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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**  
13 **WESTERN DIVISION**

14 ALLERGAN, INC., ALLERGAN  
15 SALES, LLC,

16 Plaintiff(s),

17 vs.

18 FERRUM FERRO CAPITAL, LLC;  
19 KEVIN BARNES,

20 Defendants.

Case No. 8:15-CV-00992-JAK-PLA

**DEFENDANT KEVIN BARNES'**  
**NOTICE OF MOTION AND**  
**SPECIAL MOTION TO STRIKE**  
**UNDER CALIFORNIA CIVIL**  
**PROCEDURE § 425.16**

**Date:** November 9, 2015

**Time:** 8:30 AM

**Judge:** Hon. John A. Kronstadt

**Courtroom:** 750, 7<sup>th</sup> Floor

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23 **TO THE HONORABLE COURT AND TO ALL PARTIES:**

24 PLEASE TAKE NOTICE that on November 9, 2015 at 8:30 A.M., or  
25 as soon thereafter as this matter may be heard, before the  
26 Honorable John A. Kronstadt, in Courtroom 750 of the United States  
27 Courthouse for the Central District of California, Western Division,  
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located at 255 East Temple Street Los Angeles, CA 90012, Defendants Ferrum Ferro Capital, LLC and Kevin Barnes will and hereby do move this Court to strike Plaintiffs' Complaint under California Code of Civil Procedure § 425.16 – better known as California's "anti-SLAPP" statute.

Pursuant to Local Rule 7-3, on July 30, 2015 counsel for Defendants Ferrum Ferro Capital, LLC and Kevin Barnes, D. Gill Sperlein, called counsel for Plaintiffs Allergan, Inc. and Allergan Sales, Inc., in an attempt to confer regarding this motion. Counsel were unable to reach a resolution other than to the date for the hearing of the motion.

This motion is based upon the following Memorandum of Points and Authorities, any exhibits filed therewith, the Request for Judicial Notice and its exhibits filed contemporaneously herewith, the complete files and records in this action, and upon such oral and documentary evidence as may be allowed at the hearing on this motion.

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Dated: August 10, 2015

Respectfully Submitted,

RANDAZZA LEGAL GROUP

/s/ Marc J. Randazza

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9 Attorneys for Defendant,  
10 *Ferrum Ferro Capital, LLC, and Kevin Barnes*

11 **IN THE UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 ALLERGAN, INC., ALLERGAN  
14 SALES, LLC,

15 Plaintiff(s),

16 vs.

17 FERRUM FERRO CAPITAL, LLC;  
18 KEVIN BARNES,

19 Defendants.

Case No. 8:15-CV-00992-JAK-PLA

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
DEFENDANT KEVIN BARNES'  
SPECIAL MOTION TO STRIKE  
UNDER CALIFORNIA CIVIL  
PROCEDURE § 425.16**

**Date:** November 9, 2015

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**Table of Contents**

1

2 1. INTRODUCTION ..... 1

3 2. LEGAL STANDARDS ..... 3

4 3. ARGUMENT ..... 4

5     3.1. *This Action Arises from Defendants' Protected Activity* ..... 4

6         3.1.1. Ferrum Ferro's IPR petition Is Clearly Protected Conduct under the

7             Anti-SLAPP Statute. .... 5

8         3.1.2. Plaintiffs' Complaint Is Based on Defendants' Right to Petition ..... 8

9     3.2. *Plaintiffs Cannot Demonstrate a Probability of Success on their Claims* 11

10         3.2.1. Plaintiffs Cannot Succeed on their Attempted Civil Extortion Claim. 11

11         3.2.2. Plaintiff Cannot Succeed on Its Unfair Competition Claim..... 15

12         3.2.3. Plaintiffs Cannot Succeed on Their Malicious Prosecution Claim ..... 22

13 4. CONCLUSION..... 24

**TABLE OF AUTHORITIES**

**CASES**

*Allergan, Inc. v. Sandoz Inc.*, 726 F.3d 1286 (Fed. Cir. 2013) .....6, 10, 12, 18, 23, 24

*Allergan, Inc. v. Sandoz Inc.*, 818 F. Supp. 2d 974 (E.D. Tex. 2011) ..... 12

*Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) .....7

*Bertero v. National General Corp.*, 13 Cal. 3d 43, 50 (1974) .....26

*Birkner v. Lam*, 156 Cal. App. 4th 275 (2007) ..... 11

*Blackburn v. Brady*, 116 Cal. App. 4th 670, 712 (2004) ..... 12

*California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.*, 94 Cal. App. 4th 151, 169 (Cal. App. 4th Dist. 2001) .....20

*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999) .....20

*Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 652 (1996) .....8

*City of Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2008) .....9

*Contemporary Servs. Corp. v. Staff Pro Inc.*, 152 Cal. App. 4th 1043, 1052 (2007) .7

*Digerati Holdings, LLC v. Young Money Entm't, LLC*, 194 Cal. App. 4th 873, 883 (2011) ..... 15

*In Re Episcopal Church Cases*, 45 Cal. 4th 467, 477 (2009) .....9

*Ketchum v. Moses*, 24 Cal. 4th 1122 (2001) .....9

*Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal. App. 4th 1532, 1537 (2006) 11

*Mello v. Great Seneca Fin'l Corp.*, 526 F. Supp. 2d 1024, 1029 (C.D. Cal. 2007) .....8

*Microsoft Corp. v. i4i Ltd. Partnership*, 131 S.Ct. 2238 (2011) ..... 13

*Monex Deposit Co. v. Gilliam*, 666 F. Supp. 2d 1135, 1137 (C.D. Cal. 2009) ..... 17

*Panakosta Partners, LP v. Hammer Lane Mgmt., LLC*, 199 Cal. App. 4th 612, 635, (2011) ..... 11

*Price v. Stossel*, 590 F. Supp. 2d 1262, 1266 (C.D. Cal. 2008) .....7

*Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1160 (Cal. App. 1st Dist. 2000) .....20

