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.: 18-CV-325 TWR (DEB)

ORDER GRANTING MOTIONS TO DISMISS

(ECF Nos. 24, 26)

Defendants Gina M. Austin and Michael Weinstein have respectively moved to dismiss Plaintiff Darryl Cotton's First Amended Complaint. (ECF Nos. 24, 26.) Both motions are before the Court. Under Civ. L.R. 7.1(d)(1), the Court finds the motions suitable for disposition without oral argument. For the reasons set forth below, the Court **GRANTS** both Defendants' motions to dismiss.

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I. BACKGROUND

This case began with the purchase and sale of real property between Plaintiff Darryl Cotton and Defendant Larry Geraci ("Geraci"). (FAC ¶ 60.) Both are San Diego County residents. (*Id.* ¶¶ 28, 30.) Geraci and Plaintiff allegedly reached an "oral joint venture agreement" where Geraci planned on buying Plaintiff's real property to develop a cannabis dispensary. (*Id.* ¶¶ 5, 63.) Geraci was not new to the cannabis business, as he had allegedly owned and managed at least three illegal marijuana dispensaries previously. (*Id.* ¶ 43.) Due to these illicit activities, Geraci had been sanctioned and barred from owning a cannabis dispensary, and he therefore applied for a cannabis permit with the City of San Diego under his receptionist's name, Rebecca Berry. (*Id.* ¶¶ 6–7.) As the application remained pending, the parties continued to discuss the terms of the joint venture agreement, which included, among other things, Geraci's attorney, Gina Austin, putting the actual joint venture agreement into writing. (*Id.* ¶ 64.) On November 2, 2016, both parties signed a three-sentence document that Geraci drafted as a receipt "for Cotton's acceptance of $10,000 in cash towards the $50,000 non-refundable deposit." (*Id.* ¶ 66.) That same day, Geraci emailed a copy of this three-sentence document to Plaintiff, with the attachment titled "Geraci – Cotton Contract." (*Id.* ¶ 67.) At Plaintiff's request, Geraci allegedly confirmed that the email was not a purchase contract reflecting a final agreement. (*Id.*) The two continued to discuss the details of the dispensary. (*Id.* ¶¶ 69–70.)

Months later, however, the deal broke down when Geraci allegedly refused to put their joint venture agreement into writing as promised. (*Id.* ¶ 71.) In March 2017, Plaintiff emailed Geraci to terminate the joint venture agreement for anticipatory breach and to tell him that he was selling the property to a third-party. (*Id.* ¶¶ 71–72.) The next day, Plaintiff received an email from Geraci's lawyer, Michael Weinstein, containing copies of a complaint and a *lis pendens* recorded on his property. (*Id.* ¶ 74.) The complaint showed that Geraci had sued Plaintiff in state court, asserting claims for (1) breach of contract, (2) breach of covenant of good faith and fair dealing, (3) specific

performance, and (4) declaratory relief. (*Id.* ¶ 75.) The case went to trial, where Geraci testified that he had instructed Berry, his receptionist, to submit the application for a cannabis permit. (*Id.* ¶ 9.) Berry also allegedly testified that she had made certifications in the application knowing that they were false—namely, that she was the alleged "sole owner of the cannabis permit being sought," when in reality, it was for Geraci. (*Id.* ¶ 10.) Lastly, Austin testified as Geraci's cannabis attorney and as someone who helped Geraci and Berry submit their application. (*Id.* ¶ 11.) In her testimony, Austin allegedly stated that it was "not unlawful for Berry to have submitted the [application] with false statements." (*Id.*) The jury ultimately returned a verdict for Geraci, finding that the email he had sent to Plaintiff was a "fully integrated purchase contract" that had binding effect. (*Id.* ¶ 104.) Plaintiff tried to move for a new trial, arguing that the email was not an enforceable contract, but Judge Wohlfeil denied the motion. (*Id.* ¶ 106.)

