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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

John J. Hurry, et al.,

Plaintiffs,

v.

Financial Industry Regulatory Authority Incorporated, et al.,

Defendants.

Case No. 2:14-cv-02490-PHX-ROS

RESPONSE TO MOTION TO DISMISS ALL CLAIMS

Oral Argument Requested

I. INTRODUCTION[1]

Defendants are not comfortable with the facts of this case as alleged in the First Amended Complaint [37 ("Complaint")], so they've rewritten it to allege facts they are more used to seeing. But the facts as alleged actually matter. They cannot be tweaked, altered, or ignored just because they are getting in the way of an otherwise familiar argument. For example, citing the Complaint, Defendants assert they "copied the hard drives of computers located at SCA's offices" and then define those as the "Copied Computers." [46 ("Motion") at 2.] But the Complaint doesn't allege the computers were located at *SCA*'s offices. It alleges the three password-protected computers and numerous hard drives within them were located in the separate, locked offices of *ISC*, a business Defendants concede is outside their direct regulatory control. According to the Complaint, Defendants used threats against SCA personnel to coerce their way into the Hurrys' offices at ISC and make copies of each and every one of the ISC computers within.

[1] Per the Court's Order entered May 21, 2015 [65], Plaintiffs have not included in this Response additional arguments regarding exhaustion of remedies that fell outside the scope of the Court's request for supplemental briefing [61].

Defendants' desire to obscure these facts as alleged is understandable. They know there is no meaningful distinction between a registered person's office at a separate, non-member business, and a registered person's home or even the home of his family member. If they permissibly can coerce access to one—and copy every document, computer, and hard drive within—they permissibly can coerce access to the others and do the same. They're understandably uncomfortable with such a result and so, as with many other key allegations, they have recast the facts to avoid the issue. Defendants may be used to getting their way, but they should know better. They are stuck with the well pleaded facts of the Complaint. As demonstrated in each section below, when those facts are considered and properly viewed, Plaintiffs state legally viable claims against Defendants. The Motion must be denied.

II. LEGAL ARGUMENT

A. Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030

The CFAA imposes penalties on anyone who intentionally (i) accesses a computer without authorization or exceeds authorized access and thereby *obtains information* from a "protected computer" or (ii) accesses a "protected computer" without authorization, and as a result of such conduct, *causes damage* and loss. Subsection (g) affords one who has suffered loss or damage a private right of action, including for injunctive relief, where a violation of the statute has caused a "loss" of at least $5,000.[2] Defendants contend they were authorized to access the ISC computers, and that, even if they weren't authorized, they are immune from such claims. Neither argument is persuasive.

1. Defendants accessed the ISC Computers without authorization or exceeded authorized access.

a. Rule 8210 did not authorize access to the ISC computers.

Despite that unauthorized computer access is the cornerstone of the CFAA, Congress did not define what it meant by the term "without authorization." The Ninth Circuit has explained that "authorization" means "permission or power granted by an authority" and "to endorse, empower, justify, permit by or as if by some recognized or proper authority." *LVRC Holdings LLC v. Brekka*, 581 F.3d

[2] The CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11).

1127, 1133 (9th Cir. 2009) (looking to dictionary definitions). Thus, the question here is whether Defendants had "proper authority" or "permission" to access the ISC Computers.

The version of Rule 8210 in effect on November 12, 2012 allowed FINRA to inspect and copy the "books, records, and accounts" of those under its jurisdiction "[f]or the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules."[3] Nothing in the rule authorized FINRA to seize, access, and copy the computers and hard drives of entities outside its jurisdiction as part of an onsite examination.[4] Unlike the SEC or state securities commissions, FINRA has no subpoena power. As a result, under Rule 8210, it lacks any authority to compel an entity that is not a member firm to produce any documents or information unless that entity is identified on a member firm's Form BD as a direct owner of the member firm.[5] ISC is not and was not a FINRA member firm, the owner of a FINRA member firm, or a "person associated with a member." It simply isn't under FINRA's jurisdiction. Thus, Rule 8210 did not and could not grant FINRA authority over ISC's books and records—let alone authority to access and copy the entirety of ISC's computers and hard-drives.

Defendants attempt to avoid this outcome by misstating the applicable facts and relying on inapplicable law. First, they argue that, even if the computers were technically owned by ISC, they were being used in the offices of a FINRA member firm (SCA) by persons associated with that member (the Hurrys). But, the ISC Computers were not merely *owned* by ISC, they were located in the *separate and locked office* of ISC and used by the Hurrys "primarily to attend to the management and operations of ISC, Scottsdale Partners [the owner of the building], their other non-member real estate businesses, and new and potential business ventures that arise for them from time to time." [37 ¶ 67.] Thus, "the ISC

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[3] Defendants suggest they were conducting an "investigation" in November of 2012. But, as alleged, the 8210 letter makes clear that Defendants accessed and copied the ISC Computers in November of 2012 as part of an onsite "examination" of SCA, not an investigation.

[4] In 2013, FINRA amended Rule 8210 to extend FINRA's authority to inspect and copy documents to items "in such member's or person's possession, custody or control." FINRA Rule 8210(a) (2013). The "possession, custody or control" language in the 2013 version of Rule 8210 was not in the rule when Defendants seized, accessed, and copied the ISC Computers.

[5] "Rule 8210 only permits [FINRA] to inspect the books and records of certain direct owners of a member firm." Charles A. Bowsher *et al.*, Report of the 2009 Special Review Committee on FINRA's Examination Program in Light of the Stanford and Madoff Schemes at 70 (Sept. 2009), available at www.finra.org/web/groups/corporate/@corp/documents/corporate/p120078.pdf

1 Computers contained hundreds of gigabytes of electronic data that (1) were not SCA's 'books and
2 records' (nor the books and records of any other FINRA member) [and] (2) were unrelated to SCA." [37
3 ¶ 71.][6] On the facts as alleged, there is no basis to conclude the ISC Computers comprised "books and
4 records" of SCA or of any other entity or person subject to FINRA's jurisdiction.

5 Second, Defendants argue incorrectly that they had jurisdiction over the ISC Computers because
6 Rule 8210(a) permits FINRA to inspect and copy "books and records" in a "member's or person
7 [associated with a member's] possession, custody or control." As noted in footnote 4, the language
8 extending Rule 8210 to reach "possession, custody or control" was first added in 2013, *after* Defendants
9 had already seized, accessed, and copied the entirety of the ISC Computers. That language could not
10 have authorized Defendants' action because it didn't exist.

11 **b. Defendants exceeded authorized access to the ISC computers.**

12 The CFAA also provides for liability when a person "exceeds authorized access" to a computer.
13 To "exceed[] authorized access" is "to access a computer with authorization and to use such access to
14 obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18
15 U.S.C. § 1030(e)(6). Even if Rule 8210 can be construed as authorizing access to some of the information
16 on the ISC Computers, Defendants exceeded the scope of that authorization when they accessed and
17 copied all of it.