1     *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 806 (Cal. Ct. App. 2002) .....7

2     *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634 F. Supp. 2d 1009, 1013

3         (N.D. Cal. 2007) .....9

4     *Tjaden v. H.S.B.C. Bank USA N.A.*, 2015 U.S. Dist. LEXIS 49023, \*27 (S.D. Cal. Apr. 14,

5         2015) .....16

6     *World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1569

7         (2009) .....7, 8

8     **STATUTES**

9

10    35 U.S.C. § 311 .....5, 18

11    35 U.S.C. § 314(a) .....13

12    Cal Bus & Prof Code § 17538.5.....20

13    Cal. Code Civ. Proc. § 425.16 .....5, 7, 8

14    Cal. Code Civ. Proc. § 425.16(e)(2) .....15

15    Cal. Pen. C. § 518 .....16

16    Cal. Pen. C. § 519 .....16

17    Civ. L. R. 16-15.1 .....25

18    Fed. R. Evid. 408 .....25

19    **OTHER AUTHORITIES**

20    5 Witkin, *Summary of California Law* (10th ed. 2005) Torts, § 486 .....26

21    Elizabeth P. Offen-Brown, *Forum Shopping and Venue Transfer in Patent Cases:*

22         *Marshall's Response to TS Tech and Genentech*, 25 BERKELEY TECH. L.J. 61, 71

23         (2010) .....12

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**1. INTRODUCTION**

The only reason Plaintiffs Allergan, Inc., Allergan Sales, LLC (hereinafter collectively referred to as Allergan) brought this action was to retaliate against Defendants Ferrum Ferro Capital, LLC and Kevin Barnes (hereinafter referred to collectively as “FFC”) for petitioning the United States Patent and Trademark Office’s (“USPTO’s”) Patent Trial & Appeal Board (“PTAB”) to invalidate a patent – as is its right under the law.<sup>1</sup> See 35 U.S.C.A. § 311.

Allergan retaliated by filing this case in order to punish Defendants for exercising their right to petition the U.S government – specifically, the U.S. Patent Office. Thus, Allergan’s case is strategic litigation against public participation (commonly referred to using the acronym “SLAPP.”) Each of the claims set forth in Allergan’s SLAPP Complaint relies on the premise that FFC brought a challenge to Allergan’s patent. Allergan should defend that case – not seek to multiply the proceedings with a SLAPP suit.

Because Allergan brought this SLAPP action as retaliation for FFC engaging in the fundamental First Amendment right to petition the government, California’s anti-SLAPP law applies. See Cal. Code Civ. Proc. § 425.16. Since there are sound legal arguments to support FFC’s position that Claim 4 of the ‘149 Patent is non-patentable as obvious, Allergan cannot demonstrate a probability of prevailing, as

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<sup>1</sup> Ferrum Ferro in particular seeks to deem the 4<sup>th</sup> claim of Allergan’s ‘149 Patent unpatentable using the process of an Inter Partes Review (IPR).

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1 it must. Specifically, Allergan cannot demonstrate that FFC's  
2 challenge is baseless and brought in bad faith. FFC's IPR challenge is  
3 demonstrably well-taken. A reasonable person reviewing all the facts  
4 could conclude that claim 4 of the '149 patent is obvious and  
5 therefore nonpatentable. Most notably, after carefully reviewing  
6 evidence as presented in district court, an esteemed judge of the  
7 Federal Circuit, in a strongly worded opinion, stated that claim 4 of  
8 the '149 patent is indeed obvious and therefore nonpatentable and  
9 invalid. See *Allergan, Inc. v. Sandoz Inc.*, 726 F.3d 1286, 1296 (Fed.  
10 Cir. 2013) (Dyk, dissenting); see also Req. for Judicial Not., Ex. A.  
11 Accordingly, any notion that Ferrum Ferro's *Inter Partes* action is  
12 brought in bad faith is clearly unsupportable. Perhaps this  
13 unpatentability opinion is only the opinion of one Federal Circuit  
14 judge – but it certainly is enough to say that Ferrum Ferro's case is  
15 valid, especially in light of the lower burden of proof for an IPR.

16 Moreover, as further evidence of the validity of FFC's IPR  
17 petition, Allergan attempted to bring this same cause of action  
18 against FFC as part of the IPR proceeding and was promptly denied  
19 by the administrative law judges. (See June 15, 2015 email  
20 correspondence from PTAB denying Allergan's request for  
21 authorization to file a motion for sanctions, attached as **Exhibit A.**)  
22 Therefore, this action is arguably already *res judicata*.

23 Since FFC's IPR challenge is objectively reasonable, Allergan's  
24 claims for extortion, unfair business practice, and malicious  
25 prosecution all fail.

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## 2. LEGAL STANDARDS

The Anti-SLAPP Act (Cal. Code Civ. Proc. § 425.16) is a creation of state law, but it applies in federal court. See *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); see also *Price v. Stossel*, 590 F. Supp. 2d 1262, 1266 (C.D. Cal. 2008) (“[I]t is beyond dispute that the California anti-SLAPP motion is available in federal court.”).

The Legislature enacted § 425.16 to protect defendants from interference with the exercise of their constitutional rights, particularly the right to petition the government, as Defendants did just before this case, and in retaliation Allergan brought this suit. See *Contemporary Servs. Corp. v. Staff Pro Inc.*, 152 Cal. App. 4th 1043, 1052 (2007); see also *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 806 (Cal. Ct. App. 2002) (“The goal is to eliminate meritless or retaliatory litigation at an early stage of the proceedings”). In this case, Defendants’ Special Motion to Strike challenges the legal sufficiency of Plaintiffs’ allegations, as well as Plaintiffs’ inability to substantiate the state law claims raised in the Complaint.

