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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

12 RESOLUTE FOREST PRODUCTS, INC.,
13 RESOLUTE FP US, INC., RESOLUTE FP
14 AUGUSTA, LLC, FIBREK GENERAL
15 PARTNERSHIP, FIBREK U.S., INC.,
16 FIBREK INTERNATIONAL INC., and
17 RESOLUTE FP CANADA, INC.,

16 Plaintiffs,

17 v.

18 GREENPEACE INTERNATIONAL (aka
19 "GREENPEACE STICHTING COUNCIL"),
20 GREENPEACE, INC., GREENPEACE
21 FUND, INC., FORESTETHICS, DANIEL
22 BRINDIS, AMY MOAS, MATTHEW
23 DAGGETT, ROLF SKAR, TODD PAGLIA,
24 and JOHN AND JANE DOES 1-20,

25 Defendants.

CASE NO. 3:17-CV-02824-JST

**GREENPEACE FUND, INC.'S NOTICE OF
MOTIONS AND MOTIONS TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(6)
AND STRIKE PURSUANT TO CAL.
CODE CIV. PROC. SECTION 425.16;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: May 31, 2018
Time: 2:00 p.m.
Judge: Hon. Jon S. Tigar
Department: Ctrm. 9, 19th Floor

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1 **NOTICE OF MOTIONS AND MOTIONS**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE** that on May 31, 2018 at 2:00 p.m., in Courtroom 9 of the
4 United States District Court for the Northern District of California, 450 Golden Gate Avenue,
5 San Francisco, CA 94102, before the Honorable Jon S. Tigar, United States District Judge,
6 defendant GREENPEACE FUND, INC. will and hereby does move for an Order: (1)
7 dismissing Plaintiffs’ Amended Complaint, ECF No. 185, pursuant to Rule 12(b)(6) of the
8 Federal Rules of Civil Procedure on the ground that it fails to state a claim upon which relief
9 may be granted, and (2) striking Plaintiffs’ Amended Complaint, ECF No. 185, pursuant to
10 California Code of Civil Procedure section 425.16 on the grounds that all of the plaintiffs’
11 causes of action against GREENPEACE FUND, INC. arise from protected activity, and the
12 plaintiffs cannot establish a probability of success on the merits against GREENPEACE
13 FUND, INC.

14 These Motions are based on this Notice of Motions; the accompanying Memorandum
15 of Points and Authorities¹ and the anticipated Reply in support; the Court’s records and files
16 in this action; and any other materials or arguments the Court may receive before or at the
17 hearing on these Motions.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. INTRODUCTION**

20 The plaintiffs’ amended complaint is old wine in a new bottle. It suffers from all of
21 the same fatal defects that plagued the original. The plaintiffs have not even tried to remedy
22 the most glaring defect as to this defendant: *it still fails to attribute any publication*
23 *whatsoever to Greenpeace Fund, Inc.* And its fundamental character remains the same. This
24 lawsuit is a meritless attempt to chill classic political advocacy. If the plaintiffs have their
25 way, they will seriously undermine First Amendment protection for political speech, make

26 _____
27 ¹ Greenpeace Fund, Inc. joins in the arguments of Greenpeace International, Greenpeace, Inc.,
28 Daniel Brindis, Amy Moas, Matthew Daggett, and Rolf Skar (collectively, the “Other
Greenpeace Defendants”) and Todd Paglia (collectively, “Stand”) in support of their separate
motions to dismiss and strike Plaintiffs’ Amended Complaint.

1 RICO a weapon to be used against anyone who dares to donate to an advocacy organization
2 (and the organizations themselves), and bankrupt defendants who have the temerity to
3 criticize corporate conduct.

4 This attack on the First Amendment should end here. Timber companies enjoy no
5 immunity from criticism, and debates about timber cutting should be resolved in the court of
6 public opinion or in the academy, not in this Court. This motion to dismiss and special
7 motion to strike under the California anti-SLAPP statute should be granted without leave to
8 amend.

9 **II. PROCEDURAL HISTORY**

10 This section is narrowly focused on history and allegations that relate to Greenpeace
11 Fund, Inc. This Court granted the defendants' last round of motions to dismiss and special
12 motions to strike. ECF No. 173 at 6:8-7:13. There are now two iterations of the plaintiffs'
13 complaint, which contain a total of 314 pages. ECF No. 1, 185. As a result, Greenpeace
14 Fund, Inc. will recount only information it considers vital to its own dispositive motions.

15 **A. THE PARTIES**

16 The plaintiffs in this matter are Resolute Forest Products, Inc., Resolute FP US, Inc.,
17 Resolute FP Augusta, LLC, Fibrek Generap Partnership, Fibrek U.S., Inc., Fibrek
18 International Inc., and Resolute FP Canada, Inc. (collectively, the "plaintiffs"). ECF Nos. 1,
19 185. Resolute Forest Products, Inc. is the parent company of the remaining plaintiffs. ECF
20 No. 185 ¶ 24. Resolute Forest Products, Inc. says it has annual sales of approximately \$3.5
21 billion. *Id.* It calls itself "the largest producer of newsprint in the world and in North
22 America, the biggest volume producer of wood products east of the Rockies, the third largest
23 market pulp producer in North America, and the largest producer of uncoated mechanical
24 papers in North America." *Id.*

25 The defendants in this matter are Greenpeace Fund, Inc., the Other Greenpeace
26 Defendants, and Stand (collectively, the "defendants"). ECF No. 1, 185. The Other
27 Greenpeace Defendants and Stand are non-profit organizations that advocate for the
28

1 environment and their officers and employees. ECF No. 173 at 2:25-3:3; *see also* ECF No. 1
2 ¶¶ 31-32, 34-39; ECF No. 185 ¶¶ 31-32, 34-39. Greenpeace Fund, Inc. is different; it raises
3 and donates funds to other Greenpeace defendants. ECF No. 173 at 2:27-28; *see also* ECF
4 No. 1 ¶¶ 33, 41(b); ECF No. 185 ¶¶ 33, 41(b).

5 **B. THE PLAINTIFFS SUE GREENPEACE FUND, INC. BASED ON CONCLUSORY AND**
6 **THREADBARE ALLEGATIONS.**

7 The plaintiffs filed this lawsuit on May 31, 2016 in the Southern District of Georgia.
8 ECF No. 1. In their original complaint, they alleged against all of the defendants including
9 Greenpeace Fund, Inc. three federal RICO causes of action, a state law RICO cause of action
10 “on the basis of the same acts alleged under federal racketeering,” a state law conspiracy
11 cause of action, a defamation cause of action, tortious interference with prospective business
12 relations, tortious interference with contractual relations, a common law conspiracy cause of
13 action, a cause of action for trademark dilution, and a cause of action for attorney’s fees. ECF
14 No. 1 ¶¶ 218-318. They sought treble damages. ECF No. 173 at 6:6-7. Without including
15 attorney’s fees, they alleged that the defendants had caused them damages “far in excess of”
16 C\$100 million, and thus that the defendants were liable for far more than triple that amount,
17 C\$300 million. ECF No. 1 ¶ 17.

18 The plaintiffs’ original complaint was 124 pages long and incorporated five appendices
19 by reference. ECF No. 1. Yet, despite its prolixity, it repeatedly failed to allege essential
20 facts. *Id.* It alleged numerous statements that it claimed gave rise to liability, but it often
21 failed to identify their allegedly unlawful content, which defendant was responsible for which
22 statement, and the role of each defendant in each statement and the broader alleged enterprise.
23 *See* ECF No. 173 at 14:75-15:7.

24 The plaintiffs’ original complaint alleged almost nothing about Greenpeace Fund, Inc.
25 *See* ECF No. 1. When it referenced Greenpeace Fund, Inc. at all, the references were
26 conclusory or underscored the need to discuss Greenpeace Fund, Inc.’s role separately. *See*
27 ECF No. 1 ¶¶ 33 (alleging in a conclusory fashion that Greenpeace Fund, Inc. was involved in
28 planning “GP-Inc.’s forest campaign [sic]” in some unspecified way), 41(b) (conceding that

1 Greenpeace Fund, Inc. is a “separate and distinct legal entit[y]” from the other Greenpeace
2 entities, but nevertheless also alleging in a conclusory fashion that Greenpeace Fund, Inc. was
3 somehow “intimately involved” in the other Greenpeace entities’ campaigns), 41(l) and 45
4 (alleging in a conclusory fashion that Greenpeace Fund, Inc. somehow published unspecified
5 “disinformation” and was somehow “actively involved” in a campaign through its Executive
6 Director). It provided some scant information about the hundreds of allegedly fraudulent
7 publications upon which it was based, but it failed to attribute a single one to Greenpeace
8 Fund, Inc. *See* ECF No. 1-1.

9 **C. THE DEFENDANTS MOVE TO DISMISS, STRIKE, TRANSFER, AND STAY**
10 **DISCOVERY, AND THE MOTIONS TO TRANSFER AND STAY DISCOVERY ARE**
11 **GRANTED.**

12 The defendants moved to stay discovery based on the merits of dispositive motions
13 that they intended to file soon thereafter. ECF No. 35. They then moved to transfer the case
14 to this district for improper venue under 28 U.S.C. § 1406(a). ECF Nos 57, 62. They also
15 moved to dismiss and strike the plaintiffs’ original complaint under Rule 12(b)(6) and the
16 Anti-SLAPP Statute. ECF Nos. 55-56, 60-62.

