

KJAR, McKENNA & STOCKALPER LLP

James J. Kjar, Esq. (SBN: 94027)

kjar@kmslegal.com

Jon R. Schwalbach, Esq. (SBN: 281805)

jschwalbach@kmslegal.com

Gregory B. Emdee, Esq. (SBN: 315374)

gemdee@kmslegal.com

841 Apollo Street, Suite 100

El Segundo, California 90245

Telephone: (424) 217-3026

Facsimile: (424) 367-0400

Attorneys for Defendant,

MICHAEL WEINSTEIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual,
Plaintiff,

v.

CYNTHIA BASHANT, an
individual; JOEL WOHLFEIL, an
individual; LARRY GERACI, an
individual; REBECCA BERRY, an
individual; GINA AUSTIN, an
individual; MICHAEL WEINSTEIN,
an individual; JESSICA
MCELFRESH, an individual; and
DAVID DEMIAN, an individual,
Defendants.

Case No.: 3:18-cv-00325-BAS-DEB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT MICHAEL
WEINSTEIN'S REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Date: July 27, 2020

Time: 10:00 a.m.

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

District Judge: Cynthia A. Bashant

Magistrate Judge: Daniel E. Butcher

Courtroom: 4B (4th Floor)

Complaint Filed: February 19, 2018

Trial Date: None

I. INTRODUCTION

Plaintiff Darryl Cotton's ("Plaintiff") First Amended Complaint ("FAC") is the latest in a long line of attempts to plead causes of action against Defendant, Michael Weinstein ("Defendant" or "Weinstein"), for his actions in representing a client. Plaintiff, knowing his repetitive claims are baseless, has not been deterred—also suing the Honorable Joel Wohlfeil, the state court judge who presided over the state court action, *Geraci v. Cotton*, San Diego Superior Court, Case No. 27-2017-00010073-CU-BC-22 CTL, the Honorable Cynthia Bashant, the federal judge who denied Plaintiff's request for preliminary injunction, and now in Opposition is making thinly veiled threats to sue Defendant's current counsel for adequately representing its client and filing this Motion to Dismiss. Plaintiff's Opposition does not refute Defendant's Motion to Dismiss and makes no showing of how Plaintiff's First Amended Complaint alleges any facts to support a claim against Defendant.

Instead of proving he has additional facts to permit amendment, Plaintiff's Opposition regurgitates his vague and inadequate contentions of the First Amended Complaint and fails to do more than simply reference Defendant's protected litigation speech and activity. Plaintiff accuses Defendant of suborning perjury and malicious prosecution—allegations that do not support and are not an element to any cause of action in the First Amended Complaint. Plaintiff's Opposition is a clear reflection of Plaintiff's relentless approach of filing baseless suits, bar complaints, and judicial complaints—adding any individual who testifies, adjudicates, or advocates against his claims.

Therefore, for the reasons stated herein and the subject Motion to Dismiss, Plaintiff's First Amended Complaint should be dismissed with prejudice.

II. ARGUMENT

A. Plaintiff Has Failed to Prove That His First Amended Complaint States Any Facts To Meet The Requisite Pleading Standards

Plaintiff's First Amended Complaint fails to allege any facts sufficient to

1 state a claim for relief against Defendant. The First Amended Complaint contains
 2 no factual allegations to support its alleged causes of action against Defendant,
 3 neglects to state an actionable and independent cause of action against Defendant,
 4 and contains no other facts describing or specifying any conduct of Defendant to
 5 support any remote allegations of some alleged wrongdoing.

6 Plaintiff's Opposition simply reiterates his repetitive and unintelligible
 7 pleading and asserts that his grievance with Defendant stems solely from his belief
 8 that Defendant "masterminded the [underlying state court action] through
 9 numerous illegal actions." (Plaintiff's Opposition ["Oppo"] at 19:13). Plaintiff then
 10 proceeds to list the "illegal actions" such as filing the underlying state court action
 11 against Plaintiff without probable cause, making arguments Plaintiff deems
 12 frivolous or false, and presenting evidence Plaintiff's claims are false. (Oppo. at
 13 19:13-17.) Plaintiff's Opposition fails to expound on these alleged "illegal actions"
 14 beyond claiming they are a fraud upon the court. Nor does Plaintiff explain how he
 15 was harmed or injured and how this allegation supports any of his causes of action
 16 against Defendant. The only causes of action asserted against Defendant are
 17 Plaintiff's Third Cause of Action for Declaratory Relief and Fourth Cause of
 18 Action for Punitive Damages. Both of these "causes of action" are duplicative of
 19 Plaintiff's other legal claims and not tethered to any substantive action against
 20 Defendant.

