INTRODUCTION

Appellant (Plaintiff) Mitchell J. Pearce appeals from the Judgment entered following orders granting Appellees' motions to dismiss. Pearce sued for violations of, and conspiracy to violate, 42 U.S.C. § 1983, the RICO Act, California's Unruh Act, malicious prosecution, and for assault and battery. Pearce alleges that Appellees maliciously prosecuted proceedings to revoke his professional licenses, fabricated, concealed, and destroyed evidence, unlawfully searched him during the revocation hearings, and revoked his license on impermissible grounds for which Pearce received no notice. In ruling that the complaint failed to state a claim, the district court ignored facts pleaded in the complaint, assumed facts not pleaded, and misapplied settled law. On de novo review, this Court should reverse.

JURISDICTIONAL STATEMENT

(A) District court jurisdiction is based on 28 U.S.C. § 1331. The first through third, seventh, ninth, 11th - 13th, 15th - 25th, and 27th - 31st claims arise under 18 U.S.C. § 1961 et seq. and 42 U.S.C. §§ 1983, 1985.

The remaining state-law claims derive from the "same nucleus of operative fact" as the federal claims and are subject to pendent jurisdiction. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1091 (9th Cir. 1989).

(B) This Court's jurisdiction is based on a final judgment entered on January 3, 2007 that disposed of all parties' claims. 28 U.S.C. § 1291, FED. R. APP. P. 28(a)(4)(D).

(C) Pearce filed his Notice of Appeal on February 1, 2007.

ISSUES PRESENTED FOR REVIEW

1. 42 U.S.C. §1983 statutes of limitations.

A. Accrual and tolling.

B. Discovery rule

C. Equitable estoppel

2. Whether immunity is available for:

A. Knowingly providing false information to a licensing board.

B. Complaining witnesses where the licensing board does not conduct an investigation.

C. Licensing board members that have no jurisdiction to bring an accusation.

D. Persons who fabricate, conceal, or destroy evidence.

E. Persons who fabricate licensing-board accusations based on the licensee's exercise of constitutional rights.

3. Applicability of claim preclusion and release.

A. Claim preclusion based on prior judgment.

(1) Identity of claims.

(2) Identity of parties.

B. Defense of release; prior settlement agreement.

(1) Implied incorporation into complaint.

(2) Judicial notice.

4. Special motion to strike (anti-SLAPP); likelihood of prevailing.

5. Sufficiency of color-of-state-law allegations.

6. Sufficiency of conspiracy allegations.

7. Sufficiency of RICO allegations

A. Statute of limitations, accrual, and tolling.

B. Res judicata.

C. Alleging "separate structure" not required.

STATEMENT OF THE CASE

Nature of the case.

This is a civil action for compensatory and punitive damages. All claims for relief arose out of administrative proceedings by the California Board of Chiropractic Examiners ("Chiropractic Board") and the California Acupuncture Board to revoke Pearce's licenses to practice.

Pearce's 31 claims are in four categories:

(1) Federal claims for violation of, and conspiracy to violate, 42 U.S.C. §1983. The violations denied Pearce his First Amendment right to free association, his Fourth Amendment right to freedom from unreasonable search, and his right to due process of law under the Fifth and 14th Amendments. The violations include defamation, failure to provide notice of and hearing on charges and penalties, fabrication, concealment, and destruction of evidence, unreasonable searches, license revocation on unlawful grounds, and conspiracy to commit these acts.

(2) Pendent claims for violation of, and conspiracy to violate, Pearce's civil rights under CAL. CIV. CODE §§ 52 and 52.1.

(3) Pendent claims for malicious prosecution and assault and battery.

(4) Federal claims for violation of 18 U.S.C. § 1961 et seq. Pearce alleges that certain Appellees formed enterprises to injure Pearce in his business by using the U.S. mail to submit false insurance claims in patterns and practices of criminal fraud and fabrication of evidence.

Parties

Appellant

Pearce is a chiropractor, acupuncturist, and Qualified Medical Examiner appointed by the Calif. Dept. of Industrial Relations. (ER 73:4).[1]

Appellees

Gaylyn Stuart (f.k.a. Gaylyn Machado, hereinafter "Stuart" (ER 74:10), treated by chiropractor **Bruce Love** (ER 75:11), filed a workers' compensation claim through her attorney, **Susan Levin**. (ER 75:12). Attorneys **David Fulton, Denine Guy** (ER 75:13) and **Richard Alexander** (ER 76:16) later brought state-court actions against Pearce on behalf of Stuart.

Deputy Attorney General **Carol Romeo** (73:5) prosecuted an accusation against Pearce before the Chiropractic Board ("*Chiropractic Board v. Pearce"*). **Vivien Hersh** and **Susan Meadows** are supervisors in the Attorney General's office. (ER 77:18). **James Sharp** is a Department of Consumer Affairs investigator assigned to investigate Stuart's claim. (ER 73:6)

Vivian Davis and **Elizabeth Ware** were Executive Directors of the Chiropractic Board. (ER 74:9). **Lloyd E. Boland, John Bovee, Jacalyn Buettner, John Deronde, Stephen Foreman, R. Lloyd Friesen, Rosa Mei Lee, Michael Martello, Craig Missakian, Deborah E. Pate, Jeffrey Steinhardt,** and **Sharon Ufberg** are Chiropractic Board Members. (ER 74:8, 85:40) (Davis, Ware, and the 12 board members hereinafter "Chiropractic Board Defendants").

Chiropractor **C. Brett Sullivan** (ER 76:14) assisted in the malicious prosecution of

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[1.] References to Appellant's Excerpts of The Record are ER [page number]. References to the First Amended Complaint ("FAC") are ER [page number] **:** [FAC paragraph number].

Chiropractic Board v. Pearce. (ER 126:164-167).

Defendants **Patricia Brickman** (ER 77:20) and **Lynde Scheffer** (ER 78:21) were witnesses who aided and abetted the malicious prosecution of *Chiropractic Board v. Pearce*.

Attorney **Defendant Winifred Botha** represented Alexander in Pearce's state-court actions for defamation and malicious prosecution. (ER 76:15, 105:91).

Deputy Attorney General **Lawrence Mercer** (ER 77:17) and attorney general supervisors Hersh and Meadows (ER 77:18) maliciously prosecuted *Acupuncture Board v. Pearce*. (Romeo, Mercer, Hersh, and Meadows, hereinafter collectively "AG Defendants").

The AG Defendants suborned psychologist **Peter Berman** (ER 77:19) to provide a false report with which to prosecute *Acupuncture Board v. Pearce*.

Course of Proceedings and Disposition Below

Docket no.	Date	ER no.	Document or Event
1	**08/19/02**	-	**Complaint** filed
106	05/04/04	165	Order (1) granting Alexander's motion to dismiss with leave to amend and (2) deferring ruling on special motion to strike.
113	**06/3/04**	70	**First Amended Complaint**
148	04/19/05	63	Order granting Scheffer's motion to dismiss FAC
149	04/19/05	48	Order (1) Granting Alexander's motion to dismiss FAC, (2) granting special motion to strike.
150	04/20/05	38	Order granting Fulton's & Guy's motion to dismiss FAC.
184	02/9/06	36	Botha's stipulation to be bound by order on Alexander's motion to dismiss.
187	05/10/06	25	Love's stipulation to be bound by orders on other motions to dismiss.
198	01/3/07	7	Order granting State Defendants' and Stuart's motion to dismiss FAC

199	01/3/07	17	Order granting Levin's motion to dismiss FAC
200	**01/3/07**	5	**Judgment** in favor of Defendants.
203	**02/1/07**	1	**Notice of Appeal**

STATEMENT OF FACTS

Stuart et al. file complaint against Pearce with the Chiropractic Board.

In 1991, Stuart, through her attorney Levin (ER 75:12, 81:32), filed a workers' compensation claim with State Compensation Insurance Fund ("SCIF") (ER 74:10, 78:24-32), supported by treating chiropractor, Love. (ER 75:11, 79:25, 81:29-31, 83:35-36, 94:60, 103:85, 124:156, 149:266). Pearce performed an independent examination of Stuart on August 6, 1991 at the behest of SCIF. (ER 78:24). To evaluate Stuart's claim that her constipation and urinary difficulties were work-injury related, Pearce performed a standard digital examination to test anal muscle tone and to rule out a tumor. (ER 79:26). Pearce's female office assistant was present. (*Ibid*.).

Pearce reported to SCIF that Stuart's symptoms did not result from an industrial injury (ER 80:28), Love's care was in appropriate (*ibid*.), and Stuart and Love were likely perpetrating insurance fraud. (ER 81:29). Unbeknownst to Pearce, Love was himself defending accusations of fraud and incompetence by the Chiropractic Board. (*Ibid*.). SCIF disputed Stuart's claim on the ground of fraud. (ER 81:30).

To discredit Pearce's report, Stuart, Love, and Levin recruited Fulton and Guy. (ER 82:34). On October 4, 1991, Stuart, through Fulton & Guy, filed a complaint with the Chiropractic Board alleging that Pearce sexually battered Stuart. (ER 83:31-34, 37).

Pearce prevails in civil action filed by Stuart.

On January 23, 1992, Stuart (f.k.a. Machado), through Fulton & Guy, sued Pearce for

sexual battery and malpractice. (*Machado v. Pearce*, Santa Clara County Superior Court case no. 1-92-CV-718197). (ER 84:38). Stuart dismissed her sexual battery claim. On August 13, 1993, the court entered judgment for Pearce on the remaining negligence count. (ER 91:53).

Chiropractic Board conspires with Sullivan to write report on Pearce.

The Chiropractic Board Defendants knew Sullivan supported their desire to stop chiropractors from performing rectal exams or diagnosing the mental state of patients, so the board hired Sullivan to write a report to support the accusation against Pearce. (ER 89:50-51).

On March 29, 1992, Sullivan wrote a report claiming that in examining Stuart and giving an opinion of her mental state, Pearce acted beyond the scope of chiropractic practice. (ER 90:51). Sullivan's report included facts that disclosed his prejudice, thus making his report incompetent as a basis for an accusation. (*Ibid.*). The Chiropractic Board Defendants instructed Sullivan to revise his report deleting the indications of bias. (*Ibid.*). Sullivan complied and backdated his revised report. (*Ibid.*). The Chiropractic Board Defendants concealed Sullivan's original report and prevented Pearce from obtaining a copy until after they had revoked Pearce's license. (ER 90:52).

Sharp fails to investigate complaints.

Sharp refused to interview Pearce's office assistant, who had witnessed Pearce's examination of Stuart (ER 88:45), and to perform any other investigation. In return for agreeing to testify against Pearce, the Chiropractic Board Defendants dismissed their accusation against Love. (ER 89:48).

Chiropractic Board commences accusation against Pearce.

On February 17, 1993, the Chiropractic Board Defendants commenced *Chiropractic Board v. Pearce*, alleging that Pearce sexually battered Stuart and that his rectal examination and psychological opinion of Stuart exceeded the scope of chiropractic practice. (ER 85:40). The Chiropractic Board Members, Sharp, and the AG Defendants (collectively "State Defendants") all knew Stuart's complaint was false and that their accusation lacked probable cause. (ER 85:40-43, 88:47, 89:49).

The State Defendants brought the accusation for the illegal purpose of promulgating their baseless opinion that chiropractors should not perform examinations or adjustments via the rectum or give opinions on a patient's mental state. (ER 85:40-44, 88:46). Yet CAL. BUS. & PROF. CODE, APP. I, §7, which expressly authorizes chiropractors "to use all necessary mechanical . . . measures incident to the care of the body. . . ." (ER 86:41, 87:43, 113:113) and to diagnose to their patients. (CAL. BUS. & PROF. CODE APP. I §§ 5 & 7). (ER 87:43, 113:113).

Levin and Fulton & Guy conspire with Alexander to discredit Pearce.

Fulton and Guy conspired to, and did, abet the prosecution of *Chiropractic Board v. Pearce*. (ER 91: 53). Their motive was to establish that they had brought *Machado v. Pearce* with probable cause, thereby precluding a malicious prosecution action against them by Pearce. (*Ibid.*). Levin and Fulton & Guy enlisted Alexander (ER 91: 53, 91:54), who agreed to file a second lawsuit against Pearce based on the same allegations as *Machado v. Pearce*, despite knowing that a second action was barred by res judicata. (*Ibid.*). Alexander further agreed to, and did, cause the publication of libelous newspaper articles about Pearce. (*Ibid.*). Stuart, Love, Levin, Fulton & Guy, Alexander, and Sharp intended for the articles to facilitate prosecution of *Chiropractic Board v. Pearce* by attracting additional women to

complain against Pearce. (ER 91:54).

On November 9, 1994, in furtherance of the conspiracy, Alexander mailed a letter to Romeo falsely stating that Pearce had confessed to sexually battering Stuart and had suborned the SCIF adjustor to testify falsely in *Machado v. Pearce*. Alexander's letter also falsely stated that Pearce had burned down his wife's house and attempted to murder her. (ER 92:56).

