APPENDIX

DISTRICT COURT OPINION

John J. HURRY, et al., Plaintiffs,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY INCORPORATED, et al., Defendants.

No. CV-14-02490-PHX-ROS
Signed 08/05/2015

Attorneys and Law Firms

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George Ian Brandon, Sr., Gregory Alan Davis, Gregory Sumner Schneider, Squire Patton Boggs (US) LLP, Phoenix, AZ, for Defendants.

ORDER

Honorable Roslyn O. Silver, Senior United States District Judge

The Financial Industry Regulatory Authority ("FINRA") and Scott M. Andersen seek dismissal of all claims asserted by John and Justine Hurry and their related companies. The allegations in the complaint establish the claims either are barred by absolute immunity or fail on other grounds. Therefore, all claims will be dismissed with very limited leave to amend.

BACKGROUND

Greatly simplified, the facts alleged in the amended complaint are as follows. John and Justine Hurry

("Hurrys") are "successful entrepreneurs who own or operate several businesses in Arizona, Montana, Nevada, Utah, and California." (Doc. 37 at 3). Two of those businesses are Scottsdale Capital Advisors Corporation ("SCA") and Alpine Securities Corporation ("Alpine"). Both SCA and Alpine are registered broker-dealers and members of FINRA. As described by the Ninth Circuit, "FINRA is a self-regulatory organization that has the authority to exercise comprehensive oversight over all securities firms that do business with the public." *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 737 (9th Cir. 2013) (quotation marks and citation omitted). FINRA's authority also extends to certain individuals associated with securities firms. Thus, because SCA and Alpine were FINRA members, FINRA had unquestioned authority to regulate and investigate SCA and Alpine. And based on their relationship to SCA and Alpine, FINRA also had some degree of regulatory authority over the Hurrys.*

On November 12, 2012, employees of FINRA conducted a "surprise onsite examination" of SCA at its headquarters in Scottsdale. (Doc. 37 at 15). That examination was led by Defendant Andersen, a FINRA employee. (Doc. 37 at 16). At that time, SCA's headquarters were located in "Suite 6" of a building owned by Scottsdale Partners, "one of the Hurrys' several real estate businesses." (Doc. 37 at 11). Scottsdale Partners is not a member of FINRA. Suite

* It is unclear whether both of the Hurrys were members of FINRA as of November 2012. It appears at least John Hurry was a member. (Doc. 63 at 6 n.4).

6 included numerous individual offices leased by different companies, all of which shared a common reception area. The office of Plaintiff Investment Services Corporation ("ISC") was located "in Suite 6—specifically, the northwest corner office of Suite 6." (Doc. 37 at 12).

Upon arriving at Suite 6, "Andersen or a member of his team" presented an SCA employee with a formal request demanding "immediate access to inspect and copy ... information in the possession, custody, or control of [SCA] and its subsidiaries, affiliates, predecessor corporations, principals, employees, and any other affiliated persons." (Doc. 37 at 17). In connection with this request, Andersen demanded an SCA employee unlock the ISC office so the "examination team [could] enter the premises, seize the ISC Computers, access the ISC Computers, and create 'mirror images' of the ISC Computers in their entirety." (Doc. 37 at 19). Under duress, the ISC office was unlocked and FINRA staff seized the ISC computers. (Doc. 37 at 20-21).

In connection with seizing the ISC computers, a FINRA employee provided a letter to "SCA's representatives" stating SCA could provide a list of any "electronic record" on the ISC computers that SCA believed was private or unrelated to SCA. FINRA would review that list and, without examining the listed records, either delete or segregate them. (Doc. 37 at 18).

The ISC computers seized by FINRA contained "hundreds of gigabytes" of information. It is undisputed that SCA and the Hurrys used the ISC

computers in conducting business related to SCA. Thus, the ISC computers contained some "SCA-related material" even though the complaint hints that the vast majority of information on the ISC computers was not related to SCA. (Doc. 37 at 19). At any rate, FINRA seized the ISC computers, made copies of all the material contained on them, and returned them a few days later. (Doc. 37 at 21) (stating ISC was deprived of the computers "for at least five days").

