

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELNY,
Plaintiff,

v.

EDMUND G. BROWN, et al.,
Defendants.

Case No. [17-cv-07357-RS](#)

**ORDER GRANTING MOTION TO
DISMISS CORRECTED FIRST
AMENDED COMPLAINT**

I. INTRODUCTION

Plaintiff Michael Zeleny brings this action against Attorney General Xavier Becerra, the City of Menlo Park (the “City”), Commander of the Menlo Park Police Department Dave Bertini, and the venture capitalist firm New Enterprise Associates (“NEA”) (collectively, “Defendants”). He advances a number of constitutional claims associated with municipal efforts to prevent him from engaging in public protest while carrying an unloaded firearm. NEA moves to dismiss the two claims advanced against it. For the reasons set forth below, the motion to dismiss is granted. Zeleny is granted leave to amend with respect to his claim under 42 U.S.C. § 1983, however the 42 U.S.C. § 1985 claim is dismissed without leave to amend.

II. BACKGROUND

A. Procedural Background

Zeleny filed this action in federal court in December 2017. Then California Governor Edmund G. Brown, Jr. was among the defendants named in the initial complaint, however NEA was not included as a defendant at that time. Governor Brown was subsequently dismissed from

1 the action. Approximately fifteen months after the filing of the original complaint, the parties to
2 the action at that time stipulated to allow Zeleny to amend his complaint to add NEA as a
3 defendant. This stipulation was granted and Zeleny’s First Amended Complaint was deemed filed.
4 He subsequently filed a Corrected First Amended Complaint (“CFAC”), which is now the
5 operative complaint. The CFAC advances two claims against NEA for conspiracy to interfere with
6 Zeleny’s civil rights under 42 U.S.C. §§ 1983 and 1985.

7 **B. Factual Background¹**

8 Since 2005, Zeleny has conducted a series of public protests in Menlo Park against NEA
9 and its affiliates for their financial backing of Min Zhu (“Zhu”) and his company. The impetus for
10 these protests is Zhu’s alleged abuse of his daughter when she was a minor. In an effort to draw
11 attention to his protests, Zeleny began openly carrying unloaded firearms during his
12 demonstrations. According to Zeleny, NEA conspired with the City to stifle his protests against
13 the company. He specifically alleges that, in 2009, NEA met with representatives of the City and
14 entered into a “tacit or explicit agreement” to prevent him from protesting and carrying a firearm.
15 CFAC ¶¶ 136, 138. Zeleny further contends that internal documents reveal that by 2010 the City
16 had developed a “firm solution” to end Zeleny’s protests. Id. ¶ 138.

17 In furtherance of this purported conspiracy, NEA engaged in a year-long surveillance
18 effort designed to track Zeleny’s online and in-person activities and transmitted this information to
19 the City. Representatives of the City also gave NEA “direct access to police officials, including
20 their private cell phone numbers” and encouraged the company to contact the police if Zeleny
21 approached NEA’s offices. Id. ¶ 139(c). NEA did in fact call the police on multiple occasions
22 when Zeleny appeared near the company’s offices. Zeleny further alleges NEA worked with the
23 City to prosecute him without basis for carrying a concealed firearm. NEA’s representatives
24 followed the trial and met frequently with the Deputy District Attorney, who regularly referred to
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27 ¹ The facts included in this section are taken from the CFAC and presumed true for the purpose of
28 this motion to dismiss.

1 NEA as her “client.” This prosecution ended in an acquittal of Zeleny in December 2014.

2 During the course of the prosecution, the State of California enacted laws which made the
3 open carry of an unloaded handgun illegal. California adopted similar restrictions with respect to
4 rifles, with an exception for authorized participants in certain types of public events. Based on
5 these statutes, the City adopted a municipal policy requiring individuals to obtain a permit if they
6 wished openly to carry a firearm during a demonstration. Since 2015, Zeleny has repeatedly
7 applied to the city for entertainment permits in connection with his armed protests, which have all
8 been denied without explanation. The CFAC alleges NEA conspired with the City to delay and
9 derail his applications, and that the true reason for these denials was simply to stop him from
10 protesting against the company.