Certain Appellees conspire to defame Pearce and to encourage prosecution of *Chiropractic Board v. Pearce*.

Stuart, Love, Levin, Fulton & Guy, Alexander, and Sharp conspired to, and did, solicit reporter Scott Winokur to write a false newspaper article about Pearce. (ER 92:56). Alexander mailed letters to Winokur restating Stuart's sexual battery claims. On June 15, 1995, the San Francisco Examiner published a front-page story by Winokur titled, "Suit Says Insurer Helped Doctor to Hide Sex Attack." (ER 93:57). The article included defamatory statements about Pearce by Stuart and Levin, as well as an accusation of criminal sexual battery by Romeo. (ER 94:59). Appellees knew these statements were false. (ER 93:58).

Alexander further caused the San Jose Mercury to publish an article on July 5, 1995, entitled "Doctor, 2 Others, Sued in Sex Case." The article republished the above-described defamatory statements. (ER 95:61).

On June 15, 1995, Alexander commenced superior court action no. 1-95-CV-750395, entitled *Stuart v. State Compensation Ins. Fund et al.,* in which Pearce was named as a defendant (hereinafter *Stuart v. SCIF and Pearce*). The action alleged the same bogus claims as *Machado v. Pearce*. On February 26, 1996, the court entered a judgment of dismissal.

Romeo refused Pearce's entreaties to review the record from *Machado v. Pearce* that demonstrated Pearce's innocence (ER 95:62), stating that Stuart's attorneys were hounding

her to continue prosecuting *Chiropractic Board v. Pearce*. (*Ibid*.).

Romeo lies to Judge Lew to secure search of Pearce.

On August 31, 1995 and March 5, 1998, without notice to Pearce, Romeo wrote ex parte communications to Hon. Jonathan Lew, Assistant Chief Administrative Law Judge, falsely claiming that Pearce had been stalking witnesses. (ER 95:63, 103:86). Judge Lew refused Romeo's request for an order that Pearce be searched before each hearing. (*Ibid*.).

The hearing on the Chiropractic Board's accusation began on September 7, 1995. Romeo falsely told the Administrative Law Judge ("ALJ") presiding at the hearing that Judge Lew had granted Romeo's request to have Pearce searched. (ER 96:64). For the first three days of the hearing, based on Romeo's false statement, the ALJ permitted investigator Sharp to bodily pat-search Pearce each time he entered the hearing room. For the first three days of the hearing, based on Romeo's false statement, the ALJ permitted investigator Sharp to bodily pat-search Pearce each time he entered the hearing room. (ER 96:64, 65). During each search, Sharp grabbed Pearce's testicles while grinning contemptuously. (*Ibid.*). For the next 11 days, Pearce was searched with a hand-held metal detector. (*Ibid*.). The ALJ further ordered that Pearce be guarded by a uniformed officer during the hearings. (*Ibid*.).

The ALJ assumed Judge Lew had issued a search order based on probable cause to believe Pearce posed a threat of battery to court personnel and witnesses. (*Id*.). This necessarily prejudiced the ALJ to believe Pearce had battered Stuart. (ER 96:64, 96:65).

Newspaper articles attract more witnesses.

The libelous newspaper articles planted by Alexander brought forth additional women who falsely claimed Pearce had sexually battered them. These women included Scheffer and Brickman as well as Lezlie Morrow (not sued herein). (ER 97:66-69). No one conducted an

investigation to verify the claims of these witnesses. (ER 99:70).

Pearce sues Alexander for defamation.

On June 14, 1996, Pearce filed a state-court defamation action (case no. 1-96-CV-758688, *see* ER 178-52), entitled *Pearce v. Machdo (a.k.a. Stuart) and Alexander*. (ER 102:84-85, 104:89, 107:96, 111:106, 115:117,119).

Witnesses conspire with Sharp to fabricate reports.

Scheffer falsely reported to investigator Sharp that in the late 1980s or early 1990s, while teaching at Palmer College of Chiropractic, Pearce had assaulted a student named Julie Snider. When Sharp learned Pearce had never met Snider and was not teaching at Palmer during that time, he told Scheffer to substitute a story falsely alleging that Pearce had conducted an unnecessary breast examination on Scheffer. (ER 97:67). Scheffer complied by fabricating a written complaint of a breast examination that was entered into evidence. But at the hearing, Scheffer testified contrary to her report. (ER 100:75).

Brickman had consulted Pearce in 1984 because of an injury to her tail bone and other complaints. (ER 98:68). She did not pay for her x-rays and Pearce referred the bill to collection. (*Ibid*.). In retaliation, Brickman complained to the Chiropractic Board that Pearce had sexually assaulted her. (*Ibid*.). The board rejected the complaint. But eleven years later, the board used Brickman's complaint to support its accusation against Pearce, claiming that his adjustment of Brickman's tail bone through the rectum was outside the proper scope of chiropractic practice. (*Ibid*.). Brickman testified that Pearce's adjustment had resolved her tail bone problem. (ER 100:74). Although this information had been available to Sharp, he did not include it in his report. (*Ibid*.).

Morrow claimed she had confirmed through her diary that Pearce taught her how to

self-examine her breasts no earlier than 1987. (ER 98:69, 100:76). Pearce's records established he had seen Morrow only in 1983 for problems with her jaw, neck, back, lungs, and knee. (*Ibid*.).

Sharp defies subpoena of his file.

Pearce served Sharp with a subpoena for production of his investigation file. (ER 100:77). Sharp and the Chiropractic Board defied the subpoena, refused to release the file, and later destroyed it. (*Ibid*.).

Chiropractic Board revokes Pearce's license

In November 1996, the Chiropractic Board issued its decision revoking Pearce's license. (ER 37-6 to 37-2[2], *see* ER 101:78). The decision exonerated Pearce of sexual battery, but sustained the charge that he practiced outside the proper scope of chiropractic practice by performing a rectal examination and by making a psychological diagnosis of Stuart. (*Ibid*.).

The Chiropractic Board revoked on the further grounds that Pearce: (1) failed to get patient consent for an examination, (2) dated a patient's relative, and (3) had an improper attitude. (*Id*.). Pearce never received notice of these accusations. (ER 100:78, 113:111, 113, 140:229, 147:258). CAL. BUS. & PROF. CODE § 475(c) specifically prohibits the revocation of a professional license on ground no. (3). (ER 100:78).

Chiropractic Board's decision vacated by writ of mandate.

Pearce petitioned for administrative mandate *(Pearce v. Chiropractic Board*, case no. 1-96-CV-763031) to vacate the Chiropractic Board's decision. (ER 101:79). In July 1997,

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[2.] Pearce's Request for Judicial Notice (ER 37-1) and Alexander's Request for Judicial Notice (ER 187-1) were last-minute additions to Appellant's Excerpts of the Record, hence the hyphenated page numbers.

the court granted the petition and remanded: (1) to hear evidence on the suppression of Sullivan's original report, (2) to hear evidence on the Alexander-Sharp agreement to plant newspaper articles, (3) to permit full cross-examination of Morrow, and (4) to reconsider the decision in light of the lack of notice and other due process violations. (*Ibid*.).

Pearce sues for malicious prosecution of *Stuart v. SCIF and Pearce*.

On February 24, 1997, Pearce filed *Pearce v. Alexander et al*. (superior court case no. 1-97-CV-764308, *see* ER 178-12), for malicious prosecution of *Machado v. SCIF and Pearce*. (ER 102:84-85, 106:94, 111:106, 115:117, 119). The court ordered the case consolidated with *Pearce v. Machado and Alexander*. (*See supra*, p. 14; the two cases hereinafter "state court action"). *Chiropractic Board v. Pearce* did not conclude until some four years later. And since a favorable termination of *Chiropractic Board v. Pearce* was an essential element of a cause of action for malicious prosecution of that proceeding, Pearce did not plead malicious prosecution of *Chiropractic Board v. Pearce* in the state court action. (*See* ER 178-12).

Chiropractic Board holds remand hearing.

In March 1998, the Chiropractic Board held the remand hearing ordered by the superior court. (ER 101:80). Morrow, having previously testified that Pearce taught her to do a self breast examination no earlier than 1987 (ER 100:76), testified at the remand hearing that a person from the attorney general's office had convinced her to change her prior testimony and she agreed. Morrow then tesitfied that Pearce performed a breast examination on her in 1983. (ER 101: 80).

Sullivan testified he had given his original March 29, 1993 report to Sharp and was later instructed by the Chiropractic Board to change it. (ER 102:81). Sharp testified that he

had never seen Sullivan's original report. Pearce again subpoenaed Sharp's investigative file (ER 102:82). Sharp testified that he had destroyed it after receiving the earlier subpoena. (*Ibid*.)

In the Chiropractic Board proceeding, Alexander worked in concert with Romeo. (ER 105:90). During a break in his testimony in *Chiropractic Board v. Pearce*, Alexander told Romeo that they had "got" Pearce and coached Romeo on how to further question him. (ER 103:85).

Chiropractic Board again revokes license; Pearce again petitions for mandate.

On September 2, 1998, the Chiropractic Board again revoked Pearce's license. (ER 103:87). Pearce again petitioned for mandate (case no. 1-98-CV-776968). (ER 104:88). Pearce alleged: (1) The evidence against him was insufficient; (2) Pearce's examination and diagnosis of Stuart were within the standard of care; (3) by basing the revocation in part on the ground that Pearce dated the relative of a patient, the board violated Pearce's First Amendment right to free association; (4) by basing its revocation in part on Pearce's attitude, the board violated CAL. BUS. & PROF. CODE § 475; (5) the board denied Pearce his Fifth and 14th Amendment right to due process by (a) increasing without notice the penalty imposed in retaliation for Pearce having filed his writ petition and (b) finding him guilty of charges for which he had not received notice, namely, (i) not obtaining patient consent, (ii) dating a patient's relative, (iii) improper attitude, and (iv) inappropriate examination of Morrow in 1983, as opposed to 1987 as alleged in the accusation. (*Ibid*.).

Superior court denies mandate; court of appeal reverses.

In March 1999, the superior court denied Pearce's second writ petition (*Id*.). Pearce appealed the order. (*Id*.). On January 8, 2001, the court of appeal reversed and remanded

(ER 110:104), holding that the superior court had failed to independently determine witness credibility. (ER 113:110).

Alexander, Botha, and Romeo create a false report to obtain a TRO.

To cover up threats of violence against Pearce and to cover up Romeo's and Sharp's wrongdoings, Alexander, Botha, and Romeo (ER 105:91, 108:99) conspired to discredit Pearce by having the Acupuncture Board file an accusation alleging that Pearce was mentally ill. (ER 109:104). Alexander suborned two psychologists, whom he had hired as experts in prior cases, Louis and Diana Everstine to fabricate a false report on Pearce and to destroy evidence that refuted the report. (*Id.*). The Everstines did so, characterizing Pearce as delusional, paranoid, and a danger to Alexander, his attorneys, the Chiropractic Board, the Court, and witnesses. (*Id.*).

On October 12, 1999, in the state court action, and based on the falsified Everstine report, the court issued a temporary restraining order that Pearce stay away from Alexander and Botha. (106:93). The court issued a protective order that neither the TRO nor any related information be disseminated other than to the parties and the police. (*Ibid.*). Alexander promptly violated the order by sending a copy of the TRO to Romeo, who, as Alexander had planned, copied it to the Chiropractic Board and Acupuncture Board. (ER 106:94, 107:97).

AG Defendants file *Acupuncture Board v. Pearce*.

Based on the TRO, Mercer, Hersh and Meadows obtained an order from the Acupuncture Board to have Pearce examined by Berman. (ER 107:97, 109:102). The AG Defendants recruited Berman to conduct the examination, knowing he would produce a report serving their purposes. (*Id.*).

At the TRO hearing, the Everstine report was exposed as false. (108:98). Nonetheless,

the AG Defendants forced Pearce to be examined by Berman and forbade Pearce from recording the examination by threatening summary license revocation. (ER 109:102-103). Using the discredited Everstine report as a model, Berman wrote a report falsely stating that Pearce suffered from the same disorders diagnosed by the Everstines and that Pearce was likely to retaliate with lawsuits against any patient who testified against him. (ER 109:103). On May 9, 2001, based solely on Berman's report, the AG defendants commenced *Acupuncture Board v. Pearce* to revoke Pearce's acupuncture license. (ER 109:103, 114:116, 115:118, 142:237, 143:243, 144:252).

Superior Court issues writ of mandate exonerating Pearce.

At the May 21 and June 15, 2001 the superior court remand hearing in *Pearce v. Chiropractic Board*, the board admitted that it was not lawful to prosecute Pearce for his attitude. (ER 113:110-111)

On September 6, 2001, after reviewing witness credibility per the Court of Appeal, the superior court issued a peremptory writ vacating the Chiropractic Board's decision and restoring Pearce's license. (ER 114:114). The court ruled: (1) in examining the complaining patients, Pearce acted in accordance with the rules stated in the Chiropractic Board's licensing examinations (ER 113:113), (2) the board violated Pearce's due-process rights by failing to give notice of the consent, dating, and attitude charges (*ibid.*), and (3) there was insufficient evidence to sustain any of the board's decisions. (*Ibid.*). The writ became final on November 5, 2001. (ER 114:115).