18 Defendants' focus on the *location* of the ISC Computers and whether the Hurrys had possession,
19 custody or control of them is misplaced. The location and control of information on the ISC Computers
20 is irrelevant to whether Defendants are entitled to access and copy it. Just because Defendants might be
21 entitled to inspect and copy *some* information from a computer in the custody or control of an associated
22 person doesn't mean they are entitled to inspect and copy *all* information from such a computer.
23 Defendants cite no cases supporting such a broad construction of Rule 8210. *E.g.*, *In re Jay Alan*
24 *Ochanpaugh*, Securities Exchange Act Release No. 54363, 2006 WL 2482466 (Aug. 25, 2006) (noting lack

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26 [6] None of the allegations cited by Defendants is an admission the ISC Computers comprise SCA books and records. Plaintiffs merely allege Defendants were informed that, "to the extent the ISC
27 Computers contain any SCA-related material, that material likely comprises emails to or from John or
28 Justine at their respective SCA-email addresses, which are preserved in a third-party, SEC-approved, cloud-based, verifiable and auditable, electronic data repository maintained by Smarsh, Inc." [37 ¶ 92.]

1 of authority for proposition that "possession and control suffice to make the requested [third-party
2 records] 'books, records, and accounts of' [the associated person] for purposes of Rule 8210").

3 *In re Gregory Evan Goldstein* doesn't require a different result. *Goldstein* involved a written 8210
4 request served on an associated person as part of an investigation of his undisclosed business activities.[7]
5 Acknowledging "Rule 8210's scope is not unlimited," the SEC nonetheless determined there was a
6 sufficient connection between the subject of FINRA's investigation and the requested information,
7 which was stipulated to be in Goldstein's custody or control. For example, Goldstein stipulated that his
8 undisclosed consulting business claimed the member firm as a "subsidiary" through which it planned to
9 "operate a full-service, retail securities brokerage business." *In re Gregory Evan Goldstein*, Securities
10 Exchange Act Release No. 71970, 2014 WL 6986406 (Apr. 17, 2014).

11 No such connections are alleged here. Plaintiffs do not allege the Hurrys were ever served with a
12 written Rule 8210 request seeking access to and copying of the ISC Computers—let alone a written 8210
13 request related to an investigation of undisclosed outside business activities. The only written Rule 8210
14 request issued before Andersen's 15-minute ultimatum addressed an onsite examination of SCA and its
15 books and records. Even if FINRA could have theoretically requested certain documents from the
16 Hurrys as part of some hypothetical investigation into outside business activities, there are no facts
17 suggesting they did.

18 And there is no question the ISC Computers contained extra-jurisdictional material. As alleged:
19 "[m]ost of the data on the hard drives relates to the private and personal affairs of the Hurry family, *e.g.*,
20 medical records, school records, trusts and estate planning, to the private and personal affairs of
21 employees and tenants of Hurry-owned, non-member businesses, and to the Hurrys' non-member
22 businesses themselves, *i.e.*, businesses other than SCA, including privileged and confidential attorney-
23 client communications." [FAC ¶ 22(d).] When Defendants accessed and copied these materials, they
24 exceeded any access to the ISC Computers that might otherwise have been authorized under Rule 8210
25 and impermissibly "use[d] such access to obtain or alter information in the computer that the accesser is
26 not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6).

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28 [7] Rule 3270 requires associates persons to disclose to their member firms certain outside business activities.

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c. The deceptive 8210 Request and Privilege Letter and Wells Notice ultimatum invalidated any purported consent by the Hurrys.

Like the tort of trespass, the CFAA is designed to protect against unauthorized access. Trespass protects against unauthorized access to real property. The CFAA protects against unauthorized access to protected computers. In either case, an owner's consent to the access operates as a defense. For trespass, however, "an overt manifestation of assent or willingness would not be effective ... if the defendant knew, or probably if he ought to have known in the exercise of reasonable care, that the plaintiff was mistaken as to the nature and quality of the invasion intended." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1073 (9th Cir. 2004) (quoting *Prosser & Keeton on Torts* § 18, at 119). In other words, "[i]f the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm." Restatement (Second) of Torts § 892B(2) (1979).

The same holds true for the CFAA. In *Theofel*, adversaries Farey-Jones and Integrated Capital Associates, Inc. ("ICA") were embroiled in litigation when Farey-Jones issued a subpoena to NetGate, ICA's internet service provider. The subpoena demanded "'[a]ll copies of e-mails sent or received by anyone' at ICA with no limitation as to time or scope." 359 F.3d at 1071. Even though the subpoena was so overbroad as to be "patently unlawful," NetGate posted a "sample" of several hundred emails related to the company on a website and granted access to that website to Farley-Jones. Most of the emails were unrelated to the litigation and many were privileged or personal. *Id.*

When ICA found out about the disclosure, it had the subpoena quashed and sued Farley-Jones under the CFAA among other federal statutes.[8] Farley-Jones argued there was no CFAA violation because NetGate had authorized Farley-Jones's access to the emails. The Ninth Circuit rejected this argument. Applying analogous trespass law principles, the court held Farley-Jones's unlawful subpoena was deceptive as to the nature and quality of the invasion intended because "[i]t was a piece of paper

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[8] Particularly noteworthy is the claim under the Stored Communications Act, which protects communications that are stored by an internet service provider. Although relief under that statute is unavailable in this case, *Theofel* holds that its analysis of consent and authorization under that statute directly applies to those same questions under the CFAA. 359 F.3d at 1078.

masquerading as legal process." *Id.* at 1074. "The subpoena's falsity transformed the access from a bona fide state-sanctioned inspection into private snooping." *Id.* at 1073.

The rationale of *Theofel* applies with equal force here. Defendants' demand to access and copy everything on the ISC Computers with a 15-minute ultimatum exceeded FINRA's jurisdiction under Rule 8210, vitiating any consent provided by the Hurrys.[9] Any consent is also vitiated because it was improperly induced by mistake or deception in another respect. FINRA's Privilege Letter states that it "agree[s] to consider your privilege claims and, without reviewing the document, to delete or otherwise segregate those documents for which your privilege claim seems reasonable." But, despite this statement, none of the extra-jurisdictional material on the ISC computers was segregated and kept from FINRA's view or destroyed. Instead, after Defendants had accessed and copied the ISC Computers, Andersen stated that "FINRA could not agree to return or destroy any such data because the data purportedly cannot be disaggregated and also stated that, if Andersen disagreed with [a] claim of 'privilege' on any document, a FINRA staff member would review that document and decide whether, in the FINRA staff member's view, the 'privilege' claim is warranted." [37 ¶ 110.]

Lastly, any consent was vitiated by Andersen's 15-minute Wells Notice threat, which improperly induced any consent that was given "under the influence of such fear as preclude[d] [the Hurrys] from exercising [their] free will and judgment." *Inter-Tel, Inc. v. Bank of Am., Arizona*, 195 Ariz. 111, 117, ¶ 35, 985 P.2d 596, 602 (App. 1999) (quoting Restatement (Second) of Contracts § 492). As alleged, this threat understandably "caused enormous duress for John and Justine, compounding the severe emotional strain with which they were burdened because of Justine's life-threatening medical condition and her impending surgery and convalescence." [37 ¶ 100.]

2. Defendants Are Not Entitled to Immunity, Absolute or Otherwise, for the Tortious Conduct Alleged in the Complaint.

a. Defendants' acts of malfeasance were outside the bounds of FINRA's SEC-delegated prosecutorial and adjudicatory duties.

