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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOHN BROWNING,  
Plaintiff,  
v.  
DUANE LILIEN, ET AL.,  
Defendants.

Case No.: 3:15-cv-2208-GPC-BLM

**ORDER DISMISSING CASE FOR  
LACK OF SUBJECT MATTER  
JURISDICTION**

On October 11, 2016, the Court issued an order to show cause why this case should not be dismissed for lack of subject matter jurisdiction. Dkt. No. 34. Plaintiff and counter-defendant John Browning, owner of Browning Construction, filed a response to the order to show cause on October 20, 2016. Dkt. No. 37. Defendant and counter-plaintiff Duane Lilien, owner of Construction Expeditors, never filed a reply. For the foregoing reasons, the Court **DISMISSES** this action for lack of subject matter jurisdiction.

1 **PROCEDURAL BACKGROUND**

2 On October 2, 2015, Plaintiff filed a complaint against Defendant Duane Lilien  
3 and Greenstar Building Systems, LLC.<sup>1</sup> Dkt. No. 1. In the complaint, Browning alleged  
4 the following causes of action: 1) wire fraud under 18 U.S.C. § 1341 *et seq.*; 2) breach of  
5 contract; 3) unfair business practices pursuant to Cal. Bus. & Prof. Code §§ 17000 *et*  
6 *seq.*; 4) breach of good faith and fair dealing; 5) intentional infliction of emotional  
7 distress; 6) quantum meruit/quasi-contract; 7) money had and received; 8) account stated;  
8 9) intentional misrepresentation; and 10) violations of the Racketeer Influenced and  
9 Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (RICO). *Id.*

10 Defendant Lilien, proceeding pro se, answered Plaintiff’s complaint and  
11 counterclaimed for: 1) breach of contract; 2) conversion; 3) trespass to chattel; 4)  
12 interference with prospective business advantage; 5) tortious interference with business  
13 relationships; 6) tortious interference with contractual relations; 7) fraud; 8) breach of  
14 good faith and fair dealing; 9) intentional infliction of emotional distress; and 10)  
15 quantum meruit. Dkt. No. 14 at 12-23. Plaintiff never filed an answer or a motion to  
16 dismiss Defendant’s counterclaims. As a result, on April 20, 2016, the Clerk entered  
17 default as to Plaintiff for failure to “plead or otherwise defend in said action as required  
18 and provided by the Federal Rules of Civil Procedure.” Dkt. No. 22 at 1. On August 15,  
19 2016, Defendant filed a motion for summary judgment because Plaintiff had “failed to  
20 prosecute his case, because he has failed to respond to discovery, because he has  
21 attempted to circumvent the law regarding discovery and because he has failed to  
22 communicate with Lilien.” Dkt. No. 24 at 3. The Court’s order to show cause followed.

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28 <sup>1</sup> Defendant Greenstar Building Systems, LLC was voluntarily dismissed from the case pursuant to Fed.  
R. Civ. P. 41(a)(1)(A)(i) on March 3, 2016. Dkt. No. 17.



1 under the Constitution or federal statutes clearly appears to be immaterial and made solely  
2 for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and  
3 frivolous.” *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage*  
4 *Leasehold & Easement in the Cloverly Subterranean Geological Formation*, 524 F.3d  
5 1090, 1094 (9th Cir. 2008) (quoting *Bell*, 327 U.S. at 682-83); *see also Steel Co.*, 523  
6 U.S. at 89; *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

### 7 DISCUSSION

8 In his complaint, Plaintiff stated that the Court had jurisdiction over this action  
9 because he had alleged claims arising under 18 U.S.C. § 1341 *et seq.* (wire fraud) and 18  
10 U.S.C. § 1961 *et seq.* (RICO). Complaint ¶ 15 (Dkt. No. 1 at 4). Yet as the Court noted  
11 in its order to show cause, Plaintiff’s allegations were completely conclusory. *See*  
12 Complaint ¶¶ 39-42 (Dkt. No. 1 at 8-9) (“Defendants’ communication through US mail,  
13 email, phone, and other channels of interstate commerce with knowingly and  
14 intentionally false statements to Browning induced him and his agents to act or refrain  
15 from acting . . . Defendants intended Browning to rely on the information which was  
16 communicated through US mail, email, phone and other channels of interstate commerce  
17 . . . the false statements were part of a fraud to obtain money and services from  
18 Plaintiff”); *see also id.* ¶¶ 81-84 (Dkt. No. 1 at 13-14) (“Defendants conducted criminal  
19 activity intentional misrepresentations regarding payments, and intentionally  
20 misrepresented various aspects of the project to the Plaintiff and other subcontractors . . .  
21 Defendants’ behavior created a pattern of criminal activity for the various years . . .  
22 Plaintiff was harmed by Defendants’ conduct and is entitled to compensatory and  
23 punitive damages.”). Because Plaintiff had not alleged any facts, such as, for example,  
24 identifying the calls or emails allegedly made to perpetrate fraud or describing the  
25 substance of the alleged criminal activity, the Court questioned Plaintiff’s federal claims  
26 under the *Bell v. Hood* standard. Dkt. No. 34 at 4. The Court also cited Plaintiff’s  
27 history of delay in prosecuting his case as further support for its suspicion that the federal  
28 claims were immaterial, insubstantial, or frivolous. *Id.* at 3.

1 In his response to the Court's order to show cause, Plaintiff argues that his  
2 complaint is not one of the "exceptional cases" that warrants dismissal. *See Leeson*, 671  
3 F.3d at 975. The Court disagrees. Plaintiff's brief does not respond to the Court's  
4 concern that his federal claims are frivolous, immaterial, or insubstantial. Instead of  
5 explaining to the Court why its concern about lack of subject matter jurisdiction is  
6 misplaced, or assuaging the Court that jurisdiction is proper, Plaintiff does nothing more  
7 than narrate the state of the law as it pertains to the difference between dismissing a claim  
8 for want of subject matter jurisdiction and dismissing a claim for failing to state a claim  
9 on which relief can be granted. In fact, the law provides that a Court should dismiss an  
10 action where it appears that the federal claim is frivolous, immaterial, or insubstantial.  
11 But Plaintiff's brief is utterly silent as to that point.

12 Plaintiff has failed to produce any facts, other than conclusory assertions, to  
13 support the substantiality or materiality of his federal claims. Plaintiff has also failed to  
14 timely and properly prosecute this case, reinforcing the frivolous nature of his action.

15 Plaintiff twice failed to file an answer to Defendant's counter claims. On  
16 November 20, 2015, Defendant filed an answer and counter complaint against Plaintiff,  
17 and on February 2, 2016 Defendant filed an amended answer and counter complaint.  
18 Dkt. No. 3, 14. Plaintiff never responded to either filing. On February 5, 2016, this  
19 Court gave Plaintiff notice that it intended to dismiss Plaintiff's case for want of  
20 prosecution as to Defendant Greenstar Building, LLC under Federal Rule of Civil  
21 Procedure ("Rule") 4(m). Dkt. No. 15. Plaintiff voluntarily dismissed Defendant  
22 Greenstar on March 3, 2016, approximately a week before the Court was to hold its Rule  
23 4(m) hearing. Dkt. No. 17.

24 Plaintiff also failed to respond to Defendant's discovery requests. On August 15,  
25 2016, Defendant filed a motion to compel discovery because Plaintiff had not answered a  
26 single discovery request by the due date. Dkt. No. 31. The magistrate judge granted  
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1 Plaintiff's motion to compel in its entirety<sup>2</sup> and in so doing noted that "Plaintiff ha[d] not  
2 provided the