Courts evaluate anti-SLAPP motions in two steps. First, in order to establish the applicability of § 425.16, a defendant must demonstrate that his actions, as targeted in the complaint, were made in furtherance of the defendant’s right to petition or right to free speech. See Cal. Code Civ. Proc. § 425.16(b). The focus is on the substance of the lawsuit; whether the plaintiff’s cause of action itself was based on an act in furtherance of the defendant’s right of petition or free speech. See *World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1569 (2009). To determine

1 whether the “arising from” requirement is met, courts look to “the  
2 pleadings, and supporting and opposing affidavits stating the facts  
3 upon which the liability or defense is based.” *Id.*

4 Once a defendant has made a prima facie showing that the  
5 complaint targets protected activity, the burden shifts to the plaintiff  
6 who must demonstrate a probability of prevailing on their claims. To  
7 carry this burden, the plaintiff must demonstrate that the Complaint  
8 is both legally sufficient and supported by facts able to sustain a  
9 judgment. See *Mello v. Great Seneca Fin'l Corp.*, 526 F. Supp. 2d  
10 1024, 1029 (C.D. Cal. 2007). If the plaintiff cannot do so, the Court  
11 must strike the complaint. The Plaintiff in this case cannot, since all of  
12 the claims fail as a matter of law.

### 13 **3. ARGUMENT**

#### 14 **3.1. This Action Arises from Defendants’ Protected Activity**

15 California’s anti-SLAPP statute provides that a “cause of action  
16 arising from any act of that person in furtherance of the person’s  
17 right of petition . . . shall be subject to a special motion to strike . . .”  
18 See Cal. Code Civ. Proc. § 425.16(b)(1) In determining whether a  
19 defendant makes a successful showing on the first prong of the Anti-  
20 SLAPP analysis, courts do not look to the particular cause of action  
21 pled by the plaintiff, but rather consider whether the plaintiff brought  
22 the suit based on the exercise of the defendant’s right to petition as  
23 protected under the statute. See *Church of Scientology v.*  
24 *Wollersheim*, 42 Cal. App. 4th 628, 652 (1996) (holding that, with an  
25 Anti-SLAPP motion, the “nature or form of” the action is “not what is  
26 critical but rather that it is against a person who has exercised  
27

1 certain rights"). Courts typically look to "the 'gravamen or principle  
2 thrust' of the plaintiff's claim to determine whether they arise from  
3 the defendant's constitutionally protected petitioning or free speech  
4 rights." *In Re Episcopal Church Cases*, 45 Cal. 4th 467, 477 (2009). A  
5 defendant may take advantage of the Anti-SLAPP statute if the  
6 "defendant's conduct underlying the plaintiff's cause of action" was  
7 "itself" in furtherance of the right of petition or free speech." *City of*  
8 *Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2008). In addition, California's  
9 Anti-SLAPP statute protects direct petitioning of the government and  
10 petition-related statements and writings, whether or not the  
11 statement is made in connection with a public issue. See *Ketchum v.*  
12 *Moses*, 24 Cal. 4th 1122, 1131 (2001). Further, where a cause of  
13 action alleges both protected and unprotected activity, the cause  
14 of action will be subject to California's anti-SLAPP statute unless the  
15 protected activity is merely incidental to the unprotected conduct.  
16 See *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634 F.  
17 Supp. 2d 1009, 1013 (N.D. Cal. 2007).

### 18 **3.1.1. Ferrum Ferro's IPR petition Is Clearly Protected** 19 **Conduct under the Anti-SLAPP Statute.**

20 FFC is a venture fund focused on the strategic deployment of  
21 capital towards socially beneficial ends. One of the company's core  
22 social interests is expanding the availability of lower-cost  
23 pharmaceutical products for senior citizens suffering from debilitating  
24 medical conditions such as glaucoma. While FFC is currently not  
25 directly in the business of distributing pharmaceuticals, it looks for  
26 opportunities where it can apply its capital to create opportunities to  
27 promote its core principles while still obtaining a return on its capital.

1 Allergan presently holds the exclusive rights over its tellingly  
2 named drug, Combigan, which merely combines two other drugs  
3 (brimonidine and timolol) to treat glaucoma. As a result, other  
4 generic producers of similar brimonidine/timolol solutions are barred  
5 from offering lower-cost drugs to patients in need. See *Sandoz Inc.*,  
6 726 F.3d at 1296; see also Req. for Judicial Not., Ex. A.

7 Under a belief<sup>2</sup> that Allergan's Combigan patents are obvious  
8 and therefore invalid, FFC filed an Inter Partes Review of U.S. Patent  
9 No. 7,030,149 (hereinafter the "149 patent") as the America Invents  
10 Act, 35 U.S.C. § 311 permits them to do. See generally 35 U.S.C. §  
11 311. The Federal Circuit Court of Appeals has already issued a  
12 decision finding that all of Allergan's remaining patents are invalid as  
13 obvious. See *Sandoz Inc.*, 726 F.3d 1286; see also Req. for Judicial  
14 Not., Ex. A.

15 35 U.S.C. § 311 reads in part, "a person who is not the owner of  
16 a patent may file with the Office a petition to institute an *inter partes*  
17 review of the patent." 35 U.S.C. § 311(a). If the IPR proceeding is  
18 successful, Allergan's artificial monopoly on this market would be  
19 lifted, allowing other generic producers, including producer(s)  
20 financed by FFC, to make and distribute affordable solutions to  
21 patients seeking a cost efficient solution to their ailment, thereby  
22 satisfying Ferrum Ferro's core missions of reducing the cost of  
23 pharmaceutical products for senior citizens suffering from debilitating  
24 medical conditions.

25 \_\_\_\_\_  
26 <sup>2</sup> A belief supported by at least one Federal Circuit judge. See  
27 *Sandoz Inc.*, 726 F.3d at 1296 (Dyk, dissenting); see also Req. for  
28 Judicial Not., Ex. A.