After the seizure and copying of the computers, SCA and FINRA were unable to agree on how much of the information copied from the ISC computers FINRA was entitled to access. SCA believed it was unreasonable to require it to identify the individual records FINRA was entitled to examine. Based on that, FINRA agreed SCA could submit a list of "search terms" which would be used to identify the private or non-SCA records. SCA argued that method was also unreasonable and proposed the copies of the ISC computers be turned over to a third-party who could "extract any SCA books and records." (Doc. 37 at 24). FINRA rejected that proposal and, eventually, SCA provided a list of search terms. FINRA rejected many of the proposed search terms, apparently believing they were too broad. That is, FINRA believed the proposed search terms would exclude records FINRA was entitled to review.

Approximately four months after the seizure of the ISC computers, the parties were still arguing about FINRA's right to access the information copied from the computers. On March 8, 2013, ISC filed suit in this court alleging the seizure and copying of its computers violated the Computer Fraud and Abuse Act, 18

U.S.C. § 1030. (Doc. 37 at 27-28). ISC did not serve that complaint but did send copies of it to FINRA and Andersen. Around the time ISC filed its complaint, FINRA and Andersen began to engage "in a pattern of escalating harassment" against the Hurrys and their companies. (Doc. 37 at 28). That harassment included FINRA denying an application by Alpine to offer additional financial services, FINRA employees inducing the Nevada Secretary of State to issue subpoenas to the Hurrys for business records, and FINRA employees making false insinuations while interviewing employees of the Hurrys' companies. (Doc. 37 at 30). FINRA and Andersen also "conspired to leak non-public, confidential, and misleading information to a reporter for a newsletter distributed on the internet." (Doc. 37 at 35). That reporter later published stories about FINRA's investigation into SCA as well as negative information regarding SCA's business practices. Those stories allegedly led other financial institutions to close bank accounts held by SCA, Alpine, and the Hurrys. It is unclear whether this alleged harassment impacted ISC's desire to pursue its suit, but the record does not show any effort by ISC to prosecute its claims and the suit was eventually dismissed for failure to prosecute.

After the foregoing events, the Hurrys and twenty-seven of their related companies filed this suit, asserting fourteen claims for relief. The complaint is sixty-three pages long and contains over 350 paragraphs. The complaint recounts the events described above and asserts claims based on FINRA and Andersen illegally seizing and accessing the ISC computers, leaking information to a reporter, and

disclosing private information. FINRA and Andersen seek dismissal of all claims under a variety of theories.

ANALYSIS

The motion to dismiss presents two types of arguments. First, FINRA and Andersen ("Defendants") argue the Court lacks subject matter jurisdiction over all claims asserted by the Hurrys—and only the Hurrys—because the Hurrys did not exhaust their administrative remedies before filing suit. And second, Defendants argue all of the claims, from all of the plaintiffs, fail to state plausible claims for relief.

I. Subject Matter Jurisdiction

Defendants' first argument is that the Court lacks subject matter jurisdiction over all claims asserted by the Hurrys because the Hurrys did not pursue their administrative remedies before filing suit. As noted earlier, "FINRA is a self-regulatory organization" responsible for regulating securities firms and the firms' associated persons. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 737 (9th Cir. 2013). In its regulatory capacity, FINRA has the ability to initiate disciplinary proceedings against firms and associated persons by issuing a complaint. *See* FINRA Rules 9211, 9212. Once FINRA initiates disciplinary proceedings, any entity or individual named in the complaint must follow FINRA's procedures for contesting the claims. Those procedures involve an initial hearing and, eventually, appeal of an adverse decision to the Securities and Exchange Commission ("SEC"). FINRA Rules 9311, 9370. Only after the SEC

resolves such an appeal can an aggrieved entity or individual proceed to court, and then only to the applicable United States Court of Appeals. 15 U.S.C. § 78y(a). It is undisputed that individuals involved in FINRA disciplinary proceedings must exhaust this administrative process before filing suit. *See Charles Schwab & Co. Inc. v. Fin. Indus. Regulatory Auth. Inc.*, 861 F. Supp. 2d 1063, 1069 (N.D. Cal. 2012) (discussing administrative exhaustion requirement). But what is missing from the FINRA Rules, as well as Defendants' briefing, is evidence that aggrieved entities or individuals can initiate the administrative process on their own behalf.