11 III. LEGAL STANDARD

12 Under the Federal Rules of Civil Procedure, a complaint must contain “a short and plain
13 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). While
14 “detailed factual allegations” are not required, a complaint must have sufficient factual allegations
15 to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
16 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A motion to dismiss under
17 Rule 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. Dismissal under
18 Rule 12(b)(6) may be based on either the “lack of a cognizable legal theory” or on “the absence of
19 sufficient facts alleged” under a cognizable legal theory. *UMG Recordings, Inc. v. Shelter Capital
20 Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). When evaluating such a motion, courts
21 generally “accept all factual allegations in the complaint as true and construe the pleadings in the
22 light most favorable to the nonmoving party.” *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir.
23 2005). Courts, however, need not accept legal conclusions as true. *Iqbal*, 556 U.S. at 678.
24 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
25 statements, do not suffice.” *Id.*

26 IV. DISCUSSION

27 NEA advances three primary arguments in its motion to dismiss. First, it argues both of the

1 claims advanced against it are barred by the statute of limitations. Second, the company contends,
2 Zeleny’s 1983 claim is barred by the Noerr-Pennington doctrine. Finally, NEA argues the CFAC
3 fails to state a claim under Section 1985 because Zeleny has not alleged he is a member of a
4 protected class.

5 **A. Statute of Limitations**

6 A cause of action may be dismissed under Rule 12(b)(6) for failure to state a claim where
7 “the running of the statute is apparent on the face of the complaint.” Von Saher v. Norton Simon
8 Museum of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010) (quoting Huynh v. Chase
9 Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006)). In other words, a complaint should be
10 dismissed only if “it appears beyond doubt” the plaintiff will be unable to establish a timely claim.
11 Id. (quoting Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206 (9th Cir. 1995)). Where
12 the timeliness of a claim turns on when it began to accrue, the claim should be dismissed only if
13 the facts are so clear that the question of accrual can be decided as a matter of law. Mir v. Deck,
14 No. SACV 12-1629-RGK (SH), 2013 WL 4857673, at *5 (C.D. Cal. Sept. 11, 2013).

15 **1. Date of the Last Overt Act**

16 For conspiracy claims arising under Sections 1983 and 1985, the statute of limitations
17 begins to run from “the last overt act alleged from which damage could have flowed.” Lambert v.
18 Conrad, 308 F.2d 571, 571 (9th Cir. 1962). A plaintiff must allege a specific overt act occurring
19 within the statutory period and cannot rest on a “general allegation that the conspiracy continued
20 to a date within the limitations period.” Id. Neither Section 1983 nor Section 1985 contains a
21 federal statute of limitations, so courts apply the forum state’s statute of limitations for personal
22 injury claims. Accordingly, the statute of limitations for these claims is two years. See Cal. Civ.
23 Proc. Code § 335.1; Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004) (“For actions under 42
24 U.S.C. § 1983, courts apply the forum state’s statute of limitations for personal injury actions,
25 along with the forum state’s law regarding tolling, including equitable tolling, except to the extent
26 any of these laws is inconsistent with federal law.”).

27 NEA argues that, because none of the overt acts alleged in the CFAC occur after March 29,
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1 2017—the date two years before the parties stipulated to amend the complaint to include NEA—
2 these two claims are barred by the two-year statute of limitations. Zeleny responds that the CFAC
3 does include conduct occurring after March 2017, but fails to cite to any portion of the complaint
4 which supports this statement. Instead, he falls back on the allegation that NEA and the City
5 worked to thwart his permit application at each stage of the appeal process and requests judicial
6 notice that the City issued its final denial of Zeleny’s permit application on August 19, 2017. NEA
7 does not appear to oppose this request for judicial notice and attached a copy of the document to
8 which Zeleny appears to be referring as Exhibit A to its reply. The document in question is dated
9 August 29, 2017. Judicial notice of the August 29, 2017 denial of Zeleny’s permit appeal is
10 granted, accordingly Zeleny has alleged at least one overt act occurring within the statute of
11 limitations period.

12 **2. Delayed Discovery Rule**

13 Even if Zeleny failed to plead an overt act occurring after March 2017, the delayed
14 discovery rule casts doubt on whether this is the correct statute of limitations period. Under
15 California’s delayed discovery rule, a claim does not accrue “until the plaintiff discovers, or has
16 reason to discover, the cause of action.” *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 807
17 (Cal. 2005). In other words, the claim accrues once the plaintiff “has reason at least to suspect a
18 factual basis for its elements.” *Id.* Zeleny argues he did not discover evidence that NEA was
19 involved in the alleged conspiracy to interfere with his First Amendment rights until the City
20 produced such evidence during discovery. In other words, he did not have evidence of an actual
21 “meeting of the minds” between NEA and the City. *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir.
22 1983) (affirming summary judgment where the plaintiff did not have evidence of a “meeting of the
23 minds”).

