

APPENDIX A

Case: 16-16689 04/19/2018 DktEntry: 22

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

**STATE BAR OF CALIFORNIA; THE
CALIFORNIA SUPREME COURT,**
Defendants-Appellees.

D.C. No. 3:16-cv-02277-MMC No. Dist. of Cal., SF

**FILED
APR 19 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

ORDER

Before: WALLACE, SILVERMAN, and BYBEE,
Circuit Judges.

The panel has voted to deny the petition for
panel rehearing.

The full court has been advised of the
petition for rehearing en banc and no judge has
requested a vote on whether to rehear the matter
en banc. See Fed. R. App. P. 35.

Kinney's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 21) are denied.

No further filings will be entertained in this closed case.

APPENDIX B

Case: 16-16689 12/28/2017 DktEntry: 19

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

**STATE BAR OF CALIFORNIA; THE
CALIFORNIA SUPREME COURT,**
Defendants-Appellees.

D.C. No. 3:16-cv-02277-MMC No. Dist. of Cal., SF

**FILED
DEC 28 2017
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

MEMORANDUM *

Appeal from the United States District Court for
the Northern District of California Maxine M.
Chesney, District Judge, Presiding

Submitted December 18, 2017**

Before: WALLACE, SILVERMAN, and BYBEE,
Circuit Judges.

Charles G. Kinney appeals pro se from the
district court's judgment dismissing his antitrust
and 42 U.S.C. § 1981 action arising out of

California State Bar disciplinary proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's order granting a motion to dismiss. *Coal. To Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012). We affirm.

The district court properly dismissed Kinney's action because his claims against the State Bar of California and the California Supreme Court are barred by the Eleventh Amendment. See *Simmons v. Sacramento Cty. Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (California state courts are "arms of the state" entitled to Eleventh Amendment immunity); *Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995) (the State Bar of California is an arm of the state and is entitled to Eleventh Amendment immunity); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (Eleventh Amendment immunity applies to states and their agencies or departments "regardless of the nature of the relief sought").

The district court did not abuse its discretion by denying Kinney leave to amend the complaint because amendment would have been futile. See *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile); see also *Cooper v. Ramos*, 704 F.3d 772, 777-78 (9th Cir. 2012) (*Rooker-Feldman* doctrine bars district court from

exercising jurisdiction over a “de facto” appeal from a state court judgment).

The district court did not abuse its discretion by declining to enter the default of the California Supreme Court because Kinney’s claims against the California Supreme Court lacked merit. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092-93 (9th Cir. 1980) (setting forth standard of review and holding that district court did not abuse its discretion by declining to enter default judgment “[g]iven the lack of merit in [plaintiff’s] substantive claims”).

The district court did not abuse its discretion by denying Kinney’s motion for recusal because Kinney failed to establish any basis for recusal. *See United States v. Johnson*, 610 F.3d 1138, 1147-48 (9th Cir. 2010) (setting forth standard of review and discussing grounds for recusal).

The district court did not abuse its discretion by denying Kinney’s motion to vacate because Kinney failed to establish any grounds for such relief. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and requirements for relief under Fed. R. Civ. P. 59(e) and 60(b)).

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Kinney's request for oral argument, set forth in the opening brief, is denied.

No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

◆
CHARLES G. KINNEY,
Petitioner,

v.

STATE BAR OF CALIFORNIA; et al,
Respondents,

◆
On Petition For Writ Of
Certiorari To The
Ninth Circuit Court of Appeals
#16-16689 (April 19, 2018 denial
of petitions for rehearing) **[1 of 8]**

U.S. District Court, Northern
District of Calif. (San Francisco)
#3:16-cv-02277-MMC

◆
SUPPLEMENTAL APPENDIX
FOR A WRIT OF CERTIORARI

◆
CHARLES KINNEY
Petitioner in pro se
5826 Presley Way
Oakland, CA 94618
charleskinney@hotmail.com
Telephone: 510-654-5133
Fax: 510-594-0883