According to Defendants, the Hurrys skipped the required administrative process and filed this suit prematurely. But despite submitting multiple briefs on the topic of administrative exhaustion, Defendants have not clearly explained what *available* administrative process the Hurrys skipped before filing this suit. At present, there is no disciplinary proceeding pending against the Hurrys involving the events at issue in this suit. And, based on the arguments presented by Defendants, the Hurrys lack the ability to initiate any administrative process. As courts have stressed in other contexts, an administrative exhaustion requirement depends on an administrative process actually being available.[†] Defendants have not cited, and the Court

[†] *See, e.g., Barboza v. California Ass'n of Prof'l Firefighters*, 651 F.3d 1073, 1076 (9th Cir. 2011) ("As a general rule, an ERISA claimant must exhaust available administrative remedies before bringing a claim in federal court."); *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) ("The PLRA mandates that inmates exhaust all available administrative remedies ....").

has not located, any case where a suit was dismissed for failure to exhaust administrative remedies when no administrative process was pending and the plaintiffs lacked the ability to start the administrative process. Accordingly, the request to dismiss the Hurrys' claims based on an alleged failure to exhaust administrative remedies will be denied.‡

II. Claims Either Barred by Immunity or Not Plausible

In addition to arguing the Court lacks subject matter jurisdiction over the Hurrys' claims, Defendants also argue the complaint does not state plausible claims for relief under Federal Rule of Civil Procedure 12(b)(6). Defendants' arguments under Rule 12(b)(6) address the claims from the Hurrys and all of their related companies (collectively, "Plaintiffs"). Unfortunately, neither the complaint nor the motion to dismiss differentiates amongst the twenty-nine plaintiffs. The Court's analysis will follow suit and lump Plaintiffs together even though it appears likely that only some

‡ Defendants hint that the administrative process could have been exhausted if SCA had refused to provide the requested information during the November 12, 2012 raid. (Doc. 62 at 4). That refusal may have led to FINRA formally initiating a disciplinary proceeding where the Hurrys could have raised their grounds for refusing to produce the information. Defendants cite no authority accepting this type of argument and, in any event, the Court must deal with the facts as they are, not a hypothetical set of facts. Under the undisputed facts, the Hurrys cannot now initiate the administrative process and, therefore, they have no available administrative remedy which they can be faulted for failing to pursue.

of the claims could possibly be brought by certain subsets of individuals or entities.[§]

A. Standard for Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true" and viewed in the light most favorable to the nonmoving party, "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). Under this standard, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This does not require "detailed factual allegations," but it does require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* This is not a "probability requirement," but a requirement that the factual allegations show "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

B. Defendants' Immunity

Defendants claim they are entitled to absolute immunity for eight of the fourteen claims in the complaint. Plaintiffs disagree, primarily arguing absolute immunity does not apply when, as here, some

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[§] For example, the complaint appears to assert a claim for defamation on behalf of a variety of companies controlled by the Hurrys. The complaint does not, however, provide any indication how those companies have a plausible claim for defamation. That is, the complaint contains no allegations connecting the alleged defamatory statements to each of the named companies.

of the plaintiffs were not members of FINRA and not directly subject to FINRA's authority. In support of this argument, Plaintiffs proffer hypotheticals involving the outer reach of absolute immunity. While interesting, those hypotheticals are largely beside the point because this case involves very straightforward actions by Defendants exercising their regulatory power.

As a self-regulatory organization registered under the Securities Exchange Act of 1937, FINRA "supervises the conduct of its members under the general aegis of the SEC." *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1210 (9th Cir. 1998). As explained by the Ninth Circuit, Congress viewed this system of "self-regulation with strong SEC oversight" as preferable to "a pronounced expansion of the SEC." *Id.* at 1213. Thus, while FINRA is a private party, Congress granted FINRA "quasi-governmental power[ ]" to act in a regulatory capacity. *Id.* As a consequence of being granted such power, FINRA is entitled to "immunity from suit" whenever it is acting in its "quasi-governmental capacity." *Id.* at 1214. In other words, FINRA "has [absolute] immunity when acting in an adjudicatory, prosecutorial, arbitrative or regulatory capacity." *Id.* And this immunity "admits of no exceptions: if the action [being challenged was] taken under the aegis of the Exchange Act's delegated authority, [FINRA] is protected by absolute immunity from money damages." *P'ship Exch. Sec. Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999) (quotation omitted).