"No man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. (16

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[9] *Cf. also Bumper v. North Carolina*, 391 U.S. 543, 549 (1968) ("A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid."), parenthetically cited and quoted in *Theofel*, 359 F.3d at 1073.

1 Otto) 196, 220 (1882) ("All of the officers of the government . . . are creatures of the law, and are bound
2 to obey it."). In recognition of that bedrock principle, federal courts have long recognized that a grant of
3 immunity is an "extreme remedy," *Lacey v. Maricopa Cty*, 693 F.3d 896, 912 (9th Cir. 2012) (en banc)
4 ("*Lacey II*"), that must be "narrowly construed." *Weissman v. NASD*, 500 F.3d 1293, 1297 (11th Cir. 2007).
5 Absolute immunity will be afforded only to those who "establish[ ] that such immunity is appropriate"
6 in light of the facts presented. *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Lacey II*, 693 F.3d at 912
7 (party seeking immunity "bears the burden of showing . . . immunity is justified for the function in
8 question") (*quoting Burns v. Reed*, 500 U.S. 478, 486 (1991)).

9 That burden cannot be met unless '"any lesser degree of immunity could impair the judicial
10 process itself."' *Lacey II*, 693 F.3d at 912 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997)); *see also*
11 *DiBlasio v. Novello*, 344 F.3d 292, 296 (2nd Cir. 2003) ("The presumption is that qualified rather than
12 absolute immunity is sufficient to protect government officials in the exercise of their duties," and hence
13 courts are generally 'quite sparing' in their recognition of absolute immunity.") (*quoting Burns*, 500 U.S. at
14 486-87). When it comes to SROs, such immunity will be afforded only when the SRO was performing
15 duties akin to those of prosecutors or judges. *E.g.*, Rohit A. Nafday, *From Sense to Nonsense and Back Again:*
16 *SRO Immunity, Doctrinal Bait-and-Switch, and a Call for Coherence*, 77 U. Chi. L. Rev. 847, 848 (2010).

17 Defendants tacitly urge the Court to abandon the foregoing tenets. They propose a construction
18 of immunity that is essentially boundless, one that shields FINRA and its agents from liability irrespective
19 of the status of the victim, the nature of the conduct alleged, and the type of relief sought. If Defendants
20 view of the law were correct, they could infringe on the rights of anyone they please with impunity. But,
21 as Plaintiffs demonstrate below, the law is otherwise. Defendants compound the flaw in their motion by
22 failing to demonstrate how, if the allegations of the Complaint are taken as true, immunity is warranted.
23 Instead, they further mischaracterize both the Complaint and the cases by shading or otherwise ignoring
24 them while attempting to shift the burden to Plaintiffs to demonstrate that immunity is *unwarranted.*

25 FINRA's status as an SRO does not *ipso facto* render the organization immune from suit for its
26 tortious conduct. Immunity is afforded only to an SRO that has proven the conduct alleged was part of
27 a "purely" regulatory function "that would otherwise be performed by a government agency." *Weissman*,
28 500 F.3d at 1297. To determine whether an SRO's conduct is quasi-governmental, federal courts look to

the objective nature and function of the activity for which the SRO seeks immunity. *Id.* An SRO may invoke immunity only when performing duties that are properly within the scope of its delegated authority, including:

> (1) disciplinary proceedings *against exchange members*; (2) the enforcement of security rules and regulations and general regulatory oversight *over exchange members*; (3) the interpretation of the securities laws and regulations *as applied to the exchange or its members*; (4) the referral of *exchange members* to the SEC and other government agencies for civil enforcement or criminal prosecution under the securities laws; (5) the public announcement of regulatory decisions; and (6) an SRO's amendment of its bylaws where the amendments are inextricable from the SRO's role as a regulator….

Id. (emphasis added, citations omitted). As these examples illustrate, immunity attaches only with respect to "an SRO's performance of regulatory, adjudicatory, or prosecutorial duties in the stead of the SEC." *Weissman*, 500 F.3d at 1296 (citing *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213–15 (9th Cir. 1998), among others).

Naturally, in its capacity as an SRO, FINRA may "regulate" only those classes of persons or entities as to whom Congress or the SEC has explicitly delegated regulatory power. It follows that when FINRA commits tortious acts against persons or entities over whom it lacks regulatory authority, immunity cannot attach. None of the federal circuit court decisions upon which Defendants rely to support their expansive immunity argument is to the contrary. In *Sparta*, the NASD had regulatory authority over the plaintiff in connection with the allegedly wrongful delisting of its stock and suspension of trading on the public offering. The plaintiffs in *Austin Municipal Securities, Inc. v. NASD*, a registered broker-dealer and five of its associates, likewise were subject to NASD regulation. 757 F.2d 676, 681-682 (5th Cir. 1985). So, too, with respect to the putative class of individuals in *Lowe v. NASD*, 548 F.3d 110 (D.C. Cir. 2008), that sued the NASD for the negligent performance of its duties in administering Series 7 exams.

The foregoing point is germane to this dispute because, at the time the alleged misconduct occurred, neither the SEC nor FINRA had regulatory authority over any Plaintiff other than John and Justine Hurry. *E.g.*, Compl at ¶¶ 2, 4, 122. Even as to the Hurrys, FINRA cannot invoke regulatory immunity under the circumstances alleged. Although the Hurrys' securities-related activities are subject to regulation, none of those activities was the target of FINRA Matter No. 20120327319, the initiative

that led to its November 2012 raid on SCA's office, the invasion of ISC's separate office and copying of its computers and hard drives, and the several additional events described in the Complaint. It was only SCA's conduct upon which FINRA was focused. [37 ¶ 72]. Notably, as Plaintiffs allege, when FINRA raided SCA's offices in connection with FINRA Matter No. 20120327319, it did not issue a Rule 8210 request to the Hurrys—indeed, FINRA has *never* issued a Rule 8210 Request to the Hurrys in relation to FINRA Matter No. 20120327319. [37 ¶ 80]. Additionally, FINRA has not charged the Hurrys (or SCA, for that matter) with any wrongdoing in connection with FINRA Matter No. 20120327319. [37 ¶ 77]. Thus, FINRA was not exercising its SEC-delegated "regulatory, adjudicatory, or prosecutorial duties" as to the Hurrys and cannot claim absolute immunity as to the tortious acts of which they complain.[10]

While Defendants will argue otherwise, FINRA and its employees cannot possibly be immune for any tort they commit simply because they purportedly were conducting an "investigation" when the act occurred. To illustrate the flaw in Defendants' logic, let's assume that just prior to the raid in November 2012, a FINRA agent had pulled into the parking lot of SCA's offices and struck a bystander with a FINRA-owned vehicle. Would FINRA be immune from the bystander's claim in those circumstances? What if the victim was Justine Hurry? Would FINRA be immune merely because it has regulatory jurisdiction over her securities-related activities, even though she was not being investigated when she was struck by the car? What if FINRA accidentally—or intentionally—started a fire in ISC's offices while it was copying the hard drives? Would FINRA be immune because it was supposedly in the process of conducting an investigation of SCA, a regulated party, and the property of ISC, a non-regulated party, was damaged? In other words, to accept Defendants' argument that everything it does during an investigation is subject to absolute immunity would shield FINRA in ways that were never intended by Congress or the federal courts.

