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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA COALITION FOR FAMILIES AND CHILDREN, et al.,

Plaintiffs,

v.

SAN DIEGO COUNTY BAR ASSOCIATION, et al.,

Defendants

Case No. 13-cv-1944-CAB (BLM)
Judge: Hon. Cathy Ann Bencivengo

OPPOSITION TO MOTION TO DISMISS COMPLAINT

Date: November 22, 2013
Time: 3:30 p.m.
Courtroom:4C

ORAL ARGUMENT REQUESTED SUBJECT TO COURT APPROVAL

Complaint Filed: August 20, 2013

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I. INTRODUCTION

On August 20, 2013, Plaintiffs California Coalition for Families and Children, a Delaware Public Benefit Corporation ("CCFC"), Lexevia, a California Professional Corporation ("LEXEVIA"), and Colbern C. Stuart, an individual ("Plaintiff") filed the instant Complaint (Dkt#1). The Complaint asserts 34 Counts seeking compensatory damages and equitable relief under federal and related state law against 51 named Defendants. The federal law Counts are asserted under the Civil Rights Act of 1871, the Racketeering and Corrupt Organizations Act of 1970 ("RICO"), the Lanham Act, the Declaratory Judgment Act, and the Criminal and Penal Code. The Complaint identifies the commission of 28 categories of RICO "predicate crimes" under 18 U.S.C. § 1961(5) and 32 federally-indictable civil rights crimes ("FICRO") under 18 U.S.C. §§ 241, 242, and 371, which form the basis for two counts seeking declaratory and injunctive relief. The Complaint totals 177 pages.

On September 30, 2013, Defendants, the San Diego County Superior Court, Robert J. Trentacosta, Michael M. Roddy, Lisa Schall, Lorna A. Alksne, Christine K. Goldsmith, Jeannie Lowe, William H. McAdam, Jr., Edlene C. McKenzie, and Joel R. Wohlfeil ("Defendants") filed the present Motion to Dismiss Complaint ("MTD") (Dkt.# 16). The MTD presents fifteen attacks going to every Count of the Complaint, requesting dismissal "with prejudice" and "without leave to amend." MTD 11:8, 23:4.

On October 28, 2013 Plaintiffs delivered a detailed meet and confer letter ("M&C") to Defendants under Local Rule 26.1 (a) and F.R.C.P. Rule 26(f) in an attempt to resolve or streamline issues asserted in the MTD. Ex. "A" to Declaration of Colbern Stuart In Support of Motion to Strike/Opposition to Motion to Dismiss Complaint ("Stuart Decl."). The M&C identified numerous infirmities in the MTD, set forth detailed analysis of the Complaint in light of the MTD attack, suggested that most attacks could be resolved informally to remove the MTD from the Court's docket and streamline further attack, and offered stipulations toward the same. On

October 30, 2013 Defendants rejected the M&C. Stuart Decl. Ex. B.

On November 7, 2013 Plaintiff filed a Motion to Strike ("MTS") certain matter submitted with the MTD (Dkt#19). This Opposition may be read with the Motion to Strike memorandum.

II. DISCUSSION

A. Immunities

1. The MTD Ignores Defendants' Burden of Proof on Immunities (MTD IV.C-E (pp. 10:10-11:22) vs. M&C III.B (pp.15-29))[1]

MTD sections C, D, and E raise the substantive affirmative defenses of absolute judicial and sovereign immunities. Plaintiff's Motion to Strike sets forth the procedural infirmities of the MTD in asserting an affirmative defenses in a Rule 12(b)(6) motion, and requests to strike MTD sections C, D, and E. MTS II.E.1 Should the Court grant the Motion to Strike, the remainder of this section A may be shelved. Should the Court decline to strike, further analysis follows.

2. The Complaint Admits No Immunity

A defendant may bring a Rule 12(b)(6) motion based upon an affirmative defense in unusual circumstances: where the face of the Complaint "admits" a defense. *Jablon v. Dean Witter & Co*., 614 F.2d 677, 682 (9th Cir. 1980). A Rule 12(b)(6) motion asserting that the complaint "admits" a defense must show the defense is (i) "definitively ascertainable from the complaint and other allowable sources of information," and (ii) "suffice to establish the affirmative defense with certitude." *Gray v. Evercore Restructuring L.L.C.*, 544 F3d 320, 324 (1st Cir. 2008).

No facts disclosed in the Complaint establish any affirmative defense "with certitude", and in fact the Complaint disclaims immunity. Compl. ¶¶ 147, 159.

a. <u>Absolute Judicial/Quasi-Judicial Immunity:</u>

Judicial and quasi-judicial immunity are defenses available to judicial officials

[1] To assist the Court and counsel, related sections of the MTD and M&C are referenced throughout.

performing a "judicial act" within the scope of their jurisdiction. *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986). "Judicial acts" require "exercise of discretion in the independent decision-making adjudication of controversies." *Ashelman* at 1076 (9th Cir. 1986); *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731 (1980); *Antoine v. Byers & Anderson, Inc*., 508 U.S. 429, 432 (1993). The analysis requires more than an assertion that the defendant "was a judge" when he performed the act—the asserting party must establish that the "*precise act*" accused of causing constitutional harm was a "judicial act" within the judge's jurisdiction. *Ashelman* at 1076.

Many actions of a judge are not "judicial acts." Actions such as supervision, appointment, and retention of court personnel have been consistently denied judicial immunity. *Forrester v. White*, 484 U.S. 219, 229 (1988); *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) ("These [executive] functions bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries."); *Meek v. Cnty. of Riverside*, 183 F.3d 962, 966 (9th Cir. 1999) ("A state court judge is generally not entitled to absolute immunity from liability arising out of a decision to fire a subordinate judicial employee because the decision is not a judicial or adjudicative act, but rather an administrative one."); *Antoine* at 437.

"Other relevant factors to analyze a "judicial act" include: (i) the adversary nature of the process, (ii) the correctability of error on appeal, (iii) the importance of precedent, and (iv) the presence of safeguards that reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985); *Arena v. Dep't of Soc. Servs. of Nassau Cnty.*, 216 F. Supp. 2d 146, 153-54 (E.D.N.Y. 2002).

Actions of a judge that are "judicial acts," but outside of the judge's jurisdiction are also not shielded by immunity. *Miller v. Davis*, 521 F.3d 1142, 1147 (9th Cir. 2008). Actions under color of law in the absence of jurisdiction are "*coram non*

judice", and a defendant causing injuries while in *coram non judice* is entitled to no immunity, but is *strictly liable* as a trespasser. *Manning v. Ketcham*, 58 F.2d 948 (6th Cir. 1932).

The analysis necessary requires evidence, the burden of proving all of which rests with Defendants. M&C III.B.1-2. No such record exists. For this reason alone the MTD may be denied. If further analysis is useful, Plaintiff offers the following.

Analytical Framework

All analysis of the Complaint may be conducted with an understanding of the framework on which it is based. The Complaint is "built" on a number of "core" events causing injury in fact (HARM), and giving standing Plaintiff.

1. STUART ASSAULT: An assault by various Defendants at the SDCBA SEMINAR organized by the Family Law Community on the commercial property of SDCBA. All events occurred outside of any court proceeding while members of the Family Law Community, including judges, attorneys, sheriff's deputies, and service providers were gathered discussing law, practices, procedures, business, and administration related to Family Law. The STUART ASSAULT is actionable injury in fact. Compl. ¶ 124 *et passim*.

2. STUART-SDCBA CONTRACT: Prior to the SDCBA SEMINAR, Plaintiff STUART had entered into a contract with Defendant SDCBA to attend the SDCBA SEMINAR Compl. ¶ 127. Stuart was attending the SEMINAR pursuant to that contractual right for commercial purposes detailed in the Complaint as COMMERCIAL PURPOSES (Compl. ¶¶ 109-110, 113, 117-123, 126-128, 149, 177-178, 180). Breach of contract and related bad faith, inducement, and interferance are actionable injuries in fact.