An important feature of this absolute immunity is that, according to the Ninth Circuit, it is derived from

sovereign immunity principles.** *See Sparta*, 159 F.3d at 1214 (quoting *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 59 (2d Cir. 1996)). As a private corporation FINRA "does not share in the SEC's sovereign immunity." *Barbara*, 99 F.3d at 59. But FINRA's "special status and connection to the SEC" means it is entitled to an absolute immunity similar to what the SEC itself would enjoy. *Id.* Under this approach, "the identity of the plaintiff is not material. *DL Capital Grp., LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 99 (2d Cir. 2005). Instead, the immunity analysis turns on the nature of the action being challenged. If the complained-of acts were taken in connection with FINRA exercising its quasi-governmental powers, absolute immunity applies, regardless of whether the plaintiffs were FINRA members. *See id.*

Another important feature of the absolute immunity recognized by the Ninth Circuit is that its logic extends to cover the actions of FINRA employees. The immunity applies whenever a particular action is "taken under the aegis of the Exchange Act's delegated authority." *P'ship Exch. Sec. Co.*, 169 F.3d at 608. And given that FINRA can only take actions through its employees, FINRA employees can also invoke this absolute immunity. *See, e.g., Standard*

** The Court notes the Ninth Circuit's conflation of "absolute immunity" with "sovereign immunity" is confusing and there are substantial reasons to question the soundness of the Ninth Circuit's approach. *See* Rohit A. Nafday, *From Sense to Nonsense and Back Again: SRO Immunity, Doctrinal Bait-and-Switch, and A Call for Coherence*, 77 U. Chi. L. Rev. 847, 865-66 (2010) (noting Ninth Circuit's adoption of sovereign immunity was problematic).

Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., 637 F.3d 112, 115 (2d Cir. 2011) ("There is no question that an SRO and its officers are entitled to absolute immunity from private damages suits in connection with the discharge of their regulatory responsibilities."). Hence, Andersen is absolutely immune for action taken when he was "exercising quasi-governmental powers." *Sparta*, 159 F.3d at 1214.

Plaintiffs disagree with this analysis, in particular the idea that Defendants can be immune from suit by non-members. However, Plaintiffs do not cite any Ninth Circuit authority questioning the expansive reach of Defendants' absolute immunity. Instead, Plaintiffs posit a number of hypotheticals meant to illustrate the allegedly absurd scope of the absolute immunity Defendants invoke. For example, Plaintiffs question whether Defendants' absolute immunity would apply to a FINRA employee involved in a traffic accident. Plaintiffs also question whether FINRA or a FINRA employee would be absolutely immune for "accidentally—or intentionally—start[ing] a fire in ISC's offices while ... copying the hard drives." (Doc. 66 at 10). These hypotheticals are interesting but ultimately unconvincing. A brief diversion into one of the hypotheticals shows why.

Assuming for a moment Defendants had burned down ISC's offices, an attempt to invoke absolute immunity might present a close question. If the fire occurred when Defendants were exercising their quasi-governmental powers, absolute immunity may bar that suit, even though doing so would appear unjust. Of course, absolute immunity *often* bars recovery in seemingly unjust ways. *See, e.g., Broam v. Bogan*, 320

F.3d 1023, 1030 (9th Cir. 2003) ("A prosecutor is also absolutely immune from liability for the knowing use of false testimony at trial.").

That being said, the idea that absolute immunity would bar a claim based on Defendants *intentionally* burning down ISC's offices is far-fetched. Absolute immunity only extends to Defendants' actions taken in their quasi-governmental capacity. It is hard to see how intentionally burning down Plaintiffs' buildings could ever be deemed an exercise of Defendants' quasi-governmental powers. That is, burning buildings is probably not an acceptable way to supervise and regulate the securities industry. Thus, even under the expansive scope of absolute immunity Plaintiffs fear, Defendants likely could be sued for intentionally burning down ISC's offices.

In the end, Plaintiffs' hypotheticals merely distract from the question actually presented by the eight claims which Defendants assert are barred by immunity. That question is: was the investigation, seizure, and copying of ISC's computers connected to the legitimate exercise of Defendants' regulatory power? In other words, was the seizure of the computers connected to Defendants acting in their "adjudicatory, prosecutorial, arbitrative or regulatory capacity"? *Sparta*, 159 F.3d at 1214. If the seizure was so connected, claims based on the seizure are barred by absolute immunity. Looking to the allegations in the complaint, Claims I, II, III, IV, V, VI, and XIII are, in fact, barred by absolute immunity.