17 The district court in Georgia granted the defendants’ motion to stay discovery on the
18 grounds that there was “an immediate and clear possibility of dismissing some or all of the
19 claims and/or defendants.” ECF No. 66. The district court also denied a later motion by the
20 plaintiffs to lift the discovery stay. ECF No. 91. The district court then granted the
21 defendants’ motion to transfer the case to this Court, and left to this Court the task of ruling on
22 the defendants’ motions to dismiss and Anti-SLAPP motions. ECF No. 104.

23 The parties filed supplemental briefs with this Court. ECF Nos. 127, 145, 148, 161,
24 165, 168.

25 **D. THIS COURT GRANTS GREENPEACE FUND, INC.’S MOTION TO DISMISS AND**
26 **GRANTS IN PART GREENPEACE FUND, INC.’S ANTI-SLAPP MOTION.**²

27 ² ECF No. 173 is now the “law of the case.” *See United States v. Alexander*, 106 F.3d 874,
28 876 (9th Cir. 1997).

1 This Court held a hearing on the defendants’ initial round of motions to dismiss and to
2 strike on October 10, 2017. ECF No. 173 at 2:16. The Court asked the parties to focus on
3 certain issues, and the parties did so. See Order Setting Time Limits, *Resolute Forest*
4 *Products, Inc. v. Greenpeace Int’l*, Case No. 3:17-CV-02824-JST (N.D. Cal. Oct. 10, 2017).

5 Less than a week after the hearing, the Court granted the motions to dismiss in their
6 entirety and the Anti-SLAPP motions as to the state law claims. ECF No. 173 at 27:16-25. It
7 held California law governs this case. ECF No. 173 at 7:17-8:21. It then turned to the
8 substance of the the motions. It first addressed the motions to dismiss, ECF No. 173 at 8:23-
9 21:18, then the Anti-SLAPP motions, ECF No. 173 at 21:19-26:4, and then the plaintiffs’
10 arguments that they were entitled to discovery before the Court ruled, ECF No. 173 at 26:5-
11 27:14.

12 The Court began with the actual malice standard. ECF No. 173 at 9:18-18:7. The
13 Court concluded that the plaintiffs had to plead and prove actual malice because they are at
14 least limited purpose public figures. ECF No. 173 at 11:10-12:12. The Court also held that
15 the plaintiffs were required to allege specific facts that would make a finding of actual malice
16 plausible. ECF No. 173 at 12:27-13:17; see also ECF No. 173 at 13:18-20 (“ ‘States of mind
17 may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim
18 plausible.’ ”) (quoting *Pippen v. NBC Universal Media, LLC*, 734 F.3d 610, 614 (7th Cir.
19 2013)). The Court explained that the actual malice standard precludes holding a speaker liable
20 for an alleged “defamatory falsehood” unless it was published with knowledge it was false or
21 awareness that it was probably false, and it was in fact materially false. ECF No. 173 at
22 12:13-20. Thus, the Court held that pleading actual malice requires allegations of specific
23 facts that make it plausible to infer that for each alleged false statement, “the speaker itself
24 held the requisite state of mind.” ECF No. 173 at 13:25-26. “[T]he state of mind required
25 for actual malice would have to be brought home to the persons in the [defendant’s]
26 organization having responsibility for the publication of the [statement].’ ” ECF No. 173 at
27 14:1-3 (quoting *New York Times*, 376 U.S. at 287).

1 Based on these rules, the Court held that the plaintiffs had failed to allege actual malice
2 in a plausible, non-conclusory way. ECF No. 173 at 14:4-28. It disregarded the plaintiffs’
3 conclusory allegations of actual malice, then addressed what remained. ECF No. 173 at
4 14:10-12. According to the plaintiffs, the defendants had participated in a “scheme” that
5 involved “faked” photographs, redrawing maps, and altering established geographical
6 boundaries to make the case that Resolute had breached the CBFA. ECF No. 173 at 14:10-15.
7 The Court held that while these allegations suggested some degree of knowledge or intent, the
8 plaintiffs had failed to allege facts indicating that the defendants “knew the photos were faked,
9 rather than mistaken, and no such inference can be drawn because Greenpeace shortly
10 thereafter retracted its statement” as it relied on “ ‘inaccurate maps.’ ” ECF No. 173 at 14:16-
11 19. The Court concluded that the plaintiffs had not sufficiently alleged actual malice because
12 they “ ‘[did] not provide any specific allegations that would support a finding that [the
13 Defendants] harboured serious subjective doubts as to the validity of [their] assertions.’ ”
14 ECF No. 173 at 14:25-28 (quoting *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1239 (N.D. Cal.
15 2014)).

16 The Court held that the plaintiffs’ actual malice allegations were also insufficient
17 because they never identified “who among the ‘Greenpeace [E]nterprise’ made the knowingly
18 false statements.” ECF No. 173 at 15:1-4. “All of Resolute’s discussions of photograph
19 faking and map redrawing fail to specify what individual did the faking, and Resolute does not
20 allege that the speaker of the alleged false statements regarding the C[BF]A knew that the
21 photos were faked or maps redrawn.” ECF No. 173 at 15:4-7. In addition, in the few
22 instances where the plaintiffs did identify who was responsible for a statement, the plaintiffs
23 did not allege specific facts indicating that the individual had acted with actual malice. ECF
24 No. 173 at 15:7-12.

25 Because the plaintiffs failed to allege actual malice in a non-conclusory, plausible way,
26 the Court dismissed their claims for defamation, tortious interference with business relations,
27
28

1 and tortious interference with contractual relations.³ ECF No. 173 at 15:26-16:2. In addition,
2 it held many of the statements upon which these claims were based were also not actionable
3 on the independent grounds that they constituted protected opinion or related to matters of
4 legitimate scientific debate. ECF No. 173 at 16:3-18:7. With respect to the latter category of
5 statements, the Court held, “The academy, and not the courthouse, is the appropriate place to
6 resolve scientific disagreements of this kind.” ECF No. 173 at 18:2-3.

7 The Court then turned to the plaintiffs’ civil RICO causes of action. First, the Court
8 held that the civil RICO causes of action were all dissonant with Rule 9(b). The Court held
9 that the civil RICO causes of action were all subject to Rule 9(b) because they were either
10 predicated on fraud or located within a unified course of alleged fraudulent conduct. ECF No.
11 173 at 19:8-9. It then held that the allegations supporting the civil RICO causes of action fell
12 “far short” of Rule 9(b)’s requirements. ECF No. 173 at 20:1-2. Rule 9(b) required the
13 plaintiffs to “state the time, place, and specific content of the false representations as well as
14 the identities of the parties to the misrepresentation,” and identify the “specific role of each
15 defendant in each scheme.” ECF No. 173 at 19:11-14. The Court held that the plaintiffs had
16 failed to satisfy these requirements because they often did not “identify the author” of the
17 allegedly false publications, and they never “identif[ied] the ‘misconduct’ or ‘specific content’
18 that constitute[d] fraud in the reports.” ECF No. 173 at 19:20-22.

19 Second, the Court held that the plaintiffs had failed to allege that the defendants’
20 conduct proximately caused their alleged injuries, a prerequisite for RICO standing. ECF No.
21 173 at 20:3-22. The Court held that the plaintiffs had failed to explain how they were the
22 victim of the alleged fundraising scheme since the only allegedly defrauded parties were the
23 donors, it would be difficult to ascertain the damages attributable to the alleged wrongful
24 conduct because “there are numerous reasons why a customer might cease or interrupt its
25

26 ³ The Court did not rule on Greenpeace Fund, Inc.’s argument that this failure warranted
27 dismissing the plaintiffs’ other claims as well, because it dismissed those claims on other
28 grounds. ECF No. 173 at 20-21 n.14. However, the Court did dismiss the plaintiffs’
trademark dilution claim in this section on the ground the plaintiffs had failed to allege
trademark ownership. ECF No. 173 at 16 n.10.

1 relationship with Resolute,” and imposing liability would require the Court to adopt
2 complicated rules apportioning damages. ECF No. 173 at 20:12-22.

3 Third, the Court held that the plaintiffs’ civil RICO claims predicated on extortion
4 under the Hobbs Act failed as a matter of law. ECF No. 173 at 21:1-18. Plaintiffs had failed
5 to satisfactorily allege that the defendants ever demanded or obtained the plaintiffs’ property.
6 ECF No. 173 at 21:14-18. “There was no alleged property transfer between Greenpeace and
7 Resolute.” ECF No. 173 at 21:17-18.

8 The Court dismissed the plaintiffs’ state RICO claims “for the same reasons” as their
9 federal RICO claims. ECF No. 173 at 20 n.14. It also dismissed the plaintiffs’ cause of action
10 for “attorney’s fees” on the grounds that it was not supported by any law. ECF No. 173 at
11 25:17-26:4. It then dismissed the plaintiffs’ federal, state, and common law conspiracy claims
12 because they required the plaintiffs to state a legally sufficient claim under another theory to
13 survive, and the plaintiffs had not done so. ECF No. 173 at 20 n.14.