Nor does immunity apply to claims asserting non-monetary relief. *Wood v. Strickland*, 420 U.S.

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[10] Other acts alleged cannot be subject to immunity either. Defendants' defamatory statements about the Hurrys and their businesses to *Deal Pipeline* (*see* Compl, ¶¶ 176-220), were purely tortious acts that served no conceivable regulatory purpose. *Cf. Platinum Partners Value Arbitrage Fund, L.P. v. Chi. Bd. Options Exch.*, 976 N.E.2d 415, 422 (Ill. App. Ct. 2012) (CBOE's disclosure to certain market participants that the strike price of a mutual fund would be downwardly adjusted—before that decision was publically announced—was not a regulatory act subject to immunity).

308, 315 n.6 (1975), *overruled in part on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Adler v. Pataki*, 185 F.3d 35, 48 (2d Cir. 1999). Here, Plaintiffs' claims seek injunctive relief in addition to monetary damages.

b. Plaintiffs' allegations survive a qualified immunity challenge as well.

Investigators—unlike judges and prosecutors—are traditionally afforded only *qualified* immunity for their actions. *Lacey v. Maricopa County*, 649 F.3d 1118, 1129-30 (9th Cir. 2011) ("*Lacey I*") (special prosecutor not entitled to absolute immunity when acting as an investigator). In *O'Callaghan v. New York Stock Exchange*, for example, a former broker-dealer alleged the NYSE and several of its employees brought disciplinary proceedings against him in order to wrongfully deprive him of his license. 2013 WL 3984887 (S.D.N.Y. Aug. 2, 2013) *aff'd*, 563 F. App'x 11 (2d Cir. 2014). While the district court concluded the NYSE and certain individuals were absolutely immune because they were "involved in … quasi-adjudicatory and prosecutorial duties" in connection with the allegedly wrongful disciplinary proceedings, *id.* at *17, it reached a different conclusion with regard to Defendant Bruno, an NYSE attorney who supervised an investigation against O'Callaghan and acted as an advisor during the subsequent proceedings, and Defendant Dalton, an NYSE investigator who investigated O'Callaghan and testified at O'Callaghan's first disciplinary hearing. The district court found them entitled only to *qualified* immunity because they were functioning "more like investigators than as prosecutors[.]" *Id.* at *16.

Here, much of the conduct about which Plaintiffs complain relates to purported investigatory activities that Defendants FINRA and Andersen performed—specifically, their conduct during and after the November 2012 raid. But that "investigation"—if that's what it was—is all that Defendants did. FINRA never charged the Hurrys (or SCA, for that matter) with any wrongdoing in connection with FINRA Matter No. 20120327319, or conducted any disciplinary proceedings against them with regard to that matter. [37 ¶ 77]. Nor has FINRA accused the Business Plaintiffs or the other individual plaintiffs of any wrongdoing, as it lacks jurisdiction over them. Thus, as it relates to the acts alleged, neither FINRA nor Andersen has acted in a prosecutorial or adjudicatory role with regard to *any* of the Plaintiffs. Their acts were either investigatory (at most), or, in some cases, had no conceivable regulatory purpose.[11] As a

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[11] These acts would include, for example, the Defendants' defamatory statements to Bill Meagher, the reporter for *Deal Pipeline*. [37 ¶¶ 176-220]. *Cf. Platinum Partners*, 976 N.E.2d at 422.

1 result, FINRA's and Andersen's actions should at most be subjected to a qualified immunity analysis.

2 Even under a qualified-immunity analysis, Plaintiffs' claims withstand scrutiny at this stage.
3 "Qualified immunity shields public officials from civil damages for performance of discretionary
4 functions." *Lacey I*, 649 F.3d at 1130. Under qualified immunity, an official is protected from suit when
5 he or she "makes a decision that, even if constitutionally deficient, reasonably misapprehends the law
6 governing the circumstances." *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). Here, FINRA's
7 and Andersen's actions went beyond a mere "reasonable misapprehension" of the law. The November
8 2012 raid is illustrative. As alleged, Defendants were informed the computers in ISC's office were not on
9 SCA's premises, did not belong to SCA, were used for purposes unrelated to SCA, and contained
10 Plaintiffs' sensitive, private, confidential, and trade-secret information as well as attorney-client-privileged
11 communications and attorney work product that belonged to Plaintiffs. [37 ¶ 91]. Defendants were also
12 informed that, to the extent there was any SCA-related information on the ISC computers, it would
13 consist of e-mails that could readily be obtained from the SEC-approved electronic data depository
14 maintained by Smarsh, Inc. [37 ¶ 92]. Yet Defendants still demanded access to them. Worse, Defendants
15 threatened to take draconian action against any SCA employee who dared to question their authority.
16 They threatened to issue Wells Notices[12] to everyone in the building if Defendants' demands were not
17 met within 15 minutes. [37 ¶ 94]. In short, Defendants knowingly used—indeed, abused—their position
18 as regulators in order to gain access to information they had no authority to obtain.

19 Defendants are also alleged to have leaked non-public, confidential, and misleading information
20 to *Deal Pipeline*, a news service distributed on the Internet. Defendants told *Deal Pipeline* the Hurrys or
21 their companies were engaged in illegal activities, including insider trading, and were the target of various
22 criminal investigations, none of which was true. [37 ¶¶ 176-220]. No reasonable FINRA official could
23 conclude the law authorized the dissemination of false and defamatory information about Plaintiffs to
24 the media. These acts served no legitimate purpose. They were designed solely to embarrass and discredit
25 John and Justine Hurry.

26 In sum, the acts alleged in the Complaint show Defendants' actions were not merely

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28 [12] The significance of receiving a Wells Notice is described in the Complaint at ¶¶ 94-100. [37]. A Wells Notice can mark the end of the securities-trading career of the person who receives it.

unreasonable but coercive, and that they reflect malice and bad faith rather than a mere mistaken belief about the scope of their authority. Defendants are not entitled even to the lesser protection of qualified immunity with regard to this conduct.

B. Prima Facie Tort

"One who intentionally causes injury to another is subject to liability to the other for that injury if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability." *Restatement (Second) of Torts* § 870 (1979). While Defendants contend no such tort exists in Arizona, there is no Arizona authority rejecting prima facie tort as a viable claim. In *Rutledge v. Phoenix Newspapers, Inc.*, 715 P.2d 1243, 1246 (Ariz. Ct. App. 1986), *overruled on other grounds by Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781 (Ariz. 1989), a defamation case, the court observed that where a "claim of liability for intended consequences" (*i.e.*, prima-facie tort) has been recognized in other jurisdictions, it is available when the plaintiff has no "adequate redress by any of the forms of action known and practiced." *Id.* (citing a 1939 *Corpus Juris Secondum* article and a 1976 New York defamation case). Because the plaintiff in *Rutledge* had a remedy for the defamation alleged, the court found on summary judgment that he could not also avail himself of a claim for prima-facie tort. Here, as it is not yet clear whether Plaintiffs will be found to have other claims available to them, and because Plaintiffs are entitled under Fed. R. Civ. P. 8(d)(2) and (3) to plead alternative causes of action (and even inconsistent claims), it would be premature to dismiss Plaintiffs' prima-facie tort claim.