Claims I and II allege violations of the Computer Fraud and Abuse Act, Claim III alleges a trespass upon chattel, Claim IV alleges "intrusion upon seclusion," Claim V alleges "conversion," Claim VI alleges misappropriation of trade secrets, and Claim XIII alleges "deprivation of constitutional rights." As best as can be determined from the complaint, all of these claims are based on Defendants seizing and accessing the ISC computers. But as admitted in the complaint, the seizure and access of the computers were directly related to the investigation of SCA, Alpine, and the Hurrys. Put in terms of the absolute immunity case law, Defendants' actions were "taken under the aegis of the Exchange Act's delegated authority." *P'ship Exch. Sec. Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999). Therefore, Claims I, II, III, IV, V, VI, and XIII are barred by absolute immunity.

The only close question is whether Claim IX, alleging defamation, is also barred by absolute immunity. Claim IX appears to be based on two different types of statements. First, Defendants allegedly made defamatory statements during investigatory interviews of SCA's employees. And second, Defendants allegedly made defamatory statements to a reporter. The statements during interviews of SCA's employees were made in direct connection with the investigation of SCA, Alpine, and the Hurrys. Therefore, they are barred by absolute immunity. The statements to a reporter, however, do not appear to have been in furtherance of any legitimate investigatory or regulatory goal. Thus, the portion of the defamation claim based on statements to a reporter is not barred by absolute immunity.

All aspects of Claims I, II, III, IV, V, VI, and XIII are barred by absolute immunity as is the portion of Claim IX based on statements during investigatory interviews. The portion of Claim IX based on statements to a reporter is not barred. The remaining claims—Claims VII, VIII, X, XI, XII, and XIV—as well as the surviving portion of Claim IX, must be analyzed on their merits.

C. Prima Facie Tort

Claim VII asserts a claim under Arizona law for "prima facie tort." Because the complaint is structured such that all the factual allegations are incorporated into each substantive claim, it is not clear which facts allegedly support Plaintiffs' claim for "prima facie tort." But regardless of this flaw, the Arizona Court of Appeals has noted "Arizona has not adopted" a "prima facie tort" theory of liability. *Lips v. Scottsdale Healthcare Corp.*, 214 P.3d 434, 440 (Ariz. Ct. App. 2009), *aff'd in part, vacated in part*, 229 P.3d 1008 (2010). Plaintiffs do not cite any Arizona authority recognizing this type of claim. Therefore, the claim will be dismissed. *Cf. Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011) (holding "plaintiffs choosing the federal forum ... [are] not entitled to trailblazing initiatives under [state law]") (quotations omitted).

D. Violation of Privacy Act

Claim VIII alleges Defendants violated the Privacy Act, 5 U.S.C. § 552a, by disclosing certain information. But FINRA is a private corporation and does not qualify as an "agency" as that term is defined by the Privacy Act. *Lucido v. Mueler*, No. 08-15269, 2009 WL 3190368, at *7 (E.D. Mich. Sept. 29, 2009) ("FINRA is not 'agency' for purposes of the [Privacy] Act."). It is also clear that the Privacy Act does not allow suit against individuals, especially private parties. *See Hewitt v. Grabicki*, 794 F.2d 1373, 1377 n.2 (9th Cir. 1986) ("The weight of authority is that the [Privacy Act's] authorization of suit only against an 'agency' thereby excludes individual officers and government employees."). The Privacy Act claim will be dismissed.

E. Statements to Reporter

Claim IX is a claim for defamation, Claim XI is a claim for public disclosure of private facts, and Claim XII is a claim for "false light." All three of these claims are based on Defendants making statements to a reporter.[††] Those statements allegedly led to the reporter publishing articles containing unflattering information regarding Plaintiffs. All three of these claims fail for similar reasons.

The defamation and false light claims can be analyzed together. A plausible defamation claim requires allegations of a publication, that is false, which "bring[s] the defamed person into disrepute,

[††] As mentioned earlier, the only allegations regarding defamation not barred by absolute immunity involve Defendants' communications with a reporter.

contempt, or ridicule" or "impeach[es] plaintiff's honesty, integrity, virtue, or reputation." *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 787 (Ariz. 1989). And a plausible false light claim requires allegations showing Defendants "knowingly or recklessly published false information or innuendo about [Plaintiffs] that a reasonable person would find highly offensive." *Hart v. Seven Resorts Inc.*, 947 P.2d 846, 854 (Ariz. Ct. App. 1997). Under both of these claims, identifying the false statement at issue is the most basic requirement.