Settlement of state court actions.

Meanwhile, the parties reached a mediated settlement in the state court action. (ER 111:106). The agreement, handwritten at the mediation (ER 178-2), provides that only the

causes of action pleaded in the two complaints were settled and that Alexander's attorney would prepare a formal settlement agreement. (ER 111:106, 112:109). The agreement did not include a waiver of the provisions of CAL. CIV. CODE § 1542 (general release does not extend to claims not known or suspected to exist). (*See* ER 178-2). Nor did Alexander's counsel prepare a formal settlement agreement. (*Ibid.*).[3] Per the agreement, Pearce filed a Request for Dismissal in each case. (ER 178-10, 178-60). The court entered judgment of dismissal on October 25, 2001.

Alexander abets malicious prosecution of *Acupuncture Board v. Pearce*.

On July 5, 2001,the Everstines repudiated their report. (ER 112:108). In late 2001, Alexander called at least one of Pearce's patients and exhorted her to complain about Pearce to the Acupuncture Board. (ER 115:117).

Berman refused to retract his report (ER 114:116) and the AG Defendants continued prosecuting *Acupuncture Board v. Pearce*. (*Ibid.*).

Pearce prevails in *Acupuncture Board v. Pearce*.

Beginning January 28, 2002, the Acupuncture Board held a hearing on its accusation against Pearce before Hon. Jonathon Lew. (ER115:118). Judge Lew stated on the first day that he had never authorized the searches of Pearce in *Chiropractic Board v. Pearce*, as claimed by Romeo (*Ibid.*; *see supra* pp. 12-13). Judge Lew found in favor of Pearce (ER 116:120) and the Acupuncture Board adopted the decision on May 16, 2002. (ER 116:121).

Pearce commenced this action on August 19, 2002.

SUMMARY OF ARGUMENT

1. The statute of limitations does not bar Pearce's claims.

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[3] After Alexander's counsel failed to draft a proposed formal settlement agreement, Pearce drafted one. But Alexander refused to sign it and it was never signed by any party.

A. The limitation period for Pearce's § 1983 claims was tolled while the license-revocation proceedings against him were pending.

B. Pearce's claims did not accrue until the license-revocation proceedings against him terminated.

C. The discovery rule delayed the accrual of the causes of action for assault and battery, violations of the Unruh Act, and § 1983 based on illegal searches.

D. Appellees are equitably estopped from asserting the statute of limitations defense for the fourth and fifth counts.

2. Appellees are not immune.

A. No immunity for knowingly providing false information to a licensing board.

B. No Immunity for complaining witnesses where the licensing board does not conduct an investigation.

C. Appellees are not immune on the ground that the licensing boards, not they, commenced the accusations against Pearce.

D. The board members are not immune because there was a complete absence of jurisdiction to bring accusations against Pearce concerning his attitude or the impropriety of the rectal exam or diagnosis of Stuart.

E. The AG Defendants are not immune for prosecuting *Acupuncture Board v. Pearce* in retaliation for Pearce's successful defense of *Chiropractic Board v. Pearce* and based on Pearce's First-Amendment-protected activity.

F. Appellees have no immunity for fabricating, concealing, or destroying evidence.

3. Pearce's claims for malicious prosecution are not defeated by the defenses of claim preclusion or release.

A. The original decision by the Chiropractic Board established that the sexual battery accusation was brought without probable cause.

B. Claim preclusion does not apply because Pearce did not plead or dismiss a cause of action for the malicious prosecution of *Chiropractic Board v. Pearce* or *Acupuncture Board v. Pearce* in his state court actions.

C. Claim preclusion does not apply because the claims in the state court action and the claims in the present action allege violations of different primary rights.

D. Pearce's claims for the malicious prosecution of *Chiropractic Board v. Pearce* and *Acupuncture Board v. Pearce* had not accrued and thus were not available to be pleaded in the state court action.

E. As to Appellees Fulton & Guy, Love, Romeo, Sharp, Sullivan, Scheffer, Brickman, the Chiropractic Board members, and Botha, the "identity of parties" requirement for claim preclusion is not present.

F. The defense of release fails because the court may not deem the hand written agreement to be impliedly incorporated by reference into the FAC.

G. The defense of release fails because the court may not take judicial notice of the terms of the agreement in the state court action.

4. If this court reverses the order striking the 6th count (malicious prosecution) as to Alexander, it must reverse the orders granting his special motion to strike and awarding him attorney fees.

5. The claims for violating 42 U.S.C. § 1983 allege that Appellees acted under color of state law

6. The 12th, 16th, 25th, 27th, and 28th claims allege civil rights violations, not just

conspiracies.

7. The FAC states facts alleging claims for RICO violations.

A. The RICO activities of Alexander and Botha occurred within four years before Pearce commenced this action.

B. Pearce's RICO claims did not accrue, or alternatively were tolled, until after the conclusion of the administrative proceedings against him.

C. Pearce's RICO claims are not barred by res judicata.

D. RICO claims need not allege a "separate structure."

ARGUMENT

1. Reviewability and Standard of Review.

A. Reviewability.

Appellant seeks review of the district court's orders granting five motions to dismiss without leave to amend. (ER 7, 17, 38, 48, 63).[4] The court ruled that the FAC failed to allege facts sufficient to state a claim. FED. R. CIV. P. 12(b)(6). (*Ibid.*). Pearce raised each issue in his FAC (ER 70) and in his papers in opposition to defendants' motions. (*See* Reporter's Transcripts "RT," 2/21/03, 3/14/03, 8/27/04, 10/14/05, 12/15/06).

B. The Standard of Review is De Novo.

A dismissal under FED. R. CIV. P. 12(b)(6) is reviewed de novo. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

C. The Court Must Accept the Truth of the Facts Pleaded.

On motion to dismiss, the moving party has the burden of proving that it is "beyond

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[4] The district court granted Alexander's motion to dismiss the original complaint with leave to amend (ER 165) and did not rule on the other motions. (*See* docket nos. 96, 102, 106). The court then granted five motions to dismiss the FAC without leave to amend.

doubt that the plaintiff can prove no set of facts in support of his claim." *Coney v. Gibson*, 355 U.S. 41, 45-46 (1957); *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000). A motion to dismiss admits the pleaded facts for the purpose of the complaint's legal sufficiency. *United States v. Geisler*, 174 F.2d 992, 998 (7th Cir. 1949).

> The trial court must read the facts alleged in the complaint "generously," drawing all reasonable inferences in favor of the party opposing the motion. The court's role does not extend to weighing the evidence that might be introduced at trial. The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

Szoke v. Carter, 165 F.R.D. 34, 36-37 (D.N.Y. 1996), *quoting in part Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Here, the court simply could not conceive that the nefarious conspiracies alleged in the FAC could have occurred. (*See, e.g.*, ER 42 (Pearce's conspiracy allegations "seemingly unbelievable"), ER 61 ("some of the facts pleaded seem unbelievable"), ER 66 (allegations "difficult to accept"). But rule 12(b)(6) "does not countenance dismissals based on the judge's disbelief of the complaint's factual allegations." *Neitzke v Williams*, 490 U.S. 319, 327 (1989) (different holding superseded by statute), *Soliman v. Philip Morris, Inc.*, 311 F.3d 966 (9th Cir. 2002), *Hardy v. Vial*, 48 Cal. 2d 577, 580 (1957) (conspiracy to ruin a professional career), *Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 & n.9 (1983) (court incorrectly interpreted complaint as containing word "only").

Nor may the court read into the complaint allegations not pleaded, as the court did here. (*See, e.g.,* ER 20 (court assumes Chiropractic Board conducted independent investigation), ER 18, 54, 168, 171 (court assumes agreement for settlement of state court action included claims pleaded herein).

2. Pearce's § 1983 Claims Are not Barred by the Statute of Limitations.

A. Pearce's 42 U.S.C. § 1983 Claims Did not Accrue Until the Favorable Termination of the Chiropractic and Acupuncture Board Proceedings.

The district court ruled that the first through third, seventh, ninth, 11th through 13th, 15th through 19th, and 21st through 25th counts were barred by the statute of limitations because the incidents giving rise to those claims occurred more than one year before Pearce filed his Complaint. At the time, the applicable limitation period was one year under former CAL. CIV. PROC. CODE § 340 *amended by* 2002 CA ALS 448.

A § 1983 action lies for malicious prosecution "intended to subject a person to a denial of constitutional rights." *See Bretz v. Kelman,* 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc). The federal court adopts the forum state's elements of a malicious prosecution claim. *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987). Those elements include the termination of the maliciously-prosecuted action in the plaintiff's favor. *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 341 (2004). A cause of action does not accrue until all elements have occurred. *United States v. Gutterman*, 701 F.2d 104, 105 (9th Cir. 1983). Inexplicably, the court here ruled that "[a] favorable determination of Pearce's Chiropractic Board proceedings is not a necessary element of Pearce's [§ 1983] claim. . . ." (ER 169). *Chiropractic Board v. Pearce* did not terminate in Pearce's favor until September 6, 2001 and *Acupuncture Board v. Pearce* did not end until May 16, 2002.

The favorable-termination element applies to claims for malicious prosecution of an administrative proceeding. *Westlake Community Hospital v. Superior Court of Los Angeles County*, 17 Cal. 3d 465 (1976). An administrative proceeding does not terminate until any appeal or retrial is completed. *Korody-Coyler Corp. v. General Motors Corp*., 208 Cal. App. 3d 1148, 1151-1152 (1989).

The *Westlake* analysis finds support in *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, plaintiff alleged that prosecutors secured his prior murder conviction through an unlawful investigation and destruction of exculpatory evidence. *Id*. at 478-479. The district court dismissed because the issues raised "directly implicate the legality of [petitioner's] confinement." *Id*. at 479 (brackets in original).

The Supreme Court affirmed. *Id*. at 490. By analogy to the "favorable termination" element of malicious prosecution, the Court held that in a § 1983 suit in which a judgment in favor of the plaintiff would necessarily imply the invalidity of a prior criminal conviction, an essential element of the claim is proof that the conviction has been reversed or expunged. *Id*. at 486-487.

The ruling furthered the long-expressed concerns for finality and consistency, *id*. at 484-485, along with the strong judicial policy against two conflicting resolutions arising out of the same events. *Id*. at 484. Otherwise, "parallel litigation over the issue[ ] of probable cause. . . ." may result with the possibility of the plaintiff succeeding in his § 1983 action while failing in the underlying criminal action. *Ibid*.

The *Heck* Court stated an important corollary:

> Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor [citations omitted], so also a § 1983 cause of action . . . attributable to an unconstitutional conviction . . . does not accrue until the conviction or sentence has been invalidated.

Id. at 489-490 (emphasis added).

This Court should extend the principle applied to a convict in *Heck* to a professional such as Pearce who faces proceedings to revoke his license. The Court should hold that where a licensee alleges the violation of constitutional rights in a revocation proceeding, his § 1983

claim does not accrue until those proceedings terminate in his favor.

The FAC alleges that while *Chiropractic Board v. Pearce* was pending from February 17, 1993 to September 6, 2001 and *Acupuncture Board v. Pearce* was pending from May 9, 2001 to May 16, 2002, Appellees violated a multitude of Pearce's rights under the First, Fourth, Fifth, and 14th Amendments. (ER 85:40, 114:114). Had Pearce filed his § 1983 suit within one year, the issue of probable cause to bring an accusation against Pearce would have been subjected to "parallel litigation." A § 1983 judgment in Pearce's favor would "necessarily imply the invalidity" of the Chiropractic Board's decision. "[I]t would be difficult to argue with a straight face that a statutory scheme comports with due process when it defines the statute so that under all circumstances it expires before a plaintiff could file." *Larramendy v. Newton*, 994 F. Supp. 1211, 1216 (E.D. Cal. 1998).

B. The Limitation Period for Pearce's § 1983 Claims Was Tolled While the License-Revocation Proceedings Were Pending.

As an alternative to the rule of accrual, this Court may reverse on the ground of equitable tolling. The applicable statute of limitations and the issue of tolling are governed by state law. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). "[Equitable tolling] ordinarily requires reference to matters outside the pleadings, and is not generally amenable to resolution on a rule 12(b)(6) motion." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993).

To survive a rule 12(b)(6) motion, a plaintiff need not literally raise "equitable tolling" in the complaint. *Einheber v. Regents of the Univ. of Cal.*, 119 Fed. Appx. 861, 862 (9th Cir. 2004). "The sole issue is whether the complaint, liberally construed in light of our 'notice pleading' system, adequately alleges facts showing the potential applicability of the equitable tolling doctrine. "[A]n allegation of the continued pendency of prior actions suffices to overcome a motion to dismiss." *Cervantes* at 1277; *see also Palazzolo v. Sonne*, 221 Fed.