While this case in state court was pending, Plaintiff filed for a TRO in federal court and asserted RICO and Section 1983 claims against Geraci and his attorneys, Weinstein and Austin. (*Id.* ¶ 102.) Judge Curiel was originally assigned the case and stayed the proceedings under the *Colorado River* doctrine.[1] (*Id.* ¶ 103.) After the jury trial before Judge Wohlfeil ended, the case in federal court was transferred to Judge Bashant after Judge Curiel recused himself. (*Id.* ¶ 108.) Judge Bashant then proceeded to lift the stay in Plaintiff's case and denied Plaintiff's *in forma pauperis* request for court-appointed counsel. (*Id.* ¶ 110.) On April 9, 2020, Plaintiff filed a motion for reconsideration, which Judge Bashant also denied. (*Id.* ¶ 113.) Plaintiff states that he requested an attorney to "prove that Judge Wohlfeil [was] biased" for (1) enforcing an illegal contract

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[1] Under the *Colorado River* doctrine, a federal court may "stay a federal action in favor of a related state proceeding" in the interest of "wise judicial administration." *Cartmill v. Sea World, Inc.*, No. 10CV361-CAB (POR), 2013 WL 12415737, at *1 (S.D. Cal. Aug. 7, 2013) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483 (1976)). The court may stay its proceedings "only under extraordinary circumstances." *Id.* (internal quotation marks and citation omitted).

(that is, Geraci's email) and (2) allegedly stating that Geraci's lawyer, Weinstein, was "not capable of acting unethically" in response to Plaintiff's comment that Weinstein was "being an unethical attorney." (*Id.* ¶¶ 14, 111.) Plaintiff alleges that Judge Bashant's rulings against him, and in particular, the denial of his request for a court-appointed attorney and her rulings in a related case, *Austin v. Flores*, Case No. 20-cv-656 TWR (MDD), suggest that she is "covering up" for Judge Wohlfeil—especially since both served on the San Diego Superior Court for at least seven years. (*Id.* ¶¶ 110, 113, 116–17, 119–32.) Plaintiff alleges that he did not have a "fair and impartial tribunal." (*Id.* ¶ 135.)

Characterizing this case as a "collateral attack on a state court judgment issued by Judge Joel R. Wohlfeil," (*id.* ¶ 1), Plaintiff asserts four causes of action against the various Defendants. (*Id.* ¶¶ 138–157.) Plaintiff asserts Section 1983 claims against Judges Bashant and Wohlfeil, and, relevant here, a third and fourth cause of action for declaratory relief and punitive damages against the rest of the Defendants, including Defendants Austin and Weinstein. (*Id.*) In asserting a cause of action for declaratory relief, Plaintiff asks this Court to declare the state court judgment "void and vacated" for being "procured by a fraud on the court, the product of judicial bias," and because it "enforces an illegal contract." (*Id.* ¶ 150.) In seeking punitive damages, Plaintiff claims that he has been denied justice by the state court judgment and biased judges, and that he has incurred hefty legal fees as part of litigation. (*Id.* ¶¶ 152–57.)

II. LEGAL STANDARD

Rule 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must contain a "short and plain statement showing that the pleader is entitled to relief," backed by sufficient facts that make the claim "plausible on its face." Fed. R. Civ. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 566 U.S. at 678. Rather, it

demands enough factual content for the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The court must accept as true "all factual allegations in the complaint" and "construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). This presumption does not extend to conclusory allegations, "unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

III. ANALYSIS

A. Defendant Gina M. Austin

Plaintiff asserts two causes of action against Austin: (1) declaratory relief and (2) punitive damages. (FAC ¶¶ 149–57.) In response, Austin argues that this Court should dismiss Plaintiff's claims because it is "entirely devoid of any facts" and thus falls short of surviving a Fed. R. Civ. P. 12(b)(6) motion to dismiss. (ECF No. 24 at 2.) The Court agrees.

1. Declaratory Relief

Plaintiff's third cause of action seeks declaratory relief against all Defendants, including Austin. (FAC ¶¶ 149–50.) In particular, Plaintiff asks this Court to "vacate and declare void" the judgment rendered in the state court as a product of "fraud on the court, the product of judicial bias, and because it enforces an illegal contract." (FAC ¶ 150.)