3. CHILLING: Plaintiffs were at the time of the STUART ASSAULT engaged in an ongoing campaign toward "reform, exercise, support, and advocacy" or civil rights which they allege defendants have and are oppressing in violation of law, described generally as "Family Federal Rights Reform, Exercise, Support and

Advocacy", or "FFRRESA". (Compl. 184-189). The Complaint details Defendants' ongoing hostility to Plaintiffs' FFRRESA as HARASSMENT and ABUSE. Plaintiffs' political and reform activities in furtherance of FFRRESA are described as DUE ADMINISTRATION OF JUSTICE. Plaintiffs' efforts toward improving practice standards among family law practitioners is identified as BUSINESS DEVELOPMENT (Compl. ¶ 110), PUBLIC BENEFIT ACTIVITY. (Compl. ¶ 111).

4. DUE ADMINISTRATION OF JUSTICE: The Complaint describes on "branch" of the FFRRESA activities as actual engagement with state and federal officials toward reform of state laws and practices within the Family Law forum. Those efforts include formal and informal complaints, litigation, participation in law enforcement investigations of civil rights and other crimes, and political activity. Interference with DUE COURSE OF JUSTICE by any means is injury in fact.

5. DOYNE, INC. FRAUD AND ABUSE: Counts 17-20 describe allegations specific to STUART arising from his interactions with family law professionals in which certain Defendants committed fraud, extortion, bribery, abuse of process, and other culpable acts. Fraud and related crimes are actionable injury in fact.

6. UNJUST ENRICHMENT: Count 20 identifies entities unjustly enriched by direct payments from STUART relating to the DOYNE, INC. FRAUD AND ABUSE.

7. COMPETITIVE/CONSUMER INJURY: Count 21 identifies competitive and consumer injury caused to Plaintiffs by named defendants' operation of their family law businesses which compete with Plaintiffs and wrongfully describe, promote, and advertise each respective defendants' businesses. Damages caused thereby is injury in fact.

8. RICO CLAIMS FOR RELIEF: The 13 RICO counts are related to the "core" STUART ASSAULT, the DOYNE, INC. FRAUD AND ABUSE, various schemes used by defendants to commit fraud (SAD), and the DUE AMINISTRATION OF JUSTICE allegations described above. The RICO Claims for Relief allege

cognizable claims and injury in fact from those foundations.

9. PROSPECTIVE RELIEF: The ongoing criminal civil rights violations are also related to the above "core" allegations causing injury in fact and ongoing threat of continued injury, giving standing to the prospective relief requested.

On this framework further analysis may proceed by identifying the injury alleged in each Count, then proceeding to trace the HARM "back" to one or more acts of each Defendant asserted to be liable. If that string of causation between the HARM and the Defendant's alleged culpable act involves no "judicial act", then judicial immunity cannot shield the defendant.

A complete analysis is Defendants' burden here, but to offer an example, Count 1 alleges HARM caused in the STUART ASSAULT. Compl. ¶ 130-136. The direct acts alleged to cause the HARM are certain defendants confronting, intimidating, threatening, physically grabbing, searching, handcuffing, forcing, and ejecting Plaintiff from the SDCBA SEMINAR. Compl. ¶ 135. In legal terms the HARM includes assault, battery, search, and seizure. Compl. ¶ 143.

The actors *directly* causing this HARM include defendants OFF DUTY OFFICERS' two employees performing the physical assault. Directly overseeing the ODO employees were two unknown Sheriff's Deputies in the immediate vicinity. Compl. ¶ 133-135. Those security officers were in turn joined by ALKSNE and several other Defendants in the "huddle" before and during the STUART ASSAULT. Compl. ¶ 131-133. ALKSNE'S acts in conferring, planning, instructing, supervising, etc. the men during the assault are plainly not "judicial acts."

This analysis may be expanded to include other culpable acts directly or indirectly "setting in motion" the events leading to the HARM. See "acts" analysis at M&C III.C. Summary examples:

- Count 2 alleges "CHILLING" to Plaintiffs ¶¶ 149, 188, 355, which may be traced to the STUART ASSAULT and HARASSMENT AND ABUSE, then to

defendants named in Count 2 responsible for perpetrating each act (direct, indirect, supervisory) leading to the STUART ASSAULT;

- Count 5 expands the causal chain from each HARM to include "SUPERVISOR LIABILITY" to those defendants named in the Count—defendants with supervisory responsibility for the more direct and/or indirect actors in, for example, Count 1, and includes theories of supervisory direct acts and omissions, and deliberate indifference ¶¶ 162-171.

Each subsequent Count may be analyzed in similar fashion.

The M&C provides detailed examples of how the analysis may be conducted for Defendants GOLDSMITH (M&C pp. 43-45), and ALKSNE (M&C pp. 45-47). The analysis for each Defendant is complex, but no more so than, for example, a patent infringement analysis involving a chain of related product developers, producers, and retailers. It is respectfully suggested that requiring such analysis in an initial pleading—while certainly possible—would encumber the record, Court, and parties unnecessarily. "[I]t would be burdensome to have the district court 'prune' a complaint at the pleading stage by making a determine action with regard to each allegation within a cause of action that is legally cognizable when viewed in its totality."). *Bernheim v. Litt*, 79 F.3d 318, 326 (2d Cir. 1996); *Westways World Travel v. AMR Corp*., 182 F. Supp.2d 952 (C.D. Calif. 2001). "Such an analysis is better done in the context of a motion for summary judgment where the true facts, as opposed to the presumed facts, are established." *Id*.

b. Quasi-Judicial Immunity

Defendant RODDY claims quasi-judicial immunity (MTD IV.E), yet such a defense is clearly unavailable. RODDY is an administrator, not a judicial official, and the allegations of the Complaint do not allege any acts by RODDY requiring judicial discretion, application of facts to law, or acts intimately involved with the judicial process. Whatever Mr. Roddy's general responsibilities as an administrator of the Superior Court operations may be, the Complaint alleges his responsibility

for a private commercial forensic psychology enterprise and the family law facilitator, domestic violence clinics and paperwork, and related court operations. Compl. ¶¶ 11, 12, 23, 94, 96, 140, 275, 281, 318, Count 5, ENTERPRISES 1-4. These are not "tasks [which] are an essential part of the operation of the courts and the judicial process." (MTD 12:9). See, *Forrester*, *Antoine*, *Zolin*, *supra; Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir.1982). To the extent that RODDY'S "precise acts" accused in the Complaint are within RODDY'S job description, they are administrative functions, possibly authorized, and therefore possibly eligible for a qualified immunity not relevant at this stage.

c. Eleventh Amendment Immunity:

Eleventh Amendment immunity applies only to "States."[2] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987). Thus, entities "beneath State level" such as counties, cities, and other municipal corporations are generally not entitled to assert 11th Amendment Immunity. See *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown,* 520 U.S. 397 (1997)*; Monell v. Dep't of Soc. Servs. of City of New York,* 436 U.S. 658 (1978).

In some cases a "beneath State level" entity may assert Eleventh Amendment immunity if it can prove that the *function* it is performing that is accused of causing Constitutional deprivation is in fact a State-level function, so that in effect the State is the "real, substantial party in interest." *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984). This requires a showing of fact. "We must look behind the pleadings to determine whether a decree in the case would operate in fact against the sovereign. If the judgment would actually run against the state treasury, the action is barred." *Zolin* at 1110. This test looks to whether the "beneath State level" entity is accused for activity that is (1) a "State level" function, (2) controlled

[2] The capitalized term "State" is used only to refer to one of the fifty autonomous sovereign entities comprising the United States—i.e., the "State of California." "State" is not used to convey its more general connotation of any governmental entity, as in "state action." This usage is unfortunately inconsistent in the caselaw.

by the State, (3) for which the State is liable and (4) the State will be bound for any injunctive remedy sought. *Id.*; *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464 (1945).