Appx. 516, 517 (9th Cir. 2007); *see* 9TH CIR. R. 36-3(b). Equitable tolling applies to administrative proceedings. *Cervantes* at 1274.

Here the court ignored the FAC's allegations of the pendency of *Chiropractic Board v. Pearce* (ER 85:40, 114:114) and *Acupuncture Board v. Pearce*. (ER 111:105, 116:120). None of the orders granting Appellees' motions to dismiss even mention tolling. This despite the State Defendants' concession that California's tolling rule would apply if the facts supported it[5]. (*See* RT 2/21/03, 14:12-25). Thus, far from making the three-part inquiry established by *Cervantes* at 1275-1276, the court failed even to make the "threshold inquiry" deemed inadequate in that case.

As here, *Cervantes* appealed from a judgment of dismissal. *Id.* at 1274. The complaint alleged facts showing that the plaintiff had: (1) provided timely notice to the defendants; (2) demonstrated lack of prejudice to the defendants; and (3) evidenced good faith and reasonable conduct. *See id.* at 1275.

Here, Appellees could not possibly have suffered prejudice or lack of notice because they themselves filed, prosecuted, and abetted the license-revocation proceedings.

The Chiropractic Board waited seven months before serving its accusation (ER 95:62) and didn't start its hearing until more than two years later. (ER 96:64). A purpose of the delay was to allow Alexander to seek out additional complainants with defamatory newspaper articles. (ER 91:54). (*See supra* at 11-12).

Appellees' relentless violations of Pearce's due-process rights necessitated a petition for writ of mandate (ER 101:79), a rehearing (*ibid.*), a second petition (ER 104:88), an appeal

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[5] At the Feb. 21, 2003, hearing, the State Defendants attributed the doctrine of equitable tolling to *Heck v. Humphrey*. *Heck* actually ruled that the accrual analysis made it unnecessary to address tolling. 512 U.S. at 489.

(*ibid*.), and a remand hearing (ER 110:104, 113:110). The court then reversed the revocation of Pearce's license, terminating *Chiropractic Board v. Pearce*. (ER 114:114).

Tolling is particularly applicable in light of the multiple allegations that Appellees fraudulently concealed their unlawful conduct. (*See, e.g.,* ER 90:52, 97:66, 117:127, 118:132, 120:138, 123:151, 124:153, 127:168, 128:171, 131:185, 146:257). By defying the subpoena of his file, and later destroying it, Sharp concealed the absence of authority to search Pearce and Sullivan's original report. (ER 100:77, 102:82, 119:137, 123:151, 134:202). Fraudulent concealment tolls the statute of limitations for both 42 U.S.C. § 1983 and 18 U.S.C. § 1964(c) claims. *Gibson v. United States*, 781 F.2d 1334, 1345 (9th Cir 1986); *Grimmet v. Brown,* 75 F.3d 506, 514 (9th Cir. 1996).

The FAC alleges that the AG Defendants and Sharp concealed Romeo's lack of authority to have Pearce searched. (ER 118:132, 120:138). It alleges that the Everstines destroyed some 51 minutes of the recording of their interview with Pearce. (ER 105:92, 108:98). The Chiropractic Board members concealed Sullivan's original report. (ER 90:52). The State Defendants concealed Romeo's ex parte communications to Judge Lew and her fabrication of evidence in requesting a search order. (ER 117:127). Appellees' active concealment prevented Pearce from discovering the constitutional violations. This Court must accept the truth of these allegations.

The FAC satisfies the third *Cervantes* prong by alleging that Pearce acted reasonably by commencing the present action within five weeks after the decision in *Acupuncture Board v.*

Pearce became final. (ER 116:120-122).

C. The District Court Ignores Applicable Precedent and Relies on a New York District Court Case.

The district court ignored California's rules of equitable tolling and accrual, as well as the *Heck* rule of delayed accrual. The court stretched to New York for a district court case that declined to apply these rules, *Triestman v. Probst*, 897 F. Supp. 48 (S.D.N.Y. 1995). *Triestman* relies solely on three other district court cases. The only appellate court to consider *Triestman*, the Eleventh Circuit, rejected its standard on accrual. *See O'Ferrell v. U.S.*, 998 F. Supp. 1364, 1373 n.7 (11th Cir. 1998); *see also* 35 *Ind. L. Rev.* 1085, 1099 & n.97 (pointing out that *Triestman* fails even to mention *Heck*).

This Court should disregard *Triestman* and rule that Pearce's § 1983 claims arising out of the administrative proceedings did not accrue until their favorable termination. Alternatively, the Court should hold that accrual was tolled during the proceedings. Either way, the Court should rule that Pearce's 42 U.S.C. § 1983 claims are not barred by the statute of limitations.

3. The Claims for Violation of 42 U.S.C. § 1983 Adequately Allege Color of State Law.

In dismissing the 12th count against Scheffer (ER 130), the 18th and 27th counts against Levin (ER 135, 146), and the 27th and 28th counts against all Defendants (ER 146, 149), the district court, citing *Gomez v. Toledo,* 446 U.S. 635, 640 (1980) ruled that the FAC fails to allege that Appellees acted under color of state law. Instead of accepting the truth of the pleaded facts, the court again characterized Pearce's allegations as "seemingly unbelievable." (ER 43).

> [T]o act "under color of" state law . . . does not require that the defendant be an officer of the State. It is enough that he is a

> willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions.

Dennis v. Sparks, 449 U.S. 24, 28 (U.S. 1980).

Here, the FAC is replete with facts showing that Stuart, Levin, Fulton & Guy, Alexander, Scheffer, Brickman, Sullivan, and Berman were "willful participants" who "jointly engaged" with the State Defendants to defame Pearce, fabricate, conceal, and destroy evidence, and to suborn and abet these wrongdoings. (*See, e.g.,* ER 82:33-37, 90:51-52, 92:54-61, 97:66-70, 100:74-75, 102:81-85, 105:90, 92-94, 107:97-99, 109:101-103, 111:105, 114:116-119, 124:156, 126:160, 127:165, 128:173, 129:177, 130:181, 132:189, 133:193,197, 135:206-210, 143:243, 248, 144:252, 146:256-260, 148:263, 149:266, 150:271-274, 154:278, 156:284). These allegations are sufficient to withstand a motion to dismiss. *See, e.g., Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law. . . . To act 'under color' of law . . . , [i]t is enough that he is a willful participant in joint activity with the State or its agents." *Id*. at 152 *quoting in part United States v. Price*, 383 U.S. 787, 794 (1966) n7, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

4. The Fourth Count (Assault and Battery) and the Fifth Count (Violation of CAL. CIV. CODE §§ 51.7, 52.1) Avoid the Bar of the Statute of Limitations by Alleging Facts That Invoke the Discovery Rule and the Doctrine of Equitable Estoppel.

A. The Discovery Rule Delayed the Accrual of the Causes of Action Alleged in the Fourth and Fifth Counts.

The fifth count seeks damages and a civil penalty (CAL. CIV. CODE § 52) against Romeo and Sharp for illegal searches of Pearce under color of law in violation of CAL CIV. CODE §§ 52.1. and 51.7. *See Jones v. Kmart*, 17 Cal. 4th 329, 334-336 (1998). The State

Defendants are not immune simply because the search occurred in conjunction with a trial, *Gabbert v. Conn,* 131 F. 3d 793 (9th Cir. 1997), *rev'd on other grounds,* 526 U.S. 286, or in a courtroom. *Gregory v. Thompson,* 500 F.2d 59, 64 (9th Cir. 1974).

The court dismissed the second, third, fourth, and fifth counts against the State Defendants on the ground of the one-year statute of limitations. (ER 12). Again resorting to *Triestman,* 897 F. Supp. at 50, the court ruled that the limitation period for a § 1983 claim stemming from a warrantless search begins to run on the date of the search, not on the date the plaintiff learns that the search was constitutionally deficient. (*Ibid*.).

California ameliorates the harshness of *Triestman* with the "discovery rule," whereby accrual is delayed until the plaintiff is aware of his injury and its causes. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1109 (1988), *Leaf v. City of San Mateo*, 104 Cal.App.3d 398, 406 (1980). Since no injury is sustained from a lawful search, *see Sternberg v. Superior Court*, 41 Cal. App. 3d 281, 288 n.3 (1974), a person cannot know that he has been injured until he discovers the facts that made the search unlawful.

A duty to investigate arises when the plaintiff becomes aware of facts that would make a reasonably prudent person suspicious. *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 131 (1975). Here, Romeo's representation to the ALJ of her authority to have Pearce searched was not a reasonable cause for suspicion. Pearce was entitled to believe that Romeo had complied with her duty "not seek to mislead the judge. . . ." CAL. R. PROF. CONDUCT 5-200(B). Since Romeo did not provide a written order to the ALJ, it was incumbent upon the judge, not Pearce, to confirm that Judge Lew had in fact ordered the search.

Application of the discovery rule initially depends on the allegations of the complaint *Mangini v. Aerojet-General Corp*., 230 Cal. App. 3d 1125, 1150 (1991). It must allege the

time, the manner of discovery, and the circumstances excusing delayed discovery. *Id*. Thereafter, the issue of when the person should have become suspicious is a question of fact that cannot be decided on motion to dismiss. *See Day v. Rosenthal*, 170 Cal. App. 3d 1125, 1164 (1985); *McKeown v. First Interstate Bank of California*, 194 Cal. App. 3d 1225, 1229 (1987). Here, the district court utterly ignored the many pleaded facts that excuse Pearce's delayed discovery. (*See, e.g.,* ER 95:63-64, 100:77, 102:82, 113:111, 117:127, 118:132, 119:137-138, 121:143, 123:151)

B. By Their Own Conduct, Appellees Are Equitably Estopped From Asserting the Statute of Limitations as a Defense to the Fourth and Fifth Counts.

Apart form the discovery rule, equitable estoppel delays accrual of a cause of action where "the delay in commencing the action is induced by the conduct of the defendant." *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 384 (2003). Here, Sharp actively concealed, and later destroyed, evidence of the constitutional deficiency of the searches. (ER 96:64, 100:77, 102:82, 115:118). Pearce was not reasonably able to learn of the violation of his constitutional rights until January 28, 2002, when Judge Lew surprised everyone by stating that he had never ordered that Pearce be searched. (ER 115:118). Pearce commenced the present action within one year thereafter.

5. The Sixth, Eighth, and 14th Counts State Claims for Malicious Prosecution

A. Probable Cause for Prosecuting *Chiropractic Board v. Pearce* Was not Established in That Case.

The district court ruled that the sixth count (vs. Alexander, Stuart, Levin, Love, and Fulton & Guy), the eighth count (vs. Sullivan), and 14th count (vs. Brickman) fail to allege facts establishing lack of probable cause. The court, citing *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 824 (2002), ruled that "the fact that Sullivan and Brickman

allegedly helped bring a claim that initially prevailed proves that the claim was 'arguably tenable'" and thus brought with probable cause. *Id*. The court's reasoning is flawed.

In California, licensing agencies, such as the Chiropractic Board, do not have fact-finding power. *Laisne v. Cal. State Board of Optometry,* 19 Cal. 2d 831 (1942). Their factual findings are binding only if not challenged by petition for writ of mandate. *Id*. at 844. If the licensee does petition, as Pearce did here, the agency's findings are moot. To hold otherwise would violate the provisions of CAL. CONST., § 1, ART. VI. *Id*. at 839, *see Governing Board v. Haar*, 28 Cal. 4th 369, 377-378 (1994).

Second, whether there was probable cause for a prior action is a factual issue that may not be decided on summary judgment, *McKenzie v. Lamb*, 738 F.2d 1005, 1007 (9th Cir. 1984)*, citing Smiddy v. Varney*, 665 F.2d 261, 265 (9th Cir. 1981); *Gilker v. Baker*, 576 F.2d 245 (9th Cir. 1978), much less on a motion to dismiss where there is no evidence before the court.

Third, the court overlooks that in its original decision, the Chiropractic Board found in Pearce's favor on the charge that he sexually battered Stuart, Scheffer, and Brickman. (ER 101:78). (Indeed, Appellees have brought Stuart's sexual-battery claim before four courts, each of which exonerated Pearce. Pearce sues Stuart, Love, Levin, Fulton & Guy, Alexander, Sullivan, Scheffer, and Brickman specifically for abetting the malicious prosecution of Stuart's sexual battery accusation. The board's decision does not negate the lack of probable cause of these particular Appellees to prosecute this particular charge. The trial court erred in dismissing this claim regardless of the outcome on any other charge in *Chiropractic Board v. Pearce. Bertero v. National General Corp*., 13 Cal. 3d 43, 56 (1974).

Fourth, the absence of fraud and perjury in the claim that initially prevailed is a

prerequisite to it being a basis for determining that it was arguably tenable. *Wilson v. Parker* at 817, 826. Fraud or perjury can never be the basis for finding probable cause:

> [I]t would be obnoxious to every one's sense of right and justice to say that because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established against a man who had thus been doubly wronged. . . . So . . . "if . . . it be averred that the conviction was procured by fraud, perjury or subornation of perjury, or other unfair conduct . . . , the presumption of probable cause is effectually rebutted."