C. Defamation and Defamation by Implication

To plead defamation, the plaintiff must allege that (1) the defendant made a false and defamatory statement about the plaintiff, (2) the defendant published the statement to a third party, and (3) the defendant knew the statement was false, acted in reckless disregard of whether the statement was true or false, or negligently failed to ascertain the truth or falsity of the statement. *Peagler v. Phoenix Newspapers, Inc.*, 560 P.2d 1216, 1222 (Ariz. 1977). Defendants argue that Plaintiffs have not alleged "a publication by FINRA of a provably false representation." They are wrong. The Complaint is replete with allegations that FINRA and its agents, including Andersen, provided false and defamatory information to the media. Paragraphs 176-220 allege in detail the defamatory statements Defendants evidently leaked to Bill

Meagher, a reporter for *Deal Pipeline*. These later found their way into a series of articles by Meagher in late 2013 and early 2014. What was leaked included statements that the Hurrys or their companies were engaged in illegal activities, including insider trading, and that they were the targets of various criminal investigations. None of these statements were true. And because these statements "impeach[] the honesty, integrity or reputation" of Plaintiffs, they are *per se* defamatory. *See Peagler*, 560 P.2d at 1223.

Defendants also contend that, because it was Meagher and not they who wrote the articles, they did not "publish" any defamatory statements. But this argument misses the point. What matters is that Defendants are alleged to have told Meagher things about Plaintiffs that were untrue and defamatory. *That* was the "publication."[13] Meagher's articles are merely evidence that Defendants made these defamatory statements to Meagher in the first instance. Defendants' argument is meritless.

D. Intentional Interference with Contractual Relationship or Business Expectancy

To plead tortious interference, the plaintiff must allege: (1) existence of a valid contractual relationship, (2) knowledge of the relationship on the part of the interferor, (3) intentional interference inducing or causing a breach, (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 31 (Ariz. 2002). Plaintiffs allege Defendants made untrue and defamatory statements about them to various people, including Meagher of *Deal Pipeline*. These statements, some of which ended up in Meagher's published articles, were read by officials at Plaintiffs' banks. The banks reacted by ceasing to conduct business with Plaintiffs. How and when these events occurred is described in detail in paragraphs 221-231 of the Complaint.

Defendants contend (1) their conduct did not cause the disruption of Plaintiffs' banking relationships and (2) they did not know of the relationships. But neither argument is compelling. Whether Defendants' statements to Meagher as incorporated into his published articles caused the banks to cease doing business with Plaintiffs presents a classic question of fact. *Petolicchio v. Santa Cruz County Fair & Rodeo Ass'n, Inc.*, 866 P.2d 1342, 1348 (Ariz. 1994) ("Generally, proximate cause is a question of fact for

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[13] "Publication" means intentionally or negligently communicating a defamatory statement to a third person (*i.e.*, someone other than the person defamed). *Restatement (Second) of Torts* § 577(1) (1977). The third person in this case was Meagher. For a defamation claim, "publication" does not require publication in the colloquial sense (*i.e.*, appearance of the statement in a newspaper).

the jury…"). At the pre-answer stage, it is enough that the allegations support a reasonable inference that Defendants' circulation of false and highly damaging statements about Plaintiffs caused the banks to close Plaintiffs' accounts. For example, the closure of the accounts with J.P. Morgan Chase Private Bank and Chase Bank occurred not long after the publication of the December 6, 2014 *Deal Pipeline* article. [37 ¶ 222]. A reasonable factfinder could conclude that, based on the damaging content of the statements and the temporal proximity between publication and termination of the banking relationships, Defendants' statements were the proximate cause of the banks' cessation of business with Plaintiffs. Plaintiffs have therefore sufficiently pled causation. That Defendants knew of Plaintiffs' banking relationships is also plainly alleged. John Hurry is alleged to have told FINRA on at least two occasions about both his personal and business banking relationships. [37 ¶¶ 142–143; 170–175]. These allegations sufficiently allege Defendants' knowledge of those relationships.

E. Violation of Uniform Trade Secrets Act, A.R.S §§ 44-401, *et seq.* ("USTA")

The UTSA as adopted in Arizona prohibits one party from misappropriating the trade secrets of another. Under the UTSA, the term "misappropriation" means "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means[.]" A.R.S. § 44-401(2)(a). Misappropriation can also be demonstrated by showing the defendant disclosed the trade secret to others. *Id.*, § 44-401(2)(b). "Improper means" is defined to "include[] theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy or espionage through electronic or other means." *Id.*, § 44-401(1).

The UTSA does not purport to define every type conduct that could be deemed "improper" and courts have observed that "[a] complete catalogue of improper means is not possible." *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) ("In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct.") (quoting *Restatement of Torts* §757, cmt. f (1939)). What is clear is that the "improper means" need not be a stand-alone tort. In *E. I. duPont*, for instance, the defendants took aerial photographs of the plaintiff's methanol manufacturing plant, which was visible only from the sky, while the plant was being constructed. *Id.* In doing so, the defendants did not violate any independent legal norm, such as trespass, breach of contract, or breach of confidentiality. Nevertheless, the Fifth Circuit held the defendants' conduct "f[e]ll below the generally accepted standards of commercial morality and reasonable conduct" and was "improper." *Id.*

1 Defendants do not contest Plaintiffs have alleged there were trade secrets contained within the
2 electronic materials they seized in November 2012. Instead, they argue that (1) Plaintiffs' trade secrets
3 were not "misappropriated" because Defendants did not acquire them "by improper means," (2)
4 Plaintiffs have failed to allege disclosure of the trade secrets, and (3) they are immune from suit.
5 Defendants are wrong. As to the first contention, Plaintiffs allege that Defendants' access to the disputed
6 hard drives was gained *through their violation of the Computer Fraud and Abuse Act*. Alleging a statutory violation
7 of this nature undoubtedly satisfies the "improper means" prong of the test at the initial pleading stage.
8 Plaintiffs further allege that Defendants exceeded their authority by seizing and copying the data of
9 Plaintiffs, parties over whom Defendants had no regulatory authority. This, too, was improper. In all
10 events, a jury will ultimately determine whether these acts were sufficient to meet the improper-means
11 prong of the statute. For now, taking the allegations as true, Plaintiffs have adequately pled improper
12 means. As for Defendants' second argument, it's a red herring. Under the UTSA, misappropriation can
13 occur *either* by improper acquisition *or* disclosure. A plaintiff is not required to show both. A.R.S. § 44-
14 401(2) (defining misappropriation in terms of *either* acquisition *or* disclosure). Finally, as discussed at
15 length above, Defendants are not immune from suit.

16 **F. Privacy Act**

17 The Privacy Act, a subpart of the Administrative Procedures Act, prescribes the circumstances
18 under which a federal agency can properly disclose its records concerning an individual. 5 U.S.C. §
19 552a(b). The statute provides in relevant part that, "[n]o agency shall disclose any record which is
20 contained in a system of records by any means of communication to any person, or to another agency,
21 except pursuant to a written request by, or with the prior written consent of, the individual to whom the
22 record pertains…." 5 U.S.C.A. § 552a(b). The Privacy Act borrows the definition of "agency" from the
23 Freedom of Information Act ("FOIA"). 5 U.S.C. § 552a(a)(1). FOIA defines "agency" to "include[] any
24 executive department, military department, Government corporation, Government controlled
25 corporation, or other establishment in the executive branch of the Government (including the Executive
26 Office of the President), or any independent regulatory agency[.]" 5 U.S.C. § 552(f).