This analysis is necessary for any "beneath State level" entity—both individuals and municipalities—accused of a function that is an "arm of the State": "When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself. . . . The Eleventh Amendment bars a suit against state officials when the State is the real, substantial party in interest." *Id.*

Analysis

Defendants are entitled to sovereign immunity if they can establish:

(i) State Financial Liability: "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank,* 372 U.S. 609 (1963); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

(ii) State Authority: The legal authority or jurisdiction, if any, the entity or individual asserting immunity is acting under, both generally and with respect to the specific acts accused. The scope of the authority and nature of the acts and other facts relating to the alleged malfeasance has also been an issue often in contention. *Zolin*, *supra*;

(iii) State is Bound: Whether any equitable relief on the individual would effectively bind the State of California.

The Complaint does not name the State of California, and no defendant is a State agency or department. On the presumptively true assertions in the Complaint each Defendant is named and described as a "beneath State level" entity. Compl. ¶¶ 9, 11, 12, 22, 23, 25, 26, 27, 28, 29, 147, 159 inter alia. Thus, no admission of State or "arm of the state" has occurred in the Complaint. Further, no Defendant has (or at

1 this stage may) attempted an "arm of the state" record, and indeed any such attempt
2 appears futile. See M&C III.B.1.
3 d. Defendant Superior Court San Diego County.
4 The MTD asserts that summarily that "The Ninth Circuit has consistently held
5 California superior courts are considered arms of the state and therefore enjoy
6 Eleventh Amendment immunity." MTD 10:15-17. Closer examination of the
7 MTD's authority reveals this is a vast overstatement. The "consistent" cases on which
8 Defendants rely are spawn from a single case: *Greater Los Angeles Council on*
9 *Deafness, Inc. v. Zolin,* 812 F.2d 1103, 1106 (9th Cir. 1987). In *Zolin*, the plaintiff, a
10 public interest organization for the deaf, sued the Los Angeles County Superior
11 Court, its Jury Commissioner, and its Director of Jury Services individually and in
12 their official capacities for money damages and prospective relief. *Id*. at 1106.
13 Plaintiff alleged injury caused by the defendants' refusal to provide sign-language
14 interpreters to enable deaf citizens to serve as jurors. *Id.*
15 The District Court tried the case (*Greater Los Angeles Council of Deafness,* Inc.
16 Zolin, 607 F. Supp. 175, 179 (C.D. Cal. 1984)), making findings of fact with respect
17 to issues determinative of immunity. The Court of Appeals found that the facts
18 showed that only the Superior Court of the County of Los Angeles was entitled to
19 Eleventh Amendment Immunity. *Zolin*, 812 F.2d at 1110.
20 The Court of Appeals analyzed the District Court's Eleventh Amendment findings
21 with regard to each defendant as follows:
22 *The County of Los Angeles*: The Court of Appeals found that "the eleventh
23 amendment does not bar actions against cities and counties. It therefore does not
24 preclude the suit against the County." *Id*. at 1101.
25 *The Los Angeles County Superior Court Individual Employees*: The Court of
26 Appeals found that the superior court employees sued in their individual capacities
27 are not entitled to eleventh amendment immunity. "A functional approach governs
28 the eleventh amendment's application to actions for money damages against state

1 officials. Such actions are considered to be suits against the state, and thus barred, if
2 'the state is the real, substantial party in interest." *Pennhurst State School & Hospital*
3 *v. Halderman*, 465 U.S. 89 (1984). The Court of Appeals relied on the District
4 Court's findings of fact after trial that "the state treasury is not in jeopardy." *Id*.
5 *The Superior Court*: Despite the fact that the County of Los Angeles would be
6 responsible for payment of damages against the Superior Court itself, the Court of
7 Appeals declined to apply the *Penhurst* functional "real party in interest" test with
8 regard to the Superior Court, stating: "Although the County does pay most of the
9 Superior Court's bills, state case law and constitutional provisions make clear that the
10 Court is a State agency. See Cal. Const. art. 6 §§ 1, 5 (West Supp.1986); *Sacramento*
11 *& San Joaquin Drainage Dist. v. Superior Court*, 196 Cal. 414, 432, 238 P. 687, 694
12 (1925). The official name of the court is the Superior Court of the State of California;
13 its geographical location within any particular county cannot change the fact that the
14 court derives its power from the State and is ultimately regulated by the State." *Id*.
15 The remaining cases cited by Defendants *Duerst v. California*, 2:13-CV-0302 GEB
16 KJN, 2013 WL 665560 (E.D. Cal. Feb. 22, 2013), *Simmons v. Sacramento County*
17 *Superior Court,* 318 F.3d 1156, 1161 (9th Cir. 2003), and *Los Angeles County Ass 'n*
18 *of Envtl. Health Specialists v. Lewin*, 215 F.Supp.2d 1071 (C.D. Cal. 2002), each
19 parrot *Zolin*, finding that the "official name" of the Court is "Superior Court for the
20 State of California," and plaintiffs accused the court for "central" State functions of
21 issuing judicial orders which harmed each respective plaintiff.
22 The "central function" analysis has been recognized by Court of Appeals decisions
23 involving interagency partnerships. In *Del Campo v. Kennedy*, 517 F.3d 1070, 1077
24 (9th Cir. 2008) the Court of Appeals explained: "The factors we apply in the state
25 sovereign immunity inquiry, drawn from *Mitchell v. Los Angeles Community College*
26 *Dist*., 861 F.2d 198, 201 (9th Cir.1988). Under *Mitchell*, courts look to five factors:
27 "(1) whether a money judgment would be satisfied out of state funds; (2) whether the
28 entity performs central governmental functions; (3) whether the entity may sue or be

sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity." *Mitchell*, 861 F.2d at 201. Courts in other Circuits apply a similar "central function" analysis for extending Eleventh Amendment Immunity, looking to (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; and (3) from where the entity derives its funds and who is responsible for judgments against the entity. See *Stewart v. Baldwin County Board of Education,* 908 F.2d 1499, 1509 (11th Cir.1990); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.,* 734 F.2d 730, 732 (11th Cir.1984).

These factors turn on facts which cannot be derived from the face of the Complaint. The Complaint names The "Superior Court of San Diego County", consistent with common usage. This Court and this District's United States Attorney has referenced the title "San Diego Superior Court. *See, e.g., U.S. v. Frega*, 179 F.3d 793, 813 (9th Cir. 1999); U.S. District Court, Southern District of California Case Nos. 97-50100, 97-50111, 97-50113 and 97-50171. The Court's operations, control, indemnity, organization, and finances cannot, and *need not* be, detailed in the Complaint because such facts are apparently unique to each county court, and in the control of Defendants herein. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002); *Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246, 249 (9th Cir.1997).

Extending Eleventh Amendment immunity to non-State entities has been described as "strong medicine," and has been undertaken with caution by federal courts. Caution in so doing here would seem wise. See, e.g., *Del Campo v. Kennedy*, 517 F.3d 1070, 1075 (9th Cir. 2008); *N. Ins. Co. of New York v. Chatham Cnty., Ga*., 547 U.S. 189, 194 (2006); *Alden v. Maine*, 527 U.S. 706, 713 (1999); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993).

B. Conflation of Rule 12 Grounds for Relief (MTD IV.B (pp. 8:7-10:9), IV.F (pp. , 12:23-15:1 et passim) vs. M&C III.A (pp. 5-15))

The MTD exhibits a pervasive confusion between several Rule 12 grounds for

dismissal and authority thereunder. The MTD is brought under only Rules 12(b)(6) and Rule 12(b)(1), yet the cites authority and analysis relevant to Rule 12(c), (e), and (f), including two cases which analyzed a fraud complaint under Rule 9(b)'s fraud particularity requirement in addition to the Rule 8 grounds Defendants herein assert. The MTD cites *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1052 (9th Cir. 2011) in which a plaintiff requested leave to file a second amended complaint alleging a False Claims Act count pled under Rule 9(b)'s heightened pleading standards for fraud. *Id*. At 1055. The procedural context was unusual; after plaintiff amended her complaint once and a two year "period of acrimonious discovery," defendants sought discovery on what the plaintiff's "false claim" was. *Id*. In response, plaintiff mistakenly denied that she was required to prove a false claim. Because a "false claim" is the *sine qua non* of a "false claims act" claim, plaintiff was wrong. *Id*. At 1056. Defendants immediately moved under Rule 12(c) for summary judgment on the pleading plaintiff *admitted* did not state a cognizable claim—the then-pending amended complaint. Facing defendants' Rule 12(c) motion, plaintiff attempted to resurrect her error, proffering a second amended pleading. The District Court refused plaintiff leave to correct her error in a second amended complaint, and granted defendants' Rule 12(c) motion. *Id*. at 1052. The Court of Appeals affirmed. *Id*.

