Appendix 1

FILED

AUG 28 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL VIRIYAPANTHU, Plaintiff-Appellant, v. STATE BAR OF CALIFORNIA; et al., Defendants-Appellees.	Nos. 18-56527 19-55482 D.C. No. 8:17-cv-02266-JVS-JDE Central District of California, Santa Ana ORDER

Before: O'SCANNLAIN, TROTT, and N.R. SMITH, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and to recommend denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

Appendix 2

NOT FOR PUBLICATION

FILED

JUL 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL VIRIYAPANTHU, Plaintiff-Appellant, v. STATE BAR OF CALIFORNIA; STATE OF CALIFORNIA; KENNETH E. BACON; JOHN NELSON; RICHARD GREEN; ORANGE COUNTY BAR ASSOCIATION, Defendants-Appellees.	No. 18-56527 D.C. No. 8:17-cv-02266-JVS-JDE MEMORANDUM*

PAUL VIRIYAPANTHU, Plaintiff-Appellant, v. STATE BAR OF CALIFORNIA; STATE OF CALIFORNIA; ORANGE COUNTY BAR ASSOCIATION; KENNETH E. BACON; JOHN NELSON; RICHARD GREEN, Defendants-Appellees.	No. 19-55482 D.C. No. 8:17-cv-02266-JVS-JDE

Appeal from the United States District Court
for the Central District of California

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

James V. Selna, District Judge, Presiding

Submitted July 21, 2020**

Before: O'SCANNLAIN, TROTT, and N.R. SMITH, Circuit Judges.

The Orange County Bar Association ruled against Paul Viriyapanthu in a fee arbitration, requiring him to pay $4,313.00 to a former client. Viriyapanthu refused to pay and so the State Bar of California suspended his license. He then initiated this lawsuit in which he seeks $6,000,000.00 in compensatory damages for discrimination in violation of the Americans with Disabilities Act and the Fourteenth Amendment, discrimination in violation of 42 U.S.C. § 1981, and a conspiracy in violation of the Sherman and Clayton Acts. He appeals from the dismissal of the entire case. The facts are known to the parties and we do not repeat them here.

I

The district court properly dismissed Viriyapanthu's damages claims made under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. The State of California, State Bar of California, and Kenneth Bacon (in his official capacity) are each entitled to sovereign immunity. *Hirsh v. Justices of Supreme Ct. of State of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995). Viriyapanthu's theory of a Fourteenth

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** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Amendment violation does not justify the abrogation of such immunity. The conduct allegedly in violation of the Fourteenth Amendment (racial discrimination and bias) is not made actionable by Title II, which only prohibits discrimination "by reason of [a] disability." 42 U.S.C. § 12132; *see United States v. Georgia*, 546 U.S. 151, 159 (2006) (recognizing Title II's abrogation of state sovereign immunity when the same conduct violates both Title II and the Fourteenth Amendment).

The district court appropriately exercised its discretion in denying Viriyapanthu's ex parte application for reconsideration of denial of leave to amend to state a claim under § 504 of the Rehabilitation Act, 29 U.S.C. § 794. Such an amendment would be futile because § 504 proscribes discrimination "solely by reason of [a qualified individual's] disability" and Viriyapanthu was alleging racial discrimination and a failure to accommodate his financial position. *Id.*

II

The district court correctly dismissed Viriyapanthu's § 1981 claim against the Orange County Bar Association. The OCBA is entitled to immunity for decisional acts taken within its jurisdiction. *Sacks v. Dietrich*, 663 F.3d 1065, 1069–70 (9th Cir. 2011). It is therefore immune from liability for its fee award and for its alleged non-enforcement of its own disclosure rules. Viriyapanthu's assertion that the OCBA discriminated against him in judicial nominations was not raised before the district court and is therefore waived. *See Bolker v. Comm'r*, 760 F.2d 1039, 1042

(9th Cir. 1985).

III

The district court correctly dismissed Viriyapanthu's claim that John Nelson and Richard Green conspired in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 15. The substance of his claim is fraudulent conduct. However, Viriyapanthu's "averments of fraud" failed to meet Fed. R. Civ. P. 9(b)'s particularity requirement. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–06 (9th Cir. 2003). All that remains are conclusory accusations of conspiracy, which fail to state a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007).

The denial of leave to amend was an appropriate exercise of discretion because it was done at Viriyapanthu's request. *See Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 977 (9th Cir. 2008).

IV

Because we affirm all of the district court's rulings, Viriyapanthu's request for reassignment to a different district judge upon remand is moot.[1]

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[1] Viriyapanthu's Amended Motion to Take Judicial Notice, ECF No. 75 (Dkt. No. 18-56827), ECF No. 34 (Dkt. No. 19-55482), is GRANTED with respect to documents 2, 5, and 7 and DENIED with respect to documents 1, 3, 4, and 6. Viriyapanthu's Supplemental Motion to Take Judicial Notice, ECF No. 120 (Dkt. No. 18-56827), ECF No. 79 (Dkt. No. 19-55482), is GRANTED with respect to documents 9 and 12 and DENIED with respect to documents 8, 10, and 11. *See* Fed. R. Evid. 201(b), 902(5). Viriyapanthu's Motion to Take Judicial Notice, ECF No.

AFFIRMED.

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57 (Dkt. No. 18-56827), ECF No. 15 (Dkt. No. 19-55482), is DENIED as moot. Viriyapanthu's Motion to Take Judicial Notice, ECF No. 62 (Dkt. No. 18-56827), ECF No. 21 (Dkt. No. 19-55482), is DENIED as moot.

The State Bar's Motion to Take Judicial Notice, ECF No. 100 (Dkt. No. 18-56827), ECF No. 59 (Dkt. No. 19-55482), is GRANTED.

