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12 Agri-Process Innovations, Inc., and
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13

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION

17 GREENLINE INDUSTRIES, INC., a
18 California corporation, and
GREENLINE INDUSTRIES, LLC, a
19 California limited liability company,

20 Plaintiffs,

21 v.

22 AGRI-PROCESS INNOVATIONS,
INC., an Arkansas corporation, and AP
23 FABRICATIONS, LLC, an Arkansas
limited liability company,

24 Defendants.
25
26
27
28

Case No. 08-5902R (AJWx)

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS COMPLAINT, OR
ALTERNATIVELY, MOTION TO
TRANSFER CASE TO THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS**

Date: October 20, 2008
Time: 10:00 a.m.
Dept: Courtroom 8
Judge: Hon. Manuel L. Real

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1 **I. INTRODUCTION**

2 On August 6, 2008, Plaintiffs Greenline Industries, Inc. (a California corporation) and
3 Greenline Industries, LLC (a California limited liability company) (collectively "Plaintiffs") filed
4 suit against Defendants Agri-Process Innovations, Inc. (an Arkansas corporation) and AP
5 Fabrications, LLC (an Arkansas limited liability company) (collectively "Defendants") in the Los
6 Angeles, California Superior Court. On September 9, 2008, Defendants filed a Notice Of
7 Removal of the litigation to the United States District Court for the Central District of California
8 and filed the appropriate notices with the respective state and federal court clerks. Defendants
9 presently file the instant Motion To Dismiss Complaint, Or Alternatively, Motion To Transfer
10 Case To The United States District Court For The Eastern District Of Arkansas ("Defendants'
11 Motion"). For the reasons stated below, Defendants' Motion should be granted.

12 **II. ALLEGATIONS ASSERTED IN PLAINTIFFS' COMPLAINT¹**

13 On August 6, 2008, Plaintiffs filed a Complaint For Recovery Of Money Paid To An
14 Unlicensed Subcontractor Under California Business And Professions Code §7031(b)
15 ("Plaintiffs' Complaint"). In that Complaint, Plaintiffs allege that they hired Defendants as
16 subcontractors to perform work at property located at 12345 Lakeland Road, Santa Fe Springs,
17 CA 90670 ("the Santa Fe property") and at property located at 1721 San Juan Highway, San Juan
18 Bautista, CA 95045 ("the San Juan Bautista property"). See Plaintiffs' Complaint, at ¶¶ 6-7.
19 Plaintiffs further allege that Defendants installed biodiesel processing units as subcontractors for
20 Plaintiffs at the Santa Fe property and the San Juan Bautista property. See Plaintiffs' Complaint,
21 at ¶ 8.

22 Plaintiffs contend that they paid \$2,310,238 to Defendants for the work performed as
23 subcontractors at the Santa Fe property and the San Juan Bautista property. See Plaintiffs'
24 Complaint, at ¶ 9. However, Plaintiffs now claim that Defendants were, at all relevant times,
25 unlicensed subcontractors. See Plaintiffs' Complaint, at ¶ 10. Plaintiffs therefore allege that they

26 _____
27 ¹ Defendants of course do not concede the truthfulness of the allegations contained in
28 Plaintiffs' Complaint. However, as this Court knows those allegations are accepted as true for
purposes of resolving Defendants' Motion. See, e.g., *Gompper v. VISX, Inc.*, 298 F.3d 893, 895
(9th Cir. 2002).

1 are entitled to recover compensation paid to Defendants for work performed at the Santa Fe
2 property and the San Juan Bautista property. See Plaintiffs' Complaint, at ¶ 11.

3 With the foregoing in mind, Plaintiffs pray for judgment against Defendants as follows:
4 (1) for "statutory forfeiture" in the amount of \$2,310,238 under California Business and
5 Professions Code ("CAL. BUS. & PROF. CODE") §7031(b) for all payments made by Plaintiffs to
6 Defendants for work performed at the Santa Fe property and the San Juan Bautista property;
7 (2) for costs of suit incurred; and (3) for attorney's fees and costs as provided by contract or law.
8 See Plaintiffs' Complaint, at "WHEREFORE" clause.

9 **III. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO**
10 **STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

11 **A. Standard For Dismissal Based Upon The Failure To State A Claim Stemming**
12 **From The Failure To Allege Capacity To Sue**

13 This Court is well-aware that FED. R. CIV. P. 12(b)(6) provides for dismissal of a
14 complaint whenever it fails to state a claim upon which relief can be granted. As the United
15 States Supreme Court recently explained, "[w]hile a complaint attacked by a Rule 12(b)(6)
16 motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the
17 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic
18 recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, _____
19 U.S. ____, ____, 127 S.Ct. 1955, 1964-65 (2007). Instead, the allegations in the complaint "must
20 be enough to raise a right to relief above the speculative level." *Id.* at 1965.