24 Although Zeleny’s assertion that he became aware of a possible claim against NEA only
25 after obtaining discovery in this action is somewhat dubious,² it is not clear on the face of the

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27 ² Zeleny’s own admissions reveal that he suspected NEA was working with the City to stop his
28 protest before any discovery was produced in this action. Indeed, in his June 7, 2018 Case
Management Statement, he explicitly stated that “NEA ha[d] enlisted the help of local authorities,

1 complaint when exactly he discovered, or reasonably should have discovered, these claims. While
2 Zeleny indisputably saw an NEA representative communicating with the City during his 2014
3 criminal trial, this alone does not necessarily suggest a conspiracy to interfere with his
4 constitutional rights. NEA also notes that Zeleny was apprised of the company’s surveillance in
5 2011 and knew at least some of this information was shared with the police. While these facts
6 raise the possibility that Zeleny knew, or should have known, NEA was conspiring to interfere
7 with his civil rights, they are insufficient to resolve this issue as a matter of law. Accordingly, the
8 statute of limitations does not form a basis for dismissal at this stage.³

9 **B. Sixth Claim: Conspiracy to Violate Civil Rights Under Section 1983**

10 **1. Noerr-Pennington Doctrine**

11 Under the Noerr-Pennington doctrine, “those who petition any department of the
12 government for redress are generally immune from statutory liability for their petitioning
13 conduct.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). The purpose of this doctrine
14 is to protect the right of the people under the First Amendment “to petition the Government for a
15 redress of grievances.”*Id.* Such conduct includes concerted efforts to sway public officials,
16 regardless of the person’s or entity’s particular motivation or intent. *United Mine Workers of Am.*
17 *v. Pennington*, 381 U.S. 657, 670 (1965). The Noerr-Pennington doctrine specifically protects
18 efforts to advocate a particular point of view with respect to a party’s business interests, *Cal.*
19 *Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972), and attempts to advocate for
20 the passage or enforcement of a particular law, *Eastern R.R. Presidents Conference v. Noerr*

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23 including the City of Menlo Park . . . , its police chief David Bertini,” and the San Mateo County
24 prosecutor’s office to help stop his protests. Zeleny CMC Statement 2. In a declaration submitted
25 on February 8, 2019—before Zeleny had received any discovery regarding NEA—he stated his
firm belief that “NEA [was] behind the denial of [his] applications for permits” and that NEA’s
involvement was “consistent with its past practices of using the legal system, law enforcement,
and political influence to silence [him].” Zeleny Decl. ¶ 45.

26 ³ Zeleny also advances a continuing violation argument, as well as an equitable tolling argument,
27 based on the fact that he sought to appeal the denial of his permit. In light of the foregoing
analysis, there is no need to reach these arguments.

1 Motor Freight, Inc., 365 U.S. 127, 135 (1961). Although the doctrine originated in the antitrust
2 context, it applies to Section 1983 cases as well. *See Boulware v. Nev. Dep't of Human Res.*, 960
3 F.2d 793, 800 (9th Cir. 1992).

4 The vast majority of NEA's alleged conduct is protected by the Noerr-Pennington
5 doctrine. For example, NEA's urging the City to "submit[] information about Zeleny to a
6 legislative committee in an effort to have the open carrying of rifles prohibited in California" and
7 its meeting with the City to address concerns related to Zeleny's armed demonstrations is
8 quintessential petitioning activity. Much of NEA's communication with the police also falls within
9 the ambit of the Noerr-Pennington doctrine. *Forro Precision, Inc. v. I.B.M. Corp.*, 673 F.2d 1045,
10 1060 (9th Cir. 1982) (holding that the Noerr-Pennington doctrine applies to communications with
11 the police). While Zeleny argues the Noerr-Pennington doctrine does not apply to challenges
12 based on First Amendment rights, the cases he cites do not support this assertion.