1 In direct retaliation for Ferrum Ferro's petition for an *Inter Partes*  
2 Review, Plaintiff Allergen filed the present suit alleging attempted  
3 civil extortion, unfair competition, and malicious prosecution. In their  
4 prayer for relief Allergen seeks, *inter alia*, a permanent injunction  
5 barring FFC's "officers, agents, employees, and all persons acting in  
6 concert" from pursuing the present *Inter Partes* Review and **ANY**  
7 **FUTURE** petitions. Dkt. No. 1 at 15, ¶4. Plaintiffs filed this action with the  
8 specific intent of censoring Ferrum Ferro's petition, or to pressure  
9 Ferrum Ferro into dropping its case. Their motive? To protect  
10 Allergan's artificial monopoly that has allowed it to extract a  
11 premium price for the mere act of combining two known  
12 medications into a single solution. Using threats of civil litigation as a  
13 means of intimidating people from petitioning their government as  
14 Plaintiffs has done here is the precise conduct from which  
15 California's Anti-SLAPP statute seeks to shield speakers. See  
16 *Panakosta Partners, LP v. Hammer Lane Mgmt., LLC*, 199 Cal. App.  
17 4th 612, 635, (2011) (holding the right of petition encompasses the  
18 filing of a legal action); see also *Birkner v. Lam*, 156 Cal. App. 4th 275  
19 (2007) (holding the constitutional right to petition includes the basic  
20 act of filing litigation or otherwise seeking administrative action);  
21 *Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal. App. 4th 1532,  
22 1537 (2006) (holding the protection for petitioning activities applies  
23 not only to the filing of lawsuits, but extends to conduct that relates  
24 to such litigation, including statements made in connection with or in  
25 preparation of litigation).

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### 3.1.2. Plaintiffs' Complaint Is Based on Defendants' Right to Petition

In the context of a motion to strike a complaint under the anti-SLAPP statute, the critical consideration is whether the cause of action is based on the defendant's protected petitioning activity. See *Blackburn v. Brady*, 116 Cal. App. 4th 670, 712 (2004).

Even before FFC's petition, Plaintiffs used litigation as a tool to ensure their anti-competitive model remains intact. In 2011, they sued half a dozen companies that sought to produce generic combination eye drops for the treatment of glaucoma. See *Allergan, Inc. v. Sandoz Inc.*, 818 F. Supp. 2d 974 (E.D. Tex. 2011) *aff'd in part, rev'd in part*, 726 F.3d 1286 (Fed. Cir. 2013); see also Req. for Judicial Not., Ex. B. Those defendants countersued, claiming that Allergan's patents were invalid. *Id.* At the Court of Appeal, the defendants prevailed on invalidating all but one of Allergan's patents. See *Sandoz Inc.*, 726 F.3d 1286; see also Req. for Judicial Not., Ex. A. However, the defendants were unsuccessful because they were required to prove by **clear and convincing** evidence that claim 4 of the '149 patent was obvious. *Id.* Therefore, Allergan narrowly escaped invalidation under this exacting standard. (The *inter partes* standard is lower.) Notably Allergan brought the original case in the Marshall Division of the Eastern District of Texas, a notoriously plaintiff-friendly haven for patent infringement suits. See Elizabeth P. Offen-Brown, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to TS Tech and Genentech*, 25 BERKELEY TECH. L.J. 61, 71 (2010). As noted above, on appeal, Justice

1 Dyk of the Federal Circuit issued a strongly worded dissent that favors  
2 FFC's position.

3 A large part of the success Allergan found in their past patent  
4 infringement litigation can be attributed to the standard of review  
5 federal courts require patent challengers to meet. This is because in  
6 normal civil litigation the issue is evaluated under a clear and  
7 convincing evidence standard. See *Microsoft Corp. v. i4i Ltd.*  
8 *Partnership*, 131 S.Ct. 2238 (2011). However, an *Inter Partes* Review,  
9 as FFC presently seeks, requires only that petitioners show "that there  
10 is a reasonable likelihood that the petitioner would prevail with  
11 respect to at least [one] of the claims challenged in the petition." 35  
12 U.S.C.A. § 314(a). Understandably, Allergan would prefer to avoid  
13 defending its patent in the face of this lower standard of proof.  
14 Allergan understands there is a statistically significant probability that  
15 FFC will prevail on its claims. Accordingly, to retaliate for FFC's  
16 petition, and to bring collateral pressure on FFC to drop its case,  
17 Allergan seeks to distort the law and allege claims that have no basis  
18 in order to prevent the *Inter Partes* Review from proceeding. See  
19 Complaint at 15, ¶14 (request for a permanent injunction prohibiting  
20 FFC from pursuing the IPR petition filed against Allergan's '149 patent  
21 and **any other IPR petitions against Allergan**) (emphasis added).

22 Rather than defend the IPR, Allergan followed its usual modus  
23 operandi by resorting to aggressive litigation in district court to keep  
24 treatments out of the eyes of under-insured patients, while  
25 maximizing their own profits. In doing so, Plaintiffs make the  
26 extraordinary assertion that petitioning the government for an *Inter*  
27



1 *Partes* Review constitutes “extortion,” “unfair competition,” and  
2 “malicious prosecution.”<sup>3</sup> Such a position is unsupportable and if  
3 permitted would gut the relevant provisions of 35 U.S.C. 35 § 311.