21 Plaintiff goes on to discuss how malicious prosecution actions are an
 22 exception to a litigation privilege not discussed by Defendant. (Oppo. at 18:2-8.)
 23 Plaintiff then lists various avenues to pursue in order to sanction attorneys for
 24 illegal acts, but none of the avenues listed include filing a federal court lawsuit
 25 against the opposing attorney to overturn a state court judgement. (Oppo. at 18:12-
 26 15.) Plaintiff then makes conclusory statements that Defendant committed criminal
 27 acts and should be "... sent to jail to suffer...". (Oppo. at 18:16-19.)
 28

Plaintiff is unable to properly plead a claim for malicious prosecution. To establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action (1) was initiated by or at the direction of the defendant and legally terminated in the plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice. *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341, 9 Cal.Rptr.3d 97, 83 P.3d 497; *Hanson v. City of Snohomish*, 852 P.2d 295, 298 (Wash. 1983); *Peasley v. Puget Sound Tug & Barge Co.*, 125 P.2d 681, 687–88 (Wash. 1942). As acknowledged by Plaintiff and cited to in Defendant's motion, the underlying state action was not terminated in Plaintiff's favor, in fact it was terminated in Defendant's client's favor and against Plaintiff after a jury trial. Therefore, Plaintiff would not be able to plead a malicious prosecution claim.

Furthermore, it is impossible for Plaintiff to successfully plead perjury against the Defendant due to the fact Defendant never testified in the underlying state court action. However, a fact of alleged perjury, even if properly pled, would support neither of the "cause of action" asserted against Defendant in the First Amended Complaint.

Plaintiff's Opposition fails to address the points raised in Defendant's Motion, and does nothing to clarify the vague and speculative wrongs alleged in the First Amended Complaint. Thus, Plaintiff has failed to give "fair notice" of the claims asserted against Defendant and the "grounds upon which they rest." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Defendant cannot possibly begin to prepare a defense based on the singular and conclusory speculation of malicious prosecution of a matter that was resolved by jury trial against Plaintiff as alleged in the First Amended Complaint.

B. Plaintiff Has Failed to Prove He Can Amend His Pleading To State Sufficient Facts

Attempting to support his pleading, Plaintiff's Opposition includes additional "facts" he believes substantiate his allegations against Defendant.

1 However, Plaintiff's Opposition simply rehashes Plaintiff's First Amended
 2 Complaint's version of history regarding the underlying state action's events.
 3 (Oppo. at 6:15-23; 7:1-25; 8:1-27; 9:1-28.) Plaintiff then states that Defendant is
 4 "evil and vile" because Defendant filed the underlying state action on behalf of his
 5 client, made arguments Plaintiff disagreed with, put on testimony that Plaintiff
 6 believes to be false. (Oppo. at 10:1-8; 19:13-17.) Ultimately, Plaintiff continues to
 7 make conclusory allegations that Defendant's representative acts in the underlying
 8 state action were "illegal". (Oppo. at 19:13.) Plaintiff's irrelevant recitation of
 9 citations from Defendant's client's declaration and biased version of events from
 10 the underlying state action does not prove he has any additional facts to support a
 11 claim.

12 On the contrary, Plaintiff cites case law that support Defendant's position,
 13 noting that "conduct must be illegal as a matter of law to defeat a defendant's
 14 showing of protected activity." (Oppo. at 18:21-22.) Defendant representing
 15 Plaintiff's opponent in his capacity as an attorney is not conduct illegal as a matter
 16 of law, therefore, Defendant's showing of protected litigation activities is not
 17 defeated.

18 Plaintiff cannot amend his pleading to meet any standard because
 19 Defendant's actions as an attorney in representing his client and his litigation
 20 related speech and activity would be subject to the California anti-SLAPP statute,
 21 adopted and as applied by this Court. Plaintiff's Opposition provides no additional
 22 substantive allegations or facts that would warrant leave to amend, and instead
 23 clarifies that Plaintiff is simply seeking to punish Defendant solely for his
 24 representation of Plaintiff's adversary in his underlying state court proceeding. In
 25 his opposition, Plaintiff even acknowledges that he has no claim against Defendant
 26 but just wants to overturn the state court action's judgment. (Oppo. at 20:18-20.)

27 Attempting to attack the validity of his underlying state court judgment,
 28 Plaintiff claims Defendant committed "criminal" and "illegal" acts. Even

1 assuming, arguendo, that Plaintiff's allegations were plausible, such accusations do
 2 not warrant the judgement be set aside. Once the time for appealing an order or
 3 judgment has passed, a court may only set aside or modify an order or judgment if
 4 the judgment is void on its face of the record on the basis of fraud and mistake.
 5 *Estate of Beard* (1999) 71 Cal.App.4th 753, 774. Additionally, it is the trial court
 6 that retains jurisdiction to set aside a void judgment. An appellate court can then
 7 review that decision. *Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.
 8 App. 4th 132, 146. Plaintiff cannot seek to circumvent this process by instead
 9 filing an action in Federal Court to act as both the state trial court and state
 10 appellate court.