Defendants contend FINRA is not an "agency" for purposes of the Privacy Act. Not so. FINRA
27 is a "Government controlled corporation" because it exercises power delegated to it and is overseen by
28 the SEC. The Fifth Circuit explained NASD's connection to the federal government as follows:

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> NASD has been "delegated governmental power in order to enforce, at (its) own initiative, compliance by members of the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements." S.Rep. No. 94-75, 94th Cong., 1st Sess. 23 (1975), U.S.Code Cong. & Admin.News 1975, pp. 179, 201. This self-regulatory power of the NASD is subject to substantial oversight by the SEC. In particular, the SEC is authorized to suspend or revoke the registration of any national securities association [such as the NASD] that fails to enforce compliance with the Exchange Act, SEC regulations, or the rules of the self-regulatory organization. 15 U.S.C. s 78s(h)(1).

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. NASD, 616 F.2d 1363, 1367 (5th Cir. 1980). Further, as the SEC itself explains, "the [Securities Exchange] Act [of 1934] empowers the SEC with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self regulatory organizations (SROs)" such as FINRA.[14] FINRA "stands in the shoes of the SEC in interpreting the securities laws for its members and in monitoring compliance with those laws." *Scher v. NASD*, 218 F. App'x 46, 47 (2d Cir. 2007). Put another way, FINRA and the SEC are, for various purposes, one and the same. And this is why FINRA is, in some circumstances (but not here), immune from liability when it is acting properly within its scope as an SRO. Given that FINRA was created by the SEC, is overseen by the SEC, and "stands in the shoes of the SEC" for purposes of interpreting and enforcing securities laws and regulations, FINRA must be considered a "Government controlled corporation" for purposes of the Privacy Act. Accordingly, FINRA is an "agency" subject to the Privacy Act.

FINRA predicates its argument on three authorities—namely, an unreported district court case and a pair of SEC decisions that aren't binding on this Court and, frankly, aren't even persuasive. Although the SEC's 1974 decision in *In re Cotzin* posits that "the NASD is not a federal agency subject to the APA's strictures," 1974 WL 161433, at *3 (S.E.C. Jun. 12, 1974), it cites no authority and proffers no rationale for that conclusory statement. The SEC's 1995 decision in *In re Palumbo* is similarly uninformative, expressing without analysis that "the Administrative Procedure Act does not apply to self-regulatory organizations such as the NASD." 1995 WL 630926, at *6 (S.E.C. Oct. 26, 1995). Finally, *Lucido v. Mueler*, merely parrots the language from *Cotzin* and *Palumbo* without analyzing whether FINRA

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[14] http://www.sec.gov/about/whatwedo.shtml#laws (last visited Apr. 28, 2015).

1 is, or could be, a "Government controlled corporation" as discussed above. No. 08-15269, 2009 WL
2 3190368 (E.D. Mich. Sep. 29, 2009). None of these decisions is helpful to the Court.

3 **G. Trespass Upon Chattel is Properly Alleged.**

4 Defendants assert Plaintiffs have alleged "no loss" but that's not accurate either. The Complaint
5 alleges Defendants forced SCA to retain the services of a forensic data specialist and the Hurrys expended
6 hundreds of thousands of dollars to collect and track the seized and copied drives. [37 ¶¶ 105, 109].
7 Plaintiffs allege losses of at least $5,000 through the cost of responding to the offenses, including damage
8 assessments and restoring data, programs, and systems to their prior condition. [37 ¶¶ 206-207].

9 Defendants suggest there was no interruption to the use of ISC's computers but that too is
10 incorrect. The Complaint alleges Defendants deprived ISC of the full use of those devices for at least
11 five days. In the case cited by Defendants, by contrast, the plaintiff alleged a deprivation for
12 "approximately two minutes." *Koepnick v. Sears Roebuck & Co.*, 762 P.2d 609, 619 (Ariz. Ct. App. 1988).
13 As noted in *Koepnick*, the Restatement provides that one who commits trespass to a chattel is subject to
14 liability if, *inter alia*, he dispossess the other of the chattel, the chattel is impaired as to its condition, quality
15 or value, or the possessor is deprived of the use of the chattel for a substantial time. *Id.* at 618, 762 P.2d
16 at 3311 (citing Restatement (Second) of Torts § 218 (1965)). Plaintiffs allege an actionable claim.

17 **H. Conversion Exists for Conversion of Electronically Stored Information**

18 Conversion is an intentional exercise of dominion or control over a chattel which so seriously
19 interferes with the right of another to control it that the actor may justly be required to pay the other for
20 the full value of the chattel. Restatement (Second) of Torts § 222A (1965). Consistent with the
21 Restatement, the Complaint alleges Defendants intentionally converted files and other information on
22 the ISC computers, including trade secrets, attorney-client communications, proprietary business and
23 customer information, client lists, formulas, bank account numbers, passwords and other personal and
24 proprietary information. [37 ¶ 71]. A conversion claim is applicable to Defendants' unauthorized and
25 wholesale copying of the computer files residing on ISC's computers. *E.g.*, *Bridgetree, Inc. v. Red F. Mktg.,*
26 *LLC*, No. 3:10-cv-00228, 2013 WL 443698, *14-15 (W.D.N.C. Feb. 5, 2013) (evidence sufficient to
27 support conversion claim where defendant copied computer files, including trade secrets and proprietary
28 information); *see also Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1134, 1144 (M.D. Fla.
2007) (computer files may be subject of conversion claim). Whereas in *Miller v. Hehlen*, 104 P.3d 193

(Ariz. Ct. App. 2005), the defendant compiled a customer list he created from data sheets maintained by the employer, Plaintiffs do not allege Defendants compiled a list from information taken from ISC. Plaintiffs allege Defendants took all files in their entirety residing on ISC's computers, including trade secrets and proprietary information.

I. Intrusion Upon Seclusion.

One who intentionally intrudes upon the solitude or seclusion of another or his private affairs or concerns is liable to the other for invasion of his privacy if the intrusion would be offensive to a reasonable person. Restatement (Second) of Torts, § 652(B) (1977).[15] Plaintiffs allege Defendants unlawfully misappropriated information residing on the computers of ISC. [37 ¶ 102]. ISC is not a FINRA member. [37 ¶ 63]. The information consisted of private and confidential matters, including health, education, and retirement records, trade secrets, and attorney-client communications, pertaining to Plaintiffs as well as employees of such businesses as an ice cream store and bicycle shop. [37 ¶ 71]. The information had nothing to do with FINRA or a FINRA regulated activity, and was outside of its jurisdiction. [37 ¶¶ 91,102]. To the extent FINRA could access information on the computers pertaining to securities-related activities, FINRA could not misappropriate all of the contents.

On this claim (as others), Defendants are less than straightforward with the facts alleged. Defendants assert the information resided "on computers located at the place of business of a FINRA member." Motion at 11. That is false. If for some reason the location of records outside of FINRA's jurisdiction matters to FINRA, the information confiscated by Defendants resided on computers belonging to ISC. ISC is not a FINRA member. [37 ¶¶ 89, 90].