Appendix 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:17-cv-02266-JVS (DFMx) Date October 26, 2018

Title Viriyapanthu v. State of CA, et al,

Present: The Honorable James V. Selna

Karla J. Tunis/Gabriela Garcia	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) Order Regarding Motion to Dismiss

Defendants the State Bar of California ("State Bar") and Kenneth Bacon ("Bacon") (collectively, "Defendants") moved to dismiss Plaintiff Paul Viriyapanthu's ("Viriyapanthu) First Amended Complaint ("FAC"). (Mot., Docket No. 131.) Viriyapanthu opposed. (Opp'n, Docket No. 148.) Defendants replied. (Reply, Docket No. 150.) Viriyapanthu filed a Notice of Errata[1] (Docket No. 149) and objections. (Docket No. 151.) Defendants requested that the Court strike Viriyapanthu's Notice of Errata. (Docket No. 150 at 1–2, n.1.)

I. BACKGROUND

In 2007, Cesar Viveros ("Viveros") contracted with attorney Kenneth Teebken ("Teebken") to perform certain immigration work. (FAC, Docket No. 112 ¶ 28.) Viveros made payments to Teebken for this work. (Id.) In 2008, Teebken ceased practicing law and entered into an agreement with Viriyapanthu to take over portions of

[1] In Viriyapanthu's Notice of Errata, he stated, "Any and all references to 'OCBA' is erroneous and a typo. The opposition is being made to the State Bar and Kenneth Bacon's Motion to Dismiss and any reference to the opposition as to the OCBA should be replaced with Defendants Kenneth Bacon and the State Bar of California." The Court strikes this portion of the Notice of Errata because Viriyapanthu's proposed changes do not correct merely typographical errors, since the OCBA references in the First Amended Complaint ("FAC") and the Opposition are related to another single party in the case, not multiple defendants. Further changing references from "OCBA" to "Kenneth Bacon and The State Bar of California" raises additional substantive issues because Viriyapanthu would be making allegations that these parties conducted the underlying arbitration and is nonsensical. (Reply, Docket No. 150 at 1–2, n. 1.) See Bias v. Moynihan, 508 F.3d 1212, 1224 (9th Cir. 2007).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:17-cv-02266-JVS (DFMx) Date October 26, 2018

Title Viriyapanthu v. State of CA, et al,

his immigration practice. (Id. ¶ 30.) Viveros was contacted to allow Viriyapanthu to continue prosecuting his immigration application. (Id.) Viveros was given an unsigned retainer agreement. (Id.) In 2009, Viveros resigned from his employer, who was sponsoring his immigration application. (Id. ¶ 32.) At that point, his employer sponsored immigration application was not transferable. (Id.) Viveros wanted a refund of the fees he had paid. Viveros contacted Nelson, who instructed him to complete and submit an OCBA arbitration form. (Id. ¶ 33.) Viveros initiated an attorney fee arbitration against Viriyapanthu under California's Mandatory Fee Arbitration Act[2] ("MFAA"). (Id. ¶ 51; FAC, Docket No. 112-3, Ex. 14.) Viriyapanthu alleges that OCBA members had an agreement that members acting as arbitrators would rule in favor of other members in order to prevent non-member attorneys from practicing law. (FAC ¶ 34.) Viriyapanthu alleges that Nelson informed Viveros of the agreement. (Id. ¶ 35.) Nelson represented Viveros during the arbitration proceeding. (Id. ¶ 37.) In the proceeding, Viriyapanthu asked Nelson if he had any pre-existing relationships with the arbitrators or the bar association, which he denied. (Id. ¶ 38.) Viriyapanthu alleges that this was a false representation. (See id. ¶ 44.) In 2010, the OCBA arbitration panel awarded $4,313 to Viveros. (FAC, Docket No. 112-3, Ex. 11.)

Viriyapanthu filed a petition to vacate the arbitration award, which was denied. (FAC, Docket No. 112 ¶ 39.) Green represented Viveros in the state court proceedings. (Id.) In April 2013, the trial court's decision was affirmed on appeal. (Id.; FAC, Docket No. 112-3, Ex. 15.) Then Viriyapanthu filed a petition for review with the California Supreme Court, which it denied. (Compl., Docket No. 1 ¶ 41.)

Viriyapanthu alleges that Green contacted Bacon to request the State Bar's involvement to enforce the arbitration award. (Id. ¶ 42.) Bacon presides over the State Bar MFAA program. (Id. ¶ 17.) Bacon's assistant notified Viriyapanthu of his intent to move to place him on involuntary inactive status and suspend his license. (Id. ¶ 43.)

[2] The MFAA authorizes the State Bar Board of Trustees to create a system and procedure for arbitrating fee disputes in arbitrations conducted by local bar associations. Cal. Bus. & Prof. Code § 6200, et seq. When a MFAA arbitration is initiated by a client, fee arbitration is mandatory. Cal. State Bar R. 3.501(A). The MFAA prohibits awarding affirmative relief in such arbitrations; local bar association arbitrators may only award a refund of fees and costs previously paid. Cal. Bus. & Prof. Code § 6203(a).

Viriyapanthu contacted Bacon to inform him that he had a disability and was unable to pay the award. (Id. ¶ 21.) He requested an accommodation for the disability. (Id.) Bacon informed Viriyapanthu that he could avoid a suspension of his license by providing a doctor's affidavit that he could not work at all. (Id.) Viriyapanthu informed Bacon that he wished to declare bankruptcy to discharge the MFAA debt to prevent the suspension of his license. (Id. ¶ 22.) Bacon informed him that even if he discharged the debt, the State Bar would continue to suspend his license. (Id.) On August 23, 2016, the State Bar Court granted Bacon's motion to suspend Viriyapanthu's license. (Id. ¶ 45.)

On December 29, 2017, Viriyapanthu filed suit in this court alleging claims against Bacon, Nelson, Green, the OCBA, and the State Bar. (Compl., Docket No. 1.) On June 7, 2018, the Court granted all defendants' motions to dismiss without prejudice and allowed Viriyapanthu to file an amended complaint. (Order, Docket No. 101.) On July 9, 2018, Viriyapanthu filed an amended complaint against Defendants alleging the following causes of action: (1) a violation of Equal Protection under Title II of the Americans with Disabilities Act ("ADA") and (2) a violation of Due Process under Title II of the ADA.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a Rule 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Second, assuming the

veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id. For purposes of ruling on a Rule 12(b)(6) motion, the court must "accept factual allegations in the complaint as true 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). However, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555).