13 First, *Adams v. Kraft* questioned whether the Noerr-Pennington doctrine immunized
14 government officials from retaliatory prosecution claims arising under the First Amendment, not
15 whether private entities that petitioned the government were immunized from liability. *Adams v.*
16 *Kraft*, No. 10-CV-0602-LKH, 2011 WL 846065, at *14-15 (N.D. Cal. Mar. 8, 2011). Furthermore,
17 *Associated Press v. United States*, which was decided more than fifteen years before Noerr, is
18 inapposite. 326 U.S. 1 (1945). Zeleny cites this case for the general proposition that "[f]reedom to
19 publish is guaran[teed] by the Constitution, but freedom to combine to keep others from
20 publishing is not" and "[f]reedom of the press from governmental interference under the First
21 Amendment does not sanction repression of that freedom by private interest." *Id.* at 20. In that
22 case, the Supreme Court rejected the argument that a particular application of the Sherman Act
23 infringed upon the freedom of the press and held that the press were not immune from antitrust
24 laws. *Id.* Accordingly, this case has little bearing on the issue at bar.

25 Finally, to the extent Zeleny relies upon *A.H.D.C. v. City of Fresno* to support its
26 argument, this district court case is unpersuasive as it does not address First Amendment claims,
27 nor does it provide any analysis which can reasonably be carried over to this case. *A.H.D.C. v.*

1 City of Fresno, No. CV-F-97-5498, 2000 WL 35810718, at *4 (E.D. Cal. Aug. 31, 2000).
2 Ultimately, the First Amendment interest in allowing the public to petition the government for
3 redress justifies application of the Noerr-Pennington doctrine here. Allowing NEA to be held
4 individually liable for raising concerns with the government regarding the open display of firearms
5 near its offices, albeit during a protest, would severely impinge upon the public’s right to petition
6 the government. By contrast, application of the Noerr-Pennington doctrine to Zeleny’s Section
7 1983 claim does not prevent Zeleny from challenging the government’s alleged violation of his
8 constitutional rights and seeking an injunction to prevent any future violations.

9 **2. Sham Exception to Noerr-Pennington Doctrine**

10 Zeleny contends that, even if the Noerr-Pennington doctrine would otherwise bar his
11 Section 1983 claim, the sham exception to this doctrine allows him to proceed. Under the sham
12 exception, a defendant who uses a governmental process, “as opposed to the outcome of that
13 process,” to violate the plaintiff’s rights may be held liable for such conduct. *City of Columbia v.*
14 *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991). The quintessential example of such
15 conduct is filing frivolous objections during a governmental proceeding “with no expectation of
16 achieving denial” but rather to impose expense and delay. *Id.* (emphasis added). A plaintiff must
17 further show (1) the defendant’s use of the governmental process was objectively baseless, (2) the
18 defendant engaged in a pattern of petitions without regard for their merit, or (3) the defendant’s
19 misrepresentations deprived the governmental proceeding of its legitimacy. The plaintiff’s
20 complaint must allege specific facts to support the sham exception. *Franchise Realty Interstate*
21 *Corp. v. S.F. Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1080-81 (9th Cir.
22 1976); *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988).

23 Zeleny argues NEA acted “not with a legitimate expectation of ultimately preventing” him
24 from obtaining a permit to carry a gun during his protest, but to delay and protract the process.
25 Opp. 18. He specifically contends the company attempted to delay and chill his protests by helping
26 the City wrongfully prosecute him and urging the City to adopt an incorrect interpretation of the
27 pertinent firearm statutes. He further alleges NEA and the City “coordinated an effort to pepper

1 [him] with ever-changing time, place, and manner requirements for his protests” and that the City
2 “testified under oath at a hearing” during his appeal of the permit denial. Id. 18-19. In his view,
3 these actions are analogous to filing baseless petitions before a state agency in order to clog the
4 agency’s decision-making process and prevent the application from being considered. Id. at 18
5 (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)).

6 These arguments are unpersuasive. Zeleny relies heavily on the City’s alleged conduct and
7 attempts to attribute this conduct to NEA by claiming the City was acting at the company’s behest.
8 The question is not, however, whether the City acted properly in handling Zeleny’s prosecution
9 and permit applications, but whether *NEA’s* actions in these proceedings were “frivolous” and
10 done with no expectation of achieving a particular result on the merits, but rather to impose
11 expense and delay. *Omni Outdoor Advertising*, 499 U.S. at 380. The CFAC does not allege NEA
12 lacked an expectation its lobbying efforts would result in a denial of the permit application. To the
13 contrary, Zeleny alleges the NEA directly lobbied the City to deny Zeleny’s permit and that the
14 City agreed and subsequently made that determination. This does not plausibly suggest an effort to
15 “clog” the City’s decision-making process or to prevent the application from being considered—
16 rather it suggests an effort to urge a particular decision on the merits. Finally, Zeleny fails to allege
17 NEA had any impact on his criminal trial, much less explain how NEA’s involvement in the trial
18 could have resulted in undue delay or expense. In sum, the Section 1983 claim as currently plead
19 is barred by the Noerr-Pennington doctrine and is, accordingly, dismissed with leave to amend.⁴