21 Also, FED. R. CIV. P. 9(a) provides that "[i]t is not necessary to aver the capacity of a party
22 to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the
23 legal existence of an organized association of persons that is made a party, except to the extent
24 required to show the jurisdiction of the court." "When the litigant's capacity, authority, or legal
25 existence is relevant to the question of subject matter jurisdiction, the pleader must allege
26 whatever is necessary to comply with the pleading requirement set forth in Rule 8(a)(1)." *Wright & Miller, Federal Practice and Procedure: Civil 3d*, vol. 5A § 1293, at 18 (West 2004).

27 Defendants move to dismiss based upon these Federal Rules of Civil Procedure, as
28 Plaintiffs have not alleged requisite facts in support of a claim for relief under the California

1 Construction Services Licensing Law (“CSLL”) codified at CAL. BUS. & PROF. CODE § 7000, *et*
2 *seq.*

3 **B. “Contractor” As Construed Under The CSLL**

4 Plaintiffs’ Complaint alleges that Plaintiffs hired Defendants as their subcontractors to
5 perform work at the Santa Fe property and the San Juan Bautista property, installing biodiesel
6 processing units. *See* Complaint, ¶¶ 6-8. It is obvious that Plaintiffs’ Complaint is contending—
7 without explicitly saying so—that Plaintiffs were the contractor for this project.

8 As will be discussed below, Section 7031(a) of the CSLL “requires all persons *engaged in*
9 *the business or acting in the capacity of a contractor* to be licensed.” *Great West Contractors,*
10 *Inc. v. WSS Industrial Construction, Inc.*, 162 Cal.App.4th 581, 587, 76 Cal.Rptr.3d 8, 13 (2008)
11 (emphasis added). A “contractor,” which “is synonymous with ‘builder’” under the CSLL, is
12 defined in pertinent part as:

13 *[a]ny person who undertakes to or offers to undertake to, or*
14 *purports to have the capacity to undertake to, or submits a bid to,*
15 *or does himself or herself or by or through others, construct, alter,*
16 *repair, add to, subtract from, . . . [or] . . . improve . . . any building*
17 *. . . or other structure, project, development or improvement, or to*
do any part thereof . . . , whether or not the performance of work . . .
involves the addition to, or fabrication into, any . . . project . . . of
any material or article of merchandise.

18 *See* CAL. BUS. & PROF. CODE § 7026 (emphasis added).

19 “Persons” deemed “engaged in the business or acting in the capacity of a contractor” are
20 broadly defined to include “an individual, a firm, copartnership, corporation, association or other
21 organization, or any combination of any thereof.” CAL. BUS. & PROF. CODE § 7025. Also, “[t]he
22 term ‘contractor’ includes . . . *[a]ny person, consultant to an owner-builder, firm, association,*
23 *organization, partnership, business trust, corporation, or company, who or which undertakes,*
24 *offers to undertake, purports to have the capacity to undertake, or submits a bid, to construct any*
25 *building or home improvement project, or part thereof.”* CAL. BUS. & PROF. CODE § 7026.1
26 (emphasis added). Foreign contractors, isolated transactions, or “unique” building services and
27 capabilities are not exempt from the licensing law. *See Hydrotech Systems, Ltd. v. Oasis Water*
28 *Park*, 52 Cal.3d 988, 995 (1991).

1 C. The Failure To Allege That One Is A Licensed "Contractor" Constitutes The
2 Failure To Allege Capacity To Sue, And Thus The Failure To State A
3 Cognizable Claim

4 Plaintiffs purport to seek relief against Defendants under CAL. BUS. & PROF. CODE
5 § 7031(b) which provides in pertinent part that:

6 (b) Except as provided in subdivision (e), a person who utilizes the
7 services of an unlicensed contractor may bring an action in any
8 court of competent jurisdiction in this state to recover all
9 compensation paid to the unlicensed contractor for performance of
10 any act or contract. . . .

11 "Contractor" includes subcontractor and specialty contractor." See CAL. BUS. & PROF. CODE
12 § 7026. Accordingly, this lawsuit involves a contractor (Plaintiffs) attempting to recover sums
13 from its subcontractor (Defendants) premised upon the allegation that the latter party is not
14 licensed pursuant to the CSLL.

15 However, CAL. BUS. & PROF. CODE § 7031(a) (emphasis added) provides in relevant part
16 that:

17 (a) Except as provided in subdivision (e), no person engaged in the
18 business or acting in the capacity of a contractor may bring or
19 maintain any action, or recovery in law or equity in any action, in
20 any court of this state for the collection of compensation for the
21 performance of any act or contract where a license is required by
22 this chapter without alleging that he or she was a duly licensed
23 contractor at all times during the performance of that act or
24 contract, regardless of the merits of the cause of action brought by
25 the person, except that this prohibition shall not apply to
26 contractors who are each individually licensed under this chapter
27 but who fail to comply with §7029.

28 "It is settled that 'section 7031 bars a suit for breach of contract as well as for the collection of
compensation for performance of any act.'" *K&K Services, Inc. v. City of Irwindale*, 47
Cal.App.4th 818, 823, 54 Cal.Rptr.2d 836, 838 (1996) (quoting *Currie v. Stolowitz*, 169
Cal.App.2d 810, 813, 338 P.2d 208 (1959)).