Defendants incorrectly assert that information is not secluded if is "intermingled" with other information on a non-FINRA member's computers. Under Defendants' logic, a person can place a folder of information pertaining to a FINRA member in a file cabinet belonging to an entity that is not regulated by FINRA, and all contents of the file cabinet, even contents having nothing whatsoever to do with FINRA-regulated activities, is fair game. Defendants cite no cases for this position because it is unsustainable and would eviscerate any limits to FINRA's jurisdiction under Rule 8210.

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15 Arizona follows the Restatement for this claim. *See Hart v. Seven Resorts Inc.*, 947 P.2d 846, 853 (Ariz. Ct. App. 1997).

1 Defendants lastly assert their intrusion was not offensive because the Hurrys somehow consented
2 by virtue of their registration with FINRA.[16] But, while a FINRA member may agree that information
3 within FINRA's jurisdiction may be the subject of an 8210 examination, it does not thereby agree that
4 FINRA may access any records of the member. Defendants had no right to all of the contents residing
5 on ISC's computers, and empty assertions such as "the inspection of the Copied Computers was
6 performed in accordance with a FINRA Rule" don't change that fact.

7 **J. Public Disclosure of Private Facts.**

8 A person that gives publicity to a matter concerning the private life of another is subject to liability
9 for invasion of privacy if the matter publicized is the kind that (a) would be highly offensive to a
10 reasonable person and (b) is not of legitimate concern to the public. Restatement (Second) of Torts,
11 §652D. This section of the Restatement allows for tort liability from publicity given to statements that
12 are true. *See id.* The Complaint alleges multiple instances by Defendants of intentional leaks to Bill
13 Meagher of *Deal Pipeline*, an online news service for securities professionals and financial institutions,
14 intended to harm the Hurrys and destroy their businesses. Much of the information disclosed by
15 Defendants was private and confidential. Multiple disclosures attributed to Defendants were false and
16 misleading, but the Complaint also alleges statements of fact, the publicity of which also harmed the
17 Hurrys. For instance, Meagher reported on the on-site examination of SCA in November 2012, which
18 under FINRA rules was supposed to be confidential. [37 ¶ 216]. He also reported on a FINRA audit that
19 FINRA scheduled for SCA and stated that FINRA made a regulatory request for personal notes of SCA
20 employees. [37 ¶ 208].

21 ***1. Defendants Misconstrue the Law Regarding Publicity.***

22 Defendants incorrectly argue there was no publicity. Under the Restatement, publicity means
23 "the matter is made public by communicating it to the public at large, or to so many persons that the
24 matter must be regarded as substantially certain to become one of public knowledge." Restatement
25 (Second) of Torts, § 652(D) cmt. a. The question is whether the publicity "reaches, or is sure to reach,
26 the public." *Id.* When Defendants intentionally fed information to *Deal Pipeline* as alleged in the

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28 [16] Defendants' contention has no bearing on the other Plaintiffs, none of whom are registered with FINRA or are under FINRA's jurisdiction.

Complaint, Defendants' communications were "substantially certain to become one of public knowledge." It is irrelevant that Defendants did not themselves publish the information: they accomplished that result through Meagher. *Byars v. Sch. Dist. of Phila*, 942 F. Supp. 2d 552, 567 (E.D. Pa. 2013) (although the defendant spoke with one reporter, "we find that Plaintiff has adequately pled that [the] communication was 'substantially certain to become one of public knowledge'").

2. FINRA did not consider the information to be of public interest.

As alleged, Defendants disseminated information to the press that was not in the public record and not of public interest. That Defendants conducted an on-site examination of SCA in November 2012 as reported in *Deal Pipeline* is but one example. The 8210 Letter associated with such examinations states "[t]his inquiry should not be construed as an indication . . . that any violations of federal securities laws or FINRA, NASD, NYSE, or MSRB rules have occurred." It also states the examination shall remain confidential, presumably in recognition of the harm that disclosure of the examination, which does not indicate wrongdoing, would cause. The fact that FINRA planned an audit of SCA and that FINRA made a regulatory request for the notes of SCA employees would seem to fall in the same category. Like an 8210 examination, these are not events a FINRA member is required to disclose. If FINRA itself did not consider these matters to be a subject of public interest, query how Defendants could argue the opposite now.

These facts contrast with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, the Supreme Court held that a state could not impose sanctions consistent with the First Amendment for publishing the name of a victim of rape. The Court reasoned that Cox obtained the victim's name from judicial records that were themselves available for public inspection. *Id.* at 496. Here, Defendants did not disseminate information that was already in the public domain, nor did FINRA itself believe the information was a matter of public interest. FINRA fed the information to Meagher not to inform the public but, as alleged, to injure the Hurrys.

K. False Light

In Arizona, one who gives publicity to a matter that places another before the public in a false light is subject to liability for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person; and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

See Godbehere, 783 P.2d at 784 (*citing* Restatement (Second) of Torts § 652E (1977)). Plaintiffs allege multiple instances of intentional leaks by Defendants to Bill Meagher intended to harm the Hurrys and destroy their businesses. Much of the information was private and confidential, and several communications were false and misleading. [37 ¶¶ 177, 192, 195, 198, 200, 208, 209, 216]. Defendants' two challenges to this claim are flawed. As noted elsewhere, Defendants' position that the Complaint does not satisfy the element of publicity is inconsistent with the Restatement and the case law. And their assertion that the only references to Plaintiffs in the Meagher articles were true is premised on an incomplete recital of the allegations.

1. Defendants Misconstrue the Law Regarding Publicity.

Defendants cannot avoid liability based on the contention that *Deal Pipeline*, and not Defendants, ran the articles placing the Hurrys in a false light. As noted, when Defendants intentionally fed information to *Deal Pipeline*, the communications were substantially certain to become public knowledge. Defendants' conduct as alleged satisfies the element of publicity. *See Byars*, 942 F. Supp. 2d at 567; Restatement (Second) of Torts, § 552D cmt. a ("any publication in a newspaper or a magazine . . . is sufficient to give publicity").

2. The Complaint attributes false and misleading statements to Defendants.

Defendants assert the references to Plaintiffs in *Deal Pipeline* were true, but Defendants misrepresent the number of articles as well as their content.[17] The Complaint alleges four articles while Defendants assert there were two. The Complaint also alleges multiple references to the Hurrys that placed them in a false and misleading light, including that the Hurrys were the subject of a criminal investigation by the FBI and were involved in a pump-and-dump scheme. [37 ¶¶195, 198, 209]. Multiple other references regarding SCA and Alpine, also alleged to be false or misleading, similarly harmed the Hurrys by reason of their association with SCA and Alpine, an association made in the articles themselves. [37 ¶¶ 177, 192, 195, 198, 200, 208, 209, 216]. Still, Defendants try to claim the Meagher articles stated only that "Mr. Hurry spoke with FINRA and was in negotiations to buy Wilson Davis &

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[17] Statements of fact also give rise to liability when placing a person in false light. *See Godbehere*, 162 Ariz. at 341, 783 P.2d at 787. The on-site examination by Defendants is one example. While FINRA itself states the examination is not a public record nor any indication of wrongdoing, its publicity placed the Hurrys in a false light.

Co." [46 at 20].