III. DISCUSSION

A. The Eleventh Amendment Bars Viriyapanthu's Claims Against the State Bar and Bacon.

The Eleventh Amendment to the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Accordingly, private individuals generally may not bring suit against nonconsenting States, their agencies, or their departments in federal court. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). However, Congress may abrogate states' Eleventh Amendment immunity under limited circumstances and permit suits by private individuals against states in federal court. Kimel, 528 U.S. at 80. Additionally, states may waive their immunity by unequivocally expressing their consent to do so. Pennhurst, 465 U.S. at 99.

Eleventh Amendment immunity extends to the State Bar. Hirsh v. Justices of Supreme Court of State of Cal., 67 F.3d 708, 715 (9th Cir. 1995). Therefore, the State Bar is immune from Viriyapanthu's claim unless Congress validly exercised its limited authority to abrogate or California expressly waived its immunity. The same goes for Bacon—Eleventh Amendment immunity "extends to the individual defendants acting in their official capacities." Hirsh, 67 F.3d at 715. The Supreme Court has explained that "insofar as Title II creates a private cause of action for damages against the States for

conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." United States v. Georgia, 546 U.S. 151, 159 (2006). Therefore, this Court must assess whether Viriyapanthu's first claim alleges conduct that violates not only of Title II of the ADA but also the Fourteenth Amendment to the United State Constitution.

Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. "To state a prima facie substantive or procedural due process claim, one must, as a threshold matter, identify a liberty or property interest protected by the Constitution." United States v. Guillen-Cervantes, 748 F.3d 870, 872 (9th Cir. 2014). The Equal Protection Clause mandates that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Cent., 473 U.S. 432, 439 (1985). Differential treatment is presumed to be valid so long as it is "rationally related to a legitimate state interest." Id. at 440. However, state action that burdens a fundamental constitutional right or involves a suspect classification requires heightened scrutiny. Id.

1. Equal Protection

Viriyapanthu sues the State Bar and Bacon under Title II of the ADA and alleges that he was excluded from participation in the State Bar of California on the basis of both race and disability. (FAC ¶ 16.) Count One alleges a violation of Equal Protection based on racial animus. In particular, Viriyapanthu "alleges that the underlying arbitration regarding Cesar Viveros (which ultimately led to the loss of Plaintiff's license) was the result of racial animus and racial discrimination

which violated Plaintiff's Fourteenth Amendment Equal Protection rights." (Id. ¶ 52.) Viriyapanthu states that "the State of California has an obligation to enforce equal protection under the 14th Amendment, and prevent racial discrimination from occurring." (Id. ¶70.) Because Viriyapanthu does not allege any conduct by the State Bar or Bacon that violates the Fourteenth Amendment, his claim as to the State Bar is dismissed with prejudice.[3]

Importantly, Defendants note that even if Viriyapanthu had alleged facts of racial animus and racial discrimination by the State Bar or Bacon, those claims still would have failed under Title II of the ADA. To assert a claim under Title II of the ADA, Viriyapanthu must allege:

> (1) he "is an individual with a disability;" (2) he "is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities;" (3) he "was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity;" and (4) such exclusion, denial of benefits, or discrimination was by reason of [his] disability."

McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004) (citing Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.2002) (per curiam), cert. denied, 538 U.S. 921 (2003)) (emphasis added); see also 42 U.S.C. § 12132 "[N]o qualified individual with a disability shall by reason of such disability . . . be subjected to discrimination by any such entity" (emphasis added). Even if Viriyapanthu had alleged facts indicating that the State Bar or Bacon had somehow racially discriminated against him, he still cannot show that such conduct, while

[3] In his Opposition, Viriyapanthu argues that he has pled facts satisfying a prima facie case of race discrimination, and the State Bar should be held accountable for the racial discrimination of the OCBA. (Opp'n, Docket No. 148 at 11). The Court dismissed claims against the OCBA with prejudice. (Order, Docket No. 146 at 9.) ("Because Viriyapanthu has not shown that the OCBA arbitrators acted in excess of their jurisdiction by conducting the arbitration, quasi-judicial immunity applies.") Thus, the Court does not hold the State Bar accountable for the OCBA's conduct when immunity applied to the OCBA.

perhaps a violation of the Fourteenth Amendment, would be by reason of his disability. Thus, Viriyapanthu cannot state a claim for a violation of Title II of the ADA against the State Bar. The Court dismisses these claims with prejudice accordingly.

2. Due Process

In addition, Viriyapanthu alleges that the State Bar and Bacon violated his due process rights because Viriyapanthu "made a request to Kenneth Bacon for reasonable accommodation and was denied." (FAC ¶ 75.) Viriyapanthu alleges that he "has a Constitutionally protected 'Property Interest' in his license to practice law." (Id. ¶ 76.) The other factual allegations related to his claim for violation of due process relate to the OCBA's conducting arbitration for which it receives quasi-judicial immunity in this case, and the conduct of John Nelson and Richard Green as individuals.

In its prior Order, the Court already found that "Viriyapanthu cannot state a claim for a fourteenth amendment violation based on allegations that the State Bar's act of placing him on involuntary inactive status, after he failed to pay a mandatory arbitration award, lacks a rational relationship to a legitimate state interest." (Order, Docket No. 101 at 20 n. 13.) Since the factual allegations regarding the State Bar's and Bacon's conduct related to the due process claim are the same as the ones already found deficient in the prior complaint, the Court likewise dismisses this claim with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court **grants** Defendants' motion to dismiss with prejudice.

