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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Travis Middleton, et al.,

Plaintiffs,

v.

Richard Pan, et al.,

Defendants.

2:16-cv-05224-SVW-AGR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS STATE OF CALIFORNIA, GOVERNOR BROWN, ANNE GUST, AND DEPUTY ATTORNEYS GENERAL JONATHAN E. RICH AND JACQUELYN Y. YOUNG, TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

[Filed Concurrently with Notice of Motion and Motion to Dismiss]

Date: September 11, 2017
Time: 1:30 p.m.
Courtroom: 10A (First Street Courthouse)
Judge: Hon. Stephen V. Wilson
Trial Date: None Set
Action Filed: July 15, 2016

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INTRODUCTION

Plaintiffs' Second Amended Complaint (SAC) (ECF No. 136) fails to address any of the defects of their previous pleadings. Other than adding four defendants – the U.S. Magistrate Judge and the state government attorneys representing the Defendants – and the removal of some of the state legislators' spouses as defendants, the SAC is virtually identical to the First Amended Complaint (FAC) (ECF No. 15). By simply repeating their prior implausible claims, without any substantive amendment, Plaintiffs have entirely disregarded the Magistrate's Report and Recommendation (ECF No. 123) and this Court's order adopting and approving the dismissal of the FAC (ECF No. 135). Plaintiffs' claims should be dismissed without leave to amend.[1]

Plaintiffs' allegations that the Governor, various state legislators, *and their spouses*, engaged in an unlawful conspiracy to influence the enactment of California's mandatory child vaccination statute, California Senate Bill 277 (Stats 2015 Ch. 35) (SB 277), are no more plausible now than when they were first alleged a year ago. And, Plaintiffs' claims are certainly not made any more plausible by naming the U.S. Magistrate Judge and counsel for the Defendants.

While *pro se* pleadings are to be liberally construed, a *pro se* action should be dismissed if, after careful consideration, the Court concludes that the allegations of the complaint disclose that no cognizable claim can be stated and that amendment would be futile. *Cato v. United States*, 70 F.3d 1103, 1196 (9th Cir. 1995). Like the FAC, the SAC fails to establish any plausible claims. Given the long-established, indisputable jurisprudence establishing Defendants' immunity

[1] Because the claims and allegations within the SAC (ECF No. 136) are nearly identical to those in the FAC (ECF No. 15), Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint is incorporated by reference.

from Plaintiffs' claims and the constitutionality of mandatory school vaccination, any further amendment to Plaintiffs' pleading would be futile.

First, the Eleventh Amendment prohibits suit against the State, and by extension, the Governor in his official capacity, in federal court. Moreover, the advocacy for and passage of legislation, as well as the acceptance of campaign contributions, are protected activities under the *Noerr-Pennington* immunity doctrine, which bars suit against the Governor and Defendant Anne Gust, the Governor's wife. Furthermore, government attorneys sued for conduct related to litigation duties, such as the defense of this unfounded lawsuit, have "absolute official immunity" from Plaintiffs' claims. *Bly-Magee v. California*, 236 F.3d. 1014, 1018 (9th Cir. 2001.)

Second, even if this Court finds that one or more of the Defendants are not immune, Plaintiffs' claims fail to state plausible allegations against Defendants in their personal and official capacities. Federal Racketeer Influenced and Corrupt Organizations (RICO) statutes cannot be used to address an alleged civil rights violation. As such, Plaintiffs have not pled "predicate acts" upon which Plaintiffs can base their claims, rendering these claims defective.

Moreover, the object of the alleged conspiracy, the enactment of SB 277 and alleged violation of Plaintiffs' purported constitutional rights, was indisputably an exercise of the Legislature's legitimate and compelling interest in protecting public health and safety by mandating vaccinations for school children, something which has been *unanimously* recognized by the U.S. Supreme Court, the California Supreme Court, and every other federal and state court that has addressed the issue *for over a century*. As such, Plaintiffs' foundational claim, that their constitutional rights have been violated, fails as a matter of both state and federal law.

For the foregoing reasons, and for the reasons more specifically addressed in Defendants' motions to dismiss Plaintiffs' FAC, Defendants respectfully request that the Court dismiss Plaintiffs' SAC, without leave to amend, and dismiss this

action with prejudice.

STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure (Rule 12(b)(6)), the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The "plausibility" requirement serves to ensure that the "plain statement" required under Rule 8 of the Federal Rules of Civil Procedure (Rule 8) has "enough heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly*, 550 U.S. at 557. Purely conclusory allegations will not suffice; "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . ." *Id*. at 555-556. Plaintiffs may not rely on wholly conclusory allegations in the complaint and then simply hope that, through the discovery process, the necessary facts will arise to support their claim. *Id*. at 557-558.

Moreover, the complaint must be dismissed if there could be an alternative, non-nefarious explanation for defendants' conduct, and that plaintiffs have failed to plead specific facts to rebut it. *Twombly*, 550 U.S. at 567-567.

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified that the standards of Rule 8 it articulated in *Twombly*, *supra*, apply to all civil actions. The Supreme Court re-affirmed that, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 678 (quoting from *Twombly*).

Adherence to the pleading requirements in Rule 8 is critical to ensuring that government officials are not forced into litigation unnecessarily. As recognized in *Ashcroft v. Iqbal*:

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to

> require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed.

Iqbal, 556 U.S. at 685.

Dismissal under Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). On a Rule 12(b)(6) motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). However, the Court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, as amended by 275 F.3d 1187 (9th Cir. 2001).[2]

In evaluating a complaint under Rule 12(b)(6), the court may consider not only the allegations contained in the complaint, but also matters properly subject to judicial notice. *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage*, 524 F.3d 1090, 1096 (9th Cir. 2008). Additionally, the court need not

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[2] There is some question as to whether dismissal based on Eleventh Amendment immunity should be analyzed under Rule 12(b)(6) or as a jurisdictional issue under Rule 12(b)(1). *Elwood v. Drescher*, 456 F.3d 943, 949 (9th Cir. 2006)(12(b)(6)); *but see Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040–44 (9th Cir. 2003) (jurisdictional issue under Rule 12(b)(1)). The Ninth Circuit has since attempted to reconcile these cases by calling Eleventh Amendment immunity "quasi-jurisdictional." *Bliemeister v. Bliemeister* (*In re Bliemeister*), 296 F.3d 858, 861 (9th Cir. 2002). Since this motion is a facial challenge to the SAC, the analysis is the same under both rules. *See, e.g.*, *Hardesty v. Barcus*, Case No. CV 11-103-M-DWM-JCL, 2012 U.S. Dist. LEXIS 28902, **8-9 (D. Montana, January 20, 2012) ("[t]here is some confusion in the Ninth Circuit as to which of these two rules [Rules 12(b)(1) and 12(b)(6)] provides the proper vehicle for seeking dismissal based on Eleventh Amendment immunity. But because the legal standards under both rules are essentially the same, the Court would reach the same conclusion under either rule").

accept as true allegations that contradict matters properly subject to judicial notice. *Sprewell*, 266 F.3d at 988.

While *pro se* pleadings are liberally construed, a pro se action should be dismissed if, after careful consideration, the court concludes that the allegations of the complaint disclose that no cognizable claim can be stated and that amendment would be futile. *Cato, supra*, 70 F.3d at p. 1196.

ARGUMENT

Plaintiffs' SAC asserts nine separate Claims for Relief: (1) violation of 18 U.S.C. § 1961 et seq. (RICO); (2) violation of 18 U.S.C. § 1962(a)(d) (RICO-Conspiracy); (3) violation of 18 U.S.C. § 175 (Promoting the Sale and Use of Biological Weapons); (4) violation of 18 U.S.C. § 178 (Promoting the Sale and Use of Chemical Weapons); (5) violation of 18 U.S.C. § 241 (Infringement of Constitutional Rights); (6) violation of 18 U.S.C. § 242 (Deprivation of Rights); (7) violation of 18 U.S.C. § 1983 (Violation of Civil Rights); (8) violation of 18 U.S.C. § 1986 (Civil Rights); (9) intentional infliction of emotional distress. *See* ECF No. 136.