"To obtain declaratory relief in federal court, there must be an independent basis for jurisdiction." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). "Federal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, "[w]hen presented with a claim for a declaratory judgment," the Court must make sure that an "actual case or controversy" under Article III exists. *Rhoades v. Avon Prod., Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007). "Declaratory relief is not an independent cause of action, but instead a form of

equitable relief." *Kimball v. Flagstar Bank F.S.B.*, 881 F. Supp. 2d 1209, 1219 (S.D. Cal. 2012).

Here, Plaintiff has no claim for declaratory relief since he has no underlying cause of action against Austin. As noted above, claims for declaratory relief are "not themselves causes of action, but rather remedies available." *Inciyan v. City of Carlsbad*, No. 19-CV-2370 JLS (MSB), 2020 WL 94087, at *3 (S.D. Cal. Jan. 8, 2020). Declaratory relief claims "must be based on other, viable causes of action." *Id.* at 2. But here, Plaintiff has not alleged *any* substantive legal claim against Austin. At best, Plaintiff notes in his Opposition that Austin committed perjury when she testified in state court. (ECF No. 27 at 2; FAC ¶ 11.) But even still, this alleged perjury does not provide a basis to obtain declaratory relief because the perjury occurred in *past* litigation, and "a declaratory judgment is not a corrective action" and "should not be used to remedy past wrongs." *John M. Floyd & Assocs., Inc. v. First Imperial Credit Union*, No. 16-CV-1851 DMS (WVG), 2017 WL 4810223, at *5 (S.D. Cal. Oct. 25, 2017), *aff'd sub nom. John M. Floyd & Assocs., Inc v. First Imperial Credit Union*, 771 F. App'x 840 (9th Cir. 2019). Absent a substantive cause of action or an "actual case or controversy" against Austin, Plaintiff has no standing to obtain declaratory relief. *See Westburg v. Good Life Advisors, LLC*, No. 18CV248-LAB (MDD), 2019 WL 1546949, at *1 (S.D. Cal. Apr. 8, 2019) (stating that "a request for declaratory judgment cannot be used to bypass Article III's requirements" and that a "federal court has jurisdiction to award declaratory relief only where a true case or controversy exists."). The Court therefore **DISMISSES** Plaintiff's claim for declaratory relief against Austin.

2. Punitive Damages

Plaintiff's fourth cause of action for punitive damages fares no better. (FAC ¶¶ 151–57.) Punitive damages "constitute a remedy, not a claim." *Oppenheimer v. Sw. Airlines Co.*, No. 13-CV-260-IEG BGS, 2013 WL 3149483, at *3 (S.D. Cal. June 17, 2013). Here, since Plaintiff has not alleged a substantive legal claim against Austin,

Plaintiff has no basis to obtain punitive damages. This claim also falls short of surviving a Rule 12(b)(6) motion to dismiss, and the Court **DISMISSES** it accordingly.

B. Defendant Michael Weinstein

Plaintiff asserts the same claims against Weinstein. In particular, Plaintiff has sued to obtain (1) declaratory relief and (2) punitive damages. (FAC ¶¶ 149–57.) In response, Weinstein moves to dismiss based on (1) the *Noerr-Pennington* doctrine, (2) Plaintiff's failure to state a claim under Fed. R. Civ. P. 12(b)(6), (3) the California anti-SLAPP statute, and (4) lack of subject matter jurisdiction.[2] Since federal courts are courts of limited jurisdiction, this Court first takes up whether it has proper jurisdiction in this case. Here, it does not.

1. Declaratory Relief and Punitive Damages

Both of Plaintiff's claims against Weinstein suffer from the same deficiencies noted above. First, Plaintiff has no standing to obtain declaratory relief. As is true with his claims against Austin, Plaintiff has not alleged an "independent basis for jurisdiction." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). And since declaratory relief only serves as a remedy, not a cause of action, *see Inciyan v. City of Carlsbad*, No. 19-CV-2370 JLS (MSB), 2020 WL 94087, at *3 (S.D. Cal. Jan. 8, 2020), Plaintiff has no basis to obtain declaratory relief. For this reason, Plaintiff's second cause of action for punitive damages also fails. Punitive