In a prior Order, the Court determined that it would await a ruling on this motion before setting a timeline for Viriyapanthu to file an amended complaint as to defendants Nelson and Green. (Docket No. 146) The Court now grants Viriyapanthu thirty (30) days leave to amend his complaint only as to defendants Nelson and Green and only as to the legal claims in the FAC if he shows that

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:17-cv-02266-JVS (DFMx) Date October 26, 2018

Title Viriyapanthu v. State of CA, et al,

Noerr-Pennington immunity does not apply. Viriyapanthu may not assert new legal claims not present in the FAC against defendants Nelson and Green. Since the Court has dismissed claims against the OCBA, the State Bar, and Bacon with prejudice, Viriyapanthu may not replead claims against those defendants.

IT IS SO ORDERED.

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Appendix 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 17-2266 JVS(DFMx)	Date	September 24, 2018
Title	Paul Viriyapanthu v. State of California, et al.		

Present: The Honorable	James V. Selna
Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order**
1) Granting Defendant John Nelson's Motion to Dismiss First Amended Complaint (Fld 7-23-18, Dkt 117);
2) Denying Defendant John Nelson's Motion to Strike Portions of First Amended Complaint (Fld 7-23-18, Dkt 118);
3) Granting Defendant Richard Green's Motion to Dismiss First Amended Complaint (Fld 7-23-18, Dkt 120); and
4) Granting Defendant Orange County Bar Association's Motion to Dismiss First Amended Complaint (Fld 7-23-18, Dkt 121)

Before the Court are four motions.

First, Defendant Orange County Bar Association ("OCBA") filed a motion to dismiss Plaintiff Paul Viriyapanthu's ("Viriyapanthu") First Amended Complaint ("FAC") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Mot., Docket No. 121.) Viriyapanthu filed an opposition. (Opp'n, Docket No. 80.) The OCBA replied. (Reply, Docket No. 135.)

For the following reasons, the Court **grants** the OCBA's motion to dismiss.[1]

[1] Defendant OCBA also filed a request for judicial notice in support of its motion to dismiss. (RJN, Docket No. 122.) Courts "may take [judicial] notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." Bias v. Moynihan, 508 F.3d 1212, 1225 (9th Cir. 2007) (internal citations and quotation marks omitted). All seven of the documents which the OCBA requests the Court to take judicial notice of fit into this category. Thus, the Court grants the request for judicial notice.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 17-2266 JVS(DFMx) Date September 24, 2018

Title Paul Viriyapanthu v. State of California, et al.

Second, Defendant Richard Green ("Green") filed a motion to dismiss Viriyapanthu's Complaint pursuant to Rule 12(b)(6) and 41(b). (Mot., Docket No. 120.) Viriyapanthu filed an opposition. (Opp'n, Docket No. 134.) Green replied. (Reply, Docket No. 139.)

For the following reasons, the Court **grants** Green's motion to dismiss.

Third, Defendant John Nelson ("Nelson") filed a motion to strike portions of the FAC pursuant to Rule 12(f). (Mot., Docket No. 118.) Viriyapanthu filed an opposition. (Opp'n, Docket No. 133.) Nelson replied. (Reply, Docket No. 137.)

For the following reasons, the Court **denies** Nelson's motion to strike portions of the FAC.

Fourth, Defendant Nelson filed a motion to dismiss Viriyapanthu's Complaint pursuant to Rules 12(b)(1) and 12(b)(6). (Mot., Docket No. 117.) Viriyapanthu filed an opposition. (Opp'n, Docket No. 133.) Nelson replied. (Reply, Docket No. 136.)

For the following reasons, the Court **grants** Nelson's motion to dismiss.[2]

I. BACKGROUND

In 2007, Cesar Viveros ("Viveros") contracted with attorney Kenneth Teebken ("Teebken") to perform certain immigration work. (FAC, Docket No. 112 ¶ 28.) Viveros made payments to Teebken for this work. (Id.) In 2008, Teebken ceased practicing law and entered into an agreement with Viriyapanthu to take over portions of his immigration practice. (Id. ¶ 30.) Viveros was contacted to allow Viriyapanthu to continue prosecuting his immigration application. (Id.) Viveros was given an unsigned

[2] Under Federal Rule of Evidence 201, the Court may take judicial notice of matters of public record if the facts are not "subject to reasonable dispute." Lee v. City of Los Angeles, 250 F.3d 668, 688–89 (9th Cir. 2001); see Fed. R. Evid. 201(b). The Court takes judicial notice of the documents in the Request for Judicial Notice ("RJN") Exhibit 1, Exhibit 2 pages 1–18, and Exhibits 4–8 pursuant to Fed. R. Evid. 201. All of the documents in the these portions of Exhibits 1 and 2 in the RJN contain facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The RJN for Exhibit 3 is denied as moot, as the facts in the exhibit were not considered.

retainer agreement. (Id.) In 2009, Viveros resigned from his employer, who was sponsoring his immigration application. (Id. ¶ 32.) At that point, his employer sponsored immigration application was not transferable. (Id.) Viveros wanted a refund of the fees he had paid. Viveros contacted Nelson, who instructed him to complete and submit an OCBA arbitration form. (Id. ¶ 33.) Viveros initiated an attorney fee arbitration against Viriyapanthu under California's Mandatory Fee Arbitration Act[3] ("MFAA"). (Id. ¶ 51; FAC, Docket No. 112-3, Ex. 14.) Viriyapanthu alleges that OCBA members had an agreement that members acting as arbitrators would rule in favor of other members in order to prevent non-member attorneys from practicing law. (FAC ¶ 34.) Viriyapanthu alleges that Nelson informed Viveros of the agreement. (Id. ¶ 35.) Nelson represented Viveros during the arbitration proceeding. (Id. ¶ 37.) In the proceeding, Viriyapanthu asked Nelson if he had any pre-existing relationships with the arbitrators or the bar association, which he denied. (Id. ¶ 38.) Viriyapanthu alleges that this was a false representation. (See id. ¶ 44.) In 2010, the OCBA arbitration panel awarded $4,313 to Viveros. (FAC, Docket No. 112-3, Ex. 11.)