Moreover, under CAL. BUS. & PROF. CODE § 7031(d) (emphasis added):

(d) If licensure or proper licensure is controverted, then proof of
licensure pursuant to this section shall be made by production of a
verified certificate of licensure from the contractor's state license
board which establishes that the individual or entity bringing the

1 action is duly licensed in the proper classification of contractors at
 2 all times during the performance of any act or contract covered by
 3 the action. *Nothing in this subdivision shall require any person or*
 4 *entity controverting licensure or proper licensure to produce a*
 5 *verified certificate when licensure or proper licensure is*
 6 *controverted, the burden of proof to establish licensure or proper*
 7 *licensure shall be on the licensee.*

8 “Read together, subdivisions (a) and (d) of section 7031 provide that the contractor must
 9 plead licensure, and, if licensure is ‘controverted,’ must also prove licensure by producing a
 10 verified certificate.” *Advantec Group, Inc. v. Edwin’s Plumbing Co., Inc.*, 153 Cal.App.4th 621,
 11 626-27, 63 Cal.Rptr.3d 195, 199 (2007). The California Court of Appeals, citing
 12 Section 431.10(a) of the California Code of Civil Procedure and its definition of a “material
 13 allegation in a pleading[.]” has held that “[b]ecause section 7031, subdivision (a), requires the
 14 pleading of licensure (without it, the contractor cannot recover, regardless of the merits of the
 15 claim), the allegation of licensure is a ‘material’ allegation[.]” *Id.*, 153 Cal.App.4th at 627, 63
 16 Cal.Rptr.3d at 199. Indeed, the Court “recognized that some statutes require that a complaint
 17 include an allegation of capacity to sue, and distinguished such situations from the ordinary one
 18 in which capacity to sue is not alleged in the complaint.” *Advantec Group, Inc.*, 153 Cal.App.4th
 19 at 628, 63 Cal.Rptr. at 200 (*citing Hydrotech*, 52 Cal.3d 988, 994 fn. 4, 277 Cal.Rptr. 517, 520 fn.
 20 4, 803 P.2d 370, 373 fn. 4 (1991)). “As noted, section 7031 is one such statute that requires
 21 inclusion of an allegation of the plaintiff’s capacity to sue.” *Id.*

22 **D. Plaintiffs Failed To Allege That They Were A Licensed Contractor, Such**
 23 **That They Have Failed To State A Claim And Their Complaint Should Be**
 24 **Dismissed**

25 As described above, “Section 7026 plainly states that both the person who provides
 26 construction services himself and one who does so ‘through others’ qualifies as a ‘contractor.’
 27 The California courts have also long held that those who enter into construction contracts must be
 28 licensed, even when they themselves do not do the actual work under the contract. . . . Indeed, if
 this were not the rule, the requirement that general contractors be licensed would be completely
 superfluous.” *Vallejo Development Co. v. Beck Development Co.*, 24 Cal.App.4th 929, 941, 29
 Cal.Rptr.2d 669, 669 (1994). “The reason contractors must be licensed even if they hire

1 subcontractors to do the actual work is so that the public is protected ‘against persons who are
2 unqualified to perform the required work.’” *Great West Contractors, Inc.*, 162 Cal.App.4th at
3 593, 76 Cal.Rptr.3d at 18 (quoting *Currie v. Stolowitz*, 169 Cal.App.2d 810, 814-15, 338 P.2d
4 208).

5 It is for these reasons that “[s]ince its adoption in 1939, the CSLL ‘has declared that,
6 except as expressly otherwise provided, a contractor may not sue to collect compensation for
7 performance of “any act of contract” requiring a license without alleging that he or she was duly
8 licensed ‘at all times during the performance of that act or contract.’” *Great West Contractors,
9 Inc.*, 162 Cal.App.4th at 587, 76 Cal.Rptr.3d at 12-13 (quoting *MW Erectors, Inc. v. Niederhauser
10 Ornamental & Metal Works Co., Inc.*, 36 Cal.4th 412, 425, 30 Cal.Rptr.3d 755, 115 P.3d 41
11 (2005) (citing § 7031, subd. (a), and Stats. 1939, ch. 37, § 1, p. 381)). “[T]he bar extends to
12 actions ‘in law or equity’ and applies ‘regardless of the merits of the cause of action.’” *Id.*

13 It has long been the law in California that when asserting a claim under the statutory
14 provisions in question, “[i]n order to be entitled to prevail in a legal action, a contractor must
15 allege and prove that he was licensed at all times during the performance of his contract.”
16 *Albaugh v. Moss Const. Co.*, 125 Cal.App.2d 126, 132, 269 P.2d 936, 936 (1954); *see also Id.*,
17 125 Cal.App.2d at 130, 269 P.2d at 939 (“Since there is no allegation in the complaint that the
18 partners were licensed contractors, it is clear that the pleading does not state a cause of action.”);
19 *Id.*, 125 Cal.App.2d at 131, 269 P.2d at 940 (“By virtue of their failure to obtain a license before
20 they embarked upon their venture with respondents, their contract is illegal. For that reason they
21 have no standing before the law[.]”); *Id.*, 125 Cal.App.2d at 133, 269 P.2d at 941 (“Appellant was
22 required to allege in his complaint that he and [another individual] were licensed contractors. . . .
23 Neither the language of their contract nor any presumption nor inference arising therefrom will
24 serve as a substitute for such allegation.”).