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[2] Although the California anti-SLAPP statute applies to state claims in federal court, *see Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004), it does not apply to *federal* claims brought in federal court. *See Jenkins v. Luce*, No. 05CV1536W (WMC), 2005 WL 8173347, at *9 (S.D. Cal. Nov. 22, 2005) (holding that "California's anti-SLAPP statute may not be applied to federal causes of action asserted in federal court."). Here, the anti-SLAPP statute does not apply to Plaintiff's claims, because even though Plaintiff has not asserted a viable cause of action, if he had, he cannot assert a state law claim because the Court would otherwise lack proper jurisdiction. Both Weinstein and Plaintiff are California residents. Thus, Plaintiff may *only* assert a federal claim against Weinstein to keep this case in federal court, and in that case, the anti-SLAPP statute would not apply since the anti-SLAPP statute does not apply to federal claims in federal court. *See Bulletin Displays, LLC v. Regency Outdoor Advert., Inc.*, 448 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006) (holding that the anti-SLAPP statute does not apply to "federal question claims in federal court because such application would frustrate substantive federal rights.").

damages are not a cause of action but a remedy. *See Oppenheimer*, 2013 WL 3149483, at *3. Here, since Plaintiff has not asserted a separate cause of action against Weinstein that would entitle him to punitive damages, this claim also falls short of surviving a motion to dismiss. As a result, the Court **DISMISSES** both claims.

2. *Noerr-Pennington* Doctrine

Although Plaintiff lacks standing and has failed to allege a viable claim, even if he had, the *Noerr-Pennington* doctrine would bar Plaintiff's claims. The *Noerr-Pennington* doctrine stems from the First Amendment's guarantee of the right of the people to petition the government for their grievances. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). To safeguard this fundamental right, the *Noerr-Pennington* doctrine immunizes from statutory liability activities that constitute "petitioning activity." *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005). While the doctrine originally arose in the antitrust context, it now applies "equally in all contexts" relating to acts that constitute "petitioning." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000).

The right to petition, and hence the *Noerr-Pennington* doctrine, applies to the judicial branch, and immunity extends to the "use of the channels and procedures of state and federal courts to advocate causes." *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644 (9th Cir. 2009). The Ninth Circuit has made clear, however, that this immunity only extends to activities that "may fairly be described as *petitions,* not to litigation conduct generally." *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) (emphasis in original). Petitioning activity before courts include the filing of "[a] complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something." *Id.* To determine whether an activity falls within the *Noerr-Pennington* doctrine, the court must "(1) identify whether the lawsuit imposes a burden on petitioning rights, (2) decide whether the alleged activities constitute protected petitioning activity, and (3) analyze whether the statutes at

issue may be construed to preclude that burden on the protected petitioning activity." *Kearney*, 590 F.3d at 644.

Here, *Noerr-Pennington* immunizes Weinstein from liability.[3] To begin, both the first and second factors indicate that the *Noerr-Pennington* doctrine applies. Each of the claims that Plaintiff makes against Weinstein concern actions that Weinstein took while representing Geraci before Judge Wohlfeil.[4] (*See* FAC ¶¶ 13, 74, 78, 93–94, 106, 156.) In particular, Plaintiff's claims against Weinstein consist of the filing of a complaint in state court against Plaintiff (*id.* ¶¶ 13, 74) and the arguments that were made in that complaint. (*Id.* ¶¶ 78, 93.) Each of those activities are protected. First, and as noted above, the filing of a complaint clearly falls within protected petitioning activity. *See Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). Second, and relatedly, the arguments that Weinstein made in the complaint also constitutes protected petitioning activity. *See Huh v. Bank of Am., N.A.*, No. CV1504669TJHAJWX, 2015 WL 12828172, at *2 (C.D. Cal. Dec. 15, 2015) (stating that "[c]omplaints and pleading documents making legal arguments and defenses are considered petitions.") (citing *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005). To find liability for these acts would clearly burden Weinstein's right to petition. As a result, the *Noerr-Pennington* doctrine applies with full force.