Carpenter v. Sibley, 153 Cal. 215, 218 (1908) *quoting in part* 13 *Ency. of Plead. & Prac*. 449.

Fifth, the court relied on the statement in *Roberts v. Sentry Life Insurance*, 76 Cal. App. 4th 375 (1999) that the denial of a defendant's summary judgment motion in the underlying case "normally" establishes that it was brought with probable cause. *Id*. at 384. Administrative proceedings have no summary judgment procedure. Moreover, the court ignored the fact that *Roberts* used the word "normally" because if the denial of the motion was "induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong." *Ibid*. From the FAC's allegations that Appellees brought the license-revocation proceedings through fraud, perjury, and fabrication of evidence (*see supra* at 8-16, 19-20, 22), it follows that they could not have believed that the charges were true.

> The existence of probable cause is, in part, determined by an objective test. . . . [I]f the initiator knows that his claim is groundless he cannot have an actual or honest belief in its validity, and he may not escape liability . . . merely because a reasonable man might have believed it was meritorious.

Bertero v. National General Corp., 13 Cal. 3d at 55, *quoting in part* *Lee v. Levison*, 173 Cal. 166, 169 (1916). *See also Sheldon Appel Co.*

v. Albert & Oliker, 47 Cal. 3d 863, 880 (1989) (distinguishing between subjective disbelief in legal tenability and subjective knowledge of
falsity of facts).

Sixth, in *Roberts v. Sentry*, relied on by the district court, the judgment affirmed on appeal had been informed by a full presentation of evidence on motion for summary judgment, including declarations on whether Sentry had defeated Roberts' prior summary judgment motion through fraud. *Id*. at 383. Here by contrast, on motion to dismiss, the only evidence properly before the Court as to whether Appellees secured the original Chiropractic Board decision through fraud is the FAC's allegations that they did. The Court must accept the truth of these allegations. *Soliman v. Philip Morris, Inc.*, 311 F.3d at 970 n.9.

Seventh, an order denying a summary judgment motion is usually considered an effective indicator of probable cause because the defendant had the opportunity to fully conduct discovery to support his motion and because the judge who denied the motion was impartial. *Roberts* at 383. Here, the FAC alleges that Pearce was denied discovery. (ER 101:79, 113:113, 140:228).

Nor was the ALJ impartial, having been unilaterally selected by the Chiropractic Board. "[U]nconstitutional bias may be shown through evidence that the adjudicator 'had it "in" for the party for reasons unrelated to the officer's view of the law.'" *McLaughlin v. Union Oil of Calif.*, 869 F.2d 1039, 1047 (7th Cir. 1989) *quoted in Stivers v. Pierce*, 71 F.3d 732, 744 (9th Cir. 1995). Here, the ALJ would naturally presume that the reason for Judge Lew's supposed search order was that Pearce posed a threat of battery in the courtroom. (*See supra* 12-13). Since battery was the very offense with which Pearce was charged, the ALJ could hardly avoid being prejudiced against Pearce. (ER 96:64).

"[I]t is appropriate to look to irregularities in the treatment that a license applicant

receives from the Board in determining whether the decisionmaking process was affected by impermissible bias on the part of one of its members." *Stivers v. Pierce*, 71 F.3d at 745 *citing Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 (9th Cir. 1989). Here, the ALJ demonstrated bias by refusing to enforce Pearce's subpoena of Sharp's file (ER 100:77, 102:82, 119:137), adding unnoticed charges as grounds for revocation (ER 101:79, 113:113, 140:228-233), refusing to take judicial notice of Board examination materials (ER 113:113), and by retaliating against Pearce's writ petition by raising the penalty on remand without notice. (ER 104:88, 108:99, 140:232, 141:233, 146:256, 153:276, 155:281).

Eighth, in *Cowles v. Carter*, 115 Cal. App. 3d 350, 358 (1981), the court held that an adverse decision in the prior action establishes probable cause only if basic principles of procedural due process were observed.

> Did a trier of fact after a fair adversary hearing reach a determination on the merits against the defendant in the prior proceeding? If the answer is in the affirmative, the defendant . . . may not [sue] for malicious prosecution. . . .

Id. at 358 (emphasis added); *see also Allen v. McCurry* 449 U.S. 90, 95 (1980); *Trujillo v. Santa Clara County*, 775 F. 2d 1359, 1369 (9th Cir. 1985) (applying "fair adversary hearing" rule to collateral estoppel).

A "fair adversary hearing" requires the trier of fact to fulfill its duty to evaluate credibility and weigh evidence. *In re Allustiarte*, 786 F.2d 910, 917 (9th Cir. 1986); *Diamond Fruit Growers, Inc. v. Krack Corp*., 794 F.2d 1440, 1446 (9th Cir. 1986); *United States v. Milwitt*, 475 F.3d 1150, 1162 (9th Cir. 2007). In Pearce's mandate proceeding, the court of appeal reversed on the ground that the superior court had failed to evaluate witness credibility. When the trial court did so on remand, it exonerated Pearce and restored his license. (*See* ER 37-2, 113: 114) Thus the Chiropractic Board's original decision against Pearce does not make

its accusation "arguably tenable."

6. None of the Appellees is Immune from Malicious Prosecution.

(1) Pearce's Malicious Prosecution Claims Are Timely.

The district court ruled that the sixth count for malicious prosecution (vs. Stuart, Love, Levin, Fulton & Guy, and Alexander) is not barred by the statute of limitations. (ER 167). It found that favorable terminations of *Chiropractic Board v. Pearce* and *Acupuncture Board v. Pearce* were essential elements of Pearce's malicious prosecution claims and that these favorable terminations did not occur until September 6, 2001 and May 16, 2002, respectively. (*Ibid*.).[6]

The court did not address the statute of limitations as to the other malicious prosecution counts (eighth vs. Sullivan, tenth vs. Scheffer, 14th vs. Brickman, 26th vs. Berman).

(2) *Rodas v. Spiegel*, Relied on by the District Court, Does not Provide Immunity for Malicious Prosecution.

(a) There is no Immunity for Persons Who Provide Information to a Licensing Board Either Knowing it is False or for an Ulterior Purpose.

Persons who institute administrative proceedings can be liable for malicious prosecution. *Brody v. Montalbano*, 87 Cal. App. 3d 725, 735-736 (1978). "Absolute witness immunity does not extend to 'complaining witnesses . . . , whose allegations serve to bring about a prosecution.'" *Paine v. City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001) *quoting in part Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir. 1997).

In dismissing the five malicious prosecution counts, the court relied on various theories

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[6] Inexplicably, the court found that favorable termination of the two administrative proceedings was not an element of Pearce's § 1983 claims, even though they are based on the elements of malicious prosecution. (*See supra*, p. 29).

as to various defendants. First, in its order granting Levin's motion, the court denied that it relied on the absolute immunity provided by CAL. CIV. CODE § 43.8 to dismiss the sixth count. Instead, the court said it relied on *Rodas v. Spiegel*, 87 Cal. App. 4th 513, 521 (2001). (ER 20, 41, 54, 66, 167-168). But although *Rodas* does not expressly mention § 43.8, subsequent cases show that its holding necessarily is based on an erroneous interpretation of that statute.

Rodas holds that persons filing false reports with licensing boards are immune to malicious prosecution. *Id*. at 520. *Rodas* finds its rationale in *Johnson v. Superior Court*, 25 Cal. App. 4th 1564 (1994). But *Johnson* depends on interpreting CAL. CIV. CODE § 48.3 as affording absolute immunity, *id*. at 1570, an interpretation expressly disapproved in *Hassan v. Mercy American River Hospital*, 31 Cal. 4th 709, 724 (2003). The § 48.3 privilege

> may be defeated by proof that the person . . . asserting the privilege . . . knew the information was false or . . . lacked a good faith intent to assist in the [licensee's] evaluation.

Ibid.

The FAC alleges a multitude of facts showing that Appellees supplied information to the chiropractic and acupuncture boards with actual knowledge of its falsity. Appellees acted not with the intent to assist the boards in evaluating Pearce, but for the bad-faith ulterior purposes of punishing him and concealing prior fraudulent conduct. (ER 124:155-156, 127:165, 144:252).

(b) Immunity Affords No Protection Where the Licensing Board Does Not Conduct an Investigation.

The second theory relied on by the district court to insulate Appellees from liability for malicious prosecution is that the chiropractic and acupuncture boards initiated their accusations based on independent investigations. But that supposed fact appears nowhere in the FAC or in any judicially-noticeable record. The court is limited to considering the contents of the FAC

plus matters of which they are permitted to take judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. at 526 & n.9.

To the contrary, the FAC alleges that the so-called investigations were shams. (*See, e.g.,* ER 88:45). Investigator Sharp based his report solely on interviews with the complaining witnesses. (*Id.*). The Acupuncture Board relied solely on the bogus Berman report, without any pretense of an investigation. (ER 109:102-103, 114:116).

Stanwyck, v. Horne, 146 Cal. App. 3d 450 (1983) held that on demurrer, a court may presume that a board conducted an investigation unless the complaint alleges a lack thereof. *Id*. at 456, *distinguishing Hardy v. Vial,* 48 Cal. 2d 577 (1957); *see Werner v. Hearst Publications, Inc.,* 65 Cal.App.2d 667 (1944). The same rule should apply in a rule 12(b)(6) motion.

Here, the court acknowledged the *Stanwyck-Hardy* rule (ER 20, 42, 67) and that the FAC does allege the lack of an independent investigation. *Ibid*. But the court read the FAC as also alleging that the board did not prosecute Pearce based on Stuart's complaint, but because of its view on the propriety of rectal examinations of female patients by male chiropractors. (*See* ER 42-43, 67).

But even if the board did have an ulterior motive, the FAC alleges sufficient facts showing that Stuart's complaint was a "substantial factor" in causing the accusation. On motion to dismiss, the court may not speculate otherwise. Moreover whatever the FAC may say about the board's view of Stuart's rectal exam, it says nothing of the kind about Scheffer's complaint.

Most important, the FAC alleges that the conduct of Stuart, Scheffer, and Brickman

was not limited to filing their complaints. The three continued to abet the malicious prosecution of *Chiropractic Board v. Pearce* by conspiring with Sharp to fabricate his reports and to commit perjury at the hearing. (*See* ER 97:67, 98:68, 99:70, 100:74, 75, 124:156, 127:168, 128:173, 129:177, 130:181, 131:185, 132:189, 133:193, 197). This continuing conduct renders these three Appellees liable for malicious prosecution. *Zamos v. Stroud*, 32 Cal. 4th 958 966-967(2004) *citing Restatement Second, Torts*. (One who without probable cause "takes an active part in the . . . continuation . . . of civil proceedings . . . is subject to liability.").

> "Clearly, it is as much a wrong . . . and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such a proceeding in the first place."

Id. at 969 *quoting in part* 1 Harper et al., *The Law of Torts* (3d ed. 1996) §§ 4.3, 4:13; *see also Lujan v. Gordon*, 70 Cal. App. 3d 260, 264 (1977).

(3) Appellees are not Shielded from Liability on the Ground that the Chiropractic and Acupuncture Boards, not they, Commenced the Accusations.

The district court's third rationale for dismissing the malicious prosecution claims is that "since it was the Chiropractic Board that ultimately determined whether charges should be filed against plaintiff, Scheffer cannot be held liable under a theory that she 'instigated' the disciplinary proceedings." (ER 12, 66). In a footnote (ER 68 n.2), the court summarily distinguished *Harris v. Roderick*, 126 F.3d at 1198-99 without mentioning that case's two-pronged inquiry: (1) Was the law governing the defendant's conduct clearly established? And (2) Could a reasonable person believe that their conduct was lawful? Here, the law prohibiting fabricating evidence could not be clearer. And no reasonable person could have

believed that such conduct was lawful.

Nowhere did the court acknowledge the many facts in the FAC alleging that Levin, Fulton & Guy, Love, Stuart, Scheffer, and Brickman knew that their complaints to the Chiropractic Board were false and that they filed them not to assist the board in its evaluation, for bad-faith ulterior purposes. (ER 81:31-37, 88:44-47, 97:66-70, 124:156, 128:173).

The FAC alleges that Sullivan filed his report knowing it was false. (ER 76:14, 89:50-52, 102:81, 127:165). The FAC alleges that Berman knew that his report to the Acupuncture Board was false, and that he filed it for the ulterior purpose of covering up prior falsifications of evidence, unlawful searches, and other violations of Pearce's rights. (ER 77:19, 109, 110:102-104, 111:106, 114:116, 115:119, 144:252). Witnesses hired to fabricate charges against an innocent accused are liable for malicious prosecution. *Cedars-Sinai Medical Center v. Superior Court*, 206 Cal. App. 3d 414, 418 (1988).

This Court has held that in a § 1983 case alleging the malicious prosecution of a prior criminal action, the plaintiff can rebut a prima facie finding of probable cause by showing that the defendant

> knowingly provided misinformation, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings. . . . "One who procures a third person to institute a malicious prosecution is liable, just as if he instituted it himself."