INDEX TO SUPPLEMENTAL APPENDIX

Sequential No.
In Document

Supp. Appendix ("S") numbers at top of page

Appendix SA: June 1, 2016 order by USDC Judge
Chesney denying motion to disqualify (Dk #16). . 1

Appendix SB: June 16, 2016 order by USDC
Judge Chesney denying Kinney's motion to
vacate, reconsider etc. (Dk #20) 4

Appendix SC: Aug. 17, 2016 letter from USDC
Clerk declining to enter default of the Cal.
Supreme Court who had failed to answer or
otherwise respond to the complaint (Dk #29) . . . 6

Appendix SD: Aug. 29, 2016 order by USDC Judge
Chesney granting the Cal. State Bar's motion to
dismiss, and dismissing the amended complaint
without leave to amend (Dk #33) 7

Appendix SE: Aug. 30, 2016 judgment by USDC
Judge Chesney granting Cal. State Bar's motion
to dismiss, and dismissing the amended complaint
without leave to amend (Dk #35) 11

SUPPLEMENTAL APPENDIX SA

Case 3:16-cv-02277-MMC Dk 16 Filed 06/01/2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIF.

CHARLES KINNEY
Plaintiff,

v.

STATE BAR OF CALIFORNIA,
Defendants.

No. CV-16-02277 MMC

**ORDER DENYING PLAINTIFF'S MOTION
TO DISQUALIFY OR RECUSE**
Re: Dkt. No. 15

Before the Court is plaintiff's "Motion to Disqualify or Recuse," filed May 20, 2016. Having read and considered the motion, the Court rules as follows.

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144. "If the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges

facts stating grounds for recusal under section 144, the legal sufficiency of the affidavit has been established, and the motion must be referred to another judge for a determination of its merits." *United States v. Sibla*, 624 F. 2d 864, 867 (9th Cir. 1980). "An affidavit filed pursuant to [§ 144] is not legally sufficient," however, unless it "specifically alleges facts that fairly support the contention that the judge exhibits bias or prejudice directed toward a party stemming from an extrajudicial source." *Id.* at 868.

Here, the declaration submitted by plaintiff in support of the instant motion is conclusory in nature. To the extent any facts are set forth in the motion or the supporting declaration, such facts pertain only to plaintiff's disagreement with the Court's rulings in two prior cases, which disagreement is not a legally cognizable ground for recusal. See *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (holding "a judge's prior adverse ruling is not sufficient cause for recusal"; explaining "judge's performance while presiding over [movant's] case" is not "extrajudicial"). Consequently, plaintiff having failed to allege any facts stating a possible cognizable ground for recusal under § 144 or otherwise, the Court finds the affidavit is not legally sufficient. See *id.* Further, no basis exists for the Court to disqualify itself pursuant to 28 U.S.C. § 455.

Accordingly, the motion is hereby DENIED.
Fn. 1

IT IS SO ORDERED.

Dated: June 1, 2016

MAXINE M. CHESNEY

United States District Judge

Fn 1 Upon filing, the instant action was randomly assigned to a magistrate judge. Plaintiff thereafter declined to consent to proceed before the assigned magistrate judge, and, pursuant to the district's Assignment Plan, see General Order No. 44, the instant action was randomly reassigned to the undersigned. Once the defendant has been served, plaintiff may wish to explore the possibility of a stipulation to proceed before a specified magistrate judge.

SUPPLEMENTAL APPENDIX SB

Case 3:16-cv-02277-MMC Dk 20 Filed 06/16/2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIF.

CHARLES KINNEY
Plaintiff,

v.

STATE BAR OF CALIFORNIA, et al.,
Defendants.