25 With the foregoing in mind, the Complaint in the instant case demonstrates that Plaintiffs
26 clearly failed to allege that they were a duly licensed contractor with respect to the work for
27 which they hired Defendants as subcontractors and for which they now seek recovery of
28

1 compensation. The absence of this requisite allegation means that Plaintiffs have failed to state a
2 claim upon which relief may be granted. The Complaint should be dismissed.²

3 **IV. IN THE EVENT THAT THE COMPLAINT IS NOT DISMISSED, THIS**
4 **LAWSUIT SHOULD BE TRANSFERRED TO THE UNITED STATES DISTRICT**
5 **COURT FOR THE EASTERN DISTRICT OF ARKANSAS FOR FURTHER**
6 **PROCEEDINGS**

7 **A. Standard For Resolving Defendants’ Motion To Transfer In Light Of**
8 **Defendants’ Motion To Dismiss**

9 Defendants respectfully submit that if Plaintiffs’ Complaint fails to state a claim for the
10 above reasons, then the lawsuit should be dismissed outright without addressing Defendants’
11 alternative motion to transfer the lawsuit to the United States District Court for the Eastern
12 District of Arkansas. Indeed, if there is no cognizable claim left in the lawsuit, seemingly there
13 is essentially nothing left to transfer.

14 In the event that this Court does not dismiss the Complaint and elects to rule on
15 Defendants’ alternative motion to transfer, FED. R. CIV. P. 12(b)(3) provides that a complaint may
16 be dismissed for improper venue. When ruling upon such a motion the Court may consider facts
17 outside the pleadings, and the pleadings need not be accepted as true. *See Murphy v. Schneider*
18 *National, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004).

19 Moreover, under 28 U.S.C. § 1404(a), “a district court may transfer any civil action to any
20 other district or division where it might have been brought” for “the convenience of parties and
21 witnesses” or “in the interest of justice.” The United States Supreme Court has made clear that
22 when a diversity action is transferred pursuant to § 1404(a), the law of the transferor court

23 ² Defendants respectfully submit that perhaps the reason why Plaintiffs failed to properly
24 allege that they were licensed is because they were in fact not licensed. Indeed, a search of the
25 California Contracting Licensing Board’s on-line records has not revealed any licenses issued to
26 Plaintiffs. As stated in *MW Erectors, supra*, 36 Cal.4th at 23, 115 P.3d 41, 46 (emphasis added),
27 “Section 7031(a) expressly provides that . . . one may not ‘bring or maintain any action, or
28 recover in law or equity in any action, . . . for the collection of compensation for the performance
of any act or contract where a license is required . . . without alleging that he or she was a duly
licensed contractor at all times during the performance of that act or contract. *If the defendant
then ‘controvert[s]’ the plaintiff’s proper licensure, the plaintiff must prove it by producing
verified certificates establishing that he or she held all necessary licenses during performance of
the work.*” In light of the foregoing as well as the absence of any allegation contained within or
exhibit attached to their Complaint, Defendants believe that Plaintiffs will not be able to produce
such certificates nor licenses.

1 controls the action regardless of which party initiated the transfer. *See Ferens v. John Deere Co.*,
 2 494 U.S. 516, 529, 110 S.Ct. 1274, 1283 (1990) (in diversity action, the law of the transferor
 3 court applies even when the transfer was initiated by the plaintiff); *Van Dusen v. Barrack*, 376
 4 U.S. 612, 639, 84 S.Ct. 805, 821 (1964) (same rule for transfer initiated by the defendant).

5 For the following reasons, just as the United States District Court for the Northern District
 6 of California has indicated its intent to transfer other litigation between the same parties to this
 7 lawsuit to the United States District Court for the Eastern District of Arkansas, Defendants
 8 respectfully request that this Court also transfer the present litigation to the Arkansas court as
 9 well.