4 Congress explicitly created the right to file an *Inter Partes*  
5 Review when it enacted the America Invents Act. Ferrum Ferro  
6 therefore has the right to petition the government for review of the  
7 ‘149 patent. The filing of this action is an attempt to interfere with a  
8 valid challenge to Allergan’s ‘149 patent. There is no basis for  
9 Plaintiffs’ claims and their goal is clear; Allergan seeks to stifle FFC’s  
10 petition for an *Inter Partes* Review. Plaintiffs’ claims for civil extortion,  
11 unfair business practices, and malicious prosecution arise directly out  
12 of FFC filing an *Inter Partes* Review and then corresponding with  
13 Plaintiffs about the petition. While Plaintiffs mischaracterize the  
14 nature of this petition and the statements made in the  
15 correspondence, the statements are nonetheless protected, as they  
16 are written statements in connection with an issue under review by  
17 an official proceeding authorized by law. See Cal. Code Civ. Proc.  
18

19 \_\_\_\_\_  
20 <sup>3</sup> It is ironic that Allergan calls Defendants’ actions “extortion,” when  
21 Allergan itself makes its profits by trying to artificially inflate the costs  
22 of glaucoma treatments. Allergan combined two drugs that already  
23 existed, and despite the obviousness of this “invention,” if a suffering  
24 patient can’t afford Allergan’s “patent premium” then as far as  
25 Allergan is concerned, that patient should simply go blind. Despite  
26 this being the true narrative here, Allergan has the audacity to use  
27 the word “extortion” to describe Defendants’ quest to bring these  
28 treatments to under-insured patients for a lower cost. Perhaps the  
senior citizens currently unable to see because Allergan blocks their  
ability to afford sight-saving treatments would have another word for  
it.

1 §425.16(e)(2); see also *Digerati Holdings, LLC v. Young Money Entm't,*  
2 *LLC*, 194 Cal. App. 4th 873, 883 (2011).

3 Plaintiffs' SLAPP Complaint leaves no doubt as to the essential  
4 link between FFC's petitioning the government for *Inter Partes*  
5 Review and Plaintiffs' claims for relief. Each claim relies on the fact  
6 that FFC petitioned the government by filing its IPR petition and  
7 discusses the petition in detail. The link between Defendants' filing of  
8 the IPR and Plaintiffs' claims is so direct, that Plaintiffs argue that the  
9 IPR application provides a basis for subject matter jurisdiction even  
10 though all of its claims are based entirely in state law. Complaint,  
11 Dkt. No. 1, at ¶¶6-8. Therefore, Plaintiffs themselves recognize the link  
12 between the Defendants' actions under federal patent law (i.e. the  
13 filing of the IPR petition) and Plaintiffs' claims for relief.

14 Since Plaintiffs' claims were brought as retaliation against FFC  
15 for petitioning the government, Allergan must demonstrate a  
16 probability of prevailing on the merits. It cannot, and the Court must  
17 strike Allergan's claims.

18 **3.2. Plaintiffs Cannot Demonstrate a Probability of Success on**  
19 **their Claims.**

20 **3.2.1. Plaintiffs Cannot Succeed on their Attempted Civil**  
21 **Extortion Claim.**

22 Plaintiffs cannot succeed on their attempted civil extortion  
23 claim because even if all the factual allegations set forth in the  
24 Complaint are taken as true, Plaintiffs have not stated a claim upon  
25 which relief could be granted.

26 There is no private cause of action for extortion under federal  
27 law. See *Tjaden v. H.S.B.C. Bank USA N.A.*, 2015 U.S. Dist. LEXIS 49023,  
28

1 \*27 (S.D. Cal. Apr. 14, 2015). Extortion under California Penal Code §  
 2 518 is defined as “obtaining property from another, with his consent,  
 3 or the obtaining of an official act of a public officer, induced by a  
 4 wrongful use of force or fear, or under color of official right.” Cal.  
 5 Pen. C. § 518. Plaintiffs do not allege that FFC used any force against  
 6 them, and FFC is not a public officer, so only the “wrongful use of . . .  
 7 fear” language could possibly apply.

8 Cal. Pen. Code § 519 identifies the types of threats that can  
 9 induce fear for the purpose of extortion and reads,

10 Fear, such as will constitute extortion, may be induced  
 11 by a threat of any of the following: 1) To do an unlawful  
 12 injury to the person or property of the individual  
 13 threatened or of a third person; 2) To accuse the  
 14 individual threatened, or a relative of his or her, or a  
 15 member of his or her family, of a crime; 3) To expose, or  
 16 to impute to him, her, or them a deformity, disgrace, or  
 17 crime; 4) To expose a secret affecting him, her, or them  
 18 or 5) To report his, her, or their immigration status or  
 19 suspected immigration status.

20 Cal. Pen. C. § 519. Allergan does not allege that FFC has 2) accused  
 21 it of a crime, 3) exposed or imputed to it a deformity, disgrace, or  
 22 crime, 4) exposed a secret affecting Allergan, or 5) threatened to  
 23 report Allergan's immigration status. Thus, the ultimate question is:  
 24 can Allergan demonstrate a probability of prevailing by showing  
 25 that FFC wrongfully obtained Allergan's property by threatening to  
 26 do an unlawful injury to Allergan or Allergan's property? While  
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1 California Penal Code Section 523 provides for criminal sanctions  
2 even when no property has exchanged hands, the alleged facts are  
3 insufficient even to establish liability under that section. *Monex*  
4 *Deposit Co. v. Gilliam*, 666 F. Supp. 2d 1135, 1137 (C.D. Cal. 2009)  
5 (“The Court finds that . . . a cause of action [for civil extortion], either  
6 at law or at equity, may be properly found in section [Cal. Penal C.  
7 §] 523, which proscribes extortion notwithstanding that the  
8 defendant ultimately obtained no money or property by means of  
9 his extortionate threats.”).

10 First, an examination of the letter that Allergan placed in the  
11 record shows that it only states that FFC believes “. . . Allergan should  
12 be given a single opportunity to support FFC's core social and  
13 investment interests before other time-barred producers are able to  
14 file for joinder in the '149 Patent IPR . . .” and that “. . . FFC is  
15 amenable to discussing an immediate and confidential settlement  
16 with Allergan.” An offer to settle a valid case on any open-ended  
17 terms is hardly “extortion.”<sup>4</sup> FFC specifically left the language of its  
18 letter open ended, because it understood that there might be  
19 possible resolutions that it had not even considered.<sup>5</sup> While the  
20 extortion statute might apply to a demand for property to be  
21 transferred in combination with an unlawful threat, it certainly can't  
22 be applied here, where all FFC did was inform a defendant that it

23 \_\_\_\_\_  
24 <sup>4</sup> Were this the case, then anyone who ever filed a lawsuit and  
25 subsequently engaged in settlement discussions would *ipso facto* be  
engaged in extortion.