The complaint does not clearly identify any *false* statement made by Defendants. Rather than identify the particular statements at issue, Plaintiffs' response to the motion to dismiss merely points to paragraphs 176-220 of the complaint as "alleg[ing] in detail the defamatory statements." (Doc. 66 at 13, 22). But having read paragraphs 176-220, those paragraphs contain no clear identification of false statements made by Defendants. Instead, those paragraphs deal with the content of articles written by reporter Bill Meagher. The most relevant paragraphs identify false statements by Meagher, not false statements by Defendants. (Doc. 37 at ¶¶ 198, 200, 209). While Meagher's articles may have been passing along false statements made by Defendants, there are no factual allegations establishing that chain of communication. Merely alleging a factual scenario where Meagher might have learned the information from Defendants—but it is equally possible he learned the information from elsewhere—

is not enough.‡‡ *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (quotation omitted). The defamation and false light claims must be dismissed.

Finally, a plausible claim for public disclosure of private facts requires allegations that Defendants gave "publicity to a matter concerning the private life" of Plaintiffs and the publicity of that matter "would be highly offensive to a reasonable person" and "is not of legitimate concern to the public." Restatement (Second) of Torts § 652D. As with almost all of Plaintiffs' claims, the factual basis for this claim is impossible to divine from the complaint itself.§§ But

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‡‡ The complaint recognizes that some of the information may have been "leaked" by the SEC. (Doc. 37 at 40) (noting one "article mentions information that would only be known to FINRA, SEC, and SCA"). There are no facts establishing how Plaintiffs know the information provided to the reporter actually came from Defendants and not the SEC or an SCA employee.

§§ Claims for defamation and false light must be based on a false statement while a claim for public disclosure of private facts must be based on a true statement. The complaint, however, seems to use the same statements in support of all three of these claims. While Federal Rule of Civil Procedure 8 allows pleading in the alternative, that does not appear to have been Plaintiffs' intent. Instead, the complaint seems to allege some of the leaks consisted of false information and other leaks consisted of true information, but there is no clear explanation of which is which. Absent some explanation or differentiation, it is unnecessarily confusing for Plaintiffs to base claims on the leaks being both true and false.

based on Plaintiffs' opposition to the motion to dismiss, this claim is based on very particular portions of the alleged leaks to Meagher. Defendants are alleged to have disclosed the fact that an "unannounced FINRA examination of SCA" occurred and that FINRA had requested "personal notes of SCA employees." (Doc. 37 at 40-41).

Plaintiffs cite no authority establishing these types of disclosure would be "highly offensive to a reasonable person." Restatement (Second) of Torts § 652D. More importantly, Plaintiffs do not dispute that the existence of FINRA's investigation into SCA qualified as of legitimate concern to the public. Accordingly, the public disclosure claim fails.

F. Interference with Contractual Relations

Claim X alleges intentional interference with contractual relations. There are almost no factual allegations setting forth the nature of this interference. That is, the complaint makes a general claim that Defendants "pressur[ed] banking institutions to terminate or refuse banking relationships" with Plaintiffs. (Doc. 37 at 58). But the complaint does not state who specifically exerted that "pressure," when it occurred, and what was said. Based on the parties' briefing, it appears this claim is based on the information contained in Meagher's reports. For example, the complaint alleges one bank account was closed due to the "leaked information appearing [in] the December 6, 2013" article by

Meagher. (Doc. 37 at 43). These allegations, along with the similar allegations regarding other publications by Meagher, are not sufficient to state a plausible claim of intentional interference with contractual relations.

A claim for intentional interference with contractual relations requires allegations that Plaintiffs had contractual relationships with third parties, Defendants knew of those relationships, and Defendants intentionally induced or caused the third parties to breach or terminate those relationships. *Miller v. Hehlen*, 104 P.3d 193, 202 (Ariz. Ct. App. 2005). The complaint alleges Plaintiffs had relationships with various banks and that Defendants knew of those relationships. However, the complaint does not allege any facts establishing Defendants induced or caused the banks to terminate their relationships with Plaintiffs. The theory of the complaint appears to be that Defendants leaked information to Meagher, Meagher published that information, the banks read Meagher's reports, and the banks decided to terminate their relationship with Plaintiffs. This theory is not supported by *facts* plausibly showing Defendants leaked information to Meagher with the intention of "inducing or causing" the banks to terminate their relationships with Plaintiffs. *Miller v. Hehlen*, 104 P.3d 193, 202 (Ariz. Ct. App. 2005) (noting "intentional interference inducing or cause a breach" is element of claim). Absent such allegations, the claim for intentional interference with contractual relations must be dismissed.