10 **B. In Light Of The Fact That Litigation Between These Parties And**
 11 **Encompassing The Instant Dispute Is Already Pending In The United States**
 12 **District Court For The Eastern District Of Arkansas, Barring Dismissal This**
 13 **Case Should Be Transferred To The Arkansas Court**

14 **1. Law Governing The "First Filed" Rule**

15 Defendants submit that allowing competing lawsuits involving the same parties and the
 16 same issues in separate jurisdictions is a waste of judicial resources and could lead to conflicting
 17 results. "There is a generally recognized doctrine of federal comity which permits a district court
 18 to decline jurisdiction over an action when a complaint involving the same parties and issues has
 19 already been filed in another district." *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93,
 20 94-95 (9th Cir. 1982). Specifically, preference is generally given to the first-filed plaintiff's
 21 choice of forum under the "first-to-file" rule. *See Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d
 22 622, 625 (9th Cir. 1991). If the first-to-file rule does apply to a suit, the court in which the second
 23 suit was filed may transfer, stay or dismiss the proceeding in order to allow the court in which the
 24 first suit was filed to decide whether to try the case. *Alltrade, Inc.*, 946 F.2d at 623. The rule
 25 "serves the purpose of promoting efficiency well and should not be disregarded lightly." *See*
 26 *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 750 (9th Cir. 1979);
Alltrade, Inc., 946 F.2d at 625.

27 The first-to-file rule is not to be mechanically applied, but "rather is to be applied with a
 28 view to the dictates of sound judicial administration." *Pacesetter Sys., Inc.*, 678 F.2d at 95. The

1 goal is the avoidance of both an unnecessary burden on the federal judiciary and of conflicting
 2 judgments. *See Church of Scientology*, 611 F.2d at 750. Unless compelling circumstances justify
 3 departure from the rule, the first-filing party should be permitted to proceed without concern
 4 about a conflicting order being issued in the later-filed action. *See, e.g., Ward v. Follett Corp.*,
 5 158 F.R.D. 645, 648 (N.D. Cal. 1994); *see also Pacesetter*, 678 F.2d at 94, 97 (upholding lower
 6 court in declining jurisdiction over the action, citing the first-to-file rule.).

7 When a first-to-file argument is made, the first step a court must undertake is to determine
 8 whether the first-to-file rule is implicated at all. Whether the first-to-file rule may apply depends
 9 upon (1) the chronology of the actions; (2) the similarity of the parties involved; and (3) the
 10 similarity of the issues at stake. *See Alltrade, Inc.*, 946 F.2d at 625-26; *Ward*, 158 F.R.D. at 648.
 11 *See also Z-Line Designs, Inc. v. Bell'O Int'l LLC*, 218 F.R.D. 663, 665 (N.D. Cal.2003). In
 12 making this determination the Court should employ the date on which the original, rather than the
 13 amended, complaint was filed. *Ward*, 158 F.R.D. at 648. *See also Save Power Ltd. V. Syntek*
 14 *Finance Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) (“The rule does not, however, require that cases
 15 be identical. The crucial inquiry is one of ‘substantial overlap.’”).

16 **2. The “First Filed” Rule Should Be Applied In This Case And This**
 17 **Litigation Should Be Transferred To The Arkansas Court For Further**
 18 **Proceedings**

19 **a. Factor #1: The Chronology Of The Actions**

20 **(i) Two Federal Courts Have Already Ruled That**
 21 **Defendants’ Eastern District Of Arkansas Lawsuit Was**
 22 **Filed Prior To Plaintiffs’ Northern District Of**
 23 **California Lawsuit**

24 A chronology of the first two actions previously filed by and involving these parties is
 25 best set forth in a September 4, 2008 Order (*see* Exhibit A to Request for Judicial Notice filed
 26 concurrently herein) from the United States District Court for the Eastern District of Arkansas in
 27 *Agri-Process Innovations, Inc. and AP Fabrications, LLC v. Greenline Industries, LLC*, Case
 28 No. 4:08-CV00558 BSM (E.D. Ark.). That Court stated the chronological history as follows:

On February 27, 2008, API/APF filed a complaint entitled *Agri-Process Innovations, Inc., and AP Fabrications, LLC v. Greenline Industries, Inc.*, Case No. CV 2008-28, in the Arkansas County,

1 Arkansas, Circuit Court. In the complaint, API/APF alleged that
 2 Greenline had breached its contractual obligations under the
 3 vendor's agreement. On or about May 5, 2008, API/APF sent
 4 Greenline a letter terminating the contract between the parties. In
 the letter, API/APF allegedly made a claim to intellectual property
 allegedly owned by Greenline.

5 In reaction to API/APF's letter, Greenline filed a lawsuit entitled
 6 *Greenline Industries, Inc. v. Agri-Process Innovations, Inc., and AP*
Fabrications, LLC, f/k/a Greenline Fabrications LLC, No. C
 7 08-2438 CW, in the United States District Court for the Northern
 District of California on May 12, 2008. In its complaint, Greenline
 8 asserts the following claims for relief: (1) anticipatory breach of
 contract based on API/APF's purported termination of their
 9 contract; (2) misappropriation of trade secrets based on API/APF's
 false claims of ownership of Greenline's intellectual property; (3)
 10 false advertising in violation of the Lanham Act based on
 API/APF's false claims of Greenline's intellectual property in its
 11 marketing materials; and (4) an action for declaratory relief
 regarding Greenline's rights to and ownership of the copyrights of
 its designs.