The MTD cites *U.S. v. Lockheed-Martin Corp*., 328 F.3d 374 (7th Cir. 2003), a denial of a Rule 15 motion to amend a second amended complaint also under a False Claims Act fraud standard. The District Court denied leave to amend a third amended complaint after the court had directed, but plaintiff failed, three times to allege facts establishing a prima facia case of fraud under Rule 9(b). Plaintiff requested leave to amend again, proffering a voluminous third amended complaint which still *did not state a single fraud claim*. *Id*.

The MTD's conflation of Rules 12(c), (e), and (f) with Rule 12(b) is fatal to its requested relief of "dismissal with prejudice" and "without leave." MTD 11:8. For

1 example, the MTD asserts that the Complaint "fails to allege a cognizable claim" or
2 "lacks a cognizable claim" (a Rule 12(b)(6) "first ground," attack), then proceeds to
3 attack the Complaint in "hunt and peck" fashion (a Rule 12(f) tactic), identifying
4 numerous specific terms or passages as "conclusory" or "confusing." MTD 2:12,
5 10:6, 11:27, 13:27, 14:19, 18:22-25. Yet in artificially isolating "conclusory" terms,
6 the MTD blinds itself related passages which provide "additional facts" establishing
7 at least plausibility.

8 Even recast as a motion for a more definite statement, the motion is infirm. A
9 court may rarely dismiss any complaint—even with leave to amend—on Rule 12(e)
10 grounds. "The class of pleadings that are appropriate subjects for a motion under
11 Rule 12(e) is quite small." *Kennedy v. Full Tilt Poker*, 2010 WL 1710006, at *2–3
12 (C.D.Cal. Apr.26, 2010). "A motion for more definite statement is used to provide a
13 remedy for an unintelligible pleading rather than a correction for lack of detail." *N.*
14 *Cnty. Commc'ns Corp. v. Sprint Commc'ns* Co., L.P., 2010 WL 1499289, at *1
15 (S.D.Cal. Apr.12, 2010). A motion for a more definite statement may be denied
16 where the detail sought is obtainable through discovery. *C.B. v. Sonora Sch. Dist.*,
17 691 F.Supp.2d 1170, 1190–91 (E.D.Cal.2010). "Rule 12(e) provides a remedy for
18 unintelligible pleadings; it does not provide correction for lack of detail or a
19 substitute for discovery." *Id*.

20 Further, motions to dismiss consisting of the "bucket of mud" attack at the
21 Rule 12 stage have been specifically rejected by the Court of Appeals. "Whether
22 [plaintiff] states a claim for purposes of Rule 12(b)(6) should not have been analyzed
23 under the . . . evidentiary standard relevant at the summary judgment stage. Rather,
24 consistent with *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002), and *Gilligan v.*
25 *Jamco Dev. Corp.,* 108 F.3d 246, 249 (9th Cir.1997), at the pleading stage the inquiry
26 is simply whether the facts pled show that the plaintiff is entitled to relief.
27 Fed.R.Civ.P. 8(a)(2). . . . Even if Defendants' claim that the Complaint is not a
28 "model of clarity" was true, that would not be grounds for dismissal under Rule

12(b)(6)." *Keil v. Coronado*, 52 F. App'x 995, 996 (9th Cir. 2002). See also *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1131 (9th Cir.2008) (collecting Rule 8(a) cases).

As the authority Defendants cite conducts analysis under standards and context different from the present analysis under Rule 12(b)(6), the MTD conflates the resulting analysis. For that ground alone the entire MTD is off-mark.

C. Analysis Under the Relevant Rule 12(b)(6) Standard

A defendant may obtain dismissal of a Complaint by showing either: "(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim*."* *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir.1996); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The MTD has achieved neither ground.

1. Cognizable Legal Theory

The first ground for dismissal under Rule 12(b)(6) is that a complaint does not state a "cognizable" legal theory. *SmileCare, supra; Corr. USA v. Dawe*, 504 F. Supp. 2d 924 (E.D. Cal. 2007). To state lack of a "cognizable legal theory" a defendant must establish that, assuming all allegations in the complaint to be true, the complaint as a whole does not articulate a legal theory recognized within the jurisdiction. *Corr. USA v. Dawe* at 934.; *U.S. v. Howell*, 318 F.2d 162, 166 (9th Cir.1963). This attack is not directed to "claims" or claim "elements", but the existence of a "legal *theory*." *Id.*; *Thompson v. Paul* (D AZ 2009) 657 F.Supp.2d 1113, 1129.

Dismissals for failure to state a cognizable theory are rare. "[A] claim should only be dismissed if there is no cognizable legal theory upon which relief could be granted. Here, plaintiffs have set forth sufficient facts which could establish a cause of action for invasion of privacy, trademark infringement, or breach of the implied covenant of good faith and fair dealing, among other conceivable tort and/or contacts claims." *Dawe* at 934.

The Complaint avers several cognizable legal theories. The Complaint cites 34 claims on at least as many statutory and constitutional grounds, broken down by elements, and alleges facts tracking the elements of each theory. The BACKGROUND and COMMON ALLEGATIONS sections plead abundant "factual context" elaborating on the facts and theories, and are incorporated into each claim by reference. Compl. ¶ 141.

The MTD attacks the structure of the Complaint for combining a number of legal theories under single counts. (MTD IV.F.1). For example, Count 1 asserts "deprivation of constitutional rights" under 42 U.S.C. § 1983, generally identifying the 1st, 4th, 5th, 6th, 7th, 8th, and 14th amendments to the United States Constitution, describes the legal theories asserted as "Illegal Search, Seizure, Assault, Battery, Arrest, and Imprisonment", and asserts generally "supplemental state law claims" which track the constitutional deprivations. Compl. p. 69, ¶¶ 142-148. California law recognizes civil "theories" of "assault," "battery," "kidnapping," "trespass," etc. The Count details facts which support each of these related legal theories. Compl. ¶¶ 142-148. This observation of the "combined" structure of Count 1 is accurate, though irrelevant to an attack on the cognizable legal claims of this Complaint.

2. "Insufficient Facts Under a Cognizable Legal Claim"

The MTD identifies the existence of what it alleges are "conclusory" terms at locations in the Compliant while ignoring passages setting forth relevant factual context and support. The relevant inquiry is not whether a given claim *contains* conclusions, but whether a claim consists of "*nothing more than*" bare conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 574, 127 S. Ct. 1955, 1976, 167 L. Ed. 2d 929 (2007); *Starr v. Baca*, 652 F.3d 1202, 1221 (9th Cir. 2011) cert. denied, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (U.S. 2012); *Ashcroft v. Iqbal*, 556 U.S. 662, (2009) ("A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of further factual enhancement."). But this is not the

total analysis required under Rule 12(b)(6); the *existence* of conclusions in virtually any pleading is inevitable and in most cases useful context. "[I]t is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." *Starr*, supra; Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 Colum. L.Rev. 518, 520–521 (1957). See also *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (construing *Twombly-Iqbal* in fact pleading context).

The MTD also exhibits selective attention to *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548-49 (2007), by ignoring *Twombly's* legal context. In *Twomby*, the Court imposed a heightened pleading standard on antitrust pleaders, requiring the antitrust plaintiffs to plead enough "factual context" to make the allegation of an antitrust "agreement in restraint of trade" "plausible." *Id*. at 548. "The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, *absent some factual context suggesting agreement*, as distinct from identical, independent action." *Id*. (emphasis added).

