APPENDICES

APENDIX A / Opinion of the Ninth Circuit Court of Appeals Dated May 27th 2022

APENDIX B / Opinion of United States District Court for the Southern District Dated June 29th 2021.

No. _____

IN THE
Supreme Court of the United States

Pernell Swahili El
Petitioner

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT
Respondent

On Appeal from the 9th Circuit Court of Appeals
21-55805 / Opinion Filed May 27th 2022

Pernell Swahili El v. SAN DIEGO UNIFIED SCHOOL DISTRICT, No. 21: 55805 United States Courts of Appeals for the Ninth Circuit (Appendix pages 1-2)

Pernell Swahili El v. SAN DIEGO UNIFIED SCHOOL DISTRICT, No. 3:20-cv-00257-AJB-AGS (2021) U.S. District Court, California (Appendix page 3 -7)

Appendix 1

NOT FOR PUBLICATION

FILED

MAY 27 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PERNELL SWAHILI EL, Plaintiff-Appellant, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Defendant-Appellee.	No. 21-55805 D.C. No. 3:20-cv-00257-AJB-AGS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Anthony J. Battaglia, District Judge, Presiding

Submitted May 17, 2022**

Before: CANBY, TASHIMA, and NGUYEN, Circuit Judges.

Pernell Swahili El appeals pro se from the district court's judgment dismissing his action alleging various federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion a dismissal for failure to comply with a court order. *Pagtalunan v. Galaza*, 291 F.3d

* 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).

Appendix 2

639, 640 (9th Cir. 2002). We affirm.

The district court did not abuse its discretion in dismissing El's action because El failed to file a substantive opposition to defendant's motion to dismiss, despite being ordered to do so. *See id.* at 642-43 (discussing factors to consider in determining whether to dismiss for failure to comply with a court order).

The district court did not abuse its discretion by denying El's motions to strike. *See United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 637 (9th Cir. 2012) (standard of review). One of El's motions to strike failed to comply with local rules, *see Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002) ("The district court has considerable latitude in managing the parties' motion practice and enforcing local rules that place parameters on briefing."), and the other was based on the incorrect belief that a defendant is required to file an answer prior to the resolution of a motion to dismiss, *see* Fed. R. Civ. P. 12(a)(4) (a responsive pleading is not required until after a motion to dismiss has been denied).

We reject as without merit El's contentions that the district court erred by denying his motion for summary judgment without prejudice as premature, that the district court erred by failing to issue a scheduling order, or that the district judge erred by failing to recuse himself.

AFFIRMED.

Appendix 3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PERNELL SWAHILI EL, Plaintiff, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Defendant.	Case No.: 20-cv-00257-AJB-AGS **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT** **(Doc. No. 34.)**

Before the Court is Defendant San Diego Unified School District's ("Defendant" or "District") motion to dismiss *pro se* Plaintiff Pernell Swahili El's ("Plaintiff") Second Amended Complaint ("SAC"). (Doc. No. 34.) As explained in a prior order in this case, despite the Court's issuance of a briefing schedule for the motion to dismiss, Plaintiff did not file an opposition, and instead, filed various other documents that were not responsive to the issues raised in Defendant's motion. (Doc. No. 46.) Considering Plaintiff's *pro se* status, the Court afforded Plaintiff a final opportunity to submit an opposition to Defendant's motion—this time, specifically instructing that "[n]o later than April 23, 2021, Plaintiff is **DIRECTED** to respond to the arguments raised in Defendant's motion to dismiss the Second Amended Complaint." (*Id.* at 4 (emphasis in original).) Plaintiff did

not file his opposition by the April 23 deadline, and instead filed it four days later. (Doc. No. 51.) The Court, however, accepted his untimely filing in the interest of justice. Defendant thereafter filed its reply to Plaintiff's opposition. For the reasons set forth below, the Court **GRANTS** Defendant's motion and **DISMISSES WITHOUT LEAVE TO AMEND** Plaintiff's SAC.

I. BACKGROUND

Plaintiff, an employee of the San Diego Unified School District, brings this civil action, alleging claims against Defendant for: (1) religious and national origin discrimination, (2) defamation, (3) disparate impact discrimination, (4) disparate treatment discrimination, (5) failure to provide religious reasonable accommodations, (6) conspiracy against rights, pursuant to various federal statutes, as well as for (7) violations of the Constitution of the State of California, and (8) a violation of a Treaty between Morocco and the United States. (Doc. No. 21 at 7–14.) Defendant seeks to dismiss Plaintiff's SAC for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 34.)

II. LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint, i.e. whether the complaint lacks either a cognizable legal theory or facts sufficient to support such a theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (citations omitted). For a complaint to survive a Rule 12(b)(6) motion to dismiss, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In reviewing the motion, the court "must accept as true all of the allegations contained in a complaint," but it need not accept legal conclusions. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). "If the Court finds that the plaintiff did not allege sufficient facts 'to raise a right to relief above the speculative level' and support a cognizable legal theory, it may dismiss the complaint as a matter of law." *Great Minds v.*

previously indicated, "Plaintiff has failed to plead facts demonstrating any religious or national origin discrimination." (*Id.* at 17.) Eighth, and lastly, Defendant contends that Plaintiff's claim of a treaty violation is legally deficient because the 1787 Treaty between the United States and Morocco that Plaintiff cites "does not have anything to do with claims involving harassment, discrimination, or defamation" and "neither Plaintiff nor the District were parties to this Treaty." (*Id.*)

The Court agrees with the above-specified deficiencies in Plaintiff's SAC. Critically, despite being afforded the opportunity, and being specifically instructed, to directly respond to the issues raised in Defendant's motion, Plaintiff's opposition contains only a single objection. (Doc. No. 51.) Plaintiff makes clear that his opposition to the motion is as follows: "Our response is that we object to defendants' [sic] second motion to dismiss as the Defendants [sic] have not verified their response, nor denied and or admitted all the claims." (*Id.* at 1.) Plaintiff's response is unavailing. There is no requirement that Defendant's motion to dismiss pursuant to Rule 12(b)(6) be verified or be filed with a verified response. There is also no requirement that a motion to dismiss contain admissions or denials to Plaintiff's allegations. Consequently, Plaintiff's sole objection to Defendant's motion to dismiss is without merit.

As Plaintiff raised no other objection—despite being ordered to directly respond to the arguments in Defendant's motion—the Court finds that Plaintiff's failure to oppose constitutes a waiver of the issues raised in Defendant's motion to dismiss. *See Qureshi v. Countrywide Home Loans, Inc.*, No. 09–4198, 2010 WL 841669, at *6 n. 2 (N.D. Cal. Mar. 10, 2010) (deeming plaintiff's failure to address, in opposition brief, claims challenged in a motion to dismiss, an "abandonment of those claims") (citing *Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n. 4 (9th Cir. 2005)); *Sportscare of America, P.C. v. Multiplan, Inc.*, No. 2:10–4414, 2011 WL 589955, at *1 (D.N.J. Feb. 10, 2011) ("In most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue."). Consequently, there being no responsive opposition to the substantive arguments in

Office Depot, Inc., 945 F.3d 1106, 1109 (9th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555).

III. DISCUSSION

Through its motion to dismiss, Defendant challenges the sufficiency of Plaintiff's eight causes of action. (Doc. No. 34-1.) First, Defendant argues that Plaintiff's religious and national origin discrimination claims fail because "Plaintiff does not allege that anyone at the District made pejorative remarks about his name, religion, or national origin; nor does he allege any facts demonstrating that anyone knew that his name was associated with a particular religion or ancestry." (*Id.* at 11.) As such, Defendant argues, Plaintiff's allegations lack the requisite nexus to his religion or national origin. (*Id.*) Second, Defendant asserts that Plaintiff's defamation claim fails because "any statement made to the EEOC in response to a charge of discrimination is absolutely privileged" and "even if this were not the case, the alleged statement is not defamatory." (*Id.*) Third, Defendant contends that Plaintiff's disparate impact claim is legally deficient because he has not pled facts demonstrating a facially neutral employment practice that disproportionately affects one protected group over another based on national origin or religion. (*Id.* at 13.)

Fourth, Defendant states that "the SAC does not identify (1) an adverse employment action or (2) a causal connection between an adverse employment action and Plaintiff's religion or national origin." (*Id.* at 14.) Fifth, Defendant maintains that Plaintiff's religious reasonable accommodation claim fails because forcing Defendant to oblige by Plaintiff's request to change his name to one that is not associated with a valid social security card would force Defendant to violate the Internal Revenue code and incur penalties. (*Id.* at 16.) Sixth, Defendant argues that Plaintiff's "conspiracy against rights" claims under 18 U.S.C. §§ 241 and 242 are criminal statutes that do not give rise to civil liability. (*Id.*) Seventh, Defendant asserts that Plaintiff's claims of violations of the California Constitution are without merit because (1) "laws requiring people to pay taxes do not violate the [Free Exercise Clause] of the Constitution," (2) "Plaintiff has not pled facts showing that he was a victim of any crime" for purposes of the "Right of Crime Victims" provision, and (3) as

Defendant's motion to dismiss, the Court finds that Plaintiff has abandoned his claims, and **GRANTS** Defendant's motion to dismiss.[1] Moreover, because Plaintiff has not demonstrated that granting leave to amend would not be futile in this case, the Court declines to permit him leave to amend his SAC.[2]

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's motion, and **DISMISSES WITHOUT LEAVE TO AMEND** Plaintiff's SAC. (Doc. No. 34.) The Clerk of Court is **DIRECTED** to close this case.

IT IS SO ORDERED.

Dated: June 29, 2021

Hon. Anthony J. Battaglia
United States District Judge

[1] While the Court is mindful of Plaintiff's *pro se* status, "courts should not have to serve as advocates for *pro se* litigants." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Indeed, "[h]e who proceeds *pro se* with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to . . . assist and guide the *pro se* layman[.]" *Jacobsen v. Filler*, 790 F.2d 1362, 1365, n. 5 (9th Cir. 1986) (quoting *United States v. Pinkey*, 548 F.2d 305 (10th Cir. 1977)).

[2] Plaintiff has repeatedly failed to comply with the Court's orders regarding his filing deadlines, as well as the substance of his filing. (Doc. Nos. 46, 47, 48, 49, 50.) It therefore does not appear that granting leave to amend would be productive or facilitate resolution of this case.