled that private attorneys, like F&B Defendants, whether
 23 counseling or representing a private citizen, are not acting under color of state law
 24 for purposes of §§1983, 1985, & 1986.¹² Ultimately, Plaintiffs have not and cannot

25 _____
 26 1999).

27 ¹² *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir.
 28 2003) (“Plaintiff cannot sue Mirante’s counsel under §1983, because he is a lawyer
 in private practice who was not acting under color of state law”); *Price v. State of*
Hawaii, 939 F.2d 702, 707-708 (9th Cir. 1991) (“private parties are not generally

1 allege that F&B Defendants are a state actor. Certainly, the allegations that F&B
 2 Defendants represented and/or counseled Geraci during the underlying state court
 3 action is plainly insufficient to plead that F&B Defendants were acting under color
 4 of state law.¹³ State action is an essential element of Plaintiffs’ federal civil rights
 5 claim under 42 U.S.C. §§1983 and 1985. As such, Plaintiffs’ §1983, §1985, &
 6 §1986 claims against F&B Defendants must be dismissed.

7 **4.33 Plaintiffs’ §1985 Claims Fails Due to a Failure to Allege Racial or**
 8 **Class-Based Discrimination**

9 “A claim [for intimidation] under section 1985(2), part 1, is composed of
 10 three essential elements: (1) a conspiracy between two or more persons, (2) to
 11 deter a witness by force, intimidation, or threat from attending federal court or
 12 testifying freely in a matter there pending, which (3) causes injury to the claimant.”
 13 *Rutledge v. Arizona Bd. Of Regents*, 859 F. 2d 732, 735 (9th Cir. 1988); *Chahal v.*
 14 *Paine Webber Inc.*, 725 F. 2d 20, 23 (2d Cir. 1984).

15 A plaintiff must show the conspiracy prevented the plaintiff from bringing
 16 an effective case in federal court. *Rutledge v. Arizona Bd. Of Regents, supra*, 859
 17 F. 2d at 735. Regardless of whether the conspiracy could have affected Plaintiffs’
 18 ability to present a case in state court, Plaintiffs must show its effect on the federal
 19 court case. *Id* at 736.

20 Presumably, Plaintiffs’ reference to “attorneys” and “his agents” refers to
 21 Geraci’s attorneys, including F&B Defendants. Am. Compl., ¶¶ 17, 267-269, 273.
 22 It appears Plaintiffs are alleging interference in the pending present federal judicial
 23 proceeding and in Cotton’s federal suit (Cotton III), which has never been served
 24 acting under color of state law”); *see also Polk County v. Dodson*, 454 U.S. 312,
 25 325 (1981) (private attorney, even if appointed and paid for by the state, is not
 26 acting under color of state law when representing a defendant).

27 ¹³ *See, e.g., Simmons v. Sacramento County Superior Court, supra*, 318 F.3d at
 28 1161 (“conclusory allegations that the lawyer was conspiring with state officers”
 are insufficient to show a private party is a state actor for purposes of 42 U.S.C.
 §1983).

1 on any defendants, in the concluded state court actions (Cotton I & Cotton II), and
2 in the concluded federal court action (Cotton IV). Am. Compl. ¶¶ 269, 280. Cotton
3 III was stayed until after the conclusion of the state court action. There has been no
4 testimony in any contested proceedings in Cotton III as it has not even been served.
5 Cotton IV is a federal court action filed and dismissed because it was deemed
6 duplicative of Cotton III by the court. Am. Compl. ¶ 229. Cotton II is a state court
7 action against the City of San Diego in which Defendant’s acted in their
8 representative capacity as attorneys once again. Am. Compl. ¶ 206.

9 A §1985(2) part 2 cause of action is different if it pertains to state judicial
10 proceedings, i.e the state court action, and requires Plaintiffs show a class-based
11 animus motivated the conspiracy.¹⁴ Nowhere in Plaintiffs’ cause of action for
12 violations of §1985 do Plaintiffs purport to be a member of any class. Further,
13 Plaintiffs do not allege any racial or class-based discrimination. Having failed to
14 sufficiently plead a §1985(2), part 2, claim, Plaintiffs has also failed to sufficiently
15 plead a §1986 claim because, as noted above, the former is a requirement.