In *Twombly* the "absence" of "factual context" was established because the plaintiffs *admitted* they could not plead facts pointing to a necessary element of antitrust liability: an "agreement" in restraint of trade. *Id*. The facts plaintiffs could plead, "conscious parallel conduct," when evaluated in the context of antitrust law, could never satisfy the "agreement" element. In the antitrust context, industry defendants are able to rely on a history of virtually identical "tried-to-verdict" antitrust class action cases showing that mere parallel conduct is not a reliable indicator of an "agreement." That studied understanding of the how antitrust cases unfold toward summary judgment allowed the Court to conclude that the typical class

action antitrust case relying only on parallel conduct could not survive summary judgment, and therefore proceeding to expensive discovery would inevitably be fruitless for plaintiffs, and unnecessarily expensive for defendants. *Id.*

a. <u>Twombly is inapposite to the present civil rights matter</u>

This "history" of caselaw showing a likelihood of "innocent" collusion is unavailable in the civil rights and RICO contexts, in which "parallel conduct" between government and private putative adversaries is, if anything, prima facia evidence of *culpable conspiracy*, as four recent cases from this Circuit's Court of Appeals have held.

In *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1058 (9th Cir. 2012) the Court of Appeals, considering *Twombly*, found that plaintiff's 42 U.S.C. § 1983 complaint alleging that Oregon State University's acts in "rounding up" and disposing of a student newspaper's on-campus distribution "newsbins" adequately pled first amendment deprivation counts against university administrative officials not directly causing the "roundup." The complaint alleged only that (1) university official defendants were aware of the accused "roundup" activity, (2) the activity was within the supervisory officials' general authority to control, and (3) the injury sustained (destruction of plaintiff's newspapers was unconstitutional. Thus, where the complaint pleads (1) knowledge, (2) authority, and (3) injury, no further details of involvement need be pled. *Id.*

In *Moss v. U.S. Secret Serv.*, 675 F.3d 1213, 1225 (9th Cir. 2012) amended, 711 F.3d 941 (9th Cir. 2013) the Court of Appeals reversed a District Court's grant of a Rule 12 motion to dismiss a section 1983 complaint brought by protesters of President Bush alleging First Amendment viewpoint discrimination. Protesters pled against supervisor secret service agent defendants merely that "at the direction of the Secret Service agents, they were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President . . . ." The Court of Appeals held: "These allegations support a plausible claim of viewpoint

discrimination . . .” against supervisor defendants. *Id.*

In *Starr v. Baca*, 652 F.3d 1202, 1215-16 (9th Cir. 2011) cert. denied, 132 S. Ct. 2101 (2012), an inmate sued Los Angeles County, numerous jailhouse deputies, their supervisors, and Sheriff Baca himself under 42 U.S.C. § 1983 for failure to prevent a group of inmates from stabbing the plaintiff 23 times. After three amendments, the complaint continued to plead no specific facts beyond the fact that Sheriff Baca had overall responsibility for the safety of the jail, and general knowledge of several prior unrelated attacks. The Court of Appeals reversed the District Court’s grant of a Rule 12(b)(6) motion to dismiss, stating “[w]e have long permitted- plaintiffs to hold supervisors individually liable in § 1983 suits when culpable action, or inaction, is directly attributed to them. We have never required a plaintiff to allege that a supervisor was physically present when the injury occurred.” *Id.* (citing *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir.1991)).

The MTD nowhere cites this near-controlling post-*Twombly-Iqbal* authority affirming decades of this Circuit’s civil rights law analyzing facts and theories consistent with those of this Complaint.

b. <u>The Complaint Alleges Sufficient Cognizable Legal Theories:</u>

The MTD asserts that the Complaint lacks a cognizable legal theory. MTD 13-16. This is inaccurate.

i Constitutional Rights Violated (MTD 13:13-15, M&C III.C.1)

The MTD admits that Counts 1-6, 9-15, 17-19 identify specific constitutional amendments and the facts relating to each violation, yet claims this does not sufficiently identify the “constitutional rights violated.” The MTD cites no authority that anything more is required to assert a cognizable civil rights claim. Indeed it would seem odd to assert that a Complaint averring violation of a statute which identifies the statute, cites the relevant provisions allegedly violated, and avers facts constituting the violation would fail to state a claim. Moreover, such an attack does not sound as an attack on legal sufficiency—but more of a motion for a more definite

statement. Further, Defendants' assertion that a Complaint must detail specifics of the "constitutional rights violated" has been rejected by *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

ii. "facts establishing that any conduct by the Superior Court Defendants caused the purported Constitutional violations." (MTD 13:16-18; M&C III.C.1.b)

The Complaint avers significant "factual support" to cognizable constitutional deprivations. It is suggested that Defendants' inability to recognize these facts results from a misunderstanding of (a) the relevant legal theories under which Defendants may be held liable and (b) the scope of relevant acts or failures to act which may create liability thereunder.

(a) Causation (MTD 12:16-18;M&C III.C.1.b.i)

The MTD references "cause" as a missing element.[3] Causation in civil rights cases is properly averred generally. *Swierkiewicz v. Sorema N.A*., 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Outside of the securities litigation context in which "loss causation" is often attenuated by a complex string of market events, "but for" causation is a *de reguiere* fact issue for a jury. *Lombardo v. Huysentruyt*, 91 Cal.App.4th 656, 666, 110 Cal.Rptr.2d 691 (2001). "As we stated in *Monroe v. Pape,* . . . § 1983 'should be read against the backdrop of tort liability that makes a man responsible for the natural consequences of his actions.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Fenters v. Chevron*, CV-F-05-1630 OWW DLB, 2010 WL 5477710 (E.D. Cal., 2010) (citations omitted).

The Complaint pleads cause generally in each Count, and in many instances with more particularity. See framework for causation analysis at II.C.A above, M&C III.C.2. The Complaint alleges causation from Defendants' acts or failures to act

[3] Defendants articulate attack on "cause", but apparently intend to attack "acts" M&C III.C.1.b. Analysis for both "cause" and "acts" is therefore offered.

1 directly and by "setting in motion" events resulting in HARM. Compl. ¶¶ 153-157 *et*
2 *passim*, fn. v., vi.

3 *(b) "Acts" (MTD 13:17-14:9 vs. M&C III.C)*

4 Even if directed at "acts," the MTD ignores abundant detail of culpable acts
5 alleged in the Complaint. See M&C "Framework for Analysis of the Complaint"
6 pp.39-63. Direct acts, indirect acts, acts "setting in motion", conspiratorial acts,
7 aiding and abetting acts, acts of enterprise affiliation, and failures to act in breach of
8 duties and responsibilities requiring action have been well-known to the bench and
9 bar for decades as acts (or failures to act) which may form the foundation for liability
10 for constitutional injury resulting therefrom. *Johnson v. Duffy,* 588 F.2d 740, 743-44
11 (9th Cir. 1978) ("California law expressly imposes liability on a public employee for
12 his own act or omission. (Cal.Gov't.Code § 820 (a public employee is "liable for
13 injury caused by his act or omission to the same extent as a private person," except as
14 otherwise provided by statute)."); *Vierria v. California Highway Patrol*, 644 F. Supp.
15 2d 1219, 1240 (E.D. Cal. 2009); *OSU*; *Starr*, *supra*. Further, an "omission to act, in
16 violation of the duties imposed upon him by statute and by regulations, thus may
17 subject him to liability under section 1983." *Hesselgesser v. Reilly,* 440 F.2d 901
18 (9th Cir. 1971); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991); *Starr*,
19 supra. An officer's liability under section 1983 may be predicated on his 'integral
20 participation' in the alleged violation. *Chuman v. Wright*, 76 F.3d 292, 294–95 (9th
21 Cir.1996). "[I]ntegral participation' does not require that each officer's actions
22 themselves rise to the level of a constitutional violation." *Fenters v. Chevron*, CV-F-
23 05-1630 OWW DLB, 2010 WL 5477710 (E.D. Cal., 2010).