26 <sup>5</sup> However, one of them was not that Allergan would file a baseless  
27 SLAPP suit in order to attempt to strong-arm FFC into dropping its  
*Inter Partes* review.

1 was open to settlement discussions. Second, extortion requires that  
2 Allergan establish that FFC threaten an unlawful injury to it or its  
3 property. It may be that successfully invalidating Allergan's '149  
4 patent might be considered (by Allergan) to be an "injury" – but  
5 when one party asserts a legal right, that is not a legal "injury." If it  
6 were, then prosecutors would be "injuring" defendants by  
7 prosecuting them for criminal activity. The America Invents Act  
8 confers upon FFC the right to petition for an *Inter Partes* Review. See  
9 35 U.S.C. § 311. Exercising that right, FFC petitioned the government  
10 to invalidate the '149 patent using the federal law designed for that  
11 purpose. Plaintiffs' contention that FFC's application was submitted  
12 in an effort to instill fear in Plaintiffs is unsupported, unjustified, and  
13 quite bizarre. Moreover, the dissent of Judge Dyk in the *Sandoz* case  
14 indicates that the IPR petition is likely to be successful. See *Sandoz*  
15 *Inc.*, 726 F.3d at 1289-90.

16 Plaintiffs attempt to support their belief that filing an IPR claim  
17 amounts to extortion by referring to a Wall Street Journal op-ed  
18 article written by a third-party, which is paid to be critical of the IPR  
19 process.<sup>6</sup> The article was written by Mr. Peter Pitts, the President of a  
20 lobbying group funded by the branded pharmaceutical industry. As  
21 such, Pitts has a vested interest in making paid statements against  
22 the IPR process. Yet, *this* is the wall against which Allergan rests its  
23 arguments? This is nothing more than a paid advertisement by  
24

25 <sup>6</sup> See Peter J. Pitts, "'Patent Death Squads' vs. Innovation," THE WALL  
26 STREET JOURNAL, Opinion Section, (June 10, 2015),  
27 <http://www.wsj.com/articles/patent-death-squads-vs-innovation-1433978591>.  
28

1 someone who may not even believe it himself. The only thing more  
2 shameful than Allergan using this as “evidence” would be this Court  
3 failing to see it for what it is.

4 Further, commentators may use the word “extortion” to  
5 describe any number of administrative or legal procedures.  
6 However, “extortion” in Mr. Pitt’s use can only be considered to be  
7 rhetorical hyperbole; not as a legal analysis of what constitutes  
8 extortion under the criminal law or its civil counterparts. Even if it  
9 were, this court can do that analysis without the aid of one biased  
10 editorial writer who does not even have a law degree. (See Peter  
11 Pitts’ LinkedIn profile, attached as **Exhibit B**.) Peter Pitts’ opinion  
12 should have no relevance in this proceeding – except to show that if  
13 this is the best that Allergan can do, it clearly has no arrows left in its  
14 quiver.

### 15 **3.2.2.Plaintiff Cannot Succeed on Its Unfair Competition** 16 **Claim.**

17 If the underlying act is legal, then one cannot impose a duty to  
18 refrain from it through California’s Unfair Competition Law (UCL). In  
19 other words, in order to set forth a claim for unfair competition,  
20 Plaintiffs must identify a predicate violation of law, which they have  
21 not. Rather, Allergan relies on a series of accusations which do not  
22 support an inference of unfair business practice, much less establish  
23 the elements of such an action.

24 “Where, as here, the Legislature has permitted certain conduct,  
25 ‘courts may not override that determination’ by declaring such  
26 conduct to be actionable under Business and Professions Code  
27 section 17200.” *California Medical Assn. v. Aetna U.S. Healthcare of*

1 California, Inc., 94 Cal. App. 4th 151, 169 (Cal. App. 4th Dist. 2001)  
2 (citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular*  
3 *Telephone Co.*, 20 Cal. 4th 163, 182 (1999)). "[W]here the allegedly  
4 unfair business practice has been authorized by the Legislature, no  
5 factual or equitable inquiry need be made, as the court can decide  
6 the matter entirely on the law." *Schnall v. Hertz Corp.*, 78 Cal. App.  
7 4th 1144, 1160 (Cal. App. 1st Dist. 2000) (by authorizing avoidable  
8 fuel service charges, Civil Code section 1936, subdivision (m)(2)  
9 insulates the reasonableness of such charges from judicial scrutiny).  
10 Allergan sets forth a list of allegations intended to support their UCL  
11 claim. However, the acts are either specifically allowed by existing  
12 law, or they are at a minimum are not prohibited under the law.

13 For example, as the first act that Allergan offers as evidence  
14 that FFC is engaged in unfair business practices, it alleges that FFC  
15 uses a mail drop box in connection with running its business. See  
16 Complaint at ¶175(a). Although California regulates the use of mail  
17 drop boxes, it does not prohibit their use. In fact, California  
18 regulations explicitly contemplate their use. See e.g., Cal Bus & Prof  
19 Code § 17538.5. Although counsel was unable to identify any  
20 Delaware statutes governing private mail boxes, common sense  
21 indicates that the use of such private mail drop boxes is legal in  
22 Delaware as well. Indeed thousands of businesses use mail drop  
23 boxes. Some use drop boxes to ensure continuity when the business  
24 changes office locations. Others use them to protect trade secrets  
25 by preventing the public from knowing where they actually operate.  
26 Still others find their use to be a convenient way to ensure that mail is  
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1 not lost, to cut down on unwanted junk mail, or to prevent lower  
2 level employees from learning information they should not be  
3 entrusted with. Allergan does not allege that FFC violates any law  
4 regulating the use of private mail drop boxes. Moreover, the FDA  
5 form Allergan lifted this FFC mailing address from specifically allows  
6 the use of P.O. Boxes and Agents of Service. Allergan's assertion that  
7 this is an unfair business practice therefore seems nonsensical, and  
8 their inclusion of what they think is a scurrilous photograph of the  
9 facility makes their intent questionable. The use of a private mail  
10 drop box is certainly not an unfair business practice, and such an  
11 allegation is absurd.