12 On or about May 15, 2008, and before obtaining service of its
 13 original complaint, API/APF filed an Amended and Substituted
 Complaint in the Arkansas County Circuit Court and had Greenline
 14 served with the amended/substituted complaint. The
 amended/substituted complaint contains the following claims:
 15 (1) declaratory judgment that API's termination of the contract was
 effective; (2) declaratory judgment to determine API's rights to and
 16 ownership of the intellectual property; (3) an action for an
 accounting to determine the sums due under the contract; (4) breach
 17 of contract for amounts due under the contract at the time of the
 termination; and (5) breach of duty of good faith and fair dealing
 18 related to Greenline's performance and enforcement of the contract.

19 With the foregoing in mind, both the United States District Court for the Northern District
 20 Court of California (the "California Court") and the United States District Court for the Eastern
 21 District of Arkansas (the "Arkansas Court") have held that the Arkansas litigation was the "first-
 22 filed" litigation as between these parties. First, on July 28, 2008, the California Court held that
 23 "API/APF's original complaint filed in the Arkansas State Court was the first-filed case." *See*
 24 Exhibit B, at 8, to Request for Judicial Notice filed concurrently herein). Indeed, the California
 25 Court found that "API/APF's Arkansas suit has priority for purposes of the first-to-file rule.
 26 Therefore, the Court defers to the Eastern District of Arkansas to decide the appropriate forum in
 27 whether an exception to the first-to-file rule is applicable." *Id.* at 11.
 28

1 Similarly, on September 4, 2008, after conducting its own first-filed analysis, the
 2 Arkansas Court also held that the Arkansas lawsuit was the first-filed action. *See* Exhibit A, at
 3 6-11. In doing so the Arkansas Court held that “this Court’s jurisdiction attached on February 27,
 4 2008. The California Court’s jurisdiction did not attach until May 12, 2008, thus making the
 5 Arkansas case the first-filed case.” *Id.* at 9. Moreover, the Arkansas Court also held that there
 6 were “no compelling circumstances justifying a departure from applying the first-to-file rule[,]”
 7 *Id.* at 10, and that there were “no exceptions that will support the departure from applying the
 8 first-filed rule.” *Id.* at 11. The Arkansas Court therefore concluded that “after reviewing the
 9 evidence in a light most favorable to API/APF, the Court finds that API/APF’s complaint was the
 10 first filed. Greenline fails to show that this Court is not the proper venue to hear the present
 11 dispute between the parties.”³ *Id.* at 11.

12 (ii) **This Court Should Also Rule, For Purposes Of The**
 13 **First-Filed Rule, That The Instant Lawsuit Was Filed**
 14 **After The Arkansas Lawsuit**

15 Separate and distinct from these two suits, Plaintiffs filed the instant lawsuit involving the
 16 same parties in the Los Angeles, California Superior Court on August 6, 2008. Not only was this
 17 action filed many months after Defendants filed suit in the Arkansas Court and Plaintiffs filed suit
 18 in the California Court, it was also filed nine days after the California Court made its ruling on
 19 July 28, 2008 that the Arkansas lawsuit was first-filed and that the Arkansas Court should decide
 20 where the parties’ disputes should proceed. Defendants now merely await the California Court’s
 21 formal transfer of the litigation in the Northern District of California to the United States District
 22 Court for the Eastern District of Arkansas, pursuant to the California Court’s ruling that if
 23 Defendants prevailed before the Arkansas Court (which they did) that “[t]his case will be
 24 transferred to the Eastern District of Arkansas.” *See* Exhibit B, at 12.

25 _____
 26 ³ In the Arkansas action, Greenline Industries, Inc. and Greenline Industries, LLC also
 27 argued that Agri-Process Innovations and AP Fabrications had filed the Arkansas suit in bad faith
 28 and because of forum shopping. However, in addressing these issues the Arkansas Court
 completely disagreed. Specifically, it held that the alleged “conduct fails to establish that
 API/APF’s complaint was filed in bad faith,” and also found “that API/APF had not engaged in
 forum shopping.” *Id.* at 11.

1 The foregoing demonstrates that the chronology of the actions (Factor #1) militates in
2 favor of application of the first-filed rule and transferring the instant litigation to the Arkansas
3 Court for further proceedings, in conjunction with the already-pending lawsuits between these
4 parties.

5 **b. Factor #2: The Similarity Of The Parties Involved**

6 **(i) Three (Agri-Process Innovations, Inc.; AP Fabrications, LLC; and Greenline Industries, LLC) Of The Four
7 Parties At Issue Are Unquestionably Present As Parties
8 In All Three Lawsuits**

9 The named Defendants in the instant litigation before this Court, Agri-Process
10 Innovations, Inc. and AP Fabrications, LLC, are also present in the Eastern District of Arkansas
11 lawsuit (as named party-plaintiffs) and in the Northern District of California lawsuit (as named
12 party-defendants). Moreover, one of the named Plaintiffs in the instant litigation before this
13 Court, Greenline Industries, LLC, is also present in the Eastern District of Arkansas lawsuit (as a
14 named party-defendant) and in the Northern District of California lawsuit (as a named party-
15 defendant).