Despite the thorough analysis provided in the Magistrate's Report and Recommendation, Plaintiffs have simply refused to substantively amend their pleading to establish any plausibility for their claims. Not only are the same causes of action asserted, but also the same allegations within those claims. Also, naming new defendants to previously asserted claims is not only beyond the leave to amend granted by this Court, but futile in surviving a motion to dismiss when the underlying claims are factually implausible and fail as a matter of law. [3]

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[3] In the FAC, the defendant state legislators and their spouses and Anne Gust were named in all nine Claims for Relief. The State of California and the Governor were only named in the First, Second, and Ninth Claims for Relief. In the SAC, with the exception of the Seventh and Eighth Claims for Relief, all Defendants are now named. The Seventh and Eighth Claims for Relief name the defendant state (continued…)

For the reasons discussed below, each of these claims should be dismissed with prejudice.

I. DEFENDANTS ARE IMMUNE FROM SUIT IN THIS CASE

In deciding that "relief is not available against the named defendants" in the FAC and recommending that "the complaint be dismissed against the named defendant[s] with prejudice," the U.S. Magistrate Judge clearly delineated the various forms of immunity protecting the State, the Governor, the Governor's wife, and the state legislators. Report and Recommendation, 9 ECF No. 123. Plaintiffs have not only disregarded these admonitions by the Magistrate Judge by continuing to name these Defendants, but have also named as additional defendants the Magistrate Judge, herself, and three of the government attorneys representing the Defendants, who are also immune from suit.

A. Plaintiffs' Claims Against the State and Governor Brown Are Barred by the Eleventh Amendment

Plaintiffs' seven causes of action against the State of California and Governor Brown are barred by the Eleventh Amendment, which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

The immunity of the State from suit in federal court in cases such as this is unquestioned. "The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States, and by its own citizens as well." *Lapides v. Ed. Of Regents*, 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002) (citation omitted). [4]

(…continued)
legislators, the U.S. Magistrate Judge, Deputy Attorneys General Jonathan E. Rich and Jacquelyn Y. Young, and Deputy Legislative Counsel Cara L. Jenkins.

[4] The Eleventh Amendment makes explicit reference only to the States' immunity from suits "commenced or prosecuted against one of the United States by (continued…)

In particular, as explained by the Magistrate Judge, "[t]he Eleventh Amendment bars suits in federal court for damages or injunctive relief against California." Report and Recommendation, 8 ECF No. 123, citing *Papasan v. Allain*, 478 U.S. 265, 276 (1986) and *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013.)

A state agency is entitled to the same Eleventh Amendment immunity enjoyed by the State when a judgment against the agency "would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S. Ct. 1171, 1177, 59 L. Ed. 2d 401 (1979). Likewise, and most important for the purposes of the current motion, the bar to jurisdiction imposed by the Eleventh Amendment also applies to cases premised on federal questions and injunctions against state officials. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Cory v. White*, 457 U.S. 85, 91 (1982); *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987). An official capacity suit is, in all respects, to be treated as a suit against the State. See *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (citing *Kentucky v. Graham*, 437 U.S. 159 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

Despite suing the Governor in both his personal and official capacities, Plaintiffs fail to assert any allegations establishing a plausible claim against the Governor in his personal capacity. As the Magistrate Judge explained, "the Eleventh Amendment also bars suits for damages against the Governor in his official capacity" and the Governor's "only connection to SB 277 is his general

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(…continued)
Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. The Supreme Court nevertheless has long recognized the doctrine to apply to any suits by private parties against a State. *Alden v. Maine*, 527 U.S. 706, 712-713 (1999).

duty to enforce California law." Report and Recommendation, 9 ECF No. 123.

It is well established that "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Snoeck v. Brussa,* 153 F.3d 984, 986 (9th Cir. 1998); *see also Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 953 (9th Cir. 1983) (governor's "general duty to enforce California law . . . does not establish the requisite connection between him and the unconstitutional acts" alleged in suit claiming de jure segregation of city school system); *Shell Oil Co. v. Noel,* 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute"). Additionally, "[w]here the enforcement of a statute is the responsibility of parties other than the governor . . . the governor's general executive power [to enforce laws] is insufficient to confer jurisdiction"). *Women's Emergency Network v. Bush,* 323 F.3d 937, 949-50 (11th Cir. 2003).

All of Plaintiffs' claims brought against the Governor of the State of California are barred by operation of the Eleventh Amendment, as the Court has no jurisdiction to hear such claims. As such, the claims should be dismissed.