16 **4.4 PLAINTIFFS’ ENTIRE FIRST AMENDED COMPLAINT, AS**
17 **IT RELATES TO F&B DEFENDANTS, MUST BE STRIKEN**
18 **UNDER THE CALIFORNIA ANTI-SLAPP STATUTE.**

19 When a plaintiff alleges state law claims subject to the California anti-
20 SLAPP statue, the Court can dismiss these claims for legal deficiencies using a
21 Rule 12(b)(6) analysis.¹⁵ Furthermore, California’s anti-SLAPP statute applies to
22 state claims brought in federal courts.¹⁶ Cal. Code Civ. Proc. §425.16(b)(1)

23 ¹⁴ *Bretz v. Kelman* 773 F.2d 1026, 1029-1030 (9th Cir. 1985) (The Ninth Circuit,
24 rehearing the case en banc, held that because Bretz failed to allege racial or class-
25 based discrimination, he did not state a cause of action under § 1985(2) part 2 or §
1985(3) part 1.)

26 ¹⁵ See *Planned Parenthood Fed’n of Am. v. Ctr. for Med. Progress* 890 F.3d 828,
27 834, 2018 U.S. App. LEXIS 12649; *Bulletin Displays, LLC v. Regency Outdoor*
28 *Adver., Inc.*, (2006) 448 F. Supp. 2d. 1172, 1179; *Globetrotter Software, Inc. v.*
Elan Computer Group, Inc., (1999) 63 F.Supp.2d 1127, 1130.

¹⁶ *Resolute Forest Prods. v. Greenpeace Int’l*, 302 F. Supp. 3d 1005, 1024 (2017);

1 establishes “a two-step process for determining” whether an action should be
2 stricken as a SLAPP. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.

3 First, the court must determine “whether the defendant has made a threshold
4 showing that the challenged cause of action” arises from an act in furtherance of
5 the right of petition or free speech in connection with a public issue. *Id.* A
6 defendant meets the burden of showing that a plaintiff’s action arises from a
7 protected activity by showing that the acts underlying the plaintiff’s cause of action
8 fall within one of the four categories of conduct described in C.C.P. §425.16(e).

9 Second, the court must “determine whether the plaintiff has demonstrated a
10 probability of prevailing on the claim.” *Navellier v. Sletten, supra*, 29 Cal.4th at
11 88. If the defendant makes a threshold showing that the cause of action arises from
12 an act in furtherance of the right of petition or free speech in connection with a
13 public issue and the plaintiff fails to demonstrate a probability of prevailing, then
14 the court must strike the cause of action. C.C.P. §425.16, subd. (b)(1).

15 **4.41 F&B Defendants’ Litigation Acts Are Protected Under §425.16**

16 A cause of action arising from F&B Defendants’ litigation activity may
17 appropriately be subject to a special motion to strike under C.C.P. §425.16.¹⁷
18 Litigation acts covered under §425.16 include communicative conduct such as
19 filing, funding, and the prosecution of civil action. *Ludwig v. Superior Court*
20 (1995) 37 Cal.App.4th 8, 17–19. Applying California state substantive law,

21
22 *Gottesman v. Santana*, 263 F. Supp. 3d 1034 (2017); *DC Comics v. Pac. Pictures*
23 *Corp.*, 706 F.3d 1009, 1013 (9th Cir. 2013) (“We have held that [an anti-SLAPP]
24 motion is available against state law claims brought in federal court.”); See
25 *Planned Parenthood Fed’n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828, 2018
26 U.S. App. LEXIS 12649; *Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.*,
(2006) 448 F. Supp. 2d. 1172, 1179; *Globetrotter Software, Inc. v. Elan Computer*
Group, Inc., (N.D. Cal. 1999) 63 F.Supp.2d 1127, 1130.

27 ¹⁷ *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (holding an abuse of process
28 claim with no reasonable probability of success subject to strike pursuant to anti-
SLAPP).