14 The Court then granted the defendants’ anti-SLAPP motions as to the plaintiffs’ state
15 law causes of action. ECF No. 173 at 24:10-25:16. The Court held that California’s Anti-
16 SLAPP statute applied to the plaintiffs’ state law causes of action only. ECF No. 173 at
17 22:13-23:15. The Court then held that the plaintiffs’ complaint arose entirely from protected
18 activity under prong one of the Anti-SLAPP Statute, therefore the burden shifted to the
19 plaintiffs to demonstrate a probability of success on the merits under prong two of the Anti-
20 SLAPP Statute. ECF No. 173 at 24:11-25:1. With respect to prong two of the Anti-SLAPP
21 Statute, the Court held that the plaintiffs could not demonstrate a probability of success on the
22 merits as a matter of law. ECF No. 173 at 25:2-16.

23 The Court rejected the plaintiffs’ argument that they deserved discovery prior to a
24 ruling on the defendants’ motions. ECF No. 173 at 26:5-27:14. The Court dismissed the
25 plaintiffs’ claims on legal grounds; the plaintiffs were not entitled to discovery before their
26 claims were dismissed due to legal defects. *Id.*

27 For all of these reasons, the Court dismissed every cause of action in the plaintiffs’
28

1 original complaint, and granted the motions to strike as to all of the plaintiffs’ state law causes
2 of action. ECF No. 173 at 26:5-27:14. However, the Court granted the plaintiffs leave to
3 amend, resulting in Plaintiffs’ Amended Complaint, ECF No. 185. *Id.*

4 **E. THE PLAINTIFFS FILE AN AMENDED COMPLAINT THAT FAILS TO ELABORATE**
5 **ON THE CONCLUSORY AND THREADBARE BASIS FOR HOLDING GREENPEACE**
6 **FUND, INC. LIABLE.**

7 The plaintiffs filed an amended complaint on November 8, 2017. ECF No. 185. The
8 amended complaint is sixty-six (66) pages longer than the original. ECF Nos. 1, 185. Yet it
9 says almost nothing new about Greenpeace Fund, Inc. *See, e.g.*, ECF No. 185 ¶¶ 33, 41(b),
10 41(l). It expands on the original in four principal ways: (1) it contains new allegations
11 regarding the defendants’ state of mind, ECF No. 185 ¶¶ 75-88, 204-206, 209-211, 216-218,
12 219-221, 304-386, 401; (2) it says more about “Greenpeace USA,” which it continues to use
13 equivocally to conflate Greenpeace Fund, Inc. with other “separate and distinct entities,” ECF
14 No. 185 ¶¶ 41(b), 406-07 & Appxs. A-D; (3) it contains additional language about causation and
15 damages, ECF No. 185 ¶¶ 387-394; and (4) it no longer alleges state RICO, trademark dilution,
16 and attorney’s fees causes of action, and instead alleges a cause of action under the Unfair
17 Competition Law, Cal. Bus. & Prof. Code § 17200 (“UCL”), and the False Advertising Law,
18 Cal. Bus. & Prof. Code § 17500 (“FAL”), ECF No. 185 ¶¶ 492-498.

19 **F. THE PLAINTIFFS PROPOUND BURDENSOME DISCOVERY DESPITE THE**
20 **DISCOVERY STAY.**

21 With their amended complaint on file, the plaintiffs served Greenpeace Fund, Inc., the
22 Other Greenpeace Defendants, and Stand with wide-ranging requests for production. They
23 did so even though the Court held that “[n]o discovery on actual malice, or otherwise, is due
24 to Resolute.” ECF No. 173 at 27:14.

24 **III. ARGUMENT**

25 **A. LEGAL STANDARD**

26 To assess the legal sufficiency of the plaintiffs’ claims on the defendants’ motions to
27 dismiss under Rule 12(b)(6), the Court should conduct a two step analysis:
28

1 First, to be entitled to the presumption of truth, allegations in a complaint or
2 counterclaim may not simply recite the elements of a cause of action, but must
3 contain sufficient allegations of underlying facts to give fair notice and to enable
4 the opposing party to defend itself effectively. Second, the factual allegations
5 that are taken as true must plausibly suggest an entitlement to relief, such that it
6 is not unfair to require the opposing party to be subjected to the expense of
7 discovery and continued litigation.

8 *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014); *accord*
9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80, 686-87 (2009). This analysis applies when the
10 defendant’s state of mind is at issue, despite the Rules’ statement that the plaintiff may plead
11 intent “generally” and the potential utility of discovery. *Id.* at 686-87.

12 **B. THE PLAINTIFFS HAVE FAILED TO CURE THE DEFECTS THE COURT
13 IDENTIFIED IN ITS OCTOBER 16, 2017 ORDER.**

14 **1. The Plaintiffs Have Not Cured, and Cannot Cure, their Defective
15 Allegations of Actual Malice Against Greenpeace Fund, Inc.**

16 a. The actual malice standard applies to all of the plaintiffs’ causes
17 of action.

18 In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that no
19 cause of action has “talismanic immunity from constitutional limitations.” 376 U.S. at 269.
20 The actual malice standard is a constitutional limitation. *See id.* at 268-80. Accordingly, the
21 *New York Times* court held that the actual malice standard applies to not only causes of action
22 labeled defamation, but also causes of action that are based on “a defamatory falsehood.” *Id.*
23 at 279-80.

24 In a long line of cases interpreting *New York Times*, the Supreme Court has applied the
25 actual malice standard to a broad array of causes of action based on injurious falsehoods. *See*
26 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of emotional
27 distress); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 513-14 (1985) (product
28 disparagement); *Time, Inc. v. Hill*, 385 U.S. 374, 386-87 (1967) (false light invasion of
privacy).

This State and this Circuit follow these precedents. The California Supreme Court has
held:

1 [T]he various limitations rooted in the First Amendment are applicable to all
2 injurious falsehood claims and not solely to those labeled ‘defamation’ ” and
3 plaintiffs cannot circumnavigate these limitations by “creative pleading” that
4 “affix[es] labels other than defamation to injurious falsehood claims.

5 *Blatty v. New York Times*, 42 Cal. 3d 1033, 1042-43, 1045 (1986). The Ninth Circuit has
6 followed suit. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183, 1187 (9th Cir.
7 2001) (holding that right of publicity, UCL, and Lanham Act causes of action were subject to
8 the actual malice standard); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990)
9 (holding that product disparagement and tortious interference causes of action were subject to
10 the actual malice standard).

11 These cases stand for a simple rule: where a public figure plaintiff brings a cause of
12 action based on allegations that a false publication to third parties has caused it reputational
13 harm, the plaintiff must establish actual malice to prevail.

14 The actual malice standard applies to all of the plaintiffs’ causes of action. The actual
15 malice standard applies to the plaintiffs’ defamation (Count IV), trade libel (Count V),
16 tortious interference with prospective business relations (Count VI), and tortious interference
17 with contractual relations (Count VII) causes of action. ECF No. 185 ¶¶ 454-86. They are all
18 based on alleged injurious falsehoods. ECF No. 185 ¶¶ 135-221, 274-81, 351-78, 406-07,
19 454-63, 473 & Appxs. A-D; *see also* ECF No. 185 ¶¶ 454, 463, 470, 479 (incorporating prior
20 allegations into Count IV through Count VII by reference). And, in ECF No. 173, the Court
21 held that the actual malice standard applied to nearly identical causes of action in the original
22 complaint. It should reach the same conclusion for the same reasons with respect to these
23 nearly identical claims.

24 The actual malice standard also applies to the plaintiffs’ UCL and FAL cause of action
25 (Count IX). The actual malice standard applies to UCL and FAL claims based on injurious
26 falsehoods. *See Hoffman*, 255 F.3d at 1183 (holding that a UCL claim based on injurious
27 falsehoods was subject to “the full First Amendment protections afforded noncommercial
28 speech” including the actual malice standard); *cf. Total Call Int’l, Inc. v. Peerless Ins. Co.*,
181 Cal. App. 4th 161, 169-71 (2010) (holding that the First Amendment “of and concerning”

1 requirement applied to a UCL and FAL claim based on alleged injurious falsehoods). The
2 plaintiffs' UCL and FAL cause of action is based on injurious falsehoods here. ECF No. 185
3 ¶¶ 135-221, 274-81, 351-78, 406-07, 454-63, 473 & Appxs. A-D; *see also* ECF No. 185 ¶¶
4 492 (incorporating prior allegations into Count IX by reference), 493 (stating that injurious
5 falsehoods are a basis for Count IX). Thus, the plaintiffs must establish actual malice to
6 prevail.

7 The actual malice standard applies to the plaintiffs' common law conspiracy cause of
8 action (Count VIII) as well. ECF No. 173 at 20 n.14; *see also Julian v. Mission Community*
9 *Hosp.*, 11 Cal. App. 5th 360, 390 (2017). This cause of action hinges on the sufficiency of the
10 other causes of action. *Id.* The other causes of action require the plaintiffs to establish actual
11 malice, so this cause of action does, too.