24 M&C III.C.2 describe the analytical framework defining the scope of relevant
25 culpable acts, including direct and indirect acts of commission (M&C III.C.2(a)),
26 omission (M&C III.C.2(c)), deliberate indifference (M&C III.C.2(d)), affiliation,
27 aiding and abetting (M&C III.C.2(e)), and conspiracy M&C III.C.2(f)). M&C III.C.3
28 fleshes out the framework with specific references to the Complaint. Section II.A.2.a

1 above provides an available tool with which such analysis may be conducted based
2 on the "core" injuries in fact. Plaintiff respectfully suggests that this level of
3 disclosure and analysis is not appropriate or even possible in this pleading space,
4 references and incorporates the M&C sections, and requests leave to amend should
5 the Court desire such particulars in pleading. *Lipton v. Pathogenesis Corp.*, 284 F.3d
6 1027 (9th Cir. 2002).

7 **D. 42 U.S.C. 1985(1) "any office, trust or place of confidence under the**
8 **United States" (MTD 15:2-9 vs. M&C III.C.4)**

9 The MTD attacks the Complaint's averments to "STUART's Position Under
10 the United States" (Compl. ¶102-106) as insufficient to satisfy 42 U.S.C. 1985(1)'s
11 application to "any office, trust or place of confidence under the United States."
12 citing *Canlis v. San Joaquin Sheriff's Posse Comitatus* 641 F.2d 711, 717 (9th Cir.
13 1981). MTD 15:2-9. *Canlis* is inapposite as it addressed the question of whether
14 local law enforcement officers—San Joaquin County Sheriff's Office deputies—
15 could claim protection under section 1985(1) as *federal* "officers" because they
16 injured while in the course of enforcing the 14th Amendment. *Id.* at 713-17.
17 Plaintiffs Sheriff's deputies did not claim that they maintained any "office, trust or
18 place of confidence under the United States' other than their status as local law
19 enforcement "officers."

20 The Complaint does not assert that any plaintiff is a local law enforcement
21 entity. It alleges that, for purposes of this action, STUART falls within the category
22 of persons maintaining "any office, trust or place of confidence under the United
23 States." Compl. ¶¶ 191-192. *Canlis* is thus inapposite.

24 Courts addressing section 1985(1)'s description of "any office, trust or place of
25 confidence under the United States" have construed it to protect more than federal
26 law enforcement officers. "The United States Supreme Court has stated that § 1985
27 is to be accorded "a sweep as broad as its language." *Griffin v. Breckenridge*, 403
28 U.S. 88, 97 (1971); *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). Courts of appeal

have recognized that § 1985(1) is a "statute cast in general language of broad applicability and unlimited duration." *Stern v. United States Gypsum, Inc*., 547 F.2d 1329, 1335 (7th Cir.), cert. denied, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977). See also *Windsor v. The Tennessean*, 719 F.2d 155, 161 (6th Cir.1983), cert. denied, 469 U.S. 826, 105 S.Ct. 105, 83 L.Ed.2d 50 (1984).

Under *Griffin* and its progeny, courts have applied section 1985(1) to protect both state and federal actors in performance of duties under federal law. *Mollnow v. Carlton*, 716 F.2d 627, 630 (9th Cir. 1983) (tax collector); *Lewis v. News-Press & Gazette Co.,* 782 F. Supp. 1338, 1341 (W.D. Mo. 1992) (state judge); *McCord v. Bailey*, 636 F.2d 606, 614-17 (D.C.Cir.1980); cert. denied, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981); *Stern*, supra (collecting cases and analyzing statutory history).

Defendants apparently desire to cabin the "sweeping" language of section 1985(1) to the term "officer." Such is inconsistent with the language and statutory intent of the statute. Protection of a broad class persons acting "under the United States" was the *express intent* of Congress in enacting the Civil Rights Act of 1871. *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980) (statutory history); *Griffon v. Congress of Racial Equality,* 221 F.Supp. 899 (E.D.La.1963); *Brewer v. Hoxie School Dist. No. 46 of Lawrence County, Ark*., 238 F.2d 91 (8th Cir. 1956).

The Complaint describes Plaintiff's status as an officer of the federal courts of five federal districts in three states including California and this District, the United States Court of Appeals for the Federal Circuit, his status as a party and witness in the DUE COURSE OF JUSTICE, and federal law practice including numerous civil rights and constitutional law pro bono and commercial client matters. In this matter such activity includes his founding, participation, and leadership of a public benefit corporation to support education, exercise, enforcement, and reform of federal family civil rights ("FFRRESA") in both his personal and official capacity as an officer of the corporate Plaintiffs on behalf of their clients' and affiliates. Further, the injury

alleged herein occurred while and because all Plaintiffs were specifically engaged in such activity. Compl. ¶¶ 191-208.

Other than the cases construing "office" cited above, Plaintiff has been unable to identify any case construing the terms "trust" or "place of confidence" of the statute; yet their construction as a matter of law at this or any stage appears inappropriate. U.S. Const., Amend VII, XIV; *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 656 (1935); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 371 (1996) ("the first issue in a patent case, construing the patent, is a question of law, to be determined by the court. The second issue, whether infringement occurred, is a question of fact for a jury."). To the extent that the statutory terms "office" "trust" and "place of confidence" are ordinary language terms capable of comprehension by a jury, no question of law exists. See generally *Markman*, supra; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

E. The Complaint Avers Sufficient Facts Establishing Conspiracy to Deprive Civil Rights Under 42 U.S.C. 1985(2) and (3)

Defendants at MTD 15:10-22 assert "the Complaint alleges nothing more than the defendants "conspired" together in committing the so-called "Stuart Assault," . . . and fails to set forth any facts establishing racial or class-based discrimination…." This is incorrect.

1. Civil Rights Conspiracy

A conspiracy is an agreement to break the law. *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301-02 (9th Cir. 1999). "To establish the defendants' liability for a conspiracy, a plaintiff must demonstrate the existence of "'an agreement or 'meeting of the minds' to violate constitutional rights." *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540–41 (9th Cir.1989) (en banc). The defendants must have, "by some concerted action, intend[ed] to accomplish some unlawful objective for the purpose of harming another

which results in damage." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir.1999). Agreement need not be overt, but may be inferred on the basis of circumstantial evidence. *Id*. at 856. A showing that the alleged conspirators have committed acts that "are unlikely to have been undertaken without an agreement" may allow a jury to infer the existence of a conspiracy." *Kunik v. Racine County*, 946 F.2d 1574, 1580 (7th Cir.1991). Whether defendants were involved in an unlawful conspiracy is generally a factual issue and should be resolved by the jury, "so long as there is a possibility that the jury can 'infer from the circumstances (that the alleged conspirators) had a 'meeting of the minds' and thus reached an understanding' to achieve the conspiracy's objectives." *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir.1979). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *Phelps Dodge* at 1541. See also, *Starr*, supra.

The Complaint alleges facts of actual agreement and facts pointing to agreement in far too much detail to recite here. M&C pp. 48-64 are incorporated by reference.

2. Class-Based Discrimination

The Complaint at ¶¶ 193-202 alleges and incorporates facts detailing relevant invidious discrimination against four EQUAL PROTECTION CLASSES:

1. Parent-Child Class: Compl. ¶ 194, FFR allegations ¶¶ 76-79, and Exs. cited therein);

2. Domestic Relations Class: Compl. ¶¶ 100-101, 195-19198, Exs. 1, 2. See *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Sever v. Alaska Pulp Corp*., 978 F.2d 1529 (9th Cir. 1992);

3. Gender Class: Gender is a recognized equal protection class. *Larson v. School Bd. of Pinellas County*, Fla., 820 F.Supp. 596 (M.D.Fla.1993) (males as gender equal protection class). Discrimination is detailed at Compl. ¶¶ 199 and Exs. 1, 13.