Viriyapanthu filed a petition to vacate the arbitration award, which was denied. (FAC, Docket No. 112 ¶ 39.) Green represented Viveros in the state court proceedings. (Id.) In April 2013, the trial court's decision was affirmed on appeal. (Id.; FAC, Docket No. 112-3, Ex. 15.) Then Viriyapanthu filed a petition for review with the California Supreme Court, which it denied. (Compl., Docket No. 1 ¶ 41.)

Viriyapanthu alleges that Green contacted Bacon to request the State Bar's involvement to enforce the arbitration award. (Id. ¶ 42.) Bacon presides over the State Bar MFAA program. (Id. ¶ 17.) Bacon's assistant notified Viriyapanthu of his intent to move to place him on involuntary inactive status and suspend his license. (Id. ¶ 43.) Viriyapanthu contacted Bacon to inform him that he had a disability and was unable to pay the award. (Id. ¶ 21.) He requested an accommodation for the disability. (Id.) Bacon informed Viriyapanthu that he could avoid a suspension of his license by

[3] The MFAA authorizes the State Bar Board of Trustees to create a system and procedure for arbitrating fee disputes in arbitrations conducted by local bar associations. Cal. Bus. & Prof. Code § 6200, et seq. When a MFAA arbitration is initiated by a client, fee arbitration is mandatory. Cal. State Bar R. 3.501(A). The MFAA prohibits awarding affirmative relief in such arbitrations; local bar association arbitrators may only award a refund of fees and costs previously paid. Cal. Bus. & Prof. Code § 6203(a).

providing a doctor's affidavit that he could not work at all. (Id.) Viriyapanthu informed Bacon that he wished to declare bankruptcy to discharge the MFAA debt to prevent the suspension of his license. (Id. ¶ 22.) Bacon informed him that even if he discharged the debt, the State Bar would continue to suspend his license. (Id.) On August 23, 2016, the State Bar Court granted Bacon's motion to suspend Viriyapanthu's license. (Id. ¶ 45.)

On December 29, 2017, Viriyapanthu filed suit in this court alleging claims against Bacon, Nelson, Green, the OCBA, and the State Bar (collectively, "Defendants"). (Compl., Docket No. 1.) On June 7, 2018, the Court granted Defendants' motions to dismiss without prejudice and allowed Viriyapanthu to file an amended complaint. Order, Docket No. 101. On July 9, 2018, Viriyapanthu filed an amended complaint alleging the following causes of action: (1) a violation of Equal Protection under Title II of the Americans with Disabilities Act ("ADA"); (2) a violation of Due Process under Title II of the ADA; (3) Disparate Treatment under 42 U.S.C. § 1981; (4) conspiracy in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 15; and (5) petition to compel arbitration under 9 U.S.C. § 4. (FAC, Docket No. 112).

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(f)

Under Rule 12(f), a party may move to strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). A motion to strike is appropriate when a defense is insufficient as a matter of law. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982). The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters of which the Court may take judicial notice. SEC v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995).

The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). "As a general proposition, motions to strike are regarded with disfavor because [they] are often used as delaying tactics, and because of the limited importance of pleadings in federal practice."

Sands, 902 F. Supp. at 1165–66 (alteration in original) (internal quotation marks omitted). Nonetheless, "[a]llegations may be stricken as scandalous if the matter bears no possible relation to the controversy or may cause the objecting party prejudice." Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 664 (7th Cir. 1992)

Therefore, courts frequently require the moving party to demonstrate prejudice "before granting the requested relief, and 'ultimately whether to grant a motion to strike falls on the sound discretion of the district court.'" Greenwich Ins. Co. v. Rodgers, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010) (quoting Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp.2d 1028, 1033 (C.D. Cal. 2002)).

B. Federal Rule of Civil Procedure 12(b)(1)

Dismissal is proper when a plaintiff fails to properly plead subject matter jurisdiction in the complaint. Fed. R. Civ. P. 12(b)(1). A "jurisdictional attack may be facial or factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). If the challenge is based solely upon the allegations in the complaint (a "facial attack"), the court generally presumes the allegations in the complaint are true. Id.; Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). If instead the challenge disputes the truth of the allegations that would otherwise invoke federal jurisdiction, the challenger has raised a "factual attack," and the court may review evidence beyond the confines of the complaint without assuming the truth of the plaintiff's allegations. Safe Air, 373 F.3d at 1039. The plaintiff bears the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

C. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a Rule 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id. For purposes of ruling on a Rule 12(b)(6) motion, the court must "accept factual allegations in the complaint as true 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). However, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555).

D. Federal Rule of Civil Procedure 9(b)

Under Federal Rule of Civil Procedure 9(b), a plaintiff must plead each element of a fraud claim with particularity, i.e., the plaintiff "must set forth more than the neutral facts necessary to identify the transaction." Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997) (emphasis in original) (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)). A fraud claim must be accompanied by "the who, what, when, where, and how" of the fraudulent conduct charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper, 137 F.3d at 627). "A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Statements of the time, place, and nature of the alleged fraudulent activities are sufficient, but mere conclusory allegations of fraud are not. Id.

III. DISCUSSION

A. Viriyapanthu's New Allegations

In the first Order on Defendants' motions to dismiss, the Court stated:

> In sum, the Court grants Defendants' motions to dismiss without prejudice. Viriyapanthu may file an amended complaint addressing the deficiencies identified in this order within thirty (30) days. Specifically, Viriyapanthu may only replead claims against:
>
> ***
>
> The OCBA for violations of § 1983, conspiracy in restraint of trade, and RICO conspiracy if he pleads facts showing it is vicariously liable for the acts of its members or that it is not entitled to quasi-judicial immunity for the acts of its arbitrators;
>
> Nelson and Green for violations of § 1983, conspiracy in restraint of trade, and RICO conspiracy, and for a RICO enterprise against Nelson, if he pleads facts showing that their petitioning conduct falls within the sham exception to the Noerr-Pennington doctrine.

(Order, Docket No. 101 at 20).