12 Finally, the actual malice standard applies to the plaintiffs' civil RICO claims. Like all
13 of the plaintiffs' other causes of action, these causes of action are based on alleged injurious
14 falsehoods published to third parties that allegedly caused the plaintiffs reputational harm.⁴
15 The Court declined to resolve this question, and characterized it as an issue "of first
16 impression." ECF No. 173 at 20-21 n.14. But it is well established that the actual malice
17 standard applies to all causes of action based on injurious falsehoods, regardless of what
18 labels the plaintiffs have affixed to them. *See, e.g., Hustler*, 485 U.S. at 56; *Hoffman*, 255
19 F.3d at 1183. There is no principled basis for declining to apply the actual malice standard to
20 the plaintiffs' civil RICO causes of action in the face of this precedent.

- 21 b. The actual malice standard requires the plaintiffs to allege
22 specific facts that make plausible the inference that each
23 defendant – including Greenpeace Fund, Inc. – published
24 materially false statements with knowledge of falsity or serious
doubts as to truth.

25 ⁴ The plaintiffs' computer fraud, trade secrets theft, money laundering, and extortion predicate
26 act allegations change nothing. *See* ECF No. 185 ¶¶ 400(c)-(g), 420-36, 440(c)-(g), 447(c)-
27 (g). They are conclusory and implausible; the plaintiffs have not alleged a single fact that
28 could connect them to any defendant, let alone all of them. As a result, the Court should
disregard them. *See Eclectic Props. E., LLC*, 751 F.3d at 996. The Court should look to facts
to isolate the basis for the plaintiffs' claims, *see* ECF No. 173 at 14:10-12, and the only facts
alleged here relate to injurious falsehoods subject to the actual malice standard.

1 The actual malice standard precludes a public figure plaintiff from recovering for false
2 statements unless it establishes by clear and convincing evidence that the statements were
3 published with knowledge of falsity or reckless disregard for whether they were false, *New*
4 *York Times*, 376 U.S. at 279-80, and that the statements were materially false, *Air Wisconsin*
5 *Airlines Corp.*, 134 S. Ct. at 861. ECF No. 173 at 12:13-20. To establish reckless disregard,
6 the plaintiff must demonstrate that the publisher “in fact entertained serious doubts as to the
7 truth of his publication,” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or acted with a
8 “high degree of awareness of . . . probable falsity,” *Garrison v. Louisiana*, 379 U.S. 64, 74
9 (1964). ECF No. 173 at 12:20-26. “Gross or even extreme negligence” is not sufficient to
10 establish actual malice. *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1167 (2004).

11 The plaintiff must establish actual malice as to each defendant. *Cantrell v. Forest City*
12 *Publ’g Co.*, 419 U.S. 245, 253 (1974); *Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal.
13 1985). To do this, the plaintiff must establish that for each false statement, the speaker itself
14 had the requisite knowledge or awareness. ECF No. 173 at 13:25-26. For each organizational
15 defendant, the plaintiff must bring home this knowledge or awareness to the individual who
16 published the statement on the organization’s behalf. *Dongquk Univ. v. Yale Univ.*, 734 F.3d
17 113, 123 (2d Cir. 2013); *see also* ECF No. 173 at 14:1-3 (“ [T]he state of mind required for
18 actual malice would have to be brought home to the persons in the [defendant’s] organization
19 having responsibility for the publication of the [statement].’ ”) (quoting *New York Times*, 376
20 U.S. at 287).

21 The plaintiff may not establish actual malice with a showing of ill will, bad faith, or
22 ulterior motives. ECF No. 173 at 15:21-25. “Economic interests of the defendant and animus
23 toward the plaintiff cannot serve as a basis for actual malice.” *Nicosia v. De Rooy*, 72 F.
24 Supp. 2d 1093, 1109 (N.D. Cal. 1999). “Motive . . . cannot provide a sufficient basis for
25 finding actual malice.” *Harte-Hanks Comm’ns Inc. v. Connaughton*, 491 U.S. 657, 665
26 (1989). And, as this Court noted in ECF No. 173, the fact that “a party had ‘initial
27 enthusiasm’ for, but later made negative statements against, the party suing her for
28

1 defamation” is “ ‘not probative’ ” of whether it acted with actual malice in the Ninth Circuit.
2 ECF No. 173 at 15:14-19 (quoting *Makaeff v. Trump University*, 715 F.3d 254, 271 (9th Cir.
3 2013)).

4 The plaintiffs must allege actual malice in a plausible, non-conclusory way to
5 sufficiently state a claim subject to the standard. ECF No. 173 at 12:27-13:17. This Court
6 has so held, consistent with other courts in this district and every federal court of appeals that
7 has considered the question. *Id.*; *see also* ECF No. 173 at 12:27-13:17, 27:5-13 (collecting
8 cases). As this Court wrote in ECF No. 173, “ [A]pplication of the plausibility standard
9 makes particular sense when examining public figure defamation suits.’ ” ECF No. 173 at 9
10 n.7 (quoting *Michel v. NYP Holdings*, 816 F.3d 686, 702 (11th Cir. 2016)).

11 For purposes of this case, the plaintiffs are public figures. ECF No. 173 at 10:21-
12 12:12. And all of the plaintiffs’ causes of action are based on alleged injurious falsehoods.
13 *See supra* § III.B.1.i. Thus, to survive Greenpeace Fund, Inc.’s motions, the plaintiffs must
14 plead actual malice by alleging specific facts “such that it is not unfair to require the opposing
15 party to be subjected to the expense of discovery and continued litigation.” *Eclectic Props.*
16 *E., LLC*, 751 F.3d at 996.

- 17 c. The plaintiffs have not alleged specific facts that indicate
18 Greenpeace Fund, Inc. is responsible for publishing anything,
19 and have *a fortiori* not alleged specific facts that indicate
20 Greenpeace Fund, Inc. is responsible for publishing anything
with actual malice.

21 The amended complaint still fails to state a claim against Greenpeace Fund, Inc. Both
22 Greenpeace Fund, Inc. and the Court have admonished the plaintiffs that to plead actual
23 malice, they must identify the individual who published each alleged false statement and
24 allege specific facts that indicate the individual published with actual malice. ECF No. 145 at
25 4:12-8:1, ECF No. 168 at 4:1-10:2, ECF No. 173 at 14:25-15:12; *see also* ECF No. 173 at
26 15:26-16:2 (citing *Wynn*, 75 F. Supp. 3d at 1238-40; *Wynn v. Chanos*, No. 14-cv-04329-
27 WHO, 2015 WL 971360, at *3 (N.D. Cal. Mar. 3, 2015)). Yet, in their amended complaint,
28 the plaintiffs still fail to attribute any alleged statement to Greenpeace Fund, Inc. or allege

1 specific facts that indicate Greenpeace Fund, Inc. is responsible for any alleged statement. A
2 *fortiori*, the plaintiffs still allege no specific facts that indicate Greenpeace Fund, Inc. had the
3 knowledge or serious doubt necessary to publish any alleged statement with actual malice.

4 The plaintiffs still allege almost nothing at all about Greenpeace Fund, Inc. The
5 plaintiffs' prior allegations about Greenpeace Fund, Inc. remain largely untouched. ECF No.
6 185 ¶¶ 33, 41(b), 41(l), 45; *see also* ECF No. 185 ¶ 417 (conclusory allegation that
7 Greenpeace Fund, Inc. has "processed millions of dollars in fraudulently induced donations
8 over the wires in thousands of individual transactions"). The plaintiffs have added a few new
9 allegations that mention Greenpeace Fund, Inc., but the new allegations are as conclusory and
10 threadbare as the old ones. *See, e.g.*, ECF No. 185 ¶ 320 (alleging the legal conclusion that
11 the knowledge of one defendant should be automatically "imputed" to another by this Court).

12 The plaintiffs make four more specific allegations against Greenpeace Fund, Inc.: (1)
13 Greenpeace Fund, Inc. is a tax-exempt 501(c)(3) charitable organization; (2) Greenpeace
14 Fund, Inc. is a "separate and distinct" legal entity from the other defendants that has "no
15 corporate relationship" to Greenpeace, Inc. "in the form of parent, subsidiary, or affiliate"; (3)
16 Greenpeace Fund, Inc. raises money and makes donations to Greenpeace International and
17 Greenpeace, Inc., some of which was "earmarked" for Greenpeace, Inc.'s "forest campaign
18 [sic]"; (4) Greenpeace Fund, Inc. and Greenpeace, Inc. share an Executive Director, Annie
19 Leonard.

20 These allegations cannot support an inference of actual malice. As Greenpeace Fund,
21 Inc. has said before, ECF No. 145 at 4:12-8:1, ECF No. 168 at 4:1-10:2, the actual malice
22 standard has a necessary corollary: implicit in all of its requirements is that each defendant
23 must have the requisite level of fault for each statement. *See Cantrell*, 419 U.S. at 254;
24 *Murray*, 613 F. Supp. at 1281; ECF 173 at 13:25-26. If a defendant is not responsible for
25 publishing a statement, it is not possible, let alone plausible, that the defendant published that
26 statement with actual malice. It is not plausible to infer from these allegations that
27 Greenpeace Fund, Inc. is responsible for publishing any statement, let alone with actual
28

1 malice.