In response, Plaintiff claims that the complaint that Weinstein filed was a "sham" and that therefore the *Noerr-Pennington* doctrine does not apply. (ECF No. 31 at 2.) To prove that the "sham" exception applies, Plaintiff must show that (1) the lawsuit was both "objectively baseless" and a "concealed attempt to interfere with the plaintiff's business

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[3] The third factor is absent here since Plaintiff has not asserted a viable cause of action under any federal statute. But even if he had, the *Noerr-Pennington* doctrine would protect Weinstein from liability since the sole basis of Plaintiff's claims against him are his "petitioning" activities—*i.e.*, the filing of a complaint and making legal arguments in his pleadings. The *Noerr-Pennington* doctrine applies and bars these kinds of claims.

[4] Plaintiff also accuses Weinstein of being an "unethical attorney" and that he should be liable for malicious prosecution. (FAC ¶¶ 14, 16.) These claims, however, are conclusory and not factual allegations. As a result, the Court need not consider these as grounds for liability against Weinstein.

relationships," or (2) if the defendant has allegedly brought a series of lawsuits, whether those lawsuits were brought "without regard to the merits and for the purpose of injuring a market rival," or (3) if the defendant has allegedly made intentional misrepresentations to the court, whether the party's "knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998).

Here, none of these apply. In his Opposition, Plaintiff merely reiterates that the state court proceeding was a "sham" and that Weinstein had filed the complaint "without probable cause." (ECF No. 31 at 10, 19; FAC ¶ 13.) Plaintiff's main gripe stems from his disagreement with the legal arguments that Weinstein made in his pleadings, specifically concerning the parol evidence rule and the statute of frauds (*see* ECF No. 31 at 11, 13–14.) But disagreement with legal arguments made by the opposing party does not mean that the lawsuit was (1) "objectively baseless," (2) "brought without regard to merits of the case," or (3) an "intentional misrepresentation to the court." At every turn, Plaintiff only explains why he believes Weinstein's arguments are *wrong*. (*See id.*) This also serves as the basis for his claim that Weinstein should be liable for malicious prosecution. (*See* ECF No. 31 at 5, 13, 15, 18–19.) But apart from his strong disagreement with Weinstein's legal arguments, Plaintiff's claims amount to nothing else. Attempting to hold Weinstein liable for acting in his capacity as an attorney and filing complaints with legal arguments—even those with which Plaintiff disagrees—would burden Weinstein's petitioning rights. *See Williams v. Jones & Jones Mgmt. Grp., Inc.*, No. CV 14-2179-MMM JEM, 2015 WL 349443, at *9 (C.D. Cal. Jan. 23, 2015) (finding that the plaintiff's attempt to invalidate a state court's judgment because the defendant attorneys "allegedly filed papers in state court that misrepresented the basis of Plaintiffs' state court complaint" were barred under the *Noerr-Pennington* doctrine since this argument challenges "defensive petitioning activity" by the attorneys, which is protected). As a result, the Court **DISMISSES** Plaintiff's claims against Weinstein **WITH PREJUDICE**.

C. Leave to Amend

Under Federal Rule of Civil Procedure 15(a), a district court should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal quotation marks and citation omitted). With respect to pro se litigants, the Ninth Circuit has stated that this "extreme liberality" is "particularly important," *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000), and that courts should dismiss a pro se complaint without leave to amend "only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Schucker v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir. 1988).

The Court **GRANTS LEAVE TO AMEND** only for Plaintiff's claims against Austin. Although Plaintiff has not asserted a viable cause of action here, the Court finds it inappropriate to deny leave to amend at this juncture, especially given Plaintiff is proceeding pro se and has only amended his complaint once. On the other hand, the Court **DISMISSES WITH PREJUDICE** Plaintiff's claims against Weinstein, since the bases of the claims here trigger the *Noerr-Pennington* doctrine. As a result, granting leave to amend would prove futile, as Plaintiff's claims against Weinstein concern "petitioning activities," and regardless of what facts Plaintiff might plead with leave to amend, those activities enjoy legal immunity.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** both Defendants' motions to dismiss. (ECF Nos. 24, 26.) The Court **GRANTS** Austin's motion to dismiss

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WITHOUT PREJUDICE (ECF No. 24) and **GRANTS** Weinstein's motion to dismiss **WITH PREJUDICE**. (ECF No. 26.)

IT IS SO ORDERED.

Dated: March 17, 2021

Honorable Todd W. Robinson
United States District Court