

1 Court disregard Plaintiff's untimely opposition. (Dkt. No. 288.)

2 Since the filing of the present motion to dismiss, the Court has granted
3 Defendants City of San Diego and Raymond Wetzel's motion for summary
4 judgment on all claims against them in Plaintiff's Third Amended Complaint
5 ("TAC"). (Dkt. No. 278.) In addition, the Court notes that Plaintiff's TAC claims
6 against Defendants James Romo and Peter Meyers have also been dismissed on the
7 merits. (Dkt. Nos. 221, 228.) In fact, of the twelve causes of action alleged against
8 the various Defendants in Plaintiff's TAC, the current operative complaint, (Dkt.
9 No. 64), only Plaintiff's twelfth cause of action against the County of San Diego
10 and Joseph Cargel remains. (See Dkt. No. 156) (staying this Court's adjudication of
11 Plaintiff's twelfth cause of action due to an ongoing criminal appeal proceeding
12 under Younger abstention principles).¹

13 Because Defendants' motion was filed prior to dismissal of several of
14 Plaintiff's claims, the motion fails to set forth authority under which this Court may
15 dismiss either: 1) a stayed cause of action such as the twelfth cause of action as set
16 forth in Plaintiff's Third Amended Complaint; or 2) a "cause of action" for
17 declaratory relief, for failure to prosecute or failure to obey a court order. Although
18 the Court has discretion to dismiss a case under Federal Rules of Civil Procedure
19 ("FRCP") 41(b) for a plaintiff's failure to prosecute or comply with a court order, or
20 under FRCP 37 for failure to comply with a Court order, the Court declines to do so

22 ¹ Although no Defendant has moved this Court to dismiss the second half of
23 Plaintiff's eleventh cause of action for declaratory relief, (Dkt. No. 64 at ¶ 126),
24 Plaintiff's claim for declaratory relief is related to his fourth cause of action for custody
25 credits, (Dkt. No. 64 at ¶¶ 77-87). This Court granted Defendant County of San Diego's
26 motion for judgment on the pleadings as to Plaintiff's fourth cause of action on March
27 4, 2014. (Dkt. No. 239.) It is well established that declaratory relief is a remedy and not
28 a cause of action. Audette v. Int'l Longshoremen's & Warehousemen's Union, 195
F.3d 1107, 1111 n.2 (9th Cir. 1999) ("Our discussion of plaintiff's state law claims
excludes the alleged fifth cause of action for 'declaratory judgment,' because it merely
seeks relief rather than stating a claim."). Absent a viable underlying claim, this Court
may not grant declaratory relief. See, e.g., Hamilton v. Bank of Blue Valley, 746 F.
Supp. 2d 1160, 1181 (E.D. Cal. 2010) ("In the absence of a viable claim, the complaint
fails to support declaratory relief."); Ventimiglia v. Wells Fargo Bank, N.A., No. CIV
13-00953 WBS CMK, 2013 WL 5719526 at *2 (E.D. Cal. Oct. 21, 2013).

1 at this juncture because the remaining cause of action in the above-captioned matter
2 is currently stayed. Accordingly, Defendants' motion is DENIED.

3 **CONCLUSION AND ORDER**

4 For the foregoing reasons, the Court hereby DENIES WITHOUT
5 PREJUDICE Defendants' motion to dismiss pursuant to FRCP 41(b), 37(b), and
6 37(d). Defendants may file a renewed motion to dismiss for failure to prosecute or
7 failure to obey a court order if Defendants set forth legal authority under which the
8 Court may grant such a motion while the remaining causes of action are stayed.
9 Alternatively, Defendants may file a renewed motion once the stay is lifted.

10 Accordingly, the Court VACATES the motion hearing set for Friday,
11 September 19, 2014 at 1:30 p.m.

12 **IT IS SO ORDERED.**

13 DATED: September 18, 2014

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15 HON. GONZALO P. CURIEL
16 United States District Judge
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