12 Next, Allergan alleges that FFC prepared a false "proposed  
13 FDA filing for a hypothetical generic brimonidine tartrate/timolol  
14 maleate ophthalmic solution in furtherance of Defendants' attempts  
15 to extort Allergan through the guise of a settlement of the IPR  
16 proceeding" (Complaint at ¶75 (b)) and "[f]alsely representing to  
17 Allergan that Defendants were prepared to 'seek FDA approval via  
18 a Paragraph III ANDA filing to produce and market a generic  
19 brimonidine tartrate/timolol maleate ophthalmic solution with [an  
20 unnamed] Contract Manufacturing Partner ('CMP')." Complaint at  
21 ¶75 (c). For these assertions, Allergan relies solely on statements  
22 made in a March 9, 2015 letter from FFC's external counsel, Mr. Amir  
23 Naini of Russ August & Kabat. However, in that letter, Mr. Naini states  
24 that, "FFC is prepared to seek FDA approval via a Paragraph III  
25 ANDA filing to produce and market a generic brimonidine  
26 tartrate/timolol maleate ophthalmic solution with a Contract  
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1 Manufacturing Parter ("CMP") **upon** the invalidation of the  
2 Combigan Orange Book-listed patents." Complaint, Ex D., Dkt. No. 1-  
3 4, at 3, ¶4 (emphasis added). Mr. Naini made it clear, via the  
4 proposed Paragraph III as opposed to Paragraph IV FDA ANDA  
5 submission, that FFC would not infringe on the '149 patent as long as  
6 it was valid. And especially, in the context of asserting legal rights, it  
7 is quite common for people to state that they are "prepared" to do  
8 something, to mean that they are "willing and able" to take the  
9 action. There is nothing unfair or illegal about FFC informing Allergan  
10 that it believes Allergan's patent to simply combine two known drugs  
11 into a single solution is invalid as obvious, that FFC is challenging the  
12 patent through an IPR, and that upon success FFC intends to invest  
13 resources to compete with Allergan by bringing to market a generic  
14 brimonidine tartrate/timolol solution. FFC has the legal right to  
15 engage in these actions and the legal right to inform Allergan and  
16 others that it intends to take these actions.

17 At ¶75 (d) of the Complaint, Allergan alleges that FFC engaged  
18 in an unfair business practice by filing an objectively baseless IPR  
19 petition for the unlawful purpose of extorting Allergan. Allergan  
20 alleges no facts that if true could establish that its IPR petition is  
21 baseless. In fact, the IPR petition is well supported. The Court need  
22 look no further than the decision of the Federal Circuit Court of  
23 appeals in the *Sandoz* case. See Req. for Judicial Not., Ex. A.

24 As Allergan sets forth in its Complaint, it brought a claim under  
25 the Hatch-Waxman Act to prevent various competitors from bringing  
26 generic versions of Combigan to market. In defending against  
27

1 Allergan's lawsuit, its competitors argued, in part, that four of  
2 Allergan's patents relating to Combigan were invalid as obvious  
3 under 35 U.S.C. §103. At the District Court, Allergan was fairly  
4 successful. The District Court found that none of the patents were  
5 invalid as obvious. However, contrary to Allergan's presentation in  
6 the Complaint, the Federal Court of Appeal viewed the matter  
7 differently. The Circuit Court reversed the District Court on three of  
8 the four patents, finding them obvious and therefore not patentable.  
9 As to the fourth patent, the '149 patent, under a clear and  
10 convincing standard the Circuit Court found that one of four claims  
11 (claim 4) of the '149 patent was not obvious. Moreover, only two of  
12 the three judges found claim 4 of the '149 patent nonobvious.  
13 Allergan was able to sustain its artificial monopoly, but only by the  
14 most narrow victory possible.

15 Furthermore, Judge Dyk's dissent is compelling. The judges in  
16 the majority found that prior art clearly indicated that the concept  
17 of using the two drugs in combination was obvious and therefore not  
18 patentable. *Sandoz*, 726 F.3d at 1289-90; see also Req. for Judicial  
19 Not., Ex. A. It was well established that the two active drugs in  
20 Combigan could be combined and administered together rather  
21 than administering them separately and that combining them and  
22 reducing the dose frequency from three or four times per day to  
23 twice per day increased patient compliance. *Id.* Claim 4 of the '149  
24 patent stated that, "the daily number of doses of brimonidine be  
25 reduced from 3 to 2 times a day *without loss of efficacy.*" The  
26 majority ruled that Allergan's competitors had not established by  
27

1 clear and convincing evidence that the benefit of no loss of efficacy  
2 was obvious. Therefore, the majority ruled the idea of combining the  
3 drugs was not obvious and was patentable. *Id.* at 1294. Dissenting,  
4 Judge Dyk wrote:

5       The majority concludes, correctly, that the composition  
6 claimed in the '463 patent would have been obvious,  
7 even though it has the unexpected property that it can  
8 be dosed twice a day without a loss of efficacy  
9 (specifically, without the appearance of a so-called  
10 'afternoon trough'). Yet the majority affirms the validity of  
11 a claim drawn to the method of dosing that same  
12 composition twice a day, because the prior art did not  
13 disclose that this dosing regimen 'would eliminate the  
14 afternoon trough issue.' Maj. Op. 13. I think that the  
15 different results as between the claims of the '463 patent  
16 and claim 4 of the '149 patent cannot be reconciled.

17 *Id.* at 1295.