B. Plaintiffs' Claims Against the Governor and His Wife Are Barred by Operation of the *Noerr-Pennington* Immunity Doctrine

The "*Noerr-Pennington"* immunity doctrine holds that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Rupert v. Bond,* 68 F.Supp.3d 1142, 1156 (N.D. Cal. 2014). Conduct covered under the immunity doctrine includes speech, proposals and petitions. *Swetlik v. Crawford*, 738 F.3d 818, 830 (7th Cir. 2013) (concurring opinion); citing *Miracle Mile Associates v. Rochester*, 617 F.2d 18 (2d Cir. 1980); *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003). The doctrine encompasses any branch of government, including the executive, legislative,

judicial and administrative agencies. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The *Noerr-Pennington* immunity is also applicable to both §1983 and RICO claims. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000).

Here, the pertinent allegations against the Governor are that he colluded with lawmakers and drug companies to espouse a position on the issue of mandatory vaccinations and, when the legislation came before him, signed SB 277 into law. Plaintiffs assert that the receipt of campaign contributions was the motivation for these purported acts. However, the *Noerr-Pennington* immunity is applicable to all the alleged acts of the Governor even if, as Plaintiffs allege, the Governor also advocated for the law and worked for its passage behind the scenes, outside of the view of the public. Plaintiffs' conclusory allegations of "secret," "closed door" meetings to influence the outcome of the passage of the bill are clearly covered by *Noerr-Pennington*. *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 895 (9th Cir. 1988). In *Boone*, the Ninth Circuit held that the plaintiffs' allegations of "shadowy secret meetings and covert agreements" did not take their claim outside of *Noerr-Pennington*. *Id.* at 894-895. Likewise, while Plaintiffs allege that legislators accepted campaign contributions in exchange for passage of the law, such allegations are not sufficient to negate the *Noerr-Pennington* immunity. "Payments to public officials, in the form of honoraria or campaign contributions, is a legal and well-accepted part of our political process" and "fall within the *Noerr-Pennington* doctrine." *Id.* Thus, not only are Plaintiffs' conclusions factually unsupported, but they all clearly entail activity that the *Noerr-Pennington* doctrine covers.

The Magistrate Judge also determined that "[t]o the extent [Defendant] Gust is not shielded by Eleventh Amendment immunity, her alleged acts in support of SB 277 would be shielded by the *Noerr* doctrine and the First Amendment."

Report and Recommendation, 9 ECF No. 123, at n.9, citing *Manistee*, 227 F.3d at p. 1093 (lobbying of government protected by *Noerr* doctrine). Plaintiffs fail to dispute the application of these immunities to either the Governor or the Governor's wife.

In short, the *Noerr-Pennington* immunity has evolved into "a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa*, 437 F.3d at 931. Regardless of the inflammatory language used by Plaintiffs, their claims against the Governor and the Governor's wife, even if true, are not actionable in light of the immunity afforded under the *Noerr-Pennington* doctrine and its progeny. As such, the claims against the Governor in the SAC do not, and cannot, state a claim against them, and this motion to dismiss should be granted.

C. Claims Against Counsel for the State of California, the Governor and the Governor's Wife Are Barred by Absolute Official Immunity

Without prior leave of court, Plaintiffs have named three government attorneys as defendants in their SAC: Deputy Legislative Counsel Cara Jenkins, and Deputy Attorney Generals Jonathan E. Rich and Jacquelyn Y. Young. Plaintiffs also added U.S. Magistrate Judge Alicia G. Rosenberg as a defendant.

A government attorney representing a party in a civil action has absolute immunity from any claim for damages "to assure that . . . advocates . . . can perform their respective functions without harassment or intimidation." *Fry v. Melaragno*, 939 F.2d 832, 837 (9th Cir. 1991), citing *Butz v. Economou*, 438 U.S. 478, 512 (1978). Because of "the similarity of functions of government attorneys in civil, criminal and agency proceedings, and the numerous checks on abuses of authority inherent in the judicial process . . . [t]he reasons supporting the doctrine of absolute immunity apply with equal force regardless of the nature of the underlying action." Fry, 939 F.2d at 837, quoting *Flood v. Harrington*, 532 F.2d 1248, 1251 (9th Cir. 1976). Absolute immunity attaches so long as "the government attorney is

performing acts 'intimately associated with the judicial phase' of the litigation." *Fry v. Melaragno*, 939 F.2d 832, 837; *accord*, *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (holding that state government attorneys for the California Attorney General are immune from liability whether sued in their official or individual capacities.)