2 *First*, the allegation that Greenpeace Fund, Inc. is a 501(c)(3) charitable organization
3 militates against the proposition that it is responsible for publishing any statements. While
4 501(c)(3) organizations can engage in some advocacy activities, their right to do so is limited
5 by their tax status. In the absence of specific allegations about Greenpeace Fund, Inc., its
6 501(c)(3) designation makes it more plausible to infer that Greenpeace Fund, Inc. left the
7 advocacy to Greenpeace, Inc. than it would be to infer that Greenpeace Fund, Inc. engaged in
8 advocacy itself.

9 *Second*, the allegation that Greenpeace Fund, Inc. is “a separate and distinct legal
10 entit[y]” makes it less plausible that Greenpeace Fund, Inc. was responsible for publishing any
11 statements. It is “a general principle of corporate law deeply ‘ingrained in our economic and
12 legal systems’ ” that one corporation is not liable for the acts of another. *United States v.*
13 *Bestfoods*, 524 U.S. 51, 61 (1998); *see also Anderson v. Abbott*, 321 U.S. 349, 362 (1944)
14 (“Limited liability is the rule, not the exception.”).

15 *Third*, Greenpeace Fund, Inc.’s financial contributions to Greenpeace, Inc. and
16 Greenpeace International do not make it responsible for their speech.

17 One whose only contribution to a political campaign is financial, and who is not
18 involved in the preparation, review or publication of campaign literature, cannot
19 be subjected to liability in a defamation action for statements contained in that
20 literature, just as one whose only involvement in the publication of a libelous
magazine article is ownership of shares in the publishing company cannot be
held personally liable for the defamatory article.

21 *Matson v. Dvorak*, 40 Cal. App. 4th 539, 549 (1995). In addition, the plaintiffs’ ambiguous
22 allegation that Greenpeace Fund, Inc. “earmarked” funds for a “forest campaign [sic],” ECF
23 No. 185 ¶¶ 33, 41(b), is not sufficient to transform its financial contributions into
24 responsibility for a particular statement by the recipient. Indeed, if merely funding an entity
25 made the funder liable for the entity’s speech about a public figure on a matter of public
26 concern, Harry Belafonte, Sidney Poitier, and Nat King Cole could all have been held liable
27 for the advertisement at issue in *New York Times*, since their names appeared on it, and
28

1 arguably any advertiser in a publication – or even a shareholder in a publicly-held publisher –
2 could be held liable. In addition, under the plaintiffs’ expansive theory of liability, Macy’s
3 would be responsible for an allegedly libelous statement in the *San Francisco Chronicle* if, as
4 it has done for years, it ran an ad in the newspaper.

5 *Fourth*, the plaintiffs’ allegation that Ms. Leonard is an officer of both Greenpeace
6 Fund, Inc. and Greenpeace, Inc. does not warrant inferring that Greenpeace Fund, Inc.
7 published anything. The “duplication of some or all of the directors or executive officers” is
8 not sufficient to hold one corporation liable for the acts of another. *Bestfoods*, 524 U.S. at 61.
9 To maintain a lawsuit against two separate corporations for a single wrongful act, the plaintiff
10 must allege in a non-conclusory, plausible way that each was “involved in the wrongdoing.”⁵
11 *Delk v. Ocwen Fin. Corp.*, Case No. 3:17-cv-02769-WHO, 2017 WL 3605219, at *5 (N.D.
12 Cal. Aug. 21, 2017). The plaintiffs’ conclusory allegations about Ms. Leonard do no such
13 thing. *See, e.g.*, ECF No. 185 ¶ 41(b). They do not state how Ms. Leonard facilitated
14 cooperation between Greenpeace Fund, Inc. and Greenpeace, Inc., when Ms. Leonard did so
15 (or, for that matter, when Ms. Leonard joined Greenpeace Fund, Inc.), which statements Ms.
16 Leonard had a hand in publishing, or whether she knew those statements were false or had
17 serious doubts about their truth when they were published.

18 The plaintiffs attempt to paper over their conclusory allegations by conflating
19 Greenpeace Fund, Inc. with Greenpeace, Inc. using another name, “Greenpeace USA.” The
20 plaintiffs allege that “Greenpeace USA” sometimes means Greenpeace Fund, Inc., and
21 sometimes means Greenpeace, Inc. ECF No. 185 ¶ 41(b). The plaintiffs later allege that
22 “Greenpeace USA” published numerous alleged statements, but almost never state whether
23 they are referring to Greenpeace Fund, Inc. or Greenpeace, Inc. ECF No. 185 ¶¶ 145 n.1, 150
24 n.2, 158 n.3, 162 n.4, 174 n.5, 186 n.6, 406-07.⁶

25 _____
26 ⁵ In this district, courts have dismissed multiple complaints against parent corporations sued
27 based on conclusory allegations that they “acted in concert” with their subsidiaries. *See, e.g.*,
28 *Williby v. Hearst Corp.*, Case No. 5:15-cv-02538-EJD, 2017 WL 1210036, at *4 (N.D. Cal.
Mar. 31, 2017); *Delk*, 2017 WL 3605219, at *5; *WhiteCryption Corp. v. Arxan Technologies,*
Inc., Case No. 15-cv-00754-WHO, 2016 WL 3275944, at **8-10 (N.D. Cal. Jun. 15, 2016).

⁶ *See also* ECF No. 185 ¶¶ 91-93, 96-101, 103, 111, 113, 120-21, 125, 127-28, 156, 172, 205-

1 This sleight of hand does not make it plausible to infer anything about Greenpeace
2 Fund, Inc. Moreover, the plaintiffs’ amended complaint verifies that their allegations about
3 “Greenpeace USA” should not be attributed to Greenpeace Fund, Inc. When the plaintiffs
4 identify an individual responsible for publishing a statement they attribute to “Greenpeace
5 USA,” they identify Mr. Brindis, Ms. Moas, or Mr. Skar, who work for Greenpeace, Inc. *See,*
6 *e.g.*, ECF No. 185 ¶¶ 406-07 & Appxs. A-D.

7 Far from buttressing their claims, the plaintiffs’ repeated use of “Greenpeace USA” is
8 improper “group-pleading” that is an independent ground for granting Greenpeace Fund,
9 Inc.’s motions. In *MacKinnon v. Logitech Inc.*, the court dismissed defamation claims where
10 the plaintiff did not “specifically identify who made the statements.” Case No. 15-cv-05231-
11 TEH, 2016 WL 2897661, at *3 (N.D. Cal. May 18, 2016). In *Kennedy Funding, Inc. v.*
12 *Chapman*, the court dismissed a claim against two independent entities, Kennedy and Keeton,
13 reasoning:

14 It is unclear what statements Kennedy allegedly made versus Keeton or,
15 alternately, why any statement made by Keeton provides the basis for
16 Kennedy’s liability. . . . With respect to the alleged statements made to the real
estate professionals, the cross-claim presents conclusions rather than factual
allegations of Kennedy’s involvement.

17 Case No. C 09-01957 RS, 2010 WL 4509805, at *5 (N.D. Cal. Nov. 1, 2010). In *Harris v.*
18 *Dillman*, the court dismissed defamation claims against multiple defendants on the ground that
19 “defamation ‘allegations are insufficient [if] they are ascribed to defendants collectively rather
20 than to individual defendants.’ ” Case No. 2:08-CV-98-GEB-CMK, 2008 WL 2383939, at *5
21 (E.D. Cal. Jun. 6, 2008). And in *Choyce v. SF Bay Area Independent Media Center*, this
22 Court dismissed a complaint against a defendant where, as here, the plaintiffs had to allege
23 that the defendant was responsible for publication and they failed to allege specific facts
24 indicating as much. Case No. 13-cv-01842-JST, 2013 WL 6234628, at **9-10 (N.D. Cal. Dec.
25 1, 2013).

26
27 06, 211, 213, 216, 218, 233-34, 236, 244, 247-52, 260, 266, 271, 274, 278-80, 304, 306, 312,
28 315, 319-22, 326, 340-47, 349-50, 354-55, 358, 360, 362-65, 368-69, 372-73, 375-83, 401,
404-07 (referring to “Greenpeace USA”).

1 Even if the plaintiffs have nudged the inference that Greenpeace Fund, Inc. had a basic
2 level of responsibility for publishing a statement across the line from conceivable to plausible
3 (and they have not), they have failed to state a claim of actual malice. They have alleged
4 nothing that would make it plausible to infer that Greenpeace Fund, Inc. in particular, a
5 “separate and distinct legal entit[y]” incorporated as a 501(c)(3) organization, ECF 185 at ¶
6 41(b), published any alleged statement with knowledge that it was false or serious doubts as to
7 its truth. The plaintiffs have not adequately alleged animus or a desire to profit, but, even if
8 they had, that would make no difference; neither animus, nor malice in the traditional sense,
9 nor a desire to profit are probative of actual malice. ECF No. 173 at 15:13-25.