18       The Court of Appeal's ruling is not binding on the PTAB and the  
19 Administrative Patent Judges apply a broader standard for claim  
20 interpretation and a lower burden of proof. The majority's opinion  
21 appears to be internally inconsistent and the PTAB may well be  
22 persuaded by Judge Dyk's well-reasoned position. Moreover, in  
23 order to succeed at the PTAB, FFC need only meet a  
24 preponderance of the evidence standard, not a clear and  
25 convincing standard as required at the district court.  
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1 To classify FFC's IPR petition as "objectively baseless" and to  
2 suggest that it can support a claim for an unfair business practice  
3 claim is clearly reaching, to put it mildly.

4 Finally, Allergan offers FFC's letter as evidence that it was  
5 engaged in unfair business practice because it offered to pursue a  
6 mutually beneficial business agreement. Complaint at ¶75(e). In the  
7 first instance, settlement discussions may not be used as evidence to  
8 prove or disprove the validity or amount of a disputed claim. Fed. R.  
9 Evid. 408. Secondly, a willingness to engage in discussions to avoid or  
10 resolve conflicts, especially conflicts that could potentially lead to  
11 resource-consuming litigation, should not be viewed negatively.  
12 Courts should and do encourage parties to settle their differences.  
13 The Central District has an entire Alternative Dispute Resolution  
14 Department designed to encourage and facilitate settlement. In  
15 fact litigants are required to participate in ADR. See Civ. L. R. 16-15.1.  
16 General Order No. 11-10, sets out the advantages of settling rather  
17 than litigating claims. As set forth *supra*, FFC has valid reasons for  
18 seeking to invalidate Allergan's '149 patent, and are likely to be  
19 successful in that endeavor. Public policy encourages parties to  
20 settle disputes. Settlement discussions are not only legal, but they are  
21 encouraged. Engaging in settlement discussions cannot be a basis  
22 for a UCL claim.

23 All of the acts of FFC as alleged by Allergan are legal and  
24 therefore cannot be the foundation for a UCL claim. The Claim must  
25 be stricken.

26 ///  
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### 3.2.3. Plaintiffs Cannot Succeed on Their Malicious Prosecution Claim

This is the most obviously sanctionably weak claim. In fact, on the face of the Complaint, Allergan concedes that the claim is invalid.

Allergan admits in its Complaint that an essential element of a malicious prosecution claim under California law is that the proceedings brought against the party claiming malicious prosecution must have been concluded in its favor. Complaint, p. 15, n. 1. On this point Allergan is correct. “To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was *pursued to a legal termination in his, plaintiff’s, favor*; (2) was brought without probable cause; and (3) was initiated with malice.” *Bertero v. National General Corp.*, 13 Cal. 3d 43, 50 (1974) (emphasis added; internal citations omitted.) If the action is not terminated in the plaintiff’s favor, then there is no cause of action. The IPR proceeding is clearly pending (as admitted by Plaintiffs). This claim must be stricken.

“Although the tort is usually called ‘malicious prosecution,’ the word ‘prosecution’ is not a particularly apt description of the underlying civil action. The Restatement uses the term ‘wrongful use of civil proceedings’ to refer to the tort.” 5 Witkin, *Summary of California Law* (10th ed. 2005) Torts, § 486, internal citations omitted. The Judicial Counsel of California Jury Instructions (CACI) list the elements of a Wrongful Use of Proceedings claim as follows:

- 1 1. That [*name of defendant*] was actively involved in
- 2 bringing [or continuing] the lawsuit;
- 3 [2. That the lawsuit ended in [*name of plaintiff*]'s
- 4 favor;]
- 5 [3. That no reasonable person in [*name of*
- 6 *defendant*]'s circumstances would have believed
- 7 that there were reasonable grounds to bring the
- 8 lawsuit against [*name of plaintiff*];]
- 9 4. That [*name of defendant*] acted primarily for a
- 10 purpose other than succeeding on the merits of the
- 11 claim;
- 12 5. That [*name of plaintiff*] was harmed; and
- 13 6. That [*name of defendant*]'s conduct was a
- 14 substantial factor in causing [*name of plaintiff*]'s
- 15 harm.
- 16

17 Moreover, the instructions specifically state that the law  
18 requires the trial judge, rather than the jury, to decide if the plaintiff  
19 has proven element number two. The face of the complaint  
20 establishes that Plaintiffs cannot establish element number two  
21 because the civil proceedings at question have not been  
22 concluded at all, much less in Allergan's favor. Allergan states that it  
23 thought it "more judicially economical and prudent to allege the  
24 cause of action now rather than have to file a separate, subsequent  
25 lawsuit on that claim alone," but offers no authority supporting such  
26 a position. Complaint p. 15, n.1. If Allergan were truly interested in  
27 advancing the principle of judicial economy it would engage FFC at  
28

1 the IPR proceedings. The result of those proceedings will not only  
2 resolve the question of whether Allergan can successfully defend  
3 and therefore meet one of the required elements for bringing a  
4 malicious prosecution claim, but might also inform Allergan's claims  
5 for extortion and unfair business practices, which certainly at this  
6 time are not supportable.

7       Incredibly, Allergan appears to believe it has the ability to look  
8 ahead and foresee claims it may have in the future. However,  
9 physics and common sense establish that it cannot. There is no  
10 question that Allergan's claim for malicious prosecution is not ripe.  
11 Allergan brought the claim for malicious prosecution in an attempt  
12 to retaliate against FFC, knowing that it could not prove the  
13 elements of the claim. The Court must strike this claim along with the  
14 other two.

15  
16 **4. CONCLUSION**

17       For the reasons set forth above, the Court must strike Plaintiffs'  
18 Complaint under California Code of Civil Procedure § 425.16.

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Dated: August 10, 2015

Respectfully Submitted,

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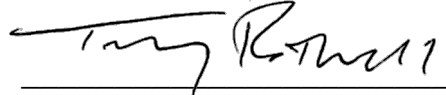
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Kevin Barnes

Case No. 8:15-CV-00992-JAK-PLA

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 10, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully Submitted,



Employee,  
Randazza Legal Group