Awabdy v. City of Adelanto, 368 F.3d 1062, 1067-1068 (9th Cir. 2004), *quoting in part* 5 Witkin, *Summary of Cal. Law*, *Torts* § 418 (9th ed. 1998) *and citing Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126-27 (9th Cir. 2002).

Awabdy expressly rejected the district court's premise that defendants were shielded from liability because the licensing boards, not defendants who prosecuted the accusations. *Id.*

As in *Awaby*, Pearce must be allowed the opportunity to prove the FAC's allegations that Appellees' knowingly-false accusations were instrumental in causing the license-revocation proceedings. *See id*. at p 1068. Because revoking a person's licence to earn a livelihood is such a severe penalty, the Court should apply the *Awaby* rule in this case.

(4) The State Defendants are Not Immune.

(a) The Board Members Are not Immune Because Their Violations of Pearce's Due Process Rights Divested the Board of Jurisdiction.

A court can have specific personal jurisdiction as to some claims but not as to others. *Muckle v. Superior Court*, 102 Cal. App. 4th 218, 227 (2002). Notice is an essential requirement for personal jurisdiction. *Janzen v. Workers' Comp. Appeals Bd.*, 61 Cal. App. 4th 109 (1997). Here, the Chiropractic Board had personal jurisdiction over Pearce for the charges included in the accusation served on him. But the board, having found in Pearce's favor on all of those charges except one, and having no authority to revoke a license on that ground, added three charges after the hearing. This lack of notice deprived the board of personal jurisdiction over Pearce as to those three charges. (ER 103:87, 104:88).

Chiropractic Board proceedings are governed by the Administrative Procedure Act. CAL CODE REGS. § 305 (1993), CAL. GOV'T. CODE §§ 11410.10, 11500, 11501. The purpose of the Act is to "insure due process concerns are satisfied." *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1420 (1987). The agency must give the person to whom its action is directed notice and an opportunity to be heard. CAL. GOV'T CODE §§ 11425.10(a)(1), 11503. The respondent must be afforded an opportunity to object and prepare a defense to any amended or supplemented accusation. *See id*. §§ 11507, 11516. The factual basis for an agency's decision must be based "exclusively on the evidence of record in the

proceeding and on matters officially noticed in the proceeding." *See id*. § 11425.50(c).

Here, the Chiropractic Board conspicuously violated every one of these due process rights. Its accusation failed to set forth the charges of lack of patient consent, bad attitude, and dating a patient's relative, and there was no amended or supplemental pleading. Pearce had no opportunity to conduct discovery, object to, or prepare a defense to the charges and the ALJ took no evidence on these allegations. Nevertheless, the board based its license revocation on them. (*See supra* at 16, 18-19).

In addition to personal and subject matter jurisdiction, in the context of immunity, the court must have jurisdiction consisting of the "power . . . to render the particular decision" that it makes. *Brily v. State of California*, 564 F.2d 849, 857 (9th Cir. 1977) (*unrelated holding disapproved*, 1991 U.S. App. LEXIS 1465 (9th Cir. 1991). An administrative agency lacks this type of jurisdiction when it acts directly contrary to statutes specifically intended to limit its authority. *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1178 (1994); *El Camino Community College District v. Superior Court*, 173 Cal App. 3d 606, 612 (1985) (school district cannot exceed powers expressly granted by Legislature). Here, CAL. BUS. & PROF. CODE § 475(c) prohibits revocation of a professional license for the "bad attitude" on which the board relied in part in revoking Pearce's license. *See Loder v. Municipal Court*, 17 Cal. 3d 859, 874 (1976); *See also Aylward v. State Board etc. Examiners,* 31 Cal. 2d 833, 838 (1948) (Chiropractic Board had no power or authority to revoke a license without giving the licensee notice and a hearing). Because the board members acted directly contrary to statute and because of their multiple due-process violations, they lacked jurisdiction and thereby forfeited their immunity. *See Brily*, 564 F.2d at 856-857.

(b) Neither the State Defendants, Nor Their Expert Witnesses, Are Immune from Pearce's Claims.

There is no absolute immunity for prosecutors or board officers for investigative actions taken before the judicial proceedings commence. *Burns v. Reed*, 500 U.S. 478, 496 (1991). Nor do prosecutors have immunity when they shop for and hire expert witnesses to fabricate evidence. *Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993). There is no immunity for officers who knowingly violate the law. *Bradshaw v. Stoller*, 72 Fed. Appx. 513, 515 (9th Cir. 2003) *citing Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Public officials are entitled to "qualified immunity" from "civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The willful destruction of evidence, as alleged against Sharp (ER 102:82, 119:137, 134:202), is a crime, CAL. PEN. CODE, § 135; *see Adoption of Jennie L.*, 111 Cal. App. 3d 422, 433 (1980). Any reasonable person, and especially a state-employed investigator, would know that destroying govenment-agency records is illegal.

Here, the FAC alleges that the State Defendants shopped for and hired Sullivan to fabricate a report upon which they could base their accusation against Pearce. (ER 89:50-52). They ordered Sullivan to change his report to delete facts that would have disqualified him and to backdate the revised report to make it appear to be the original. (ER 90:51-52). They then suppressed Sullivan's original report so that Pearce could not discover it before the hearing. (ER 91:53). All of this activity occurred before the Chiropractic Board filed its accusation against Pearce and thus before prosecutorial or judicial immunity attached.

Prosecutors do not have immunity when they act as a complaining witness. *Morely v. Walker*, 175 F.3d 756, 760-761 (9th Cir. 1999), or when they file false crime reports. *Milstein v. Cooley*, 257 F. 3d 1004, 1011 (9th Cir 2001). Here, the FAC alleges that to secure the order for Pearce to be searched when entering the hearing room, Romeo twice falsely testified to

Judge Lew that Pearce had stalked and threatening witnesses. (ER 96:64, 103:86). Romeo didn't produce statements from the allegedly stalked or threatened witnesses. Instead, Romeo herself acted as the complaining witness by submitting her own statement. (*Ibid.*). There is no immunity for recklessly or knowingly presenting false information to a judicial officer in order to obtain a search warrant. *Branch v. Tunnel*, 937 F. 2d 1382, 1387 (9th Cir 1991). Advising police on executing a warrant is a police function, not a prosecutorial function, for which prosecutorial immunity does not attach. *Burns v. Reed*, 478 U.S. at 492-496 (1991). Here, by enabling Sharp to search plaintiff by falsely claiming judicial authority to do so, Romeo surrendered any claim to immunity. *Gabbert v. Conn*, 131 F. 3d at 804-805.

(c) There is no Immunity for Fabricating, Concealing, or Destroying Writings or Other Physical Evidence.

In order to invoke the absolute judicial immunity afforded to in-court testimony by CAL. CIV. CODE § 47(b)(2), the district court incorrectly characterized the FAC as alleging that Appellees' violations of 42 U.S.C. § 1983 consisted of perjured testimony at the Chiropractic Board hearing. (*See, e.g.,* ER 13, 15 (Brickman and Berman "immune for testifying falsely at trial and conspiring to do so"). But the FAC alleges that the violations were not in-court statements, but out-of-court conduct consisting of fabricating, concealing, and destroying physical evidence, such as investigative reports, witness statements, expert reports, and audio recording tape, and suborning and abetting these violations. Not even qualified immunity is available for such activities. *Atkins v. County of Riverside*, 151 Fed. Appx. 501, 507 (9th Cir. 2005) *citing Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc).

(5) The AG Defendants and Berman Are not Immune for Prosecuting the Acupuncture Board Accusation in Retaliation Against Pearce and Based on His Constitutionally-Protected Activity.

Pearce had a constitutional right to defend himself against the Chiropractic Board accusation. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) *citing Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). The FAC alleges that in defiance of that right and in violation of 42 U.S.C. § 1983, the AG Defendants conspired to and did maliciously concoct an Acupuncture Board accusation against Pearce for the ulterior purpose of retaliating against him for his successful defense of *Chiropractic Board v. Pearce*. (ER 109:100).

The AG Defendants recruited psychologist Berman. (ER 109:102, 114:116, 142:237). They conspired to, and did, prepare the Acupuncture Board accusation without any investigation, based solely on Berman's charge that Pearce was too mentally ill to practice acupuncture and would remain so for life. (ER 142:238, 144:252). These persons knew that the charge of mental illness was false. (ER 109:100, 102-104, 114:116, 115:119, 142:237-238, 143:243, 248, 144:252). There is no absolute immunity for such actions taken before the board commenced its proceedings. *Burns v. Reed*, 500 U.S. at 496. The AG Defendants are not immune for hiring Berman to fabricate evidence. *Buckley v. Fitzsimmons*, 509 U.S. at 272.

Berman concluded that because of Pearce's supposed mental illness, he was likely to retaliate with lawsuits against patients who made complaints against him. (ER 109:103). Revoking Pearce's acupuncture license on this ground would have had a chilling effect on his right of access to the courts, which is an aspect of the First Amendment right to petition the government for redress of grievances. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983). The AG Defendants and Berman thereby violated 42 U.S.C. § 1983. (ER 78:23-25).

7. The Sixth, Eighth, Tenth, 14th, 18th, and 27th Through 31st Claims Are not Barred by Res Judicata and/or Release.

A. Claims That District Court Ruled Were Barred by Res Judicata and/or

Release.

The district court upheld the defenses of res judicata and release as to the following ten counts. (*See* ER 7, 17, 38, 48).

Count	Claim for Relief	Defendants
6	Malicious prosecution	Stuart, Alexander, Levin, Fulton & Guy, Love
8	Malicious prosecution	Sullivan
10	Malicious prosecution	Scheffer
14	Malicious prosecution	Brickman
18	Defamation in connection with violation of 42 U.S.C. § 1983 ("defamation plus")	Stuart, Alexander, Levin, Romeo, Sharp,
27	Conspiracy to violate civil rights by denying due process, unlawful search, assault & battery, defamation, and gender bias.	All defendants
28	Conspiracy to violate 42 U.S.C. § 1983. Denying due process by defamation, fabricating evidence, and suborning fabrication of evidence.	All defendants
29	Violations of RICO Act. Use of mails by enterprise to commit insurance fraud, perjury, and subornation of perjury.	Stuart, Alexander, Levin, Fulton & Guy, Love
30	Violations of RICO Act. Use of mails by enterprise to commit perjury	Romeo, Sharp, Chiro Board Sullivan
31	Violations of RICO Act. Use of mails by enterprise to commit perjury	Alexander, Botha

B. Claim Preclusion and Release Are Distinct Defenses.

In its orders granting the motions to dismiss of Alexander and Levin, the district court commingles the doctrines of claim preclusion and release. (*See, e.g.,* ER 23, 54-55, 168, 171). The two are separate and distinct affirmative defenses. *See* FED. R. CIV. P. 8(c); *compare Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (1988) *with Zenith Radio Corp. v.*

Hazeltine Research, 401 U.S. 321, 329 (1971). Claim preclusion is a rule of civil procedure; release is a rule of contracts.

C. The Ten Counts Are not Barred by Res Judicata.

(1) Requisites for Application of Claim Preclusion.

Res judicata has two aspects, only one of which is herein pertinent:

> [I]t precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. This aspect of res judicata has traditionally been referred to as "res judicata" or "claim preclusion."

Rice v. Crow, 81 Cal. App. 4th 725, 734 (2000) (citations and internal quotation marks omitted).

This Court applies California law to determine claim preclusion. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 323 (9th Cir. 1988). To dismiss the ten counts, the following requisites must be met: (1) Those who plead claim preclusion in the this case must be the same parties sued in the state court action, (2) the claims for relief sought to be barred here must be identical to the causes of action necessarily decided in the state court action. *Krier v. Krier,* 28 Cal. 2d 841, 843 (1946), *quoted in Rice,* at 734. As to Appellees Stuart, Alexander, and Levin, the second criterion for claim preclusion is not satisfied. All of the other Appellees fail to meet either criterion. (*See infra* p. 69).

(2) As to All Appellees, There is No Identity of Claims.

(a) Pearce Did not Plead or Dismiss a Claim for Malicious Prosecution of *Chiropractic Board v. Pearce* or *Acupuncture Board v. Pearce* in His State Court Action.

Incredibly, the district court ruled that the same claim alleged in the FAC's sixth count was "made . . . and dismissed" in Pearce's state court action. (ER 54). Without analyzing the two claims, the district court blithely asserts that they are "essentially identical." (ER 168).

This is patently wrong. In *Pearce v. Alexander* (superior court case no. CV 764308), the first cause of action alleges that Stuart and Alexander maliciously prosecuted *Stuart v. SCIF and Pearce* (case no. CV 7503950):

> 17. On or about June 16, 1995, defendants . . . commenced . . . Superior Court civil action number CV 750395, entitled *Gaylyn Machado Stuart v. State Compensation Insurance Fund et al*. (hereinafter *Stuart v. SCIF* or "the underlying action"). . . .
>
> 18. The underlying action terminated in favor of Pearce when defendants . . . filed therein a request for dismissal with prejudice of the entire action as to Pearce.