10 The plaintiffs’ amended complaint contains some new general allegations that the
11 plaintiffs may argue support their claim that Greenpeace Fund, Inc. published something with
12 actual malice. However, these allegations do not alter the equation as to Greenpeace Fund,
13 Inc.

14 The plaintiffs have added new allegations about what they call an “operational
15 memorandum,” ECF No. 185 ¶¶ 75-88, 322, 401, but these allegations do not support the
16 claim that Greenpeace Fund, Inc. published any statement with actual malice. The plaintiffs
17 allege that “[t]he Enterprise’s campaign plan against Resolute was the subject of months of
18 discussion in and among the Enterprise members since no later than late-2012 and early 2013,
19 and was ultimately reduced to writing in an operational memorandum.” ECF No. 185 ¶ 76.
20 This language tactically uses the passive voice to avoid identifying who wrote the alleged
21 “memorandum.” However, much later in the amended complaint, the plaintiffs reveal in
22 passing that the author is Stand, not Greenpeace Fund, Inc. ECF No. 185 ¶ 322. Moreover,
23 the plaintiffs never allege that the memorandum concedes that the accusations are false or
24 explain how it otherwise supports an inference of actual malice. ECF No. 185 ¶¶ 75-88. The
25 plaintiffs never say who received the memorandum, and say nothing that suggests Greenpeace
26 Fund, Inc. or any of its officers or employees had anything to do with its creation or even
27 knew that it existed. *See* ECF No. 185 ¶¶ 75-88, 322, 401.

1 The plaintiffs have also added new allegations that some of the defendants’
2 publications after this lawsuit was filed verify they had actual malice. ECF No. 185 ¶¶ 204-
3 206, 209-211, 216-218, 219-221, 304-318. These allegations also do nothing to strengthen the
4 plaintiffs’ claims against Greenpeace Fund, Inc., because they do not attribute any statements
5 or knowledge to Greenpeace Fund, Inc. *Id.*

6 Finally, the plaintiffs have added new allegations that expressly attempt to shore up
7 their actual malice case. ECF No. 185 ¶¶ 319-386. Consistent with the rest of the amended
8 complaint, these allegations say almost nothing about Greenpeace Fund, Inc. *Id.* They instead
9 assert:

10 Each defendant’s and Enterprise’ [sic] member’s actual and constructive
11 knowledge . . . is imputed to all other members of the Enterprise because . . . ,
12 the Greenpeace USA and Greenpeace Canada Canadian Boreal Forest teams
13 collaborated with and shared knowledge and information with one another for
the purpose of carrying out the “Resolute: Forest Destroyer” campaign. . . .

14 ECF No. 185 ¶ 320.

15 This assertion contradicts ECF No. 173 and clearly established law. There is no such
16 thing as “constructive” actual malice; actual malice requires publication with actual
17 knowledge of falsity or reckless disregard of whether a statement was true or false. *New York*
18 *Times*, 376 U.S. at 279-80. This Court has held that the plaintiffs must allege specific facts
19 establishing that each defendant had knowledge of falsity or serious doubts as to truth to plead
20 actual malice. ECF No. 173 at 12:27-14:3, 15:1-12. They have not done so. Incorrect legal
21 conclusions do not and cannot rectify the fatal flaws that this Court identified in their initial
22 complaint.

23 d. The plaintiffs have not adequately alleged actual malice against
24 Greenpeace Fund, Inc. because the statements alleged are not
25 materially false.

26 To plead a cause of action subject to the actual malice standard in a legally sufficient
27 way, a plaintiff must allege not only that the defendant published statements with the requisite
28 state of mind, but also that the statements are materially false. ECF No. 173 at 12:13-20. This

1 is an independent ground for granting Greenpeace Fund, Inc.’s motion to dismiss and Anti-
2 SLAPP motion because the statements alleged in the amended complaint (1) are not
3 susceptible to being proven true or false, (2) state the facts upon which they are based, and (3)
4 relate to matters of legitimate scientific debate. The Court and the Other Greenpeace
5 Defendants explained why this was so with respect to the original complaint. The same
6 rationale applies here.⁷

7 **2. The Plaintiffs Have Failed to Resolve the Issues Raised by the**
8 **Court’s Rule 9(b) Rulings, Because they Still Fail to Allege**
9 **Particular Actions by Greenpeace Fund, Inc.**

10 The plaintiffs’ civil RICO allegations must all satisfy Rule 9(b), because all of them
11 sound in fraud. Rule 9(b) “applies to civil RICO fraud claims.” *Edwards v. Marin Park, Inc.*,
12 356 F.3d 1058, 1066 (9th Cir. 2004). In addition, “Rule 9(b)’s heightened pleading
13 requirements apply even where fraud ‘is not a necessary element of a claim,’ but the plaintiff
14 chooses ‘nonetheless to allege in the complaint that the defendant has engaged in a unified
15 course of fraudulent conduct.’ ” ECF No. 173 at 19:2-5 (quoting *Vess v. Ciba-Geigy Corp.*,
16 317 F.3d 1097, 1103-04 (9th Cir. 2003)).

17 The plaintiffs’ civil RICO causes of action and UCL and FAL cause of action are
18 subject to Rule 9(b). The plaintiffs expressly allege, and incorporate into every one of their
19 causes of action by reference, that the “scheme” in which they locate all of their causes of
20 action was

21 to create and disseminate false and misleading reports and information
22 concerning Resolute, under the guise of protecting the environment, but in truth,
23 for the unlawful purpose of interfering with Resolute’s business and soliciting
24 fraudulent donations from the public at large.

25 ECF No. 185 ¶ 399. The plaintiffs label this a “dissemination scheme.” *Id.* Thus, as the
26 Court held with respect to the plaintiffs’ original complaint, all of the plaintiffs’ alleged
27 “predicate acts” for their civil RICO causes of action, “including those which are not fraud in
28

⁷ The Other Greenpeace Defendants elaborate on why the statements alleged in the amended complaint cannot support liability because they are protected opinion and advocacy and are not materially false in support of their separate motions to dismiss and strike, and Greenpeace Fund, Inc. joins in these arguments.

1 name, rely entirely on a unified course of fraudulent conduct.” *See* ECF No. 173 at 18:8-9. In
2 The plaintiffs’ UCL and FAL cause of action is based on fraud for the same reasons. *See* ECF
3 No. 185 ¶¶ 492-498. It incorporates the plaintiffs’ civil RICO causes of action by reference
4 and those causes of action form a basis for even their “unfair” business practices claim
5 because, to state a claim under the UCL, even “unfair” business practices allegations must be
6 “tethered to some legislatively declared policy.” *Cel-Tech Com’ns v. La Cellular*, 20 Cal. 4th
7 163, 186 (1999).

8 This Court detailed the requirements of Rule 9(b) in ECF No. 173. The plaintiffs must
9 “state the time, place, and specific content of the false representations as well as the identities
10 of the parties to the misrepresentation” and identify the “specific role of each defendant in
11 each scheme.” ECF No. 173 at 19:11-14 (quoting *Lancaster Cmty. Hosp. v. Antelope Valley*
12 *Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991)). The plaintiffs must give “notice of the
13 particular misconduct alleged so that they can defend against the charge and not just deny that
14 they have done anything wrong.” ECF No. 173 at 19:15-18. The Court held that plaintiffs
15 fell “far short” of these requirements in their original complaint because they often did not
16 “identify the author” of alleged false publications, they never “identif[ied] the ‘misconduct’ or
17 ‘specific content’ that constitute[d] fraud in the reports,” ECF No. 173 at 19:20-22, and
18 alleged that the defendants had procured millions of dollars in fraudulently induced donations
19 without describing a single donor, donation date or amount, or how the donation was
20 fraudulently induced. ECF No. 173 at 19:23-25; ECF No. 185 ¶¶ 417, 429, 441.

21 The plaintiffs have once again contradicted these rules. The amended complaint still
22 impermissibly makes “general statements about the defendants,” alleges multiple predicate
23 acts but does not say who did what, and “lumps together the defendants without identifying
24 the particular acts or omissions that each defendant committed.” *See Mostowfi v. i2 Telecom*
25 *Intern., Inc.*, 269 Fed. Appx. 621, 623-25 (9th Cir. 2008). The plaintiffs’ silence about
26 Greenpeace Fund, Inc. is particularly noteworthy, if not deafening: their Appendix does not
27 list Greenpeace Fund, Inc. as the author of any statements. *See, e.g.*, ECF No. 185 ¶¶ 406-07
28

1 & Appxs. A-D. They do not plead what Greenpeace Fund, Inc. said, when Greenpeace Fund,
2 Inc. said it, how Greenpeace Fund, Inc. was involved in any publication, or even that it ever
3 published any alleged statement in the first instance. *See supra* § III.B.1.iii. They press their
4 claim that the defendants, including Greenpeace Fund, Inc., have processed vast sums of
5 fraudulently induced donations, ECF No. 185 ¶¶ 417, but they still fail to describe “a single
6 donor, donation date or amount,” or “how the donation was fraudulently induced.” *See* ECF
7 No. 173 at 19:23-25. The plaintiffs have adamantly refused to provide the defendants with
8 “notice of the particular misconduct alleged so that they can defend against the charge and not
9 just deny that they have done anything wrong,” ECF No. 173 at 19:15-18, and, as a result,
10 their claims should all be dismissed.⁸