4. Class of One: Compl. ¶ 200. See *Vill. of Willowbrook v. Olech*, 528 U.S.

562, 564 (2000) ("[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co*., 260 U.S. 441, 445 (1923); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008).

The existence of class-based invidious discrimination is a question of fact not properly resolved at the Rules 12 stage. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267 (1993).

F. Section 1986 Claims (MTD 15:23-28)

The Complaint properly avers numerous violations of Section 1985 and Defendants as persons empowered to "prevent or aid in preventing" such violations (Compl. ¶¶ 211-214). The Section 1986 claims are satisfactory as pled.

G. Relevant Statutes of Limitations Will Not Bar the Civil Rights Allegations (MTD IV.G (16:3-23) vs. M&C III.D)

The MTD accurately identifies statutes of limitations affirmative defenses available to certain Counts. The defenses will be overcome, and may be pled upon leave to amend. Statutes longer than the two year period Defendants identify include: Actions based upon breach of written contract: Four years (Cal.C.Civ.P. § 337); Actions based upon fraud, duress, mistake: Three years (Cal.C.Civ.P. § 338, subd. (d)); Actions based upon "a liability created by statute: Three years (Cal.C.Civ.P. § 338). The M&C III.D.1-3 identified the grounds for pleading to address this affirmative defense, including equitable estoppel and statutory tolling. See M&C III.D.1-3, incorporated herein by reference, and requested a stipulation to amend. Defendants refused.

As Defendants have insisted on asserting this defense at the pleading stage, Plaintiff hereby requests leave to amend.

H. Rooker-Feldman Cannot Bar Any Count (MTD Sec. IV H vs. M&C Sec. III E)

Defendants' attack under the *Rooker-Feldman* doctrine ignores recent authority which has eviscerated the doctrine. "The *Rooker–Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 284 (2005). Granting a motion to dismiss based upon *Rooker Feldman* is increasingly rare. "Since *Feldman*, this Court has never applied *Rooker–Feldman* to dismiss an action for want of jurisdiction." *Id.* (collecting cases refusing dismissal).

To resurrect the defense, the MTD artificially cabins the numerous averments against WOHLFEIL and SCHALL in counts 17-19, then proceeds to mischaracterize those few it acknowledges as "nothing more than" judicial acts subject to a *Rooker-Feldman* bar. Yet as detailed in the M&C pp. 69-75, the allegations regarding WOHLFEIL and SCHALL do not seek to disturb any judgment of the dissolution proceeding. The Complaint does not (1) assert liability arising out of an "allegedly erroneous decision" by a state court" or (2) "seek relief from a state court judgment based on that decision." *Exxon-Mobile*, *supra*. WOHLFEIL'S referral to and endorsement of a private forensic psychology corporation in DOYNE INC. was not an appealable "decision." The dissolution action decided only decisions relating to child custody and spousal support. Claims relating to DOYNE INC's extrinsic fraud and a referral to a private forensic psychology enterprise do not necessitate disturbing WOHLFEIL or SCHALL'S appealable decisions relating to child custody and spousal support. *Kougasian v. TMSL, Inc*., 359 F.3d 1136 (9th Cir. 2004). See judicial immunity analysis at II.A.2 above. Moreover, as such orders remain "open" within the jurisdiction, they cannot be "final", and thus remain subject to collateral

attack. *In re Marriage of Fernandez-Abin,* 191 Cal. App. 4th 1015, 1042, 120 Cal. Rptr. 3d 227, 248 (2011), reh'g denied (Feb. 3, 2011); M&C p. 70.

As the *Rooker-Feldman* defense is near bankruptcy and inapplicable on these facts, this section of the MTD is infirm.

I. Lanham Act Claims (MTD IV.I, pp 19:2-20:1 vs. M&C III.F)

The MTD's attack on the Complaint's Lanham Act allegations does not assert legal insufficiency, but instead attacks *the veracity* of the allegations in the Complaint, which is inappropriate under a Rule 12(b)(6) motion. "Contrary to Stuart's assertion, the Superior Court Defendants do not engage in the advertisement or sale of goods or services and are not involved in interstate commerce", "do not compete commercially with anyone, let alone Stuart." MTD 19:17-20). Plainly an attack asserting grounds Defendants hope to prove at trial is inappropriate, and for that ground alone may be denied.

On the relevant 12(b)(6) inquiry, the presumed-true allegations of the Complaint aver facts sufficient to state a claim. The Complaint alleges plaintiffs and defendants maintained respective COMMERCIAL PURPOSES (Compl. ¶¶ 109-111 (Plaintiffs), 269, 290-305 (Defendants)), in the relevant DDIL MARKET, plaintiffs have adequately pled Lanham Act claims against these Defendants. M&C III.F.1-4. The relevant market in which the parties compete is described by Plaintiffs' businesses and operations (Comp. ¶¶ 3, 71-75, 77-101, et passim) and the common DDI Marketplace. Compl. ¶¶ 279-290, 297-305. M&C III.F.1-5.

The Complaint alleges that Defendants "in connection with their businesses, professions, PROFESSIONAL DUTIES, CONSPIRACIES and ENTERPRISE OPERATIONS, use in their advertisements, promotions, sale and offer for sale of their legal services words, terms, names, symbols, and devices, and combinations thereof, (COMMERCIAL SPEECH) which are false and misleading." Compl. ¶ 260. The Complaint further identifies Defendants' "businesses, professions. . . CONSPIRACIES and ENTERPRISE OPERATIONS" as including the Superior

Court's own operations (Compl. ¶¶ 9, 10, 11, 12), those of and in conjunction with its co-defendants including SDCBA and ALLIANCE (Compl. ¶¶ 23, 25-56, 59, 60, 70, 112, 158, 162, 166, 167, 168, 173, 174, 181, 186, 212-213, 236-243, 247, 248, 249, 251, 253, 256, 279-296), and the operation, conduct, and participation in the private commercial forensic psychology enterprises (Compl. ¶¶ 272-296).

1. Advertisements of Co-Defendants

The MTD appears to assume that a Lanham Act defendant can only be liable for its' own direct commercial representations. This is incorrect. "To the extent Defendants knowingly participated in the creation, development and propagation of the ... false advertising campaign" they may be held jointly liable for all Lanham act violations of the co-tortfeasors. *TrafficSchool.com, Inc. v. Edriver, Inc.*, 633 F. Supp. 2d 1063, 1082 (C.D. Cal. 2008) aff'd in part, rev'd in part and remanded, 653 F.3d 820 (9th Cir. 2011); *In re Century 21–RE/MAX*, 882 F.Supp. 915, 925 (C.D.Cal.1994); *Gillette Co. v. Wilkinson Sword, Inc.*, 795 F.Supp. 662, 664 (S.D.N.Y.1992). Under the Lanham Act, "[a] corporate 'officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.' " *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 852 (N.D.Cal.1979), aff'd sub nom., *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir.1981)). The same is true for the supplemental state law claims under B&P Code sections 17200 et seq. *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 784, 598 P.2d 45, 51-52 (1979); *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 631, 102 Cal.Rptr. 815, 498 P.2d 1063 (1972) ("The effect of charging . . . conspiratorial conduct is to implicate all . . . who agree to the plan to commit the wrong as well as those who actually carry it out."; *Black v. Sullivan*, 48 Cal.App.3d 557, 566, 122 Cal.Rptr. 119, 125 (1975).

The Complaint alleges both statements and advertisements of the Superior Court (Compl. Ex. 1, P22, 69-71) and its agents and/or affiliates (Compl. ¶¶ 261-262), the

ENTERPRISES and conspiracies, including the COMMERCIAL SPEECH of DOYNE, DOYNE INC (Compl. ¶ 261 B), ACFEI (Compl. ¶ 261 C), ALLIANCE, CJC, AOC, FRITZ, BIERER, and BLANCHET. Compl. ¶ 261-262, 264, and Exs. 1, 43, 41, 42, 46-49. These allegations articulate commercial representations of Defendants themselves and with others "engage in the advertisement or sale of goods or services." See M&C III.F.2.