(ER 178-17)

In his state court action, Pearce alleged that Stuart and Alexander maliciously prosecuted *Stuart v. SCIF and Pearce*, wherein the plaintiff was Stuart, the forum was the superior court, and the remedy sought was money damages. Here, Pearce alleges that Stuart, Alexander, Love, Levin, and Fulton & Guy maliciously prosecuted *Chiropractic Board v. Pearce*, wherein the petitioner was the Chiropractic Board, the forum was an administrative court, and the remedy sought was revocation of a chiropractic license. (*See*, *e.g*., ER 91:54-58, 100:78, 103:85, 87, 105:90, 106:94, 107:97, 109:101, 111:105, 113:112-113, 115:117, 124:155-156). The two malicious-prosecution claims are not even similar, let alone identical. By taking judicial notice of the state court complaints (ER 178-12, 178-52), this Court must conclude that Pearce's state court actions in no way alleged a claim, or sought relief, for the malicious prosecution of *Chiropractic Board v. Pearce* or *Acupuncture Board v. Pearce*. Nor do any of the counts of the present FAC allege a claim or seek relief for the malicious prosecution of *Stuart v. SCIF and Pearce.*

(b) Claim Preclusion Does not Apply Because the Claim in the State Court Action and the Claims Asserted Here Assert

Violations of Different Primary Rights.

In *International Evangelical Church, etc. v. Church of the Soldiers, etc.*, 54 F.3d 587 (9th Cir. 1995), this Court stated that "under the 'primary rights' theory adhered to in California, . . . there is only a single cause of action for the invasion of one primary right. . . . But the significant factor is the harm suffered, that the same facts are involved in both suits is not conclusive." *Id*. at 590 (emphasis added) *quoting Agarwal v. Johnson,* 25 Cal. 3d 932 (1979) *unrelated holding disapproved* 25 Cal. 3d 932, 574-575 n.4). As here, *Agarwal* involved a state court and a federal court case. The supreme court held that although the state and federal cases involved the same transaction, the harm compensated in the two cases was distinct, so no claim preclusion arose. *Agarwal* at 955).

Here, the district court may have believed that some of the malicious conduct of Stuart and Alexander contributed to the malicious prosecution of both *Stuart v. SCIF and Pearce* and *Chiropractic Board v. Pearce*. But claim preclusion requires that in the underlying case and the present case, the injury sustained by the plaintiff, not the conduct of the defendants, be identical. "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct . . . may frequently give rise to more than a single cause of action." *Lawlor v. National Screen Service Corp.,* 349 U.S. 322*,* 327-328 (1955); *United States v. Pan-American Petroleum Co.*, 55 F.2d 753, 776-777 (1932). And the causes of action do not necessarily accrue simultaneously.

Pearce suffered two distinct harms: In the settlement of his state court action, Pearce obtained compensation for damages sustained in defending *Stuart v. SCIF and Pearce*. In the present case, Pearce seeks compensation for damages sustained in defending *Chiropractic Board v. Pearce* and *Acupuncture Board v. Pearce*. The harm alleged in the two lawsuits is

different. Therefore, the causes of action are different and claim preclusion does not apply.

(c) Pearce's Claim for the Malicious Prosecution of *Chiropractic Board v. Pearce* and *Acupuncture Board v. Pearce* Had not Accrued and Were not Available to be Pleaded in the State Court Action.

Alternatively, the district court ruled that even if Pearce did not previously plead, settle, or dismiss the ten counts, those claims were "available" for Pearce to litigate at the time of his state court action. The court relies on a footnote in *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1005 n.5 (9th Cir. 2002). But in *Fischel* the claim pleaded in the later action had been asserted and adjudicated in the prior suit. *Id*. at 1006*; see also Robi*, 838 F.2d at 324 ("[c]orporation is asserting in the present . . . cases the same right it asserted in the California case."). Thus, the effect of claim preclusion on a cause of action that was available but not pleaded in the prior action was not before the court in either *Fischel* or *Robi*. Any statement in those cases concerning preclusion of claims not asserted or adjudicated is dictum.

A more apposite case is *Hutchison v. Reclamation Dist. No. 1619*, 81 Cal. App. 427 (1927). In *Hutchison*, the court recites the general rule that a judgment is conclusive "as to every . . . matter that was or might have been litigated in the action." *Id*. at 437. But the court explained that the rule is not always applicable literally:

> [W]here a right has accrued subsequent to the former trial and an issue was not tendered or determined in the former trial and was not necessary to a complete disposition of the issues tendered, it could not be said that the former judgment would in every case be conclusive as to that issue.

Ibid. (emphasis added) *quoted in Progressive Collection Bureau v. Whealton*, 62 Cal. App. 2d 873, 878 (1944).

Similarly, in *Haskill v. Haskill*, 56 Cal.App. 2d 204 (1942), the trial court entered judgment of divorce on grounds of desertion and neglect. The court of appeal affirmed. *Id.* at

208. Divorce for desertion or neglect required one year of separation. Since the parties had been separated for less than one year at the time of the prior judgment, the desertion and neglect causes of action could not have then existed. Thus, claim preclusion did not bar these two claims. *Id*. at 207; *see also Jordan v. Jordan*, 129 Cal. App. 2d 309, 311 (1954) *following Haskill* (second suit brought on different cause of action "which had not accrued" when prior action was tried).

CAL. CIV. PROC. CODE § 312 states, "Civil actions, without exception, can only be commenced . . . after the cause of action shall have accrued. . . ." (emphasis added). Causes of action are not properly before the court and a demurrer under CAL. CIV. PROC. CODE § 430.10(a) for lack of subject matter jurisdiction is appropriate if the causes of action are not yet ripe. *Schell v. Southern California Edison Co.*, 204 Cal. App. 3d 1039, 1047 (1988), *citing Spencer v. Crocker First Nat. Bank*, 86 Cal. App. 2d 397, 402-403 (1948). Without subject matter jurisdiction, a court has no power to decide a case, *Barnick v. Longs Drug Stores Inc*., 205 Cal. App. 3d 377, 379 (1988).

The U.S. Supreme Court has held that claim preclusion does not bar a cause of action that did not exist when the previous lawsuit was brought. *Lawler and Panzer v. National Screen Service Corp*., 349 U.S. 322, 328 (1955). This is true even if the claim arises out of a continuing course of conduct that provided the basis for the earlier claim. *Frank v. United Airlines,* 2216 F.3d 845, 851 (9th Cir. 2000); *People of State of California v. Chevron Corp*., 872 F.2d 1410, 1415 (9th Cir. 1989). This is consistent with the definition of the word "accrue," which means "to come into existence as an enforceable claim, to vest as a right; as a cause of action has accrued when the right to sue has become vested." *Leahy v. Dept. of Water and Power,* 76 Cal. App. 2d 283, 286 (1946), *quoting Websters New Int'l Dictionary*. "A cause

of action accrues when a suit may be maintained thereon. . . ." *Id*. citing *Dillon v. Board of Pension Comrs.*, 18 Cal. 2d 427, 430 (1941). "Obviously, if the cause of action in the second action arises after the rendition of the judgment in the first action, it is a different cause of action not barred by the prior judgment." 46 *Am. Jur. 2d Judgments* § 532.

Favorable termination of the underlying case is an essential element of a malicious prosecution claim. *Casa Herrera*, 32 Cal. 4th at 341. Therefore, Pearce's cause of action for malicious prosecution of *Stuart v. SCIF and Pearce* accrued upon entry of judgment in Pearce's favor in that case on April 9, 1996. But his cause of action for the malicious prosecution of *Chiropractic Board v. Pearce* did not accrue until the superior court issued its writ in Pearce's favor in that proceeding on September 6, 2001.

The same rule of accrual applies to the eighth, tenth, and 14th counts. They allege, respectively, that Sullivan, Scheffer, and Brickman also maliciously aided and abetted the prosecution of *Chiropractic Board v. Pearce*. (ER 126:164-165, 128:172-173, 132:189).

The 18th and 27th through 31st counts allege that various groups of Appellees conspired to, and did, violate Pearce's civil rights and violate the RICO Act. Under the previously-discussed principles of *Heck v. Humphrey,* 512 U.S. at 489-490, and *Westlake v. Superior Court,* 17 Cal. 3d at 484, the six civil rights and RICO claims also did not accrue until the conclusion of the license-revocation proceedings against Pearce. (*See supra*. pp. 28-31).

Contrary to the district court's ruling (ER 54), the claims alleged in the ten counts, having not yet accrued, were not "previously available" for Pearce to plead in his state court action. Claim preclusion does not bar those claims.

(3) Fulton & Guy, Love, Romeo, Sharp, Sullivan, Scheffer, Brickman, the Chiropractic Board Members, and Botha do not satisfy the "Identity of Parties" Requirement for Claim Preclusion.

The district court did not reach the second requirement for claim preclusion: identity of parties. But by judicial notice under FED. R. EVID. 201, this Court can see that Fulton & Guy, Love, Romeo, Sharp, Sullivan, Scheffer, Brickman, the Chiropractic Board Members, and Botha were not parties to the state court action. "[I]t is fundamental as to the doctrine of res judicata that before the former adjudication may operate as an estoppel as to issues in the later action, there must be an identity of parties, as well as an identity of issues. . . ." *Standard Oil Co. v. J. P. Mills Organization*, 3 Cal. 2d 128, 139 (1935). Accordingly, claim preclusion is not available to these Appellees.

D. The Settlement Agreement in the State Court Action Did not Release Any Appellees From the Claims Alleged Herein.

(1) The Court May not Deem the Settlement Agreement to be Impliedly Incorporated by Reference Into the FAC.

Proof that the claims herein alleged by Pearce are encompassed by the state court agreement is an essential element of the defense of release. The interpretation of the agreement is an issue of fact that cannot be decided on motion to dismiss. *See Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 205 (9th Cir. 1950), *unrelated holding disapproved*, 59 Cal. 2d 97, 107 (1963).

The district court quotes *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) for the rule that "[a] court may . . . consider certain materials---documents attached to the complaint, documents incorporated by reference in the complaint . . . without converting the motion to dismiss into a motion for summary judgment." Here, the handwritten settlement agreement from the state court action is not attached to the FAC. (*See* ER 70-162). The court fails to include *Ritchie*'s limitation on the quoted rule:

> A document not attached to a complaint may be considered part of the pleading under FED. R. CIV. P. 10(c), if the plaintiff refers

> extensively to the document or it forms the basis of the plaintiff's claim.

Id. at 908 (citations omitted) (emphasis added), *citing* 2 Moore et al., *Moore's Federal Practice* § 10.0[2] (3d ed. 1999).

In *Ritchie*, the trial court denied a motion on the basis of certain exhibits, including a "Petition for Return of Property." On de novo review, this Court reversed, *id*. at 911, holding that the trial court could not consider the exhibits without converting the motion into a motion for summary judgment. *Id*. at 909. The petition was not impliedly incorporated into the complaint because the complaint did not "reference [the petition] extensively." *Id*. at 908, *citing Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002). Nor was the petition "integral to [claimant's] claim." *Id*. *citing Parrino v. FHP, Inc*., 146 F.3d 699, 706 n.4 (9th Cir. 1998) *and* 5 Wright & Miller, *Federal Practice and Procedure* § 1327 (2d ed. 1990) ("mere mention" of the existence of a document insufficient to incorporate its contents by reference).

Here, this Court cannot deem the handwritten state court release agreement to be impliedly incorporated by reference in the FAC. Pearce's present claims are for malicious prosecution of *Chiropractic Board v. Pearce* and *Acupuncture Board v. Pearce*. Far from being "integral" to those claims, the state court settlement agreement is utterly unrelated to them. The FAC does mention the prior settlement but merely as part of its historical background, and as incidental to the present claims for relief. The FAC specifically alleges that

> [t]he Parties did not intend by the . . . settlement agreement to release any claims that were not alleged in the lawsuits being settled. [T]he settlement only released the cases currently in court. . . . There is nothing in the settlement that there was a release of unknown claims.

(ER 11:106 (emphasis added); *see* ER 112:109.

The Court must accept as true the allegations of FAC ¶¶ 106 and 109, and only those

allegations, because there is no judicially-noticeable contrary evidence, *see infra* pp. 73-74. In the alternative, since the pleader need not anticipate affirmative defenses---such as release---or allege facts not required to be proved, this Court may treat the FAC's references to the handwritten settlement agreement as mere surplusage. *Albi v. Street & Smith Publications, Inc.*, 140 F.2d 310, 314 (9th Cir. 1944).

(2) The Court May not Take Judicial Notice of the Settlement Agreement in the State Court Action.

In its order granting Alexander's first motion to dismiss, the district court granted Alexander's request that "the court take judicial notice of the two state actions brought by Pearce against Alexander, the settlement agreement resolving the actions, and the dismissal with prejudice filed by Pearce in those actions." (ER 168 (emphasis added)). On the defense of claim preclusion, the court was entitled to judicially notice the existence of the state court action and the judgment of dismissal therein. FED. R. CIV. P. 201(b). But on the issue of release, the court erred by judicially noticing the terms of the handwritten settlement agreement.