11 Plaintiff's Opposition provides no additional facts or claims to establish he is
 12 able to amend his First Amended Complaint to meet pleading standards. Consistent
 13 with Plaintiff's history in disregarding court and judicial processes, Plaintiff's
 14 Opposition now argues that Defendant's Motion fails to address the "merits" of
 15 Plaintiff's First Amended Complaint. (Oppo. at 18:25-26; 20:12-14.) Plaintiff is
 16 mistaken that Defendant is required to somehow guess and hypothesize the claims
 17 against him and then defend the merits of those claims in the pleading stage. A
 18 motion to dismiss dismisses conclusions, unwarranted inferences, and inadequately
 19 pled complaints when amendment would be futile. The Court does not weigh
 20 credibility and does not make any legal or factual ruling on the merits of any facts
 21 or claims; instead, the Court addresses whether there are "enough facts to state a
 22 claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 23 (2009). Defendant has proven there is no plausible claim for relief and Plaintiff's
 24 Opposition neglects to argue otherwise.

25 **C. Plaintiff Has Conceded That His Pleading Was Filed In A Harassing**
 26 **Nature And Will Not Stop Until He Obtains Media Attention**

27 Plaintiff's Opposition does not refute Defendant's Motion with any
 28 persuasive explanation for his pleading inadequacies. Instead, Plaintiff decided that

any attorney involved in the present action representing any Defendant has no defense. (Oppo. at 21:9-14.) Plaintiff then claims that Defendant's current counsel is perpetuating a criminal conspiracy by representing Defendant. (Oppo. at 22:1-3.) Based on Plaintiff's two oppositions to the two motions to dismiss filed, it is anticipated that Defendant's counsel will be added into the complaint if Plaintiff is given leave to amend. (Oppo. at 3:12-18; 22:1-4.) This is another example of Plaintiff's relentless filing of baseless complaints against everyone and anyone he believes has somehow wronged him or impacted whatever result he seeks. (Oppo. at 21:26-28; 22:4-7.)

Almost the entirety of Plaintiff's Opposition, like his meritless First Amended Complaint, focuses on the distaste he has for the attorneys and judges he has encountered, and how any action taken to defend themselves is therefore a "sham." (Oppo. at 3:12-18; 21:26-28; 22:4-7.) The very case that Plaintiff cites (*Freeman*) indicates that neither the underlying state court action nor Defendant's motion to dismiss were "shams". *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1185 (9th Cir.2005). Defendant's motion to dismiss is not "objectively baseless" and therefore not a "sham defense". *Id.* The underlying state court action was decided in Defendant's client's favor and against Plaintiff by a jury trial, definitively showing that Defendant had probable cause to bring the action and is thus therefore not a "sham". *Id.* Regardless, Plaintiff cannot transform this Court into a pseudo-appellate court and relitigate Plaintiff's state court action in order to harass Defendant.

In various pleadings, including the First Amended Complaint, Plaintiff has repeatedly conceded that his actions are baseless, he is seeking media attention, and harassing Defendant in ruthless retribution. This Court, however, is not an appropriate outlet to assuage Plaintiff's misplaced anger. (Oppo. at 22:4-7). Defendant can no longer be subjected to this continual harassment by Plaintiff's tirade of frivolous filings. Therefore, Defendant respectfully requests that

1 Plaintiff's First Amended Complaint be dismissed without leave to amend.

2 **III. CONCLUSION**

3 Plaintiff's First Amended Complaint fails to state a claim for relief against
 4 Defendant. Plaintiff's Opposition fails to prove that the First Amended Complaint
 5 is adequately pled and fails to prove that Plaintiff has sufficient facts to amend his
 6 claims. In fact, Plaintiff has consistently shown that he is incapable of assembling a
 7 coherent complaint and admitted as such in the First Amended Complaint.
 8 Accordingly, Defendant respectfully requests that this Court dismiss Plaintiff's
 9 First Amended Complaint against Defendant with prejudice without leave to
 10 amend.

11
 12 Dated: July 16, 2020

KJAR, McKENNA & STOCKALPER LLP

13 By: /s/ Gregory B. Emdee

14 JAMES J. KJAR

15 JON R. SCHWALBACH

16 GREGORY B. EMDEE

17 Attorneys for Defendant

18 Michael Weinstein,
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I electronically filed the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MICHAEL WEINSTEIN'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** with the Clerk of the Court for the United States District Court, Southern District of California by using the Southern District CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the USDC-Southern District of California CM/ECF system.

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 841 Apollo Street, Suite 100, El Segundo, California 90245. The envelope or package was placed in the mail at El Segundo, California. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully paid.

I further certify that participants in the case not registered as CM/ECF users have been mailed the above described documents by First Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days, to the following non-CM/ECF participants:

Darryl Cotton
6176 Federal Blvd.
San Diego, CA 92114
Tel: 619-954-4447

///

1 I declare under penalty of perjury under the laws of the State of California the
2 foregoing is true and correct and that this declaration was executed on July 17, 2020,
3 2020 at El Segundo, California.
4

5 /s/ Berta R. Howard

6 BERTA R. HOWARD, Declarant
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28