G. Conspiracy

Finally, Claim XIV alleges a "conspiracy to violate civil rights" under 42 U.S.C. § 1985(2). That statute prohibits entities and individuals from conspiring to deter "any party or witness ... from attending court, or from testifying to any matter pending therein." 42 U.S.C. § 1985(2). According to the complaint, the conspiracy at issue consisted of Defendants "intentionally access[ing] information" on the ISC computers to "intimidate and deter" Plaintiffs from prosecuting the suit ISC filed on March 8, 2013. The conspiracy also entailed Defendants disclosing information in retaliation for Plaintiffs filing the March 8, 2013 suit. This claim has many problems but, most importantly, it fails under the intracorporate conspiracy doctrine.

"[T]he intracorporate conspiracy doctrine ... bars a claim for conspiracy where the allegation is that an entity conspired with its employees ...." *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1074 (D. Ariz. 2012). While the Ninth Circuit has not specifically applied this doctrine in the context of a claim under § 1985(2), lower court authority in the Ninth Circuit, as well as other Courts of Appeals, establishes the doctrine bars such claims. *See, e.g., Hoefer v. Fluor Daniel, Inc.*, 92 F. Supp. 2d 1055, 1059 (C.D. Cal. 2000) (discussing circuit split). The Court will follow those courts and apply the doctrine to § 1985(2). As Plaintiffs' allegation is that FINRA conspired with Andersen, its employee, the intracorporate conspiracy doctrine bars this claim.

III. Leave to Amend

The Court must grant leave to amend if it appears Plaintiffs might be able to correct the defects set forth above. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). At present, it appears unlikely Plaintiffs will be able to amend their complaint to state plausible claims connected to the access and seizure of the ISC computers. Such claims are very likely barred by absolute immunity. But Plaintiffs may have additional facts that, if pled, will show Defendants actions were outside an exercise of their regulatory authority. Thus, Plaintiffs will be allowed to amend the claims that, at present, are barred by absolute immunity.

The claim for "prima facie tort," however, is not recognized under Arizona law and additional allegations would be futile. Additional allegations supporting the Privacy Act claim would also be futile in that Defendants are not governmental actors. Finally, the conspiracy claim is fatally flawed pursuant to the intracorporate conspiracy doctrine and cannot be cured by amendment. Therefore, leave to amend these claims would be inappropriate.

Finally, Plaintiffs may be able to allege additional facts to make plausible their defamation, false light, public disclosure, and intentional interference with contractual relations claims. Therefore, Plaintiffs will be granted leave to amend these four claims.

Accordingly,

IT IS ORDERED the Motion to Dismiss for Lack of Jurisdiction and Motion to Dismiss for Failure to State a Claim (Doc. 46) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED if Plaintiffs wish to file an amended complaint in compliance with the instructions above, they must do so no later than August 21, 2015. The Clerk of Court is directed to enter a judgment of dismissal with prejudice in the event no amended complaint is filed by that date.
IT IS FURTHER ORDERED the Motion for Leave to Take Discovery (Doc. 56) is **DENIED.**

Dated this 5th day of August, 2015.

NINTH CIRCUIT OPINION

United States Court of Appeals, Ninth Circuit.
John J. HURRY et al., Plaintiffs-Appellants,
v.
FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. (FINRA), a Delaware corporation; Scott M. Anderson, Defendants-Appellees.

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of Securities Dealers, LLC, SCAP 5, LLC, Investment Services Capital, LLC, Investment Services Holdings Corporation, Newconmgt, LLC, ISC, LLC, ISHC, LLC, Newmgt, LLC, SCAINTL, LLC, FLJH, LLC, ASD Holding Company, LLC, Hurry Foundation

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Appeal from the United States District Court for the District of Arizona, Roslyn O. Silver, District Judge, Presiding, D.C. No. 2:14-cv-02490-ROS

Before: TASHIMA, GRABER, and OWENS, Circuit Judges.