2. Government as a "person"

The MTD also appears to assume that governments cannot be considered "persons" under the Lanham Act. This is also an incorrect statement of law contradicted by the language of the statute itself defining "person" as including "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity." 15 U.S.C. § 1125(2). M&C III.F.4 details that governments regularly do advertise. See also, *Fed. Exp. Corp. v. U.S. Postal Serv.*, 40 F. Supp. 2d 943, 949 (W.D. Tenn. 1999). In San Diego, this unremarkable practice includes joint efforts in promoting legal and forensic psychology services (Compl. ¶260), (Exs. 1, 41, 42-44, 49).

J. RICO Allegations (MTD Section IV.J; M&C III.G)

The MTD attacks the RICO allegations as lacking only "ongoing organization involving any Superior Court Defendants" (MTD 20:27), "individual actions of any Superior Court Defendants" (MTD 20:28), "allegations amounting to a pattern" (MTD 21:5), and "averments specifying the conduct of any Superior Court Defendant." (MTD 21:6). These elements are related and are may be analyzed together. M&C at III.G.

"Ongoing organization" is one element of "enterprise" and is related to "pattern." An "enterprise" is "an individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although

not a legal entity." 18 U.S.C. § 1961(4). A "pattern" is simply the commission of two or more predicate crimes within a ten years. 18 U.S.C. 1961(5). To violate RICO, the enterprise entity/ies must have some minimal "ongoing organization" apart from the "pattern" of two predicate crimes. *Odom v. Microsoft Corp.,* 486 F.3d 541, 552 (9th Cir. 2007). "To establish the "ongoing organization" prong of the test, a plaintiff must prove the existence of a "vehicle for the commission of two or more predicate crimes." *Id*. "Ongoing organization" distinguishes "enterprise" from "mere recidivism." *U.S. v. Bledsoe*, 674 F.2d 647, 659 (8th Cir. 1982).

The Complaint avers ongoing organization centered on the legitimate operations of the Family Law Community within the "Domestic Dispute Industry", and specifies the criminal elements of that industry as the "DDICE"—the "black hat" operators of the "Domestic Dispute Industry Criminal Enterprise." Compl. ¶¶ 4-56, 59, 60 ("Collectively, the above-referenced defendants, operating full or part time as part of a broader "Family Law Community" of professionals, institutions, entities, practices, methods, products and services and its ancillary arms shall hereafter be referred to as the Domestic Dispute Industry (DDI).") and Compl. ¶¶ 72, 74, 112, 158, 160, 162, 167, 168, 169, 170, 173, 174, 178, 181, 182, 184-188, 191, 205, 207, 209, 211-214, 236-243, 247-251, 253, 256, 260-266, 299, 303, ("black hat operations"). Further analysis detailing Complaint averments to "ongoing organization" is disclosed at M&C III.G.2(a) (pp. 83-89).

The "pattern" analysis is disclosed at M&E III. E 2.(d) . The Complaint alleges this generally at ¶ 277, and avers each Defendant's involvement as principals and/or accessories, in two or more of the 13 predicate crimes as follows:

- Claim 2: Honest Services Fraud: All Defendants (Compl. ¶¶345-347);
- Claim 3: Influencing or injuring officer or juror generally: SAC defendants (Comp. ¶ 348);
- Claim 4: Obstruction of proceedings before departments, agencies, and committees: SAC defendants (Compl. ¶¶ 350-351);

- Claims 5, 6, 7, 8, 9, 10, 11, 12, 13: Tampering with/Retaliating with a witness, victim, or informant; : SAC defendants (Compl. ¶ 353, 355, 357, 359, 361, 362-365, 369, 371, 373).

Under *Bridge v. Phoenix Bond & Indem. Co*. 553 U.S. 639 (2008), each of the 27 predicate crimes identified in Coml. ¶ 336 would also be relevant to "pattern." Plaintiff represents a present ability to amend to plead additional involvement in such crimes.

Moreover, Defendants will be estopped from contesting certain of the allegations they challenge here by this Court's collateral rulings in the case of *U.S. v. Frega*, 179 F.3d 793 (9th Cir. 1999) (including those of this District Court in Case No. 96-CR-698), *U.S. v. Malkus*, 21 Fed.Appx. 550 (9th Cir. 2001). It is suggested that the MTD is far off base in attacking these allegations, so that detailed analysis is not justified within this limited pleading space. M&C Section III.G.1-2 discloses this analysis in detail, and is respectfully requested to be incorporated by reference.

K. The Complaint Avers Standing for Past, Ongoing, and Future Injury

The MTD grossly mischaracterizes the Complaint averments relevant to Article III standing. The MTD alleges: "The Complaint generally asks the Court to enjoin Defendants from further alleged violations of Stuart's rights." MTD 21:12-13. "Absent from the Complaint are any allegations that Stuart is likely to be wronged in the future by any of the Superior Court Defendant. Stuart's claim for prospective relief is simply in response to alleged past wrongs committed by the Superior Court Defendants." MTD 22:2-5. The MTD claims that the Complaint averments are "simply in response to alleged past wrongs committed by the Superior Court Defendants" and a "mere desire to effectuate what he believes to be the proper application of the law" MTD 21. This is incorrect.

The Complaint details the past, current, and *ongoing* injury, and *future* threat to plaintiffs' existing exercise, support, advocacy (FFRRESA), BUSINESS DEVELOPMENT, and PUBLIC BENEFIT ACTIVITIES, and continuing HARRASSMENT and ABUSE. M&C H.1., 2.

Specifically, the Complaint avers that STUART and other members of CCFC have suffered injury during and remain at jeopardy for further injury due to rightful exercise of FFRRESA, DUE ADMINISTRATION OF JUSTICE, and existing and imminent future illegal DVILS ORDERS and prosecution thereunder. The Ex Parte Motion for Temporary Harassment Restraining Order evidences that the pattern continues unabated. (Dkt.#4). The Complaint alleges that the laws, policies, procedures, and behaviors sought to be enjoined remain in effect, and that Plaintiffs remain thwarted in their PUBLIC BENEFIT ACTIVITIES including FFRRESSA the DUE ADMINISTRATION OF JUSTICE, and LEXEVIA and CCFC COMMERCIAL PURPOSES. The DVILS today remain a tool in widespread use, and daily form the basis of state family courts issuing illegal and highly invasive DVILS ORDERS.

Though not alleged in the Complaint, STUART and many of the parents affiliated with CCFC are presently under illegal DVILS ORDERS issued by one or more defendants, and are daily in jeopardy of punishment for their violation. Under the present policies, habits, and customs sought to be enjoined, parents cannot obtain relief. As such, the existence and likelihood of constitutional injury from each grant of a DVILS ORDER is not absent or remote, but *substantial, ongoing, and virtually certain*. Discussion and rebuttal regarding MTD's authority at M&C III.H.2 in incorporated by reference.

III. CONCLUSION

As detailed in the M&C suggesting the same relief here formally sought, the Complaint avers sufficient facts to satisfy Rule 8(a) and 9(b) fact and fraud pleading standards. In most attacks, Defendants have misrepresented or misunderstood the case. In addition to the relief sought in the Motion to Strike, Plaintiff respectfully

requests the MTD be denied on all grounds, or, in the alternative, requests leave to amend to cure as indicated herein.

Respectfully Submitted:

DATED: November 8, 2013

By: /s/ Colbern C. Stuart, III

Colbern C. Stuart, III, President,
California Coalition for Families and Children
in Pro Se

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the court's CM-ECF system per Federal Rule of Civil Procedure 5(b)(2)(E). Any other counsel of record will be served by facsimile transmission and/or first class mail this 8th day of November, 2013.

By: /s/ Colbern C. Stuart, III

Colbern C. Stuart, III, President,
California Coalition for Families and Children
in Pro Se