16 **(ii) The Other Federal Courts Have Already Ruled That
17 The Other Party Which Is Present In The Instant
18 Litigation (Greenline Industries, Inc.) Was Also Present
19 In The Other Cases**

20 The only question is whether the other named Plaintiff in the instant litigation before this
21 Court, Greenline Industries, Inc., was also present in those other lawsuits. The answer with
22 respect to the Northern District of California lawsuit is a clear "yes," as Greenline Industries, Inc.
23 was a named party-plaintiff in that case. The answer with respect to the Eastern District of
24 Arkansas lawsuit is somewhat less clear (since Greenline Industries, Inc. was not a formally
25 named party-defendant in that case), but it is significant that the Arkansas and California Courts
26 ruled in the affirmative on this issue as well. As the Arkansas Court observed on its own and
27 when reviewing the California Court's decision:

28 API/APF's standing argument centers around the fact that the present case involves Greenline Industries, LLC and the California case involves Greenline Industries, Inc. They submit the evidence,

1 filings from Delaware and California, showing that Greenline
2 Industries, Inc. was incorporated in March 2003. They believe that
the two suits involve separate and distinct entities.

3 Greenline points out that in the May 5, 2008 letter terminating the
4 parties agreement, API/APF referred to Greenline as Greenline
Industries, Inc. Furthermore, in a footnote in its July 28, 2008
5 order, the California court acknowledged that Greenline Industries,
Inc. was not incorporated until March 5, 2008. *Greenline Indus.,
6 Inc. V. Agri-Process Innovations, Inc., and AP Fabrications, LLC
f/k/a Greenline Fabrications LLC*, No. C 08-2438 CW, (N.D. Cal.
7 July 28, 2008) (order). The court also found that prior to that date,
Greenline Industries, Inc. may have conducted business as
8 Greenline Industries, LLC. *Id.* The court denied API/APF's
motion to dismiss for lack of standing, finding that Greenline
9 Industries, Inc. had standing to pursue the intellectual property
claims and could later amend its complaint to include allegations to
10 establish standing to pursue the breach of contract claim.

11 In light of the May 5, 2008, letter from API/APF addressed to
Greenline Industries, Inc., it appears that prior to the incorporation
12 of Greenline Industries, Inc., the parties used the names Greenline
Industries, LLC and Greenline Industries, Inc. interchangeably.

13
14 *See Exhibit A, at 5-6 (emphasis added).*

15 Accordingly, while Agri-Process Innovations, Inc. and AP Fabrications, LLC respectfully
16 disagreed with the Arkansas Court's ultimate ruling regarding the standing issue in that case, the
17 foregoing is significant for purposes of the present case. While it obviously confirms that Agri-
18 Process Innovations, Inc. and AP Fabrications, LLC are present in both the Arkansas and
19 California cases, it also shows that because Greenline Industries, Inc. allegedly "may have
20 conducted business as Greenline Industries, LLC[,]" and because Greenline Industries, LLC and
21 Greenline Industries, Inc. "used the names Greenline Industries, LLC and Greenline Industries,
22 Inc. interchangeably[,]" *Id.* at 6, both of those parties were effectively present in each one of
23 those cases.

24 Because all four of these entities are also parties to the instant litigation before this Court,
25 the similarity of the parties issue (Factor #2) also militates in favor of application of the first-filed
26 rule, and therefore transferring this case to the Arkansas Court for further proceedings in
27 conjunction with the already-pending lawsuits between these parties.

1 **c. Factor #3: The Similarity Of The Issues At Stake**

2 **(i) Two Federal Courts Have Already Ruled That The**
 3 **Eastern District Of Arkansas Litigation And The**
 4 **Northern District Of California Litigation Were**
 Sufficiently Similar To One Another To Warrant
 Application Of The First-Filed Rule

5 The California Court’s and Arkansas Court’s observations with respect to how the
 6 lawsuits filed by these parties in those respective venues (albeit both will now be resolved by the
 7 Arkansas Court) were similar in nature is also instructive with respect to how the single claim
 8 filed and issues raised in the instant litigation are similar to the previously-filed cases (Factor #3).

9 First, as the California Court noted, Greenline Industries, Inc. argued “that the single
 10 breach of contract claim in API/APF’s original complaint does not appear in the amended
 11 complaint [of the Arkansas litigation]. *However, as API/APF respond, both the original*
 12 *complaint and the amended complaint assert a breach of contract claim arising out of the vendor*
 13 *agreement.” See Exhibit B, at 9 (emphasis added). The California Court also observed that*
 14 *Greenline Industries, Inc. had argued that “if the Court considers API/APF’s Arkansas state court*
 15 *case to be the first-filed, the Court should not apply the first-to-file rule because the breach of*
 16 *contract claim in the original, unserved complaint is not sufficiently similarly to GII’s claims in*
 17 *this case. However, this case, too, arises out of a claim of breach of the vendor agreement.” Id.*
 18 *at 9-10 (emphasis added). Finally, the California Court ruled that the “although the claims*
 19 *regarding intellectual property were first raised in GII’s claims in this Court, resolution of the*
 20 *breach of contract claim in API/APF’s original complaint in the Arkansas court would certainly*
 21 *impact the GII’s contract claims in this Court.” Id. at 11. For these reasons, the California Court*
 22 *held that the claims in the Arkansas and California lawsuits were similar for purposes of the first-*
 23 *filed analysis.*