The district court relied on *Ritchie,* 342 F.3d 903. But there, this Court ruled that under FED. R. CIV. P. 201(b), only those facts "not subject to reasonable dispute" may be judicially noticed. *Id*. at 908-909.

> Facts are indisputable, and thus subject to judicial notice, only if they are either "generally known" under Rule 201(b)(1) or "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" under Rule 201(b)(2).

Id. at 909.

Ritchie held that "[t]he underlying facts relevant to the adjudication of that case . . . do not

remotely fit the requirements of Rule 201." *Ibid*.

Courts may take judicial notice of some court records. But that does not mean that every document related to a case fits within the judicial notice rule. *Id. citing Pina v. Henderson*, 752 F.2d 47, 50 (2d Cir. 1985) (existence and content of police report not proper subject of judicial notice). The underlying issue here is whether the handwritten agreement for the settlement of the state court action effectively released certain Appellees from the claims asserted herein. That issue is far from indisputable, does not remotely fit the requirements of rule 201, and cannot be decided by way of a rule 12(b)(6) motion.

8. If this Court Reverses the Order Striking the Sixth Count (Malicious Prosecution) as to Alexander, it Must Also Reverse the Order Granting His Special Motion to Strike.

The district court also granted Alexander's special motion to strike the sixth count pursuant to California's anti-SLAPP statute, CAL. CIV. PROC. CODE § 425.16. (*See* ER 59). The court found that Pearce had not "established that there is a probability that the plaintiff will prevail on the claim." *Ibid*. (*See* ER 60-61, 176-177). A reversal of the dismissal of the sixth count as to Alexander necessarily invalidates the conclusion that Pearce probably will not prevail. Accordingly, the Court must reverse the order granting Alexander's special motion to strike and vacate the court's award of attorney fees. (ER 28).

9. The 12th Count May be Subject to Dismissal, But the 19th Count States a Claim for Violation of 42 U.S.C. § 1983.

Pearce concedes the dismissal of the 12th count. However, the 19th count (ER 137) is intended to plead a violation of 42 U.S.C. § 1983, not § 1985. § 1985 in the title was a typographical error for which Pearce should not be penalized. Pleadings must be construed to do justice. FED. R. CIV. P. 8(e). Courts should not "decide the rights of the parties upon a mere

technical defect . . . which can be corrected by amendment." *Suren v. Oceanic S.S. Co.*, 85 F.2d 324, 325 (1937). The Court may analogize to a rule on statutory interpretation: "The title of a statute . . . cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998).

10. The 16th, 25th, 27th, and 28th Counts Sufficiently State Claims for Violations of 42 U.S.C. § 1983.

A. The District Court Ruled That Pearce's Claims for Conspiracy to Violate Civil Rights Are Not Barred by the Statute of Limitations.

The district court ruled that because the present suit was filed less than one year from the termination of *Chiropractic Board v. Pearce*, Pearce's 25th and 27th counts are timely. (ER 21-22, 171).

B. The 16th, 25th, 27th, and 28th Counts Allege Conduct Constituting Civil Rights Violations, Not Just Conspiracies.

It is settled that conspiracy, by itself, is not a cause of action "unless a civil wrong has been committed resulting in damage. . . . [I]t is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action." *Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 44 (1989) (emphasis added), *quoted in Applied Equip. Corp. v. Litton Saudi Arabia*, 7 Cal. 4th 503, 511 (1994). Here, the district court said with respect to the conspiracy counts, "because Pearce has no viable cause of action for violation of his constitutional rights, his conspiracy claim fails." (*See* ER 15-16, 22-24). If this Court reverses the dismissals of Pearce's § 1983 claims, then it must likewise reverse the dismissal of the counts for conspiracy to violate § 1983.

The 16th, 25th, 27th, and 28th counts do not merely allege conspiracies. Each count alleges the "civil wrongs" and "acts done" by the respective Defendants in furtherance of each conspiracy. The 16th count, by incorporating FAC ¶¶ 68, 74 (ER 98, 100), alleges that Sharp

and Brickman fabricated a report falsely accusing Pearce of sexually assaulting someone he had never met and of conducting an improper examination of Scheffer. By incorporating FAC ¶¶ 101-104, 116, 119 (ER 109-110, 114, 115), the 25th count alleges that Hersh, Mercer, and Meadows suborned Berman to fabricate a bogus report to support an accusation by the Acupuncture Board. The 27th and 28th counts incorporate FAC ¶¶ 31-119 (ER 81-115), which allege all of the unlawful conduct by Appellees who prosecuted Pearce on baseless charges, fabricated evidence, defamed, assaulted, battered, and illegally searched him.

To the extent that the district court dismissed the 16th, 25th, 27th, and 28th counts on the basis that they allege nothing but conspiracies and no wrongful acts, this Court should reverse.

C. If the Court Rules that the Conspiracy Counts Are Incorrectly Pleaded, it Should Deem Their Allegations Appended to the Corresponding Counts Alleging Violations of 42 U.S.C. § 1983.

This Court has expressed reluctance "to decide the rights of the parties upon a mere technical defect in a pleading which can be corrected by amendment." *Suren v. Oceanic S.S. Co.*, 85 F.2d at 325. Thus, if the Court decides that the separate pleading of the conspiracy counts is improper, Pearce asks the Court to deem the FAC to be amended. The Court has the power to do so. *See, e.g., Pierre v. Jordan*, 333 F.2d 951, 956 (9th Cir. 1964); *Yuen Boo Ming v. United States*, 103 F.2d 355, 359 (9th Cir. 1939). Pleadings are to be so construed as to do substantial justice. Courts should not allow a technical error that does not affect the merits to elevate form over substance. *Krasnoff v. Marshack (In re Gen. Carriers Corp.)*, 258 B.R. 181, 188 (2001); *see* FED. R. CIV. P. 108(e). If necessary, Pearce proposes that the Court amend the FAC as follows, or alternatively grant Pearce leave to make the amendments:

12th count: Allegations of conspiracy between Sharp and Scheffer appended to the

ninth and 11th counts;

16th count: Allegations of conspiracy between Sharp and Brickman appended to the 13th and 15th counts.

25th count: Allegations of conspiracy among Hersh, Berman, Mercer, and Meadows appended to the 23rd, 24th, 25th, and 26th counts.

27th count: Conspiracy concerning fabrication of evidence appended to counts: 1, 7, 9, 11, 13, 15, 17, 23, 24; and that allegations of conspiracy concerning unlawful searches appended to the 2nd, 3rd, and 21st counts

28th count: Allegations of conspiracy to defame appended to the 18th count; and allegations of conspiracy to fabricate evidence appended to counts 1, 7, 9, 11, 13, 15, 17, 23, and 24.

11. Pearce's 29th, 30th, and 31st Counts for RICO Violations do not Fail on the Basis of the Statute of Limitations or Failure to Allege a "Separate Structure."

A. Pearce's RICO Claims Are not Barred by the Statute of Limitations.

(1) The alleged RICO Activities of Alexander and Botha Occurred Within Four Years Before Pearce Commenced This Action.

The statute of limitations for RICO claims is four years. 18 U.S.C. § 1961. The FAC alleges that all of the RICO violations by Alexander and Botha, set forth in the 29th and 31st counts, occurred within four years before commencement of the instant action.

Each Co-conspirator is Liable for Acts in Furtherance of the Conspiracy Occurring Within the Limitations Period. Each member of a conspiracy is liable for acts of co-conspirators in furtherance of the conspiracy. *In re Sunset Bay Assoc*., 944 F.2d 1503 (9th Cir. 1991). The FAC alleges that the AG Defendants and Berman conspired with Alexander and Botha to bring the false acupuncture board accusations. Each person who joins a conspiracy is

liable for acts done in furtherance of a conspiracy before and after he joins. *De Vries v. Brumback,* 53 Cal. 2d 643, 648-650 (1960). A plaintiff is entitled to a full recovery of damages suffered during the limitations period "even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the [complaint]." *Zenith v. Hazeltine Research, Inc*., 395 U.S. 100, 333 (1969). Thus, here, each Appellee alleged to have conspired with Alexander or Botha is liable for all damages resulting from conduct in furtherance of the conspiracy.

(2) Pearce's RICO Claims Did not Accrue, or Alternatively Were Tolled, Until After the Conclusion of the Administrative Proceedings Against Him.

The same reasoning applicable to Pearce's § 1983 claims discussed *supra* at pp. 28-34 applies to his RICO Act claims alleged in the 29th, 30th, and 31st counts. The RICO violations occurred while the Chiropractic Board or Acupuncture Board proceedings, or both, were pending between February 17, 1993 and May 16, 2002. The FAC alleges facts by which the RICO claims pass the three-prong test established in *Cervantes*, 5 F.3d at 1275 1276.(*See supra* p. 32-33). Thus, tolling is equally applicable to the RICO claims.

Also, as with the § 1983 claims, a RICO action filed by Pearce before the termination of the license-revocation proceedings would have resulted in "parallel litigation over the issue of probable cause." A judgment for Pearce on the RICO claims would "necessarily imply the invalidity" of the licensing boards' accusations. Thus *Heck v. Humphrey,* 512 U.S. at 489-490 compels the conclusion that Pearce's RICO claims arising out of the wrongful prosecution of *Chiropractic Board v. Pearce* did not accrue until September 6, 20012 and his RICO claims arising out of the wrongful prosecution of *Acupuncture Board v. Pearce* did not accrue until May 16, 2002. Thus, the 29th, 30th, and 31st counts are not barred by the statute of limitations.

B. Pearce's RICO Claims Are not Barred by Res Judicata.

The district court dismissed Pearce's 29th, 30th, and 31st counts, in part, on the ground that the claims are barred by the rule of claim preclusion. Incredibly, the court found that the RICO allegations "are essentially identical to those made in the state court proceedings." (ER 174).

But as previously discussed, as to Appellees other than Alexander and Stuart, there is no "identity of parties." (*See supra* pp. 69-70). And as to Alexander and Stuart, there is no identity of claims. Pearce's RICO claims had not accrued at the time of the state court actions; Pearce did not plead or dismiss RICO claims in state court; the RICO claims allege violation of different primary rights than the claims alleged here; and the settlement agreement in the state court case cannot be considered by the Court and in any event did not release anyone from RICO claims. (*See supra* pp. 60-69).

C. Pearce's RICO Claims do not Fail for Failure to Allege a "Separate Structure."

In *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), this Court overruled *Chang v. Chen*, 80 F.3d 1293, 1295 (9th Cir. 1996) and *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112 (9th Cir. 2003), relied on by the district court. *See* ER 45, 58. To the extent that the court's order dismissed the 29th, 30th, and 31st counts on the ground of failure to allege an ascertainable separate structure, this Court must reverse.

12. In the Alternative to Reversing the District Court's Orders, Pearce Should be Granted Leave to Amend at Least as to All Appellees Other Than Alexander.

Alexander, Botha, the State Defendants, Fulton & Guy, Scheffer, and Love filed separate motions to dismiss the original complaint. (*See* ER 198-205, docket nos. 12, 31, 43, 53, 83, 90). The court heard all of the motions, but entered an order only on Alexander's

motion. (*See supra* p. 26, fn. 4).

After Pearce filed the FAC, Appellees again filed motions to dismiss, all of which the court granted without leave to amend. Thus Pearce was afforded an opportunity to amend only the six claims for relief against Alexander, out of a total of 31 claims. FED. R. CIV. P. 15(a) requires that leave to amend a pleading "shall be freely given when justice so requires." It is the rule in this circuit that "in dismissals for failure to state a claim, a district court should grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. Northern California Collection Service, Inc*., 911 F.2d 242, 247 (9th Cir. 1990). As to any count or party for which this Court declines to reverse the district court's dismissal, Pearce asks that the Court remand with directions to allow him to file a second amended complaint.

CONCLUSION

Appellant Mitchell J. Pearce has been battling for justice for more than 14 years, often representing himself. He has prevailed in every tribunal in which he has appeared and now seeks compensation for the economic losses resulting from Appellees' ruination of his chiropractic and acupuncture careers and for the crippling costs of defending against Appellees' actions. Pearce seeks no more than the opportunity to present the facts to a jury.

Pearce asks this Court to reverse the judgment entered below and to remand to the trial court with directions to vacate its orders granting Appellees motions to dismiss, its order granting Alexander's special motion to strike, and its order granting Alexander's motion for attorney fees. In the alternative, Pearce asks that the Court reverse and remand with directions to permit the filing of a second amended complaint. Pearce further asks for an award of costs, including attorney fees, incurred on appeal.

Certificate of Compliance Pursuant to
FED. R. APP. P. 32(a)(7)(C) and 9th Cir. R. 32-1

Pursuant to FED. R. APP. P. 32 (a)(7)(C) and 9th Cir. R. 32-1, I certify that the foregoing Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 17,791 words.

_____
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