No. CV-16-02277 MMC

**ORDER DENYING PLAINTIFF'S MOTION TO
VACATE, AMEND, OR RECONSIDER ORDER
DENYING PLAINTIFF'S MOTION TO
DISQUALIFY OR RECUSE; VACATING HEARING**
Re: Dkt. No. 19

Before the Court is plaintiff's "Motion to Vacate, Motion to Amend, and/or Motion and Request for Reconsideration of the 'Order Denying Plaintiff's Motion to Disqualify or Recuse,'" filed June 11, 2016. Having read and considered the motion, the Court rules as follows.^{Fn 1}

By the instant motion, plaintiff seeks reconsideration of the Court's order of June 1, 2015, by which the Court denied plaintiff's motion for either disqualification or recusal of the undersigned. The instant motion is procedurally improper, as plaintiff has failed to seek, let alone obtain, leave to file a motion for reconsideration, see Civil L.R. 7-9(a), and is substantively

meritless, as plaintiff has failed to identify any cognizable basis for reconsideration, see Civil L.R. 7-9(b) (setting forth grounds upon which motion for reconsideration of interlocutory order may be made).

Accordingly, plaintiff's motion is hereby DENIED.

IT IS SO ORDERED.

Dated: June 16, 2016

MAXINE M. CHESNEY

United States District Judge

Fn 1 The July 22, 2016, hearing is VACATED

SUPPLEMENTAL APPENDIX SC

Case 3:16-cv-02277-MMC Dk 29 Filed 08/17/2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 Golden Gate Avenue
San Francisco, CA 94102

www.cand.uscourts.gov

Susan Y. Soong General Court Number
Clerk of Court 415-522-2000

August 17, 2016

RE: Kinney v. State Bar of California et al
16-cv-02277-MMC

Default is declined as to California Supreme Court on
August 17, 2016.

Susan Y. Soong, Clerk

by: Maria Loo
Case Systems Administrator

SUPPLEMENTAL APPENDIX SD

Case 3:16-cv-02277-MMC Dk 33 Filed 08/29/2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIF.

CHARLES KINNEY
Plaintiff,

v.

STATE BAR OF CALIFORNIA; et al.,
Defendants.

No. CV-16-02277 MMC

**ORDER GRANTING STATE BAR'S MOTION TO
DISMISS; DISMISSING AMENDED COMPLAINT
WITHOUT LEAVE TO AMEND; VACATING
HEARING**

Re: Dkt. No. 27

Before the Court is defendant State Bar of California's ("State Bar") "Motion . . . to Dismiss Amended Complaint," filed August 3, 2016. Plaintiff Charles Kinney ("Kinney") has filed opposition, to which the State Bar has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision on the parties' respective written submissions, VACATES the hearing scheduled for September 9, 2016, and rules as follows:

1. In the First Cause of Action, Kinney alleges the State Bar "violated the Sherman Act" by conducting disciplinary proceedings against him that resulted in the

issuance of a recommendation to the California Supreme Court that he be disbarred. (See Amended Complaint ("AC") ¶¶ 20, 51-60, 83.) As the State Bar is entitled to immunity under the Eleventh Amendment, said claim is subject to dismissal without leave to amend as against said defendant. See *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 873-84 (9th Cir. 1987) (holding "state agencies and departments" are entitled to Eleventh Amendment immunity as to claims under Sherman Act); *Hirsh v. Justices of Supreme Court*, 67 F.3d 708, 712, 715 (9th Cir. 1995) (holding State Bar of California is "state agency" for purposes of Eleventh Amendment).

2. In the Second Cause of Action, Kinney alleges the State Bar "violated . . . his rights under the Civil Rights Act of 1866" (see AC ¶ 86), i.e., his rights under 42 U.S.C. § 1981,¹ by recommending to the California Supreme Court that he be disbarred. As the State Bar is entitled to immunity under the Eleventh Amendment, said claim is subject to dismissal without leave to amend as against said defendant. See *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (holding state agencies are entitled to Eleventh Amendment immunity as to claims under 42 U.S.C. § 1981).

3. The First and Second Causes of Action, in addition to being alleged against the State Bar, are alleged against the California Supreme Court, which entity, Kinney alleges, denied review of the State Bar's recommendation of disbarment, thus "caus[ing]" the State Bar's recommendation to become a "final judicial determination on the merits." (See AC ¶¶ 11, 20.) As the California Supreme Court, which defendant has not yet appeared,² is entitled to immunity under the Eleventh Amendment, the First and Second Causes of Action likewise are subject to dismissal as against said additional defendant as well. See *Simmons v. Sacramento County Superior Court*, 318 F.3d

1156, 1161 (9th Cir.2003) (holding California state courts are "arms of the state" entitled to immunity under Eleventh Amendment); *Silverton v. Dep't of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding, where court grants motion to dismiss complaint as to one defendant, court may dismiss complaint against non-moving defendant "in a position similar to that of moving defendants").

4. Kinney, in his opposition, appears to assert he is entitled to proceed against employees of the State Bar for the alleged violations of the Sherman Act and § 1981. The Court finds amendment to add such employees as defendants would be futile, as claims against them would be barred by the "Rooker-Feldman doctrine," given that any ruling in favor of Kinney and against such employees would necessarily be "contingent upon a finding that the state court decision was in error." See *Cooper v. Ramos*, 704 F.3d 772, 781-82 (9th Cir. 2012) (citing "Rooker-Feldman doctrine"; affirming dismissal of claim for damages under Civil Rights Act, where claim could "succeed[] only to the extent that the state court wrongly decided the issues before it").

CONCLUSION

For the reasons stated above, the State Bar's motion to dismiss is hereby GRANTED, and the Amended Complaint is hereby DISMISSED in its entirety without leave to amend.

IT IS SO ORDERED.

Dated: August 29, 2016

MAXINE M. CHESNEY

United States District Judge

Fⁿ 1 The "guarantees" set forth in the Civil Rights Act of 1866 are codified in 42 U.S.C. §§ 1981 and 1982. See *Georgia v. Rachel*, 384 U.S. 780, 789 n. 12 (1966).

Section 1982, which prohibits racially discriminatory denials of requests to "rent or purchase certain property or housing," see *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980), is inapplicable to the instant action. Section 1981, which bars, inter alia, racial discrimination with respect to the ability to "give evidence," see 42 U.S.C. § 1981, is, arguably, implicated by Kinney's allegations. (See AC ¶¶ 4, 32, 52-53; see also Pl.'s Opp. at 4:16-19.)

Fn 2 On August 18, 2016, Kinney filed an "Objection," in which he asserts the Clerk of Court erred by declining to enter the default of the California Supreme Court. The objection is hereby **OVERRULED**, as the summons purportedly served by Kinney on the California Supreme Court (see Pl.'s Appl. for Entry of Default, exhibit thereto) fails to name the California Supreme Court as a defendant. See Fed. R. Civ. P. 4(a)(1)(A) (providing summons must "name . . . the parties"). Moreover, even if service of process had been proper, Kinney, having failed to state a cognizable claim against the California Supreme Court, would not be entitled to entry of default judgment. See *Aldabe v. Aldabe*, 616 F.2d 1089, 1092-93 (9th Cir. 1980) (holding, where plaintiff's claims "lack[ed] merit," district court did not err in denying plaintiff's motion for default judgment and sua sponte dismissing claims).

SUPPLEMENTAL APPENDIX SE

Case 3:16-cv-02277-MMC Dk 35 Filed 08/30/2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIF.

CHARLES KINNEY
Plaintiff,

v.

STATE BAR OF CALIFORNIA, et al.,
Defendants.

No. CV-16-02277 MMC

JUDGMENT IN A CIVIL CASE

() Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED

The State Bar's motion to dismiss is hereby GRANTED, and the Amended complaint is hereby DISMISSED in its entirety without leave to amend.

Dated: August 30, 2016
Susan Y. Soong, Clerk
By: Tracy Lucero, Deputy Clerk