24 Similarly, the Arkansas Court held as well that the claims involving these parties were
 25 similar in nature. For example, the Arkansas Court held that “the single claim of breach of
 26 contract, contained in API/APF’s original complaint, arises out of the vendor’s agreement that
 27 existed between the parties. The claims in API/APF’s amended/substituted complaint also arise
 28 out of the vendor’s agreement.” *See Exhibit A, at 8. The Arkansas Court observed that even*

1 “Greenline agrees that the amended/substituted complaint raises claims that are substantially
2 similar to the claims contained in the California case.” *Id.* at 9.

3 (ii) **The Claim And Issues Raised In This Case Are**
4 **Sufficiently Similar To Those Raised In The Previously-**
5 **Filed Cases Between These Parties (Both Of Which Will**
6 **Now Be Resolved By The Arkansas Court) So As To**
7 **Warrant Application Of The First-Filed Rule And A**
8 **Transfer Of This Case To The Arkansas Court**

9 With respect to the third and final factor of the first-filed analysis, the claim and issues in
10 the instant litigation are sufficiently similar to the claims and issues in the Eastern District of
11 Arkansas case and the Northern District of California case (both of which will now be resolved
12 by the Arkansas Court), so as to warrant application of the first-filed rule and a transfer of this
13 case to the Arkansas Court. The present litigation involves a claim for money arising out of work
14 that Greenline Industries, Inc. and Greenline Industries, LLC allegedly hired Agri-Process
15 Innovations and AP Fabrications to perform as subcontractors at work sites in California. *See*
16 Plaintiffs’ Complaint, at ¶¶ 6-7. Specifically, Greenline Industries, Inc. and Greenline Industries,
17 LLC contend that the litigation arises out of the “[w]ork performed by Defendants at the Santa Fe
18 Property and the San Juan Bautista Property include[s], but is not limited to, installation of
19 biodiesel processing units.” *Id.* at ¶ 8.

20 Similarly, the litigation already pending between these same parties involves, *inter alia*,
21 “a lawsuit seeking damages and declaratory relief arising out of the parties’ prior relationship
22 involving the construction of biodiesel plants.” *See* Exhibit C (copy of file-marked Amended and
23 Substituted Complaint in the Arkansas litigation), at ¶ 1. The basis of Agri-Process Innovations
24 and AP Fabrications’ claims was alleged to result from a January 1, 2007 vendor agreement, the
25 second portion of which addressed ongoing operating conditions, ongoing plants under contract,
26 and future plants and turnkey projects between Greenline and AP Fabrications. *Id.* at ¶ 60. The
27 Amended and Substituted Complaint also asserted that subsequent to the Agreement, the parties
28 proceeded with the design, construction, installation, and start up of biodiesel plants, including
the processor. *Id.* at ¶67. Finally, the Amended and Substituted Complaint in the Arkansas

1 litigation requested an accounting of all sums which were allegedly due as between the parties.
2 *Id.* at ¶ 93-94.

3 In light of the foregoing, it is clear that the claim and issues in the instant litigation are
4 sufficiently similar to—if not wholly encompassed within—the claims and issues in the Eastern
5 District of Arkansas lawsuit and the Northern District of California lawsuit, both of which will
6 now be resolved by the Arkansas Court. For these reasons, the similarity of the actions (Factor
7 #3) militates in favor of application of the first-filed rule and transferring the instant litigation to
8 the Arkansas Court for further proceedings, in conjunction with the already-pending lawsuits
9 between these parties.

10 **V. CONCLUSION**

11 Plaintiffs' Complaint should be dismissed pursuant to Rule 12 of the Federal Rules of
12 Civil Procedure. Specifically, because Plaintiffs have failed to allege requisite facts in support of
13 a claim for relief in compliance with the statutory scheme pursuant to which Plaintiffs brings its
14 cause of action, the Complaint should be dismissed under FED. R. CIV. P. 9(a) and FED. R. CIV. P.
15 12(b)(6). In the alternative, because previous-filed and pending litigation between these parties is
16 similar to if not wholly encompasses the present litigation as well, in the event that the Complaint
17 is not dismissed this case should be transferred to the Arkansas Court pursuant to the first-filed
18 doctrine.

19 DATED: September 16, 2008

20 STOEL RIVES LLP

21
22 By: /s/ SETH D. HILTON _____
23 SETH D. HILTON
24 Attorneys for Defendants
25 Agri-Process Innovations, Inc., and
26 AP Fabrications, LLC
27
28