1 numerous cases hold the SLAPP statute protects lawyers sued for litigation-related
2 speech and activity.¹⁸

3 Here, it is indisputable that Plaintiffs' claims "arise from an act in
4 furtherance of the right of petition or free speech." Claims based in abuse of
5 process are subject to the anti-SLAPP statute because, by definition, they target
6 protected activity, the filing and maintenance of a lawsuit. *Jarrow Formulas, Inc.*
7 *v. LaMarche* (2003) 31 Cal.4th 728, 733–741. Plaintiffs solely blame F&B
8 Defendants for filing the state court action and making arguments Plaintiffs deems
9 to be "without justification" in F&B Defendants' role as Geraci's attorneys. Am.
10 Compl., ¶¶ 14, 138-140, 153, 197, 236, 290. Plaintiffs' unsubstantiated allegations
11 of extra-judicial conspiracy are precisely the types of meritless claims the
12 California anti-SLAPP statute is designed to eliminate at an early pleading stage.

13 **4.42 F&B Defendants' Litigation Speech is Protected Activity**

14 All communicative actions or speech performed by attorneys as part of their
15 representation of a client in a judicial proceeding or other petitioning context is
16 protected by the anti-SLAPP statute and litigation privilege. *Contreras v. Dowling*
17 (2016) 5 Cal. App. 5th 394, 409; See Civ. Code § 47(b). There is no exception
18 simply because a plaintiff speculates, asserts, or alleges illegality or a statutory or
19 civil violation. *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal. App.
20 4th 793, 805-810.

21 Therefore, F&B Defendants' alleged conduct, speech, and activity is
22 protected from retaliation in suit by the litigation privilege and anti-SLAPP statute.
23 Plaintiffs' allegations are entirely based on F&B Defendants' litigation speech and
24 communicative conduct. Plaintiffs' speculative assertion that F&B Defendants

25 _____
26 ¹⁸ *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141 (citing
27 *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *Jarrow Formulas, Inc. v.*
28 *LaMarche* (2003) 31 Cal.4th 728, 742–743; *Cabral v. Martins* (2009) 177
Cal.App.4th 471, 479–480; *Mindys Cosmetics, Inc. v. Dakar* 611 F.3d 590, 596
(9th Cir. 2010).).

1 committed “unlawful” acts is not enough to meet the stringent illegality exception.
2 *Id.*; Am. Compl. ¶ 301. There is no exception to the litigation privilege or anti-
3 SLAPP statute for mere violations of statutes, civil noncompliance, or bare
4 assertions of wrongdoing—only actual criminal conduct or intentionally tortious
5 acts create an exception to this privilege. *Bergstein*, 236 Cal. App. 4th at 805-810.

6 Plaintiffs’ entire 47-page First Amended Complaint against F&B Defendants
7 is based on F&B Defendants’ actions as attorneys representing their client and
8 their litigation-related speech and activity. The First Amended Complaint seeks to
9 punish F&B Defendants solely for their representation of Plaintiffs’ adversary in
10 the underlying state court action. Since the allegations against F&B Defendants are
11 pled under state law claims, they are subject to C.C.P. §425.16, recognized by this
12 Court through the Federal Rules. All state law causes of action asserted against
13 F&B Defendants are subject to dismissal pursuant to California anti-SLAPP.

14 **4.43 Plaintiffs Cannot Show their Pleading is Adequate or Amendable**

15 Once a defendant establishes the anti-SLAPP law applies, the burden shifts
16 to the plaintiff to prove their pleadings are sufficient and not subject to any
17 privilege under the anti-SLAPP statute. *Planned Parenthood Fed’n of Am., Inc. v.*
18 *Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018). A plaintiff cannot
19 establish any probability of prevailing if the litigation privilege precludes the
20 defendant’s liability on the claim. *Bergstein v. Stroock & Stroock & Lavan LLP*
21 (2015) 236 Cal. App. 4th 793, 814. When a defendant brings issues of a “special
22 motion to strike based on deficiencies in a plaintiff’s complaint, the motion must
23 be treated in the same manner as a motion under Rule 12(b)(6) except that the
24 attorney’s fee provision of §425.16(c) applies.” *Planned Parenthood Fed’n of Am.*
25 *v. Ctr. for Med. Progress, supra*, 890 F.3d at 834.