11 The plaintiffs have also failed to allege two other civil RICO elements: (1) proximate
12 causation, and (2) an exchange of property sufficient to establish extortion. With respect to
13 proximate causation, the Court held in ECF No. 173 that the plaintiffs had failed to satisfy any
14 of the prerequisites for establishing that the defendants had proximately caused them harm in
15 the original complaint. *See* ECF No. 173 at 20:9-22 (citing, inter alia, *Holmes v. Securities*
16 *Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). The same is true here. The plaintiffs
17 have still not said how they were the most direct victim of the alleged scheme because the
18 only allegedly defrauded parties were donors. *Id.* It would be difficult to ascertain the
19 damages attributable to the alleged wrongful conduct because “there are numerous reasons
20 why a customer might cease or interrupt its relationship with Resolute.” *Id.* And imposing
21 liability would require the Court to adopt complicated rules apportioning damages. *Id.* The
22 plaintiffs have made some new allegations regarding damages in the amended complaint, ECF
23 No. 185 ¶¶ 387-394, but they do not allege specific facts that alter the analysis as to these
24

25 ⁸ “To state a successful claim under RICO, a plaintiff must allege (1) conduct (2) of an
26 enterprise (3) through a pattern (4) of racketeering (known as ‘predicate acts’) (5) causing
27 injury to the plaintiff’s business or property.” ECF No. 173 at 18 n.12 (internal citations and
28 quotation marks omitted). The amended complaint does not sufficiently allege any of these
elements against Greenpeace Fund, Inc. *See Eclectic Props. E.*, 751 F.3d at 996; ECF No. 197
at 14:13-24:14. It does not allege any of them against Greenpeace Fund, Inc. in a manner that
comports with Rule 9(b) either.

1 factors.

2 Dismissing this complaint without leave to amend on the ground that the plaintiffs
3 cannot allege proximate cause is sensible. As Justice Scalia explained in *Holmes*, the
4 proximate cause requirement is premised on the truth that “[l]ife is too short to pursue every
5 human act to its most remote consequences; ‘for want of a nail, a kingdom was lost’ is a
6 commentary on fate, not the statement of a major cause of action against a blacksmith.” 503
7 U.S. at 287 (Scalia, J., concurring). Life is also too short to spend years of effort and millions
8 of dollars in fees attempting to calculate how much the plaintiffs’ alleged business issues are
9 due to alleged fraud on third parties rather than the plaintiffs’ own environmental practices,
10 market forces, a general tendency on the part of some environmentalists to donate to
11 environmental organizations and view timber companies with distrust or hostility, corporate
12 customers’ desire to be seen as “green,” and a panoply of other factors that must have been
13 involved in their former customers’ decisions to do business elsewhere. The plaintiffs – with
14 the vastly superior resources which characterize SLAPP plaintiffs – would no doubt like to
15 take ten years of the Court’s time and multiple millions of the defendants’ money seeing how
16 many angels can dance on the head of a pin, but this Court need not and should not indulge
17 them in their SLAPP suit.

18 With respect to extortion, the plaintiffs have still failed to resolve a fatal problem
19 identified by the Court in ECF No. 173. To be liable under the Hobbs Act, a defendant must
20 have obtained “ ‘property from another, with his consent, induced by wrongful use of actual or
21 threatened force, violence, or fear, or under color of right.’ ” ECF No. 173 at 21:3-5 (quoting
22 18 U.S.C. § 1951(b)(2)). The plaintiffs failed to satisfy this standard in their original
23 complaint because they had not alleged that the defendants had ever demanded or obtained *the*
24 *plaintiffs’* property. ECF No. 173 at 21:14-18. “There was no alleged property transfer
25 between Greenpeace and Resolute.” ECF No. 173 at 21:17-18. That allegation is still absent
26 in the amended complaint. This is particularly problematic to the extent that the plaintiffs are
27 alleging that Greenpeace Fund, Inc., a 501(c)(3), charitable organization that does little more
28

1 than fundraise, had any role in any extortion that would support liability.

2 **C. THE PLAINTIFFS’ COMPLAINT DOES NOT ALLEGE THAT GREENPEACE FUND,**
3 **INC. IS RESPONSIBLE FOR A WRONGFUL ACT IN A MANNER SUFFICIENT TO**
4 **OVERCOME THE FIRST AMENDMENT RIGHT OF ASSOCIATION.**

5 Like the actual malice standard, the right of association is an important component of
6 the First Amendment protections for participation in public discourse. *See NAACP v.*

7 *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The Supreme Court has explained,

8 Effective advocacy of both public and private points of view, particularly
9 controversial ones, is undeniably enhanced by group association, as this Court
10 has more than once recognized by remarking upon the close nexus between the
11 freedoms of speech and assembly. [. . .]

12 *Id.* “ [T]he practice of persons sharing common views banding together to achieve a common
13 end is deeply embedded in the American political process.’ . . . “ ‘by collective effort
14 individuals can make their views known, when, individually, their voices would be faint or
15 lost.’ ” *NAACP v. Claiborne Hardware Co.*, 458 US 886, 907-08 (1982).

16 The First Amendment shields the right of association by superimposing additional
17 requirements on association-based causes of action. To prevail against a defendant “by reason
18 of association alone,” a plaintiff must establish both (1) “that the group itself possessed
19 unlawful goals” and (2) “that the individual held a specific intent to further those illegal
20 aims.” *Id.* at 920. And the intended aim cannot be mere persuasion. The First Amendment
21 “extends to more than abstract discussion, unrelated to action.” *Id.* at 910. It “ . . . is a
22 charter for government, not for an institution of learning. ‘Free trade in ideas’ means free
23 trade in the opportunity to persuade to action, not merely to describe facts.’ ” *Id.* (quoting
24 *Thomas v. Collins*, 323 U.S. 516, 537 (1945)); *see also Claibourne Hardware Co.*, 458 U.S. at
25 926 (holding that “business losses” caused by organizing a boycott, “emotional and persuasive
26 appeals for unity in the joint effort,” and “ ‘threats’ of vilification or social ostracism” are
27 “constitutionally protected and beyond the reach of a damages award”).

28 This supports granting Greenpeace Fund, Inc.’s dispositive motions. The plaintiffs’
causes of action against Greenpeace Fund, Inc. are all based on association with the Other

1 Greenpeace Defendants. To state a claim against Greenpeace Fund, Inc. on that basis, the
2 plaintiffs must allege that Greenpeace Fund, Inc. “held a specific intent to further . . . illegal
3 aims” in a plausible, non-conclusory way. *Iqbal*, 556 U.S. at 686-87; *Claiborne Hardware*
4 *Co.*, 458 U.S. at 920. The plaintiffs have not done so as to Greenpeace Fund, Inc., so they
5 have failed to state a basis for encumbering Greenpeace Fund, Inc. with C\$300 million (or any
6 amount)of liability.

7 The plaintiffs may argue that the amended complaint is consistent with the First
8 Amendment because it is based on Greenpeace Fund, Inc.’s donations to other Greenpeace
9 defendants. *See supra* § III.B.1.iii. However, donating money to an advocacy organization is
10 in itself lawful. *See In re: Mastercard Int’l Inc.*, 132 F. Supp. 2d 468, 487 (E.D. La. 2001),
11 *aff’d*, 313 F.3d 257 (5th Cir. 2002) (holding that transferring money, without any role in
12 directing an enterprise, is not actionable under RICO); *Matson*, 40 Cal. App. 4th at 549
13 (holding that donating money does not make a party responsible for publications by the
14 recipient). Like attending meetings, recording the names of store patrons, wearing symbolic
15 attire, signing a demand letter to businesses, and leading a boycott with “emotionally charged”
16 rhetoric, donating money to an advocacy organization is “an insufficient predicate” for
17 liability. *See Claibourne Hardware Co.*, 458 U.S. at 924-32. To the extent that the plaintiffs
18 assert that Greenpeace Fund, Inc.’s donations were unlawful because Greenpeace Fund, Inc.
19 has associated with other Greenpeace defendants, the First Amendment provides otherwise.
20 *Id.* at 920.

21 The amended Complaint should be dismissed as to Greenpeace Fund, Inc. on this basis
22 for the same reasons it should be dismissed based on the plaintiffs’ inadequate allegations of
23 actual malice. If donating to an advocacy organization, without more, could make the donor
24 liable for its advocacy, donors would be exposed to a virtually limitless universe of liability.
25 That is not the law. It is not unlawful to donate to an advocacy organization, and mere
26 association with the advocacy organization cannot transform a lawful donation into a basis for
27 a C\$300 million lawsuit.