1. New Claim Against OCBA

"[I]nstead of realleging the previous § 1983, RICO and Sherman Act claims against the OCBA, Plaintiff pleads a new claim against OCBA under 42 U.S.C. § 1981." (FAC, Docket No. 112.) Defendant OCBA argues that the claims alleged against the OCBA have been waived because Viriyapanthu deliberately chose not to replead them when the Court allowed him to do so. (Mot., Docket No. 132 at 9.) Further, Defendant OCBA argues that Plaintiff's new claim should be dismissed because it exceeded the scope of the Court's leave to amend. (Id. at 9–10.) The Court **agrees** with Defendant OCBA **in part**.

As to Viriyapanthu's claims from the original complaint that have not been repled, the Court deems them to have been waived. See Lacey v. Maricopa Cty., 693 F.3d 896, 928 (9th Cir. 2012) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will consider those claims to be waived if not repled."). Petitioner's FAC indicates that he is aware that the

arguments from the original complaint that he has chosen not to replead would be waived since he specifically preserves another issue for appeal. (FAC, Docket No. ¶ 108.) The Court, however, does not find that Plaintiff's new claim exceeded the scope of the Court's leave to amend. The Court's Order did not prohibit pleading a new claim, but rather specifies deficiencies for Viriyapanthu to address in an amended complaint.

2. Motion to Strike New Allegations Against Defendant Nelson

Defendant Nelson filed a motion to strike portions of the FAC pursuant to Federal Rule of Civil Procedure 12(f) on the basis that Viriyapanthu included new matter in violation of the Court's Order that is impertinent and immaterial, or that this matter is otherwise scandalous. (Mot. to Strike, Docket No. 118 at 2, 5.) Specifically, Nelson moves to strike allegations that Nelson and Greed posed as customers of Viriyapanthu and posted derogatory and false information about Viriyapanthu on review websites. (Id. at 2.) Since the Court's Order explicitly stated that the conspiracy in restraint of trade claims could only be repled if Viriyapanthu could show that the sham exception to Noerr Pennington applied, Nelson argues these allegations should be stricken because Viriyapanthu repleads the claims without addressing the sham exception. (Id. at 5.) Instead he pursues a different basis for avoiding Noerr-Pennington immunity. (Id.) The Court disagrees.

While the Court Order does direct Viriyapanthu to plead facts showing that Nelson's and Green's conduct falls within the sham exception, the Order also indicates that Viriyapanthu may file an amended complaint addressing the deficiencies identified in the Order. (Order, Docket No. 101 at 20.) Since the new claim addresses the overall deficiency involved in the application of the Noerr-Pennington doctrine, the Court will allow Viriyapanthu to replead the conspiracy in restraint of trade claims. Thus, the Court does not find the allegations to be impertinent or immaterial. In addition, because the Court does not find that the allegations bear "no possible relation to the controversy," and Nelson has not sufficiently shown that they may prejudice him, the Court declines to exercise its discretion to strike the material as "scandalous" under Rule 12(f). See Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 664 (7th Cir. 1992). Therefore, Nelson's motion to strike is **denied**.

B. Viriyapanthu's Claims Against the OCBA Must Be Dismissed.

Viriyapanthu asserts a claim against the OCBA for disparate treatment in violation of 42 U.S.C. § 1981. (FAC, Docket No. 112 ¶ 6.) He alleges that the OCBA is a "labor organization" that has been treating minorities disparately in comparison to Caucasian members of the OCBA. (Id. ¶ 90.) Viriyapanthu argues that Caucasian attorneys were allowed to practice law without having to undergo MFAA arbitrations while minority attorneys practicing in the same area of law as Caucasian attorneys were forced to undergo MFAA arbitrations in front of the OCBA. (Id. ¶¶ 90, 95.) Viriyapanthu further alleges that this disparate treatment is part of a pattern and policy of discrimination against racial minorities perpetrated by the OCBA, whereby the OCBA excludes minority candidates from recommendations to the bench. Based on the facts alleged, Viriyapanthu cannot state a claim upon which relief can be granted.

1. The OCBA is entitled to quasi-judicial immunity.

Quasi-judicial immunity does not apply where a judicial officer acts "in the complete absence of all jurisdiction." Mireles, 502 U.S. at 12. The scope of a judicial officer's jurisdiction "must be construed broadly" where the issue is immunity. Stump v. Sparkman, 435 U.S. 349, 356 (1978). A complete absence of jurisdiction exists, for example, where "a probate judge, with jurisdiction over only wills and estates, [tries] a criminal case." Id. at 357 n.7. But "if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune." Id. Viriyapanthu does not argue that the OCBA arbitrators did not have jurisdiction to conduct the MFAA arbitration. He instead alleges that the OCBA forced him to undergo arbitration while Caucasian attorneys were allowed to continue practicing law without undergoing arbitration. (FAC, Docket No. 112 ¶¶ 90, 95.) Because Viriyapanthu has not shown that the OCBA arbitrators acted in excess of their jurisdiction by conducting the arbitration, quasi-judicial immunity applies.

2. The OCBA is not a "labor organization"

42 U.S.C. § 1981 protects the equal right of all persons to, among other things, "make and enforce contracts." 42 U.S.C. § 1981. This includes protections against impermissible discrimination in the context of an employment relationship. See Manatt v. Bank of Am., NA, 339 F.3d 792, 797 (9th Cir. 2003). "[t]he legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action." Id.

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Viriyapanthu argues that the OCBA meets the definition of "labor organization" under Title VII of the Civil Rights Act of 1964. (FAC, Docket No. 112 ¶ 88.) 42 U.S.C. § 2000e(d) states:

> The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

42 U.S.C. § 2000e(d) (emphasis added). The statute goes on to define "labor organization engaged in an industry affecting commerce":

> A labor organization shall be deemed to be engaged in an industry affecting commerce if
> (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization--
> (1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;
> (2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

> (3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
> (4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
> (5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

42 U.S.C. § 2000e(e) (emphasis added). The statute also defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b) (emphasis added).