26 All F&B Defendants’ conduct alleged in the First Amended Complaint is
27 litigation related actions, and each subject to the special motion to strike under
28 C.C.P. §425.16. By failing to state a claim upon which relief can be granted, all

1 Plaintiffs’ claims are inadequately pled under Rule 12(b)(6) standards.
2 Accordingly, Plaintiffs’ state law claims in the First Amended Complaint should
3 be stricken pursuant to C.C.P. §425.16. Consequently, F&B Defendants should be
4 awarded reasonable attorneys’ fees attributable to the bringing of this motion.

5 **4.5 PLAINTIFFS LACK STANDING TO SUE**

6 When a defendant challenges the Article III standing of a plaintiff, Rule
7 12(b)(1) provides the appropriate standard because it is the court’s subject-matter
8 jurisdiction which is challenged. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
9 2000). Once a party has moved to dismiss for lack of subject matter jurisdiction,
10 the opposing party bears the burden of establishing the Court’s jurisdiction. See
11 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128
12 L.Ed.2d 391 (1994). The Plaintiffs carry their burden by putting forth “the manner
13 and degree of evidence required” by the stage of the litigation. *Lujan v. Defenders*
14 *of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

15 To satisfy the constitutional requirement of standing that arises from Article
16 III, a plaintiff must allege the “irreducible minimum” of: (1) an injury in fact via
17 “an invasion of a legally protected interest which is (a) concrete and particularized,
18 and (b) actual or imminent, not conjectural or hypothetical”; (2) causation, i.e., the
19 injury is “fairly traceable to the challenged action of the defendant”; and (3)
20 redressability, i.e. it is “likely, as opposed to merely speculative, that the injury
21 will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560, 112 S.Ct.
22 2130–61 (internal citations and quotations omitted).

23 Legal actions cannot be brought simply on the ground that an individual or
24 group is displeased with the outcome of a lawsuit. Plaintiffs’ allegations neither
25 plead an injury in fact, indicate that F&B Defendants conduct caused Plaintiffs’
26 harm, nor will Plaintiffs’ injury be redressed by a favorable decision as no Plaintiff
27 was a party to the state court action. Voiding the state court action’s judgements or
28 any acts in said actions have no effect upon Plaintiffs. The non-Andrew Flores

1 Plaintiffs clearly have no standing in the matter as they are just individuals Plaintiff
2 Andrew Flores met and have no relation to the F&B Defendants. Am. Compl. ¶ 95.

3 **4.6 MOTION TO STRIKE REDUNDANT, IMMATERIAL,
4 IMPERTINENT, AND SCANDALOUS MATTERS**

5 A motion to strike under Rule 12(f) may be joined with a motion to dismiss
6 under Rule 12(b)(6). Fed. R. Civ. P. 12(g)(1). Rule 12(f) allows a court, or a party
7 by motion, to strike from a pleading “any redundant, immaterial, impertinent, or
8 scandalous matter.” Fed. R. Civ. P. 12(f). An “[i]mmaterial’ matter is that which
9 has no essential or important relationship to the claim for relief... being pleaded.”¹⁹

10 Plaintiff’s prayer for punitive damages is immaterial as to any allegations
11 against F&B Defendants. Therefore, Plaintiff’s prayer for punitive damages should
12 be dismissed. Plaintiff’s various inflammatory statements in their First Amended
13 Complaint must be stricken as immaterial, redundant, impertinent and scandalous.