1 **D. THE PLAINTIFFS’ UNFAIR COMPETITION LAW AND FALSE ADVERTISING LAW**
2 **CLAIM AGAINST GREENPEACE FUND, INC. FAILS.**

3 In addition to its failure to allege actual malice, its dissonance with Rule 9(b), and its
4 inconsistency with the right of association, the plaintiffs’ UCL cause of action against
5 Greenpeace Fund, Inc. fails for the same reasons that the other substantive claims in the
6 complaint do to the extent that it is based on “unlawful” or “unfair” business practices. To state
7 a claim for “unlawful” business practices under the UCL, the plaintiffs must demonstrate that
8 the defendants have violated some other law. *Bernardo v. Planned Parenthood Fed’n of Am.*,
9 115 Cal. App. 4th 322, 351(2004). To state a claim for “unfair” business practices under the
10 UCL, the plaintiffs must demonstrate that the defendants have acted contrary to some
11 “legislatively declared policy.” *Id.* at 223; *see also Cel-Tech Com’ns, Inc.*, 20 Cal. 4th at 186-
12 87. Because the other causes of action in the plaintiffs’ amended complaint fail, this cause of
13 action should fail for exactly the same reasons, at least as to the UCL’s “unlawful” and “unfair”
14 prongs.⁹

15 **E. THE PLAINTIFFS’ CONSPIRACY CLAIM AGAINST GREENPEACE FUND, INC.**
16 **FAILS.**

17 The plaintiffs have not stated a conspiracy claim against Greenpeace Fund, Inc. First,
18 whether the plaintiffs have stated a claim for conspiracy hinges on whether they have stated
19 any other claims against any defendants, and they have not stated any other claims against any
20 other defendants here. ECF No. 173 at 20 n.14; *see also Julian*, 11 Cal. App. 5th at 390
21 (holding that “[u]nder California law, [t]here is no separate tort of civil conspiracy and no
22 action for conspiracy to commit a tort unless the underlying tort is committed and damage
23 results therefrom”). Second, the plaintiffs have not alleged in a non-conclusory, plausible way
24 that Greenpeace Fund, Inc. did any wrongful act in furtherance of a conspiracy or had a
25 conspiratorial state of mind. *See Doctor’s Co. v. Superior Court*, 49 Cal. 3d 39, 44 (1989)
26 (stating the elements of conspiracy are (1) formation and operation of the conspiracy and (2)
27 damage resulting to plaintiff and (3) from a wrongful act done in furtherance of the common
28 design). Thus, the plaintiffs have not stated a conspiracy claim against Greenpeace Fund, Inc.

⁹ The Other Greenpeace Defendants and Stand elaborate on these deficiencies.

1 **F. THE COURT SHOULD GRANT GREENPEACE FUND, INC.’S ANTI-SLAPP**
2 **MOTION, BECAUSE THE PLAINTIFFS’ FAILURE TO STATE A CLAIM MEANS**
3 **THEY CANNOT SHOW A PROBABILITY OF SUCCESS ON THE MERITS AS A**
4 **MATTER OF LAW.**

4 This is a textbook SLAPP. A SLAPP is “defined by a particular strategy: obtaining an
5 economic advantage over a defendant, and not . . . the vindication of a cognizable legal right.”
6 *Breazeale v. Victim Serv’s, Inc.*, 878 F.3d 759, 764 (9th Cir. 2017). “The paradigm SLAPP . .
7 . ‘is a suit filed by a large land developer against environmental activists . . . intended to chill
8 the defendants’ continued political or legal opposition to the developers’ plans.” *Id.* (quoting
9 *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816 (1994)). That fits this lawsuit like a
10 glove. The plaintiffs in this case do not care about the merits, they care about punishing
11 Greenpeace Fund, Inc. with crushing litigation costs for funding their political adversaries.

12 This Court has already stated the anti-SLAPP standard in this case. First, the
13 defendant must make a prima facie showing that the plaintiff’s suit arises from protected
14 activity under section 425.16(e). ECF No. 173 at 23:16-24:9. Second, if the defendant makes
15 this showing, the burden shifts to the plaintiff to prove that it has a probability of success on
16 the merits. *Id.*; *see also* ECF No. 173 at 25:2-16 (applying this standard to claims dismissed
17 under Rule 12(b)(6)).

18 In light of the deficiencies in the amended complaint, this Court should grant the Anti-
19 SLAPP motion without leave to amend. The plaintiffs’ amended complaint arises from
20 protected activity under California Code of Civil Procedure section 425.16, subdivisions
21 (e)(3) and (e)(4), for the same reasons that the plaintiffs’ original complaint did. *See* ECF No.
22 173 at 24:11-25:1. The burden thus shifts to the plaintiffs to prove a probability of success on
23 the merits. Because the plaintiffs have failed to state a single legally sufficient claim, they
24 cannot prove a probability of success on the merits as a matter of law. ECF No. 173 at 25:2-
25 16.

26 **G. THE COURT SHOULD GRANT GREENPEACE FUND, INC.’S MOTIONS TO**
27 **DISMISS AND TO STRIKE WITHOUT LEAVE TO AMEND.**

28 The Court should not grant the plaintiffs leave to amend. The Court may decline to

1 grant leave to amend based on “undue delay, bad faith or dilatory motive on part of the
2 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
3 prejudice to the opposing party . . . , [and] futility of amendment.” *Carvalho v. Equifax Info.*
4 *Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178,
5 182 (1962)). This favors denying leave to amend a second time here.

6 *First*, the plaintiffs have caused undue delay. The plaintiffs presumably brought this
7 lawsuit in Georgia in hopes of avoiding a California Anti-SLAPP motion. *See* ECF Nos. 1,
8 104. The plaintiffs’ failed effort weighs against granting leave to amend.

9 *Second*, the plaintiffs have bad motives for bringing this suit. Their transparent intent
10 is to punish the defendants for their criticism with litigation costs and chill donations to and
11 collaboration among the defendants and other advocacy organizations. Each day this lawsuit
12 continues, the defendants pay a greater price for their political participation.¹⁰

13 *Third*, this case is causing irreparable harm to Greenpeace Fund, Inc. and the
14 environmental advocacy ecosystem in this country. It is chilling donations and encumbering
15 the defendants with litigation when they could be fundraising and advocating at a perilous
16 time for the environment. In addition, the plaintiffs served a raft of requests for production
17 despite the Court’s admonition that “[n]o discovery on actual malice, or otherwise, is due to
18 Resolute.” ECF No. 173 at 27:14.

19 *Fourth*, a second chance to amend would be futile. The defendants and the Court put
20 the plaintiffs on notice that the allegations against Greenpeace Fund, Inc. were not detailed
21 enough under the First Amendment, Rule 9(b), and the more basic *Iqbal* plausibility
22 requirement. *See supra* § III.B. The plaintiffs still fail to attribute a single statement to
23 Greenpeace Fund, Inc., and adamantly equivocate about its role using the term “Greenpeace
24

25 ¹⁰ Plaintiffs’ counsel has also brought another, similar lawsuit in another court against the
26 Greenpeace entities for environmental advocacy, and has publicly signalled that he will bring
27 more. *See Energy Transfer Equity, L.P. v. Greenpeace Int’l*, No. 1:17-cv-00173-CSM, ECF
28 No. 1 (D. N.D. Aug. 22, 2017); Paul Barrett, *How a Corporate Assault on Greenpeace Is*
Spreading, Bloomberg Businessweek (Aug. 28, 2017, 6:00 AM),
[https://www.bloomberg.com/news/articles/2017-08-28/how-a-corporate-assault-on-
greenpeace-is-spreading](https://www.bloomberg.com/news/articles/2017-08-28/how-a-corporate-assault-on-greenpeace-is-spreading).

1 USA.” *See supra* § III.B.1.iii. For these and other reasons, the plaintiffs’ claims fail. The
2 plaintiffs’ RICO claims also fail as a matter of law because, among other things, the
3 defendants did not proximately cause their injuries. *See supra* § III.B.2.

4 The plaintiffs’ attempt at amendment verifies the emptiness of their claims against
5 Greenpeace Fund, Inc. They do not have and have never had any factual basis for making
6 Greenpeace Fund, Inc. a defendant in this C\$300 million lawsuit. They cannot state a claim or
7 prove a probability of success , despite having had enough time to draft a 190-page amended
8 complaint. The Court should immediately terminate this meritless lawsuit, **without** leave to
9 amend.

10 **IV. CONCLUSION**

11 The Court should grant the motions to dismiss and Anti-SLAPP motions without leave
12 to amend. As the California Supreme Court concluded in *Baker v. Los Angeles Herald*
13 *Examiner*,

14 The threat of a clearly non-meritorious defamation action ultimately chills the
15 free exercise of expression. “[T]here comes a time when the finality of litigation
16 is almost as important as the decision therein. In the preservation of the free
17 exercise of speech, writing and the political function, the early termination of
[the] lawsuit is highly desirable. We should discourage attempts to recover
through the judicial process what has been lost in the political process.”

18 42 Cal. 3d 254, 268-69 (1986). Those words ring especially true in this case. The plaintiffs
19 were advised of the legal flaws in their complaint and given an opportunity to repair them by
20 amendment, but they failed to do so in a manner that heeded the Court’s order. And they have
21 served the defendants with burdensome discovery despite the Court’s indication they should
22 not. The complaint should be dismissed **without** leave to amend, and the defendants’ Anti-
23 SLAPP motions should be granted.

24
25 Respectfully submitted,

26 DATED: January 29, 2018

CANNATA, O’TOOLE, FICKES & ALMAZAN LLP

27 By: /s/ Karl Olson
28 KARL OLSON

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