Plaintiffs have not asserted any plausible claim against these government attorneys. These claims should be dismissed with prejudice.

II. PLAINTIFFS HAVE FAILED TO PLEAD A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS BECAUSE LAWS REQUIRING MANDATORY IMMUNIZATION HAVE UNEQUIVOCALLY BEEN UPHELD AS CONSTITUTIONAL FOR OVER A CENTURY

Even if this Court should find that one or more of the Defendants are not immune, Plaintiffs' claims still fail, as a matter of law, to allege a violation of their constitutional rights by any of the Defendants. As such, any further amendment would be futile. The SAC should be dismissed without leave to amend and this action should be dismissed with prejudice.

The thrust of Plaintiffs' claims is that Defendants somehow conspired to enact SB 277, and that, in so doing, Defendants violated Plaintiffs' constitutional rights. The facial implausibility of Plaintiffs' conspiracy claims is addressed in subsequent sections of this Memorandum. However, as discussed below, naming additional defendants to the Third, Fourth, Fifth, Sixth, Seventh and Eighth Claims for Relief is unavailing because the essence of these claims and the purported object of the alleged conspiracy – the enactment of SB 277 – was a proper exercise of the Legislature's legitimate and compelling interest in protecting the public health through mandatory vaccination of school children, continuously recognized as such for decades by the U.S. Supreme Court, the California Supreme Court, and every other federal and state court that has considered the issue.

Given that Plaintiffs' claims and allegations in the SAC are materially and substantively identical to those in the FAC, Defendants incorporate by reference the

legal arguments and summary of case law on pages 11 through 17 of their Defendants' Motion to Dismiss FAC (ECF No. 105-1), and on pages 10 through 15 of the Magistrate Judge's Report and Recommendation (ECF No. 123).

A. SB 277 Does Not Violate Any of the Plaintiffs' Purported Constitutional Rights

Citing extensively from *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905), *Zucht v. King*, 260 U.S. 174 (1922), *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Abeel v. Clark*, 84 Cal. 226 (1890), the Magistrate Judge detailed the long-established, indisputable jurisprudence supporting the right of the States to enact and enforce laws requiring citizens to be vaccinated. Report and Recommendation, 10-15 ECF No. 123. Such precedent has withstood over a century of constitutional challenges and been affirmed in a multitude of federal and state courts, most notably in the United States Supreme Court and the California Supreme Court. Moreover, the federal district court in San Diego confirmed the unquestioned authority of *Jacobson* and its progeny and rejected a similar challenge to SB 277 by a separate group of plaintiffs, in *Whitlow, et al. v. Department of Education et al.*, S.D. Cal. Case No. 3:16-cv-01715-DMS-BGS (*Whitlow*). The Magistrate Judge concluded that "[t]his [C]ourt finds the reasoning in *Whitow* persuasive." Report and Recommendation, 10 ECF No. 123. In responding to the Defendants' Motions to Dismiss the FAC, Plaintiffs made no attempt to distinguish or overcome the longstanding jurisprudence supporting the constitutionality of mandatory school vaccination laws such as SB 277. Plaintiffs' SAC similarly lacks any allegations or reason for this Court to ignore this precedent.

Any further leave to amend is futile because Plaintiffs' claims fail as a matter of law. The Magistrate Judge specifically addressed each of Plaintiffs' alleged violations of their purported constitutional rights. Citing U.S. Supreme Court precedent, the Magistrate Judge detailed how and why Plaintiffs' claims fail as a matter of law, as follows.

1. *Free Exercise of Religion*

There is no constitutional right to be violated, because "'[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health and death.'" Report and Recommendation, 13 ECF No. 123 (citing *Prince*, 321 U.S. at 166-67.) As such, Plaintiffs' "personal beliefs, as distinguished from religious beliefs, are not protected by the First Amendment." *Id*. (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Whitlow*.)

2. *The Fourth Amendment*

"It is not clear how Plaintiffs believe SB 277 violates the Fourth Amendment. To the extent Plaintiffs allege violation of a right to medical privacy, the [U.S.] Supreme Court has held that: '[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease.'" Report and Recommendation, 14 ECF No. 123 (citing *Bd. of Ed. v. Earls*, 536 U.S. 822, 830-31 (2002)).