14 **4.7 PLAINTIFFS CANNOT FIX THE MANY DEFECTS TO THEIR
15 CLAIMS, NOR DO THEY WANT TO, SO THEY SHOULD
16 NOT BE GIVEN LEAVE TO AMEND.**

17 Decisional law holds that leave to amend should not be given if “amendment
18 would be futile.”²⁰ Since F&B Defendants cannot be construed as state actors and
19 Noerr-Pennington is an absolute defense to claims based on F&B Defendants
20 representation of Mr. Geraci in the state court action, Plaintiffs will be unable to
21 plead *any* claim against F&B Defendants. No matter how Plaintiffs label their
22 claims, Noerr-Pennington bars it.²¹ Because Plaintiffs lack standing and could

23 ¹⁹ *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other
24 grounds, 510 U.S. 517 (1994) (quoting 5 Charles A. Wright & Arthur R. Miller,
25 Federal Practice and Procedure § 1382, at 706-07 (1990)).

26 ²⁰ *Palm v. Los Angeles Department of Water and Power*, 889 F.3d 1081, 1084 (9th
27 Cir. 2018); *Deveraturda v. Globe Aviation Security Services*, 454 F.3d 1043, 1049-
28 50 (9th Cir. 2006) (holding leave to amend properly denied where amendment
would be futile); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir.
2004).

²¹ *Dean v. Friends of Pine Meadow*, 21 Cal.App.5th 91, 108–109 (2018) (“While
the Noerr-Pennington Doctrine was formulated in the context of antitrust cases, it



1 never plead a plausible legal theory against F&B Defendants, their claims should
2 be dismissed.²²

3 **5.0 CONCLUSION**

4 In addition to lacking standing, Plaintiffs fail to state a claim. Plaintiffs will
5 be unable to demonstrate the F&B Defendants alleged conduct is not privileged
6 and protected or that they were a state actor. Accordingly, F&B Defendants
7 respectfully request this Court dismiss Plaintiffs’ First Amended Complaint against
8 F&B Defendants with prejudice. As Plaintiff cannot plead a claim against F&B
9 Defendants, this motion should be granted without leave to amend.

10
11 Dated: July 20, 2020

KJAR, McKENNA & STOCKALPER LLP

12 By: /s/ Gregory B. Emdee
13 JAMES J. KJAR
14 JON R. SCHWALBACH
15 GREGORY B. EMDEE
16 Attorneys for Defendants Michael
17 Weinstein, Scott H Toothacre,
18 Elyssa Kulas, Rachel M. Prendergast
19 and Ferris & Britton

20 has been applied or discussed in cases involving other types of civil liability,
21 including liability for interference with contractual relations or prospective
22 economic advantage [citations] or unfair competition [citation]. Additionally, the
23 “principle of constitutional law that bars litigation arising from injuries received as
24 a consequence of First Amendment petitioning activity [should be applied],
25 regardless of the underlying cause of action asserted by the plaintiffs.” [Citation.]
26 “[T]o hold otherwise would effectively chill the defendants’ First Amendment
27 rights.”), internal citation omitted.

28 ²² *Yagman v. Garcetti*, 852 F.3d 859, 863 (9th Cir. 2017) (“dismissal is appropriate where the plaintiff failed to allege ‘enough facts to state a claim to relief that is plausible on its face’”); *Golo, LLC, v. Higher Health Network, LLC, and Troy Shanks*, No. 3:18-CV-2434-GPC-MSB) 2019 WL 446251, at *4 (S.D. Cal., Feb. 5, 2019) (“Dismissal is warranted under Rule 12 (b)(6) where the complaint lacks a cognizable legal theory”).

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, I electronically filed the foregoing **NOTICE OF MOTION AND MOTION TO DISMISS THE FIRST AMENDED COMPLAINT BY DEFENDANTS MICHAEL WEINSTEIN, SCOTT H. TOOTHACRE, ELYSSA KULAS, RACHEL M. PRENDERGAST, AND FERRIS & BRITTON APC; MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk of the Court for the United States District Court, Southern District of California by using the Southern District CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the USDC-Southern District of California CM/ECF system.

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 841 Apollo Street, Suite 100, El Segundo, California 90245. The envelope or package was placed in the mail at El Segundo, California. I am readily familiar with this business’s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully paid.

I further certify that participants in the case not registered as CM/ECF users have been mailed the above described documents by First Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days, to the following non-CM/ECF participants:

NONE

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 20, 2020 at El Segundo, California.

/s/ Berta R. Howard

BERTA R. HOWARD, Declarant