Viriyapanthu alleges that OCBA falls under the definition of "labor organization" because it maintains a hiring office that refers attorneys to potential clients and its number of members exceeds twenty-five. (FAC, Docket No. 112 ¶ 89. He also alleges that "OCBA resolves disputes between employers and employees, in this case attorneys and clients." (Id.) Viriyapanthu indicates that he is a member of a protected class who was performing in accordance with his employer's legitimate expectations and nonetheless suffered an adverse employment action in violation of § 1981. (Id. ¶¶ 92–94.)

Viriyapanthu's argument fails because he confuses the attorney-client relationship with an employer-employee relationship. The OCBA is not like the labor unions § 2000e defines. It does not maintain a hiring office that procures employees for employers because clients like Viveros that receive referrals are not employers. Viriyapanthu does not allege that Viveros had fifteen or more employees working for him daily. While the number of OCBA's members may exceed twenty-five individuals, it does not satisfy the second portion of the definition, which requires that it represent, or actively seek to

represent, employees. See 42 U.S.C. § 2000e(e)(2). The OCBA's fee arbitrations are likewise not disputes between employers and employees because the clients are not employers. Viriyapanthu's analysis fails to indicate who his employer was when he was "performing in accordance according to his employer's legitimate expectations." (FAC, Docket No. 112 ¶ 93.) Thus, the Court concludes that the OCBA is not a "labor organization" for purposes of Title VII or § 1981.

Since Viriyapanthu has not otherwise alleged that he contracted with the OCBA in any manner that would indicate disparate treatment in violation of § 1981, he has failed to state a claim under 12(b)(6).[4] The Court **grants** OCBA's motion to dismiss with prejudice accordingly.

C. The Noerr-Pennington Doctrine Bars Viriyapanthu's Claims Against Nelson and Green.

The Noerr-Pennington doctrine provides absolute immunity for statutory liability for conduct when petitioning the government for redress. Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006). Immunity under the Noerr-Pennington doctrine includes communications made to the court during the course of a lawsuit. Such communications include "[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. at 933 (citation omitted). "Conduct incidental to a lawsuit, including a pre-suit demand letter, [also] falls within the protection of the Noerr-Pennington doctrine." Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1007 (9th Cir. 2008). The doctrine's application is not limited to lawsuits; it has also been applied to quasi-judicial proceedings. See, e.g., Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11 (1972) (holding that Noerr-Pennington applies when petitioning state and federal agencies); Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft, 189 F. Supp. 2d 385, 392–93 (E.D. Va. 2002) (holding that Noerr-Pennington applies to the initiation and maintenance of World Intellectual Property Organization ("WIPO") arbitration proceedings, even though WIPO is only a quasi-public entity, because it is part of the adjudicatory process and

[4] Because Viriyapanthu has not shown that he is entitled to relief under § 1981, the Court does not address his allegations that the OCBA engaged in a pattern or practice of discriminatory conduct nor the remaining arguments as to the applicable statutes of limitations.

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warrants immunity).

The Ninth Circuit has recognized an exception to the Noerr-Pennington doctrine, however. Noerr-Pennington immunity does not apply to conduct that, although "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere" with the defendant's business practices. Sosa, 437 F.3d at 938 (citation omitted). As a result, "'[s]ham' petitions don't fall within the protection of the doctrine." Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1183–84 (9th Cir. 2005). The Ninth Circuit has identified three circumstances when the so-called sham litigation exception applies:

> first, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose; and third, if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

Sosa, 437 F.3d at 938 (internal quotation marks and citations omitted).

Viriyapanthu argues that Noerr-Pennington does not apply here for two reasons. First, he argues that Defendants Nelson and Green engaged in conduct that falls outside of the "petitioning activities" protected under Noerr-Pennington when they wrote defamatory and false statements regarding Viriyapanthu on public websites such as Yelp. (FAC, Docket No. 112 ¶ 105.) Second, he argues that the sham exception to the Noerr-Pennington doctrine applies because Nelson and Green made misrepresentations in prior proceedings that deprived the litigation of its legitimacy. (Id. at ¶¶ 106–08.)

Viriyapanthu's first argument fails under Rule 9(b). "A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." Moore v.

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Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Here, the FAC states:

> As part of said efforts to put Plaintiff out of business, Defendants Green and Nelson entered into a conspiracy to put Plaintiff out of business. Said defendants, posing as clients of Paul Viriyapanthu (when they were never clients) began posting derogatory comments on attorney review websites such as Yelp fal[s]ely claiming that Paul Viriyapanthu had taken money from them and performed no services. The agreement between Nelson and Green was nonetheless a "conspiracy" to restrain trade and is actionable under the Sherman/Clayton Acts. Plaintiff alleges that Noerr-Pennington immunity does not attach to writing defamatory and false statements regarding Plaintiff on public websites.

(FAC, Docket No. 112 ¶ 105.) The FAC contains a mere conclusory statement that Nelson and Green entered into a conspiracy without including well-pleaded factual allegations to support the conclusion that they had entered into an agreement, or that the comments were derogatory and false. (Mot., Docket No.120 at 6, 9.) More importantly, it provides no indication of when these alleged defamatory posts were made or what they stated. Defendants Nelson and Green, charged with posing as customers of Viriyapanthu, simply would not enough information to know what they are accused of posting nor which websites they are accused of posting on. (Reply, Docket No. 139 at 3.) Thus, Viriyapanthu's allegations with respect to the defamatory posts do not meet the pleading standard required under 9(b).

In his second argument to avoid Noerr-Pennington immunity, Viriyapanthu alleges that Nelson and Green intentionally made misrepresentations to deprive the litigation of its legitimacy. Specifically, Viriyapanthu claims that Nelson was a member of the OCBA who had "necessarily" previously served with presiding arbitrator Sheri Honer, on other arbitrations. (FAC, Docket No. 112 at 112.) Viriyapanthu indicates "It is not simply being a member of the same bar association, but it is the working together on previous occasions that *must* be

disclosed." (Id.) Viriyapanthu points to Gray v. Chiu to suggest that Nelson's membership in the OCBA and activities within it were required disclosures because they could cause doubt as to the arbitrator's impartiality. (FAC, Docket No. 112 ¶¶ 111–12.) See 212 Cal. App. 4th 1355,1364 (2013). While Viriyapanthu recognizes that Code of Civil Procedure § 1281.9 does not apply directly to MFAA Arbitration, he cites Baxter for the proposition that courts may apply the same disclosure requirements under the CAA—in this case § 1281.9—to the MFAA. (Opp'n, Docket No. 133 at 8.) See Baxter v. Bock, 247 Cal. App. 4th 775, 785 (2016).