3. *Due Process*

Plaintiffs' "claims are foreclosed by [the U.S. Supreme Court's decision in] *Zucht*." Report and Recommendation, 14 ECF No. 123. "As *Jacobson* made clear," the decision of whether vaccines benefit or harm society "is a determination for the legislature, not the individual objectors." *Id*., at 14-15 (citing *Phillips v. City of New York*, 775 F.3d 538, 542-43 (2nd Cir. 2015).)

4. *Equal Protection*

Plaintiffs "have not alleged that children with [personal belief exemptions] are a suspect class . . . or that the classifications burden a fundamental right . . . Thus, the classifications are subject to rational basis review . . . Allowing [fully vaccinated children] to attend school and excluding [children not fully vaccinated] is rationally related to the State's interest in protecting public health and safety."

Report and Recommendation, 15 ECF No. 123 (citing *Whitlow*, 203 F.Supp. at 1088.)

5. *The Ninth Amendment*

"Plaintiffs *cannot state a claim*," because the Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." Report and Recommendation, 16 ECF No. 123 (emphasis added) (citing *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) and *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996).)

6. *The Thirteenth Amendment*

"[T]here are no facts supporting a claim of involuntary servitude" against the State Defendants. Report and Recommendation, at 16 ECF No. 123. Plaintiffs only direct their Thirteenth Amendment claim against the Magistrate Judge, incoherently alleging that "Defendant Rosenberg is essentially 'Making a Slave' of Plaintiffs." SAC, ECF No. 136, at ¶100.

It is beyond dispute that SB 277 is a constitutional enactment. Therefore, even if there were a shred of plausibility to Plaintiffs' claims that Defendants engaged in an alleged conspiracy, Plaintiffs' claims fail regardless because, as a matter of law, the object of that alleged conspiracy, the enactment of SB 277, was entirely lawful and, indeed, constitutional.

B. Plaintiffs' Criminal Claims Fail as a Matter of Law

In their SAC, Plaintiffs now name the State Defendants in their previous claims under various criminal statutes against the Legislative Defendants and Anne Gust. However, the Magistrate Judge clearly held that these claims fail as a matter of law, as follows.

1. *42 U.S.C. § 1986*

"Section 1986 imposes liability on a person who knows of an impending

violation of [42 U.S.C.] § 1985 but neglects to prevent it." Report and Recommendation, at p. 16 (citing *Karim-Panahi v. Los Angeles Police Dept*., 839 F.2d 621, 626 (9th Cir. 1989).) "A claim can be stated under section 1986 only if the complaint contains a valid claim under section 1985." *Id*. (citing *Karim-Panahi*, 839 F.2d at 626 and *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990).) 42 U.S.C. § 1985 prohibits individuals from (1) preventing an officer from performing duties; (2) obstructing justice and/or intimidating a party, witness, or juror; and (3) depriving persons of rights or privileges. "Plaintiffs' failure to allege a [valid] claim under § 1985 is fatal to any claim under § 1986." *Id*.

2. *18 U.S.C. §§ 175, 178, 241, 242*

Plaintiffs assert claims for relief under criminal statutes 18 U.S.C. § 175 (promoting the sale and use of biological weapons), §178 (promoting the sale and use of chemical weapons), § 241 (infringement of constitutional rights); and § 242 (deprivation of rights). SAC, ECF No. 136, at ¶¶ 141-55. However, Plaintiffs fail to explain how they have standing to assert such claims. "Private individuals may not prosecute others for alleged crimes." Report and Recommendation, 16 ECF No. 123. "The [U.S.] Supreme Court has not inferred a private right of action from the existence of a criminal statute." *Id*.; see also *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 190 (1994) ("[W]e have not suggested that a private right of action exists for all injuries caused by violations of criminal prohibitions.")