MEMORANDUM[***]

Plaintiffs John and Justine Hurry and several business entities brought this action against Defendants Financial Industry Regulatory Authority, Inc. ("FINRA") and Scott Andersen, alleging that Defendants engaged in unlawful behavior arising primarily out of FINRA's investigation of some of the

[***] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Hurrys' businesses. The district court dismissed most of the claims and later granted summary judgment to Defendants on the remaining claims. Plaintiffs timely appeal, and we affirm.

1. The district court correctly held that regulatory immunity bars many of Plaintiffs' claims, including those claims alleging that Defendants exceeded the scope of their regulatory and investigatory authority. See Northstar Fin. Advisors, Inc. v. Schwab Invs., 904 F.3d 821, 828 (9th Cir. 2018) (holding that we review de novo a dismissal of claims). Defendants are immune for actions taken "under the aegis of the [Securities Exchange Act of 1934's] delegated authority." Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1214 (9th Cir. 1998), overruled in other part by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, —— U.S. ——, 136 S. Ct. 1562, 194 L.Ed.2d 671 (2016). That immunity extends to Defendants' investigatory actions. See P'ship Exch. Sec. Co. v. Nat'l Ass'n of Sec. Dealers, Inc., 169 F.3d 606, 608 (9th Cir. 1999) ("Sparta admits of no exceptions: if the action is taken under the 'aegis of the Exchange Act's delegated authority,' the NASD [the National Association of Securities Dealers, FINRA's previous name] is protected by absolute immunity from money damages." (quoting Sparta, 159 F.3d at 1214)); see also id. at 607 (affirming regulatory immunity to the NASD even though the plaintiffs alleged "that the NASD, in its investigatory and administrative actions, went beyond the scope of its authority and ignored its disciplinary authority").

2. The district court correctly dismissed Plaintiffs' claim under the Privacy Act of 1974, 5 U.S.C. § 552a. The Act applies to records of natural persons only, and only natural persons may sue under the Act. St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369, 1373 (9th Cir. 1981). Before the district court, and before us, Defendants argued that Plaintiffs alleged disclosure of records of businesses only. Plaintiffs' failure to respond to that argument constitutes waiver. O'Guinn v. Lovelock Corr. Ctr., 502 F.3d 1056, 1063 n.3 (9th Cir. 2007); Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

33. The district court correctly granted summary judgment to Defendants on the leak-related claims. See Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004) (holding that we review de novo a grant of summary judgment). Both state-law claims require that Plaintiffs prove that Defendants published a statement. Watkins v. Arpaio, 239 Ariz. 168, 367 P.3d 72, 77 (Ariz. Ct. App. 2016) (false light); Dube v. Likins, 216 Ariz. 406, 167 P.3d 93, 104 (Ariz. Ct. App. 2007) (defamation). Viewing the evidence in the light most favorable to Plaintiffs, Plaintiffs have not done "more than simply show that there is some metaphysical doubt as to" whether Defendants leaked information to the reporter. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Even discrediting the direct evidence that an employee of one of the Hurrys' businesses was the reporter's source for nearly all the information, the reporter's source is still unknown. No evidence in the record helps a fact-finder decide whether the source was a FINRA employee, an employee of the Securities

and Exchange Commission, or a third party (such as the reporter himself) who obtained the information illicitly or by happenstance. Without any additional evidence, all those options are equally plausible, and only speculation could narrow the source down to FINRA. "Mere allegation and speculation do not create a factual dispute for purposes of summary judgment." Loomis v. Cornish, 836 F.3d 991, 997 (9th Cir. 2016) (alteration omitted) (quoting Nelson v. Pima Cmty. Coll., 83 F.3d 1075, 1081–82 (9th Cir. 1996)). We disagree with Plaintiffs that a reasonable jury could conclude that FINRA engaged in a cover-up with respect to the leaks alleged in this case.

3. The district court did not abuse its discretion by denying Plaintiffs' untimely request for additional discovery. See Martinez v. Aero Caribbean, 764 F.3d 1062, 1066 (9th Cir. 2014) (holding that we review for abuse of discretion a district court's discovery rulings). Plaintiffs waited more than five weeks after both the original deposition and the expiration of discovery before requesting the second deposition, even though the district court had presided over a status hearing in the meantime and had extended the discovery deadline for other purposes.

AFFIRMED.