L. *Bivens* claim against Andersen.

Defendants' opposition underscores that it is their view that FINRA and its staff are not accountable to this Court, no matter the type or degree of harm they inflict. Defendants assert they are government actors when trying to shroud themselves with immunity, while asserting they are not government actors when it comes to enforcing constitutional limits on their authority. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the U.S. Supreme Court held that officials like Andersen can be held accountable for transgressing constitutional rights. Plaintiffs allege a cognizable claim under *Bivens*. Scott Andersens' conduct is state action as alleged in the Complaint. And Plaintiffs assert recognized claims under *Bivens* and its progeny.

1. Bivens Allows Claims For First Amendment Violations.

As in *Bivens*, and based on similar facts, Plaintiffs assert a cause of action under the Fourth Amendment. Plaintiffs also seek relief for alleged transgressions by Andersen under the First, Fifth and Fourteenth Amendments. Defendants argue that there are no *Bivens* claims for First Amendment violations, but that's not so. And they ignore the other constitutional theories underpinning Plaintiffs' *Bivens* claims. Defendants' reliance on *Reichle v. Howards*, 132 S.Ct. 2088, 2093 n.4 (2012), is misplaced. What the Court in *Reichle* observed was that it had not previously held *Bivens* extends to First Amendment claims. *Id.* To infer from *Reichle* there can be no First Amendment claims under *Bivens* goes too far. In fact, the Court discusses both *Bush v. Lucas*, 462 U.S. 367 (1983), where a First Amendment *Bivens* claim did not survive and another instance, *Ashcroft v. Ichbal,* 556 U.S. 662, 675 (2009), where the Court assumed without deciding that a free exercise claim is actionable under *Bivens*. 132 S.Ct. at 2093 n.4.

Several district court cases refute Defendants' position. In *Murray v. Corr. Corp. of Am.*, No. CV 11-2210, 2012 WL 2798759 (D. Ariz. July 9, 2012), for instance, Judge Broomfield denied a motion to dismiss a *Bivens* claim arising under the First Amendment. In *Espinoza v. Zenk*, No. 10-CV-427, 2013 WL 1232208 (E.D.N.Y. Mar. 27, 2013), the district court likewise allowed *Bivens* claims arising under the First and Fifth Amendments.

2. Andersen's Conduct as Alleged in the Complaint Constitutes State Action.

Plaintiffs allege that Andersen acted under the color of law in his transgression of Plaintiffs' constitutional rights. To determine if a defendant in a *Bivens* action acted under color of law, the Ninth

Circuit looks to case law interpreting 42 U.S.C. § 1983. *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991) (*Bivens* and § 1983 actions are "identical"). "To act under color of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966). Plaintiffs allege Defendants' activities were "closely and directly coordinated with the SEC or other federal authorities." [37 ¶ 53]. Plaintiffs also allege the inquiries of the SEC and FINRA vis-à-vis the Hurrys and related businesses overlap temporally and substantively "in a manner that demonstrates joint activity" by FINRA, Andersen and the other regulators. [37 ¶ 55]. Those allegations are more than ample.

Furthermore, Plaintiffs allege FINRA and Andersen issued a Rule 8210 request in October 2013 seeking personal and business records from the Hurrys, including bank, phone and flight records. [37 ¶ 171]. Just days after the Hurrys produced the records to FINRA in redacted form, the SEC issued a subpoena to Pinnacle Aviation for the very same flight records. [37 ¶ 175]. It is more than reasonable to infer the SEC directed the initial inquiry from FINRA, only to follow up on its own just days later when FINRA returned with redacted records from the Hurrys.

Plaintiffs also allege *Deal Pipeline* published an article on December 6, 2013, entitled "FBI, securities officials investigating Scottsdale Capital, Alpine Securities, source says," which it attributes to leaks by Andersen and FINRA. [37 ¶ 192]. The article added that "FINRA 'is work[ing] with the SEC" on investigations involving SCA, Alpine and the Hurrys."' [37 ¶ 195]. The allegations do not merely describe parallel investigations as Defendants imply. If true they establish joint action between Defendants, including Andersen, and federal authorities.[18] Indeed, the SEC itself set aside an NASD disciplinary action against a securities principal who declined to respond to a request for an on-the-record interview in violation of FINRA Rule 8210 after the principal argued NASD's role in a joint investigation with the SEC rendered the 8210 request "state action." *In the Matter of Frank Quattrone*, Release No. 53547 (Mar. 24, 2006). The SEC concluded there was a genuine issue of material fact that precluded summary dismissal by NASD. Here, too, the Complaint alleges the federal government was a joint participant with

[18] Plaintiffs do not allege "only" that FINRA's investigation of SCA was coordinated with the SEC, and that the investigations by FINRA and SEC overlap temporally and substantively, as Defendants misleadingly assert. [46 at 21].

Defendants, including Andersen. It also alleges the "nexus" between Defendants, including Andersen, and federal authorities, and the government "compulsion" that Defendants reflexively assert is lacking. Discovery will provide a more fulsome understanding of Andersen's conduct, but it cannot be said that Plaintiffs do not state a cognizable claim.

None of this is to suggest that FINRA as a nominally private entity is not an agency or instrumentality of the federal government subject to constitutional limits on its authority. *E.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 930 (2001); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995). FINRA owes its existence to the government, exists for the purpose of performing government functions, operates subject to government oversight and wields government power. The Ninth Circuit has not held that FINRA is not an agency or instrumentality of the federal government. Despite Defendants' non-binding cases, holding that FINRA is not a state actor leads to illogical and unjust results in the law.

M. Conspiracy to Interfere With Civil Rights

A claim for conspiracy to interfere with civil rights exists when "two or more persons . . . conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying in any matter pending therein . . ." 42 U.S.C. § 1985(2). Plaintiffs allege Defendants intimidated and threatened the Hurrys and ISC to abandon a lawsuit against these Defendants filed on March 8, 2013 in the District of Arizona. [37 ¶¶ 6, 135, 153-167]. Physical presence in court is not a requirement under § 1985(2). *E.g.*, *Wright v. No Skiter Inc.*, 774 F.2d 422, 425-26 (10th Cir. 1985); *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983). Defendants cite *Deubert v. Gulf Federal Savings Bank*, 820 F.2d 754 (5th Cir. 1987), but *Deubert* is questionable law. *See Montoya v. FedEx Ground Package Sys. Inc.*, 2009 WL 564308 (S.D. Tex. 2009) (plaintiff stated a claim by alleging defendants conspired to injure him because of a federal suit). Defendants otherwise argue that a corporation cannot conspire with its employees, but several circuits have rejected this in the context of § 1985. *E.g.*, *Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981). The Ninth Circuit has not ruled on the question and Defendants cite no authority to suggest otherwise. The rule advocated by Defendants arose in the antitrust context and is inappropriate in the context of § 1985. *See Stathos*, 728 F.2d at 20-21. Accordingly, Plaintiffs plead a conspiracy.

III. CONCLUSION

For all the foregoing reasons, Defendants' Motion should be denied in its entirety. In the alternative, Plaintiffs' respectfully request leave to file an amended pleading curing any deficiency the Court may find in the Complaint.

RESPECTFULLY SUBMITTED this 1st day of June, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing was transmitted this 1st day of June 2015 to the Office of the Clerk of the U.S. District Court using the CM/ECF System, which will send notification of such filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants for this case.

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