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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RUBEN ODELL BOULWARE,)	NO. CV 09-4325-R(E)
)	
Plaintiff,)	
)	
v.)	MEMORANDUM AND ORDER DISMISSING
)	
DEPARTMENT OF INSURANCE,)	COMPLAINT WITH LEAVE TO AMEND
et. al.,)	
)	
Defendants.)	
_____)	

For the reasons discussed below, the Complaint is dismissed with leave to amend. See 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b).

PROCEEDINGS

Plaintiff, a state prisoner proceeding pro se, lodged a "Civil Rights Complaint" on June 16, 2009. On June 30, 2009, the Court issued an Order denying Plaintiff leave to file the action without prepayment of the full filing fee, accompanied by an explanatory Attachment ("Attachment"). On August 5, 2009, Plaintiff filed a "Motion for Reconsideration Pursuant to Local Rule 7-18" ("Motion for

1 Reconsideration"). On August 7, 2009, the Court issued an Order
2 permitting Plaintiff to file the Complaint without prepayment of the
3 full filing fee, and the Complaint was filed on that date.

4
5 **BACKGROUND**
6

7 Plaintiff's claims arise out of his conviction in 2003 on two
8 counts of worker's compensation fraud in violation of California
9 Insurance Code section 1871.4(a)(1) and one count of insurance fraud
10 in violation of California Penal Code section 550(a)(1). See People
11 v. Boulware, 2004 WL 2384372 (Cal. Ct. App., Oct. 26, 2004). The
12 worker's compensation fraud convictions were based on evidence that
13 Plaintiff knowingly failed to disclose to examining physicians a
14 previous injury that was material to the evaluation of Plaintiff's
15 worker's compensation claim. The insurance fraud conviction was based
16 on evidence that, in support of Plaintiff's claim concerning an injury
17 allegedly received at a Von's market, Plaintiff submitted a
18 physician's receipt reflecting payment in connection with a different
19 injury.

20
21 On January 5, 2007, this Court entered judgment granting
22 conditional habeas relief with respect to Plaintiff's worker's
23 compensation fraud convictions only. See Boulware v. Ollison, CV 06-
24 3744-R(E). This Court also determined that the evidence sufficed to
25 support the worker's compensation fraud convictions, and that
26 Plaintiff was not entitled to habeas relief on his insurance fraud
27 conviction. The State subsequently announced that it was unable to
28 proceed with a retrial of the worker's compensation counts, and the

1 state court dismissed those counts. See Boulware v. Marshall, 621
2 F. Supp. 2d 882, 886 (C.D. Cal. 2008). The state court resentenced
3 Plaintiff on the insurance fraud count. Id. Plaintiff filed a habeas
4 petition in this Court challenging the resentencing. See Boulware v.
5 Marshall, CV 08-4665-R(E). On December 9, 2008, this Court denied the
6 petition. See Boulware v. Marshall, 621 F. Supp. 2d 882 (C.D. Cal.
7 2008).

8
9 The present Complaint purports to allege civil rights violations
10 pursuant to 42 U.S.C. sections 1983 and 1985(2), violations of the
11 Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.
12 §§ 1961-68, and a state law malicious prosecution claim. Defendants
13 are: (1) California Department of Insurance ("DOI") Commissioner Steve
14 Poizner, in his individual and official capacity; (2) former DOI
15 Commissioners Harry Low and John Garamendi, in their individual
16 capacities only; (3) DOI "fraud division agents" Shawn Ferris, Ruby
17 Favis, Willie Lawrence, Kimberly Staal, Daniel McKerren and Barbra
18 Bridgewater, in their individual and official capacities; (4) twenty
19 insurance companies; (5) Los Angeles County deputy district attorneys
20 Lance Wong and David Wells; (6) private attorney Gene Shioda;
21 (7) private party Paul Cain III; and (8) fictitious "Doe" Defendant
22 DOI agents, insurance companies and deputy district attorneys.

23
24 **SUMMARY OF PLAINTIFF'S ALLEGATIONS**

25
26 The Complaint is somewhat confusing, but appears to allege the
27 following:

28 ///

1 In 1999, Plaintiff allegedly filed a worker's compensation claim
2 after assertedly sustaining an on-the-job injury to his shoulder while
3 working for Defendant Cain (Complaint, pp. 18, 24-25). Defendants
4 Cain and Shioda allegedly delayed the Worker's Compensation Appeals
5 Board ("WCAB") trial for years (id., p. 18). Defendants Cain, Shioda
6 and Staal allegedly attempted to stop the WCAB proceeding by asserting
7 that Plaintiff had committed fraud (id., p. 18). Defendant Shioda
8 allegedly falsely told the California Department of Insurance Fraud
9 Division that Plaintiff was an independent contractor (id., p. 25).
10 Shioda's assertedly fraudulent complaints to the Fraud Division
11 allegedly resulted in an official investigation of Plaintiff (id.,
12 p. 25). Plaintiff alleges that Cain was an "illegally uninsured
13 employer," and that DOI officials had no power to investigate claims
14 of insurance fraud made by an uninsured employer (Complaint, p. 19).
15 Defendants Ferris and Lawrence allegedly caused Plaintiff's parole to
16 be revoked on October 12, 2000 based on assertedly false allegations
17 of worker's compensation fraud, as a result of which Plaintiff
18 allegedly was incarcerated for a year (id., p. 26).

19
20 On January 5, 2000, Plaintiff allegedly cut his finger on a piece
21 of shelving at Von's market (id., p. 19). On January 7, 2000, Von's
22 manager John Robinson allegedly telephoned Plaintiff and instructed
23 Plaintiff to obtain a receipt for the injuries so that Von's could pay
24 Plaintiff (id., p. 19). On January 7, 2000, the office manager at the
25 office of the doctor who was treating Plaintiff's shoulder injury
26 allegedly authorized Irene Ochoa to treat Plaintiff's cut thumb, and
27 allegedly instructed the billing clerk, Maria Alvarez, to write a
28 receipt for this treatment (id., p. 20). On January 10, 2000,

1 Robinson allegedly told Plaintiff the claim was denied (id.).
2

3 On September 13, 2002, a WCAB judge allegedly entered judgment
4 for Plaintiff in the amount of \$20,000 on Plaintiff's worker's
5 compensation claim (id.). On September 17, 2002, Defendants McKerren
6 and Staal interviewed Alvarez (id.). On October 29, 2002, Alvarez
7 allegedly told Defendant McKerren that she did not write or recognize
8 the handwriting on the doctor's receipt given to Plaintiff (id.). On
9 November 6, 2002, Defendants Staal and McKerren allegedly interviewed
10 Robinson concerning Plaintiff's claim regarding the alleged Von's
11 injury (id., p. 21). On December 17, 2002, Defendant Staal allegedly
12 filed a report identifying Cain as a victim of worker's compensation
13 fraud and identifying Von's as the victim of attempted grand theft
14 (id.). On January 7, 2003, Defendants Staal and Wells allegedly
15 obtained a warrant for Plaintiff's arrest, without probable cause, for
16 worker's compensation fraud and insurance fraud (id., pp. 22, 28).
17 Defendants Staal and Wells allegedly omitted facts from the warrant
18 application (id., pp. 28-29). Plaintiff was arrested on January 9,
19 2003 (id., p. 28).
20

21 On July 7, 2003, Defendants Staal and Wells allegedly instructed
22 Alvarez to change Alvarez' initial statement concerning Plaintiff's
23 asserted finger injury (id.). On March 10, 2003, Defendant Wells
24 allegedly instructed Staal to induce Alvarez to change Alvarez'
25 statement identifying the person who wrote the doctor's receipt (id.,
26 p. 22). Defendants Staal and Wells allegedly instructed Alvarez to
27 fabricate her statement (id.). Based on these alleged "fabricated
28 facts and omissions," Plaintiff was "falsely convicted" (id.).

1 The Complaint contains four claims for relief, alleging:
2 (1) violation of RICO, 18 U.S.C. section 1962(b); (2) malicious
3 prosecution; (3) violation of Plaintiff's civil rights protected by
4 the First, Fourth and Eighth Amendments and Due Process, pursuant to
5 42 U.S.C. section 1983; and (4) conspiracy to violate civil rights
6 pursuant to 42 U.S.C. section 1985(3).

7
8 In his RICO claim, Plaintiff alleges that Defendants Poizner,
9 Low, Garamendi, Favis, Ferris, Lawrence, Staal, Bridgewater, McKerren,
10 Wong and Wells, and the Defendant insurance companies, allegedly
11 violated RICO through a pattern of racketeering activity "by allowing
12 private parties (insurance companies) to directly pay the salaries of
13 public prosecutors for the investigation, prosecution, conviction and
14 collection of restitution for insurance fraud related crimes"
15 (Complaint, pp. 15-16). Plaintiff contends that, pursuant to the
16 California Insurance Fraud Prevention Act, California Insurance Code
17 section 1871 et seq., the Defendant insurance companies bear the cost
18 of the administration and operation of the DOI's fraud division
19 pursuant to an alleged "pay-for-prosecutions" scheme (Complaint,
20 pp. 16-18). According to Plaintiff, pursuant to California Insurance
21 Code sections 1872.83(b)(4) and 1872.83(d),¹ Defendants Poizner, Low

22 _____
23 ¹ Section 1872.83(b) establishes a Fraud Assessment
24 Commission for the purpose of establishing and administering an
25 industry assessment to fund "increased investigation and
26 prosecution of workers' compensation fraud, and of willful
27 failure to secure payment of workers' compensation, in violation
28 of Section 3700.5 of the Labor Code." Section 1872.83(b)(4)
provides:

(4) The amount collected, together with the fines
collected for violations of the unlawful acts specified

(continued...)

1 and Garamendi allegedly distributed these assertedly private funds to
2 the DOI Fraud Division and the Los Angeles County District Attorney's
3 Office Worker's Compensation Insurance Fraud Division, and to public
4 prosecutors prosecuting insurance fraud crimes (Complaint, pp. 17-18,

5
6 ¹(...continued)

7 in Sections 1871.4, 11760, and 11880, Section 3700.5 of
8 the Labor Code, and Section 549 of the Penal Code,
9 shall be deposited in the Workers' Compensation Fraud
10 Account in the Insurance Fund, which is hereby created,
11 and may be used, upon appropriation by the Legislature,
12 only for enhanced investigation and prosecution of
13 workers' compensation fraud and of willful failure to
14 secure payment of workers' compensation as provided in
15 this section.

16
17 Section 1872.83(d) provides:

18 After incidental expenses, at least 40 percent of the
19 funds to be used for the purposes of this section shall
20 be provided to the Fraud Division of the Department of
21 Insurance for enhanced investigative efforts, and at
22 least 40 percent of the funds shall be distributed to
23 district attorneys, pursuant to a determination by the
24 commissioner with the advice and consent of the
25 division and the Fraud Assessment Commission, as to the
26 most effective distribution of moneys for purposes of
27 the investigation and prosecution of workers'
28 compensation fraud cases and cases relating to the
willful failure to secure the payment of workers'
compensation. Each district attorney seeking a portion
of the funds shall submit to the commissioner an
application setting forth in detail the proposed use of
any funds provided. A district attorney receiving
funds pursuant to this subdivision shall submit an
annual report to the commissioner with respect to the
success of his or her efforts. Upon receipt, the
commissioner shall provide copies to the Fraud Division
and the Fraud Assessment Commission of any application,
annual report, or other documents with respect to the
allocation of money pursuant to this subdivision. Both
the application for moneys and the distribution of
moneys shall be public documents. Information
submitted to the commissioner pursuant to this section
concerning criminal investigations, whether active or
inactive, shall be confidential.

1 28). Pursuant to this alleged "racketeering scheme," Defendants
2 assertedly falsely accused, arrested, prosecuted and convicted
3 Plaintiff for worker's compensation fraud and insurance fraud (id.,
4 pp. 10-12).

5
6 In his malicious prosecution claim, Plaintiff alleges that
7 Defendants Garamendi, Favis, Ferris, Lawrence, Staal, McKerran and
8 Bridgewater conducted an investigation of Plaintiff for worker's
9 compensation fraud against an allegedly "illegally uninsured
10 employer," Defendant Cain (Complaint, p. 11). These Defendants
11 allegedly conducted the investigation without probable cause and with
12 malice, and allegedly instituted the criminal case against Plaintiff
13 falsely (id.). Plaintiff alleges that the worker's compensation fraud
14 proceedings "ended in the Plaintiff's favor when the Deputy District
15 Attorney dismissed both counts of workers compensation fraud . . ."
16 (id., p. 12).

17
18 In his civil rights claim, Plaintiff alleges that Defendants
19 Favis, Ferris, Staal, Lawrence, Bridgewater, McKerren, Cain, Shioda,
20 and Wells conspired to prosecute Plaintiff falsely for worker's
21 compensation fraud in retaliation for Plaintiff's filing of a worker's
22 compensation claim, allegedly in violation of the First Amendment, the
23 Fourth Amendment, the Eighth Amendment, and Due Process (id., pp. 12-
24 15, 31-32).

25 ///

26 ///

27 In his "civil conspiracy" claim, brought pursuant to 42 U.S.C.
28 section 1985(3), Plaintiff alleges that Defendants conspired to

1 "annul" Plaintiff's \$20,000 WCAB judgment, and to prosecute Plaintiff
2 falsely for worker's compensation fraud and insurance fraud,
3 assertedly causing Plaintiff to be incarcerated for "well over 6
4 years" (id., pp. 33-34).

5
6 Plaintiff seeks injunctive relief on his RICO claim, in the form
7 of an order: (1) directing Defendants Poizner, Wong, Wells and/or
8 their successors not to retaliate against Plaintiff for the filing of
9 this lawsuit; (2) directing Defendants Poizner, Ferris, Favis, Staal,
10 Lawrence, McKerren, Bridgewater, Wong, Wells, "Fraud Division," and
11 "Los Angeles District Attorneys Workers Compensation Fraud Division"²
12 "immediately [to] cease the 'pay-for-prosecutions program' that allows
13 private funds of the 'defendant insurers' to pay the salaries of
14 public prosecutors to prosecute and convict persons of insurance fraud
15 related crimes"; and (3) directing "named and unnamed insurance
16 companies" authorized to write insurance in the State of California
17 "immediately [to] cease the practice of using their monies to pay
18 public prosecutors to investigate, prosecute and convict persons of
19 insurance fraud related crime" (Complaint, pp. 35-36).

20
21 Plaintiff seeks declaratory relief in the form of a declaration
22 that: (1) Defendants Poizner, Low, Garamendi, Favis, Ferris, Lawrence,
23 Staal, Bridgewater, McKerren, and fictitious Defendants "of the Fraud
24 Division" purportedly lacked statutory authority or probable cause "to
25 investigate an illegally uninsured employer[']s allegations of

26
27 ² It is unclear whether Plaintiff intends to sue
28 separately the DOI Fraud Division or the Los Angeles County
District Attorney's Office Worker's Compensation Fraud Division.

1 insurance fraud, and Von's claim was not an insurance claim";
2 (2) Defendants Low, Garamendi, Favis, Ferris, Lawrence, Staal,
3 Bridgewater, McKerren, and fictitious Defendants "of the Fraud
4 Division" assertedly knew that Defendant Cain "was in fact illegally
5 uninsured prior to initiating the criminal investigation into
6 worker[']s compensation insurance fraud"; (3) Defendants Poizner,
7 Garamendi, and Low allegedly "received private funds from 'defendant
8 insurers' for the purpose of investigating, prosecuting, and
9 convicting persons accused of insurance fraud related crimes" and
10 "used these private funds to pay the salaries of public prosecutors";
11 (4) both counts of worker's compensation fraud convictions were
12 reversed and dismissed on May 2, 2007, by the Los Angeles County
13 District Attorney's Office "in amended complaint BA241206"; (5) "the
14 claim filed by the Plaintiff against Von's was not an insurance claim
15 pursuant to California Penal Code section 550(a)(1)"; (6) Defendants
16 "directly or indirectly injured the plaintiff's business and property
17 by violating plaintiff's First, Fourth, Eighth and Fourteenth
18 Amendments [sic] to the United States Constitution"; and (7) the
19 Department of Insurance, Fraud Division, named and unnamed "defendant
20 insurers" and the Los Angeles County District Attorney's Office
21 Worker's Compensation Fraud Division "is [sic] an enterprise pursuant
22 to RICO statute" (id., pp. 36-37).

23
24 Plaintiff also seeks: (1) compensatory damages in the sum of
25 twenty-five million dollars, purportedly to be trebled under RICO;
26 (2) the \$20,000 WCAB judgment; (3) economic damages in the sum of
27 \$249,600 based on Plaintiff's alleged loss of business opportunities
28 as the alleged owner-operator of a trucking company; (4) punitive

1 damages in the sum of \$1 million each from Defendants Ferris, Favis
2 and Staal; and (5) punitive damages in the sum of \$500,000 each from
3 Defendants Lawrence, McKerren, Bridgewater, Shioda and Cain (id.,
4 pp. 38-39).

6 DISCUSSION

8 I. Eleventh Amendment

9
10 The Eleventh Amendment bars suits in federal court for money
11 damages against state officials in their official capacities. See
12 Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989);
13 Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999), cert. denied,
14 528 U.S. 816 (1999); Bair v. Krug, 853 F.2d 672, 675-76 (9th Cir.
15 1998) (Eleventh Amendment barred RICO and state law claims against
16 state officials in their official capacities). Thus, Plaintiff may
17 not sue the state official defendants for damages in their official
18 capacities.³

19 ///

20 ///

21 ///

22 II. Heck v. Humphrey Bars Plaintiff's Claims Implying the Invalidity 23 of His Insurance Fraud Conviction.

25
26 ³ In his Motion for Reconsideration, Plaintiff contends
27 that his official capacity claims against Defendants Poizner,
28 Favis, Ferris, Lawrence, Staal, McKerren and Bridgewater are
limited to claims for injunctive and declaratory relief only,
pursuant to Ex Parte Young, 209 U.S. 123 (1908). However, this
alleged limitation is not clear from the Complaint.

1 In Heck v. Humphrey, 512 U.S. 477 (1994), the United States
2 Supreme Court held that, in order to pursue a claim for damages
3 arising out of an allegedly unconstitutional conviction or
4 imprisonment, or for other harm caused by actions whose unlawfulness
5 would render a conviction or sentence invalid, a civil rights
6 plaintiff must prove that the conviction or sentence has been
7 "reversed on direct appeal, expunged by executive order, declared
8 invalid by a state tribunal authorized to make such determination, or
9 called into question by a federal court's issuance of a writ of habeas
10 corpus." Id. at 486-87. "A claim for damages bearing that
11 relationship to a conviction or sentence that has not been so
12 invalidated is not cognizable under § 1983." Id. at 487. Heck
13 applies to claims for conspiracy brought pursuant to 42 U.S.C. section
14 1985(3). See McQuillion v. Schwarzenegger, 369 F.3d 1091, 1097 n.4
15 (9th Cir. 2004). Heck also applies to RICO claims. See Oberg v.
16 Ausotin County, 310 Fed. App'x 144, 145 (9th Cir. 2009); Swan v.
17 Barbadoro, 520 F.3d 24, 25 (1st Cir. 2008).

18
19 The Complaint clearly implicates the validity of Plaintiff's
20 insurance fraud conviction. Plaintiff does not plead that any court
21 has overturned his insurance fraud conviction or otherwise invalidated
22 it. Hence, all of Plaintiff's claims implicating the validity of his
23 insurance fraud conviction are barred by Heck. See Heck, 512 U.S. at
24 479, 490 (upholding dismissal of civil rights action for damages
25 alleging that two prosecutors and a police investigator had engaged in
26 an unlawful investigation and arrest, knowingly destroyed exculpatory
27 evidence, and caused an unlawful voice identification procedure to be
28 used at the plaintiff's trial); Guerrero v. Gates, 442 F.3d 697, 703-

1 04 (9th Cir. 2006) (claims for false arrest, malicious prosecution,
2 and conspiracy to bring false charges against plaintiff barred by
3 Heck); Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996) (where
4 plaintiff entered "Alford" plea⁴ to criminal charges, "no question"
5 that Heck barred plaintiff's claims that defendants lacked probable
6 cause to arrest him and brought unfounded criminal charges against
7 him).

8
9 **III. The Defendant Prosecutors Are Immune From Liability for Damages**
10 **for Initiating and Pursuing the Criminal Proceedings Against**
11 **Plaintiff.**

12
13 A prosecutor is shielded by absolute prosecutorial immunity for
14 acts taken in his or her capacity as an advocate for the state "when
15 performing the traditional functions of an advocate" in initiating and
16 pursuing a criminal prosecution. See Kalina v. Fletcher, 522 U.S.
17 118, 123-25, 131 (1997) (prosecutor immune for acts in connection with
18 preparation and filing of information and motion for arrest warrant,
19 but not immune for vouching personally for allegations contained in
20 certification supporting issuance of arrest warrant); Buckley v.
21 Fitzsimmons, 509 U.S. 259, 273 (1993) (immunity extends to
22 prosecutor's "professional evaluation of evidence assembled by the
23 police and appropriate preparation for its presentation at trial or
24 before a grand jury"); Burns v. Reed, 500 U.S. 478, 491-93 (1991)
25 (prosecutor immune for acts of appearing before judge and presenting
26 evidence in support of motion for search warrant, but not immune for

27
28

⁴ See North Carolina v. Alford, 400 U.S. 25 (1970).

1 giving legal advice to police). Such immunity applies even in cases
2 involving allegations of malice, bad faith, or conspiracy. See
3 Ashelman v. Pope, 793 F.2d 1072, 1077-78 (9th Cir. 1986) (en banc).
4 Such immunity applies to Plaintiff's RICO claim as well as to his
5 civil rights claims. See Van Beek v. AG-Credit Bonus Partners, 316
6 Fed. App'x 554, 555-56 (9th Cir. 2008).

7
8 Prosecutorial immunity does not bar claims for injunctive and
9 related declaratory relief. See Roe v. City and County of San
10 Francisco, 109 F.3d 578, 586 (9th Cir. 1997). Plaintiff purports to
11 sue Defendants Wong and Wells in their official capacities only for
12 declaratory and injunctive relief pursuant to section 1983 and 28
13 U.S.C. § 2201 (Complaint, p. 7). However, the Complaint does not
14 appear to seek injunctive relief on Plaintiff's civil rights claims,
15 but only on his RICO claim (Complaint, pp. 35-36). Plaintiff also
16 appears to seek compensatory damages against all Defendants (see id.,
17 p. 38). To the extent Plaintiff seeks damages against the Defendant
18 prosecutors for acts taken in connection with the prosecution of the
19 criminal proceedings against Plaintiff, those Defendants are immune
20 from suit.

21
22 **IV. Plaintiff's RICO Claim Is Insufficient.**

23
24 The elements of a RICO claim are "(1) conduct (2) of an
25 enterprise (3) through a pattern (4) of racketeering activity (known
26 as 'predicate acts') (5) causing injury to plaintiff's 'business or
27 property.'" Living Designs, Inc. v. E.I. Dupont de Nemours and Co.,
28 431 F.3d 353, 361 (9th Cir. 2005), cert. denied, 547 U.S. 1192 (2006).

1 For purposes of RICO, "racketeering activity" means: (1) "any act or
2 threat involving murder, kidnapping, gambling, arson, robbery,
3 bribery, extortion, dealing in obscene matter, or dealing in a
4 controlled substance or listed chemical . . . which is chargeable
5 under State law and punishable by imprisonment for more than one
6 year"; and (2) any act indictable under a number of specified federal
7 criminal statutes. See 18 U.S.C. § 1961(1). A "pattern of
8 racketeering activity" requires at least two predicate acts of
9 racketeering activity. 18 U.S.C. § 1961(5). Plaintiff does not
10 expressly identify any particular RICO predicate acts, but appears to
11 base his RICO claim on his allegations concerning Defendants'
12 enforcement of California Insurance Code section 1872.83, and on all
13 of the other allegations of the Complaint, which he incorporates in
14 toto into his RICO claim (see Complaint, pp. 7-8, 10).

15
16 To the extent Plaintiff bases his RICO claim on allegations that
17 the assessment provisions of California's Insurance Fraud Protection
18 Act improperly permit private funding of public insurance fraud
19 prosecutions in general, the McCarran-Ferguson Act, 15 U.S.C. section
20 1012, precludes such a claim. The McCarran-Ferguson Act provides,
21 with limited exceptions not relevant here, that "[n]o Act of Congress
22 shall be construed to invalidate, impair, or supersede any law enacted
23 by any State for the purpose of regulating the business of insurance,
24 or which imposes a fee or tax upon such business, unless such Act
25 specifically relates to the business of insurance" 15 U.S.C.
26 § 1012(b). The Act "precludes application of a federal statute in
27 face of state law enacted for the purpose of regulating the business
28 of insurance, if the federal measure does not specifically relate to

1 the business of insurance, and would invalidate, impair, or supersede
2 the State's law." Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999)
3 (citations, quotations and brackets omitted). "RICO is not a law that
4 'specifically relates to the business of insurance.'" See id. "A
5 claim is reverse-preempted by McCarran-Ferguson when a federal law of
6 general applicability conflicts with a state law relating to the
7 business of insurance and when applying the federal law would
8 'frustrate any declared state policy or interfere with a State's
9 administrative scheme.'" Ojo v. Farmer's Group, Inc., 565 F.3d 1175,
10 1180 (9th Cir. 2009) (quoting Humana Inc. v. Forsyth, 525 U.S. at
11 310). Application of RICO to hold Defendants liable for enforcing the
12 assessment provisions of the California Insurance Fraud Prevention Act
13 would interfere with and impair enforcement of California's Insurance
14 Fraud Prevention Act.

15
16 To the extent Plaintiff contends Defendants assertedly
17 administered the Insurance Fraud Protection Act so as to fund an
18 allegedly meritless investigation and prosecution of Plaintiff, or
19 otherwise subjected Plaintiff to false arrest, fabrication of evidence
20 and malicious prosecution, Plaintiff's allegations fail to state a
21 claim under RICO. Malicious prosecution does not qualify as a RICO
22 "predicate act." See Hornung v. Madarang, 2006 WL 3190671, at *8
23 (N.D. Cal. Nov. 2, 2006); Von Bulow v. Von Bulow, 657 F. Supp. 1134,
24 1143-46 (S.N.D.Y. 1987). False arrest and "evidence planting" also do
25 not qualify. See Slade v. Gates, 2002 WL 31357043, at *5 (C.D. Cal.
26 Oct. 2, 2002).

27
28 To the extent Plaintiff simply incorporates his other allegations

1 into his RICO claim, such "shotgun" pleading is insufficient to plead
2 a RICO claim. See Savage v. Council on American-Islamic Relations,
3 Inc., 2008 WL 2951281, at *14 (N.D. Cal. July 25, 2008) (RICO claim
4 insufficient where plaintiff set forth a "redundant narrative of
5 allegations and conclusions of law, but [made] no attempt to allege
6 what facts are material to his claims under the RICO statute, or what
7 facts are used to support what claims under particular subsections of
8 RICO"); Federal Reserve Bank of San Francisco v. HK Systems, 1997 WL
9 227955, at *3 (N.D. Cal. Apr. 24, 1997) (complaint insufficient for
10 failure to "identify exactly which acts are 'predicate acts' for RICO
11 liability").

12
13 To the extent Plaintiff bases his RICO claim on alleged civil
14 rights violations, Plaintiff's RICO claim is insufficient. "Civil
15 rights violations and injury to reputation do not fall within the
16 statutory definition of 'racketeering activity,'" and hence are not
17 predicate acts for RICO purposes. See Bowen v. Oistead, 125 F.3d 800,
18 806 (9th Cir. 1997), cert. denied, 524 U.S. 938 (1998). To the extent
19 Plaintiff sues state officials in their official capacities based on
20 any alleged predicate act requiring malice or proof of specific intent
21 to defraud, Plaintiff's RICO claim is insufficient. "[G]overnment
22 entities are incapable of forming [the] malicious intent necessary to
23 support a RICO action." Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir.
24 1996), cert. denied, 520 U.S. 1268 (1997) (citation omitted); see also
25 Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d

1 397, 404 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992).⁵

2
3 To the extent Plaintiff sues for violation of section 1962(b) of
4 RICO, the Complaint fails to state a claim. Section 1962(b) of RICO
5 makes it unlawful "for any person through a pattern of racketeering
6 activity or through collection of an unlawful debt to acquire or
7 maintain, directly or indirectly, any interest in or control of any
8 enterprise which is engaged in, or the activities of which affect,
9 interstate or foreign commerce." To state a RICO claim for violation
10 of 18 U.S.C. section 1962(b), a plaintiff must allege: (1) the
11 defendant's activity leading to the defendant's control or acquisition
12 over a RICO enterprise; and (2) an injury resulting from the
13 defendant's control or acquisition of a RICO enterprise. Wagh v.
14 Metris Direct, Inc., 363 F.3d 821, 830 (9th Cir. 2003), cert. denied,
15 541 U.S. 1043 (2004), overruled on other grounds, Odom v. Microsoft
16 Corp., 486 F.3d 541, 551 (9th Cir.), cert. denied, 128 S. Ct. 464
17 (2007) (en banc).⁶ The plaintiff must allege "a specific nexus
18 between the control of the enterprise and the racketeering activity."
19 Id. (citation and internal quotations omitted). The plaintiff also
20 must allege that the defendant's acquisition or control of the
21 enterprise injured the plaintiff "separate and apart from any injury

22 _____
23 ⁵ As Plaintiff appears to recognize (see Motion for
24 Reconsideration, p. 4), Plaintiff's claims against state
25 officials in their official capacities are construed as claims
26 against the state. See Kentucky v. Graham, 473 U.S. 159, 165-66
27 (1985).

28 ⁶ Congress enacted section 1962(b) to deal primarily with
"situations in which criminal methods were employed to take
control of legitimate businesses." Three Rivers Provider
Network, Inc. v. Meritain Health, Inc., 2008 WL 2872664, at *7
(S.D. Cal. July 23, 2008).

1 resulting from the alleged pattern of racketeering." Three Rivers
2 Provider Network, Inc. v. Meritain Health, Inc., 2008 WL 2872664, at
3 *13 (S.D. Cal. July 23, 2008). Here, Plaintiff does not allege how
4 each RICO Defendant's alleged conduct assertedly led to that
5 Defendant's control or acquisition over a RICO enterprise, and does
6 not allege actionable injury resulting from any such control or
7 acquisition.

8
9 **V. Plaintiff's Malicious Prosecution Claim Is Insufficient.**

10
11 **A. The Public Employee Defendants Are Immune.**

12
13 Under California Government Code section 821.6, "[a] public
14 employee is not liable for injury caused by his instituting or
15 prosecuting any judicial or administrative proceeding within the scope
16 of his employment, even if he acts maliciously and without probable
17 cause." A "public employee" is an employee of a public entity such as
18 the state, a city or a county. See Cal. Gov't Code §§ 811.2, 811.4.
19 Hence, the Defendant public employees are immune from suit for
20 malicious prosecution. See Blankenhorn v. City of Orange, 485 F.3d
21 463, 488 (9th Cir. 2007) (holding, however, that section 821.6 does
22 not immunize public employees for tortious conduct occurring during an
23 arrest); Poppell v. City of San Diego, 149 F.3d 951, 970 (9th Cir.
24 1998) (zoning official immune from liability for infliction of
25 emotional distress for referring alleged zoning violations to city
26 attorney for prosecution); Martinez v. City of Los Angeles, 141 F.3d
27 1373, 1379 (9th Cir. 1998) (under section 821.6, a police officer may
28 not be held liable for malicious prosecution).

1 **B. Plaintiff Has Failed to Plead Sufficiently a Favorable**
2 **Termination.**

3
4 To allege malicious prosecution, a plaintiff must allege that the
5 prior proceeding terminated in his or her favor and that the
6 termination reflected the merits of the action and the plaintiff's
7 innocence of the misconduct alleged. See Siebel v. Mittlesteadt,
8 41 Cal. 4th 735, 741, 62 Cal. Rptr. 3d 155, 161 P.3d 735 (2007)
9 (citation and internal quotations omitted). "Favorable termination is
10 an essential element of the tort of malicious prosecution, and it is
11 strictly enforced." StaffPro, Inc. v. Elite Show Services, Inc.,
12 136 Cal. App. 4th 1392, 1400, 39 Cal. Rptr. 3d 682 (2006) (citation
13 and internal quotations omitted). "If the resolution of the
14 underlying action leaves some doubt concerning plaintiff's innocence
15 or liability, it is not a favorable termination sufficient to allow a
16 cause of action for malicious prosecution." Pattiz v. Minye, 61 Cal.
17 App. 4th 822, 826, 71 Cal. Rptr. 2d 802 (1998); see also Awabdy v.
18 City of Adelanto, 368 F.3d 1062, 1066, 1068 (9th Cir. 2004).

19
20 Plaintiff has failed to plead sufficiently a favorable
21 termination with respect to his convictions. Plaintiff's insurance
22 fraud conviction remains extant, barring any claim for malicious
23 prosecution based on that conviction. See Yount v. City of
24 Sacramento, 43 Cal. 4th 885, 902, 76 Cal. Rptr. 3d 787, 183 P.3d 471
25 (2008), cert. denied, 129 S. Ct. 905 (2009) (principles espoused in
26 Heck also apply to Plaintiff's state law tort claims); Susag v. City
27 of Lake Forest, 94 Cal. App. 4th 1401, 1412-13, 115 Cal. Rptr. 2d 269
28 (2002) (same); Korbel v. Chou, 27 Cal. App. 4th 1427, 1431-32, 33 Cal.

1 Rptr. 2d 190 (1994) (“[i]f the accused were actually convicted, the
2 presumption of his [or her] guilt or of probable cause for the charge
3 would be so strong as to render wholly improper any action against the
4 instigator of the charge”) (citation and internal quotations omitted).

5
6 Nor has Plaintiff pleaded sufficiently a favorable termination
7 with respect to his worker’s compensation fraud convictions. This
8 Court’s order granting conditional habeas relief does not constitute a
9 favorable termination. See DiBlasio v. City of New York, 102 F.3d
10 654, (2d Cir. 1996). Although in subsequent state court proceedings
11 the trial court dismissed the worker’s compensation fraud counts
12 pursuant to the prosecution’s statement of inability to proceed on
13 those counts, that dismissal does not, without more, demonstrate the
14 requisite favorable termination.⁷ “[A] dismissal in the interests of
15 justice satisfies [the favorable termination] requirement if it
16 reflects the opinion of the prosecuting party or the court that the
17 action lacked merit or would result in a decision in favor of the
18 defendant.” Awabdy v. City of Adelanto, 368 F.3d at 1068 (citations
19 omitted); Jaffe v. Stone, 18 Cal. 2d 146, 150-51, 114 P. 2d 335
20 (1941). Plaintiff alleges no facts plausibly suggesting that
21 dismissal of the worker’s compensation charges reflected the opinion
22 of the prosecutor or the state court that the action lacked merit.
23 See generally Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (the plaintiff
24 must plead facts, rather than conclusions, and the facts plausibly

25
26 ⁷ The court apparently dismissed the worker’s
27 compensation fraud counts pursuant to California Penal Code
28 section 1385, which permits the court, on its own motion or on
application of the prosecutor, to dismiss an action “in
furtherance of justice.”

1 must suggest an entitlement to relief). Moreover, when this Court
2 granted habeas relief on the ground of instructional error, the Court
3 also ruled the evidence sufficient to support the worker's
4 compensation fraud convictions, a conclusion wholly inconsistent with
5 any allegation that Plaintiff was innocent of worker's compensation
6 fraud. Therefore, Plaintiff has failed to plead a cognizable state
7 law malicious prosecution claim.

8
9 To the extent Plaintiff asserts a constitutional malicious
10 prosecution claim, the Complaint is also insufficient. To assert a
11 constitutional malicious prosecution claim, a plaintiff must allege,
12 among other things, that the underlying proceeding terminated "in such
13 a manner as to indicate [the plaintiff's] innocence." Awabdy v. City
14 of Adelanto, 368 F.3d at 1068 (citation and internal quotations
15 omitted). As discussed herein, the Complaint fails to plead facts
16 showing any termination indicating Plaintiff's innocence.

17
18 **VI. Plaintiff's Section 1985(3) Claim Is Insufficient.**

19
20 In order to state a claim under 42 U.S.C. section 1985(3),
21 Plaintiff must allege a conspiracy to deprive Plaintiff of his civil
22 rights, motivated by class-based, invidious animus. See Bray v.
23 Alexandria Women's Health Clinic, 506 U.S. 263, 267-68 (1993); Griffin
24 v. Breckenridge, 403 U.S. 88, 101-02 (1971); Butler v. Elle, 281 F.3d
25 1014, 1028 (9th Cir. 2002). The Complaint contains no such
26 allegations.

27 ///

28 ///

1 **CONCLUSION AND ORDER**

2
3 The Complaint is dismissed with leave to amend. If Plaintiff
4 still wishes to pursue this action, he is granted twenty (20) days
5 from the date of this Memorandum and Order within which to file a
6 First Amended Complaint. The First Amended Complaint shall be
7 complete in itself. It shall not refer in any manner to any prior
8 complaint. Failure to file timely a First Amended Complaint may
9 result in the dismissal of this action.

10
11 IT IS SO ORDERED.

12
13 DATED: October 8, 2009.

14
15 

16 _____
17 MANUEL L. REAL
18 UNITED STATES DISTRICT JUDGE

19
20 PRESENTED this 6th day of
21 October, 2009, by:

22
23 _____/S/_____
24 CHARLES F. EICK
25 UNITED STATES MAGISTRATE JUDGE