20 **C. Seventh Claim: Conspiracy to Violate Civil Rights Under Section 1985**

21 Section 1985(3) protects individuals from conspiracies to deprive them of certain legally
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23 ⁴ In addition to the arguments discussed above, Zeleny contends NEA’s communications with the
24 police qualify for the sham exception because the company “had no legitimate purpose in going to
25 the police” or “used the police in an illegitimate manner.” *Forro Precision*, 673 F.2d at 1060.
26 Zeleny does not, however, explain how the allegations in the CFAC support this conclusion.
27 Instead he states: “Zeleny alleges that NEA had an improper purpose and used the police in an
28 illegitimate manner. To the extent Zeleny has not already done so, Zeleny would amend his
complaint to add such allegations.” Opp. 20. Given the meager discussion of this issue in the
briefing, and Zeleny’s tacit admission that the complaint would benefit from additional allegations
regarding NEA’s interactions with the police, this argument will not be addressed at this juncture.

1 protected rights. *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). To establish a
2 violation of this section, a plaintiff must show (1) the existence of a conspiracy, (2) that the
3 purpose of the conspiracy was to deprive a person or class of persons of the equal protection of the
4 laws, (3) an act in furtherance of this conspiracy, and (4) that, as a result of the conspiracy, the
5 plaintiff was injured or deprived of a right or privilege to which he or she was entitled. *Id.* at 1536.
6 With respect to the second element, the plaintiff must not only identify a legally protected right,
7 but must also show the deprivation of that right was motivated by a racial or otherwise class-based
8 “invidiously discriminatory animus.” *Id.* (quotation omitted). Only those classes which the courts
9 have identified as suspect or quasi-suspect, or which Congress has indicated require special
10 protection, can support a claim under this section. *Id.*

11 Zeleny argues that “[c]ourts construing [§] 1985(3) have not limited its protection to racial
12 or otherwise suspect classifications.” *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th
13 Cir. 1979). Although *Reichardt* is a Ninth Circuit case, it has since been construed by that same
14 court to stand for the narrower proposition that gender-based classifications may result in
15 invidious discrimination and therefore can support a Section 1985 claim. *Server*, 978 F.2d at 1536-
16 37. Therefore *Reichardt*’s discussion of out-circuit cases that allowed 1985 claims to proceed
17 despite the absence of a suspect or quasi-suspect class, *Reichardt*, 591 F.2d at 505 & n.16, does
18 not reflect the current state of the law within the circuit.

19 Zeleny claims to be a part of two classes for the purposes of Section 1985: (1) a class of
20 lawful firearm owners and (2) a class of people who vocally protest violence against women. He
21 fails, however, to identify any cases which recognize either of these groups as suspect or quasi-
22 suspect classes. Nor does he point to any legislation which would suggest these groups are in need
23 of special protection. As the Supreme Court has explained, a class “connotes something more than
24 a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant
25 disfavors.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269 (1993). Accordingly,
26 the Section 1985 claim fails as a matter of law and is dismissed without leave to amend.

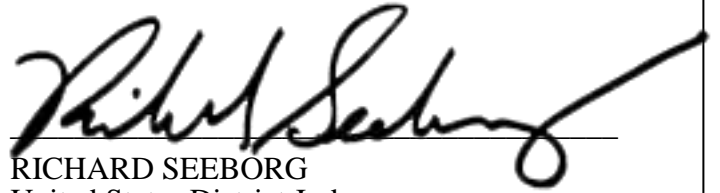
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1 **V. CONCLUSION**

2 For the reasons set forth above, the motion to dismiss is granted. The Section 1985 claim is
3 dismissed without leave to amend and the Section 1983 claim with leave to amend. Should Zeleny
4 choose to file an amended complaint, he must do so no later than August 30, 2019.

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6 **IT IS SO ORDERED.**

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8 Dated: July 30, 2019

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10 RICHARD SEEBORG
11 United States District Judge

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United States District Court
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