As further explained by the First Circuit, "[n]ot only are we unaware of any authority for permitting a private individual to initiate a criminal prosecution in his own name in a United States District Court, but also to sanction such a procedure would be to provide a means to circumvent the legal safeguards provided for persons accused of crime." *Keenan v. McGrath*, 328 F.2d 610, 611 (1st Cir. 1964.) Even if there were some remote basis for finding a private right of action under

these criminal statutes, the causes of actions still fail because of (1) Plaintiffs' lack of plausible allegations to support these claims; and (2) the longstanding jurisprudence supporting mandatory school vaccinations. Thus, Plaintiffs' Third, Fourth, Fifth, and Sixth Claims for Relief fail as a matter of law and should be dismissed with prejudice.

C. Plaintiffs Fail to State RICO Claims Against the Defendants

Plaintiffs' allegations that Defendants engaged in racketeering activity by "obstructing justice" in violation of 18 U.S.C. § 1503 are entirely conclusory and facially implausible. As articulated by the Magistrate Judge, "[t]he [C]ourt is hard pressed to see any way in which Plaintiffs' challenge to SB 277 could plausibly fall within RICO." Report and Recommendation, 17 ECF No. 123.

Plaintiffs were specifically instructed by the Magistrate Judge to "allege injury to their business or property by reason of a violation of [18 U.S.C.] § 1962" and to allege "facts tending to show that he or she was injured by the use or investment of racketeering income." 17-18 ECF No. 123, citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97 (1985) and *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992). Plaintiffs failed to do so. Plaintiffs fail to even plausibly articulate any sort of "[i]njury from alleged racketeering acts that generated the income" and even to that end, such allegations are "not sufficient." *Id*., at 18.

Plaintiffs assert that "under color of official right . . . the Hobbs Act could be used to prosecute political corruption as long as there was quid pro quo." SAC, ECF No. 136, at ¶ 91. Yet, there are no factual allegations to support such a claim of quid pro quo. All elements of RICO liability must be pled particularly: "Rule 9(b)'s requirement that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity applies to civil RICO fraud claims." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-1066 (9th Cir. 2004). "To satisfy Rule 9(b), a pleading must identify the who, what, when, where,

and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). Under Rule 9(b), "the complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

A cursory review of the overbroad and conclusory RICO allegations in the SAC clearly shows a complete failure to set forth facts with the required specificity. Plaintiffs merely allege in their pleading that certain lawmakers have taken political contributions from pharmaceutical companies and had some "closed door" meetings, and that Governor Brown entered into an enterprise with the legislators and the pharmaceutical companies to pass a law based on science that Plaintiffs reject. Thus, Plaintiffs conclude, all the Defendants engaged in a criminal enterprise aimed at "extorting" Plaintiffs' rights. This is simply insufficient to support a claim under RICO. "Absent allegations of a viable RICO violation, Plaintiffs' allegations of a conspiracy to violate RICO under § 1962(d) also fail to state a claim." Report and Recommendation, 18 ECF No. 123 (citing *Sanford v. MemberWorks*, 625 F.3d 550, 559 (9th Cir. 2010).

Given that Plaintiffs' RICO claims in their SAC are identical to those in the FAC, the State Defendants incorporate the legal arguments on pages 17 through 24 of their previous Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Second Amended Complaint, without leave to amend, and dismiss this action with prejudice.

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Dated: August 10, 2017

Respectfully submitted,

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*Pursuant to Local Rule 5-4.3.4 (a) (2) (i), the filer of this document attests that all other signatories listed on whose behalf the filing is submitted concur in the filing's content and have authorized the filing.

/s/ Jonathan E. Rich
JONATHAN E. RICH

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CERTIFICATE OF SERVICE

Case Name: **Middleton, et al. v. Pan et al.** No. **2:16-cv-05224-SVW-AGR**

I hereby certify that on August 10, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS STATE OF CALIFORNIA, GOVERNOR BROWN, ANNE GUST, AND DEPUTY ATTORNEYS GENERAL JONATHAN E. RICH AND JACQUELYN Y. YOUNG, TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On August 10, 2017, I caused to be delivered the foregoing document(s) via email to Plaintiff Travis Middleton, by agreement with him, to the following address: Travis_m_93101@yahoo.com.

On August 10, 2017, I caused to be delivered the foregoing document(s) by first class mail to the following non-CM/ECF participants:

SEE ATTACHED SERVICE LIST.

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 August 10, 2017, at Los Angeles, California.

Jonathan E. Rich	*/s/ Jonathan E. Rich*
Declarant	Signature

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