In Gray, a California appellate court held that the California Code of Civil Procedure § 1281.9 of the California Arbitration Act ("CAA") and the California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitrations ("Ethics Standards") require "a neutral arbitrator to disclose that a lawyer in the arbitration is a member of the administering 'dispute resolution provider organization.'" Id. at 1358. The court vacated the arbitration award when an arbitrator in a consumer arbitration case failed to disclose that one of the lawyers for the parties was a member of the administering private dispute resolution provider organization. Id. at 1364.

Nelson distinguishes this case from Gray, explaining that Gray did not involve MFAA arbitration, but rather a consumer arbitration case. (Reply, Docket No. 136 at 9.) Nelson indicates and the Ethics standard discussed in the case—Standard 8—is likewise inapplicable to Viriyapanthu's case because MFAA arbitration is not a consumer arbitration. See Ethics Standards for Neutral Arbitrators, Standard 2(d) ("Consumer arbitration" means an arbitration conducted under a predispute arbitration provision contained in a contract."). Nelson suggests that MFAA arbitration conducted at a local bar association is not a "provider organization" as defined by the Ethics standards, which requires the organization to be a "nongovernmental entity that, or individual who, coordinates administers, or provides the services of two or more dispute resolution neutrals." Cal. R. Ct. Ethics Standards for Neutral Arbitrators, Standard 2(g) (Reply, Docket No. 136 at 9. Nelson points out that the State Bar reserves authority over MFAA arbitrations conducted at local bar associations and argues that a local bar association such as the OCBA that conducts MFAA arbitration is not a "nongovernmental entity" as contemplated by Ethics Standard 2(g). (Id.)

Viriyapanthu has not shown that the sham exception to the Noerr-Pennington Doctrine applies. While the OCBA conducts MFAA arbitration, it is not a "provider organization" that requires membership disclosure in an arbitration. Membership in the same professional organization does not create an impression of possible bias. San Luis Obispo Bay Properties, Inc. v. Pac. Gas & Elec. Co., 28 Cal. App. 3d 556, 567 (1972). See Nemecek & Cole v. Horn, 208 Cal. App. 4th 641, 647 (2012) ("[T]he arbitrator's participation in a [County Bar Association] group comprised of 186 members, of which [the arbitrator] was one, does not require disclosure."). As Nelson points out, "membership in a local bar association . . . is obviously very different than membership at a small, private alternative dispute resolution" like the organization in Gray. (Nelson's Reply, Docket No. 136 at 16. See Opp'n, Docket No. 104 at 4.)

Even if § 1281.9 (or its MFAA equivalent) applied in this case, Viriyapanthu's argument still fails. Section 1281.9 refers to disclosures that the *neutral arbitrator* must make. CA Civ. Pro. Code § 1281.9(a). This section does not require the *representing attorney* to make any disclosures reflecting on the impartiality of the arbitrator—let alone a disclosure about membership in a local bar association. Neither does the OCBA Rule of Procedure 7(E), which indicates that information that a "person *appointed as arbitrator* must promptly disclose." (RJN, Docket No. 117-1, Ex. 2 at 8) (emphasis added.) Therefore, it would have been unnecessary for Nelson to disclose membership in the OCBA under the disclosure requirements of either § 1281.9 or OCBA Rule 7(E).

In addition, Viriyapanthu fails to meet the heightened pleading requirement for fraud under Rule 9(b).[5] Viriyapanthu alleges that Nelson and the other arbitrators had relationships that would lead to bias beyond mere membership in the OCBA, but he does not plead those facts with sufficient particularity. Viriyapanthu alleges that Nelson used the OCBA offices/facilities and "necessarily worked on other arbitrations" with Judge Honer. (FAC, Docket No. 112 ¶ 112.) But he does not indicate when, where, or how those offices and facilities were used nor when Nelson would have worked on other arbitrations with Judge Honer.

[5] Viriyapanthu argues that the circumstances surrounding these allegations constitute fraud. See Opp'n to Nelson, Docket No. 133 at 24 ("John Nelson fraudulently concealed his membership in the OCBA which would have resulted in vacatur of the arbitration award.).

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Thus, Viriyapanthu has not sufficiently alleged the circumstances constituting fraud. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

Because Viriyapanthu has failed to (1) plead facts that Defendants' Nelson and Green engaged in conduct that falls outside of Noerr-Pennington with sufficient particularity with respect to the fraudulent reviews and (2) plead facts showing that their petitioning conduct falls within the sham exception of Noerr-Pennington, the Court **grants** Nelson's and Green's motions to dismiss.[6]

IV. CONCLUSION

In sum, the Court **grants** Defendant OCBA's motion to dismiss **with prejudice** and **without leave to amend**.

The Court **denies** Nelson's motion to strike, and grants Nelson's and Green's motions to dismiss **without prejudice**. Viriyapanthu may file an amended complaint addressing the deficiencies identified in this order with respect to Defendants Nelson and Green. The Court will set the deadline once it rules on the State Bar's motion to dismiss. Viriyapanthu may not plead new legal claims against Defendants Nelson or Green; he may only replead the claims in this FAC if he shows that Noerr-Pennington immunity does not apply.

IT IS SO ORDERED.

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[6] Because Viriyapanthu's claims against Nelson and Green are barred by Noerr-Pennington immunity, the Court does not address the remaining arguments as to the applicable statutes of limitations.

Additional material from this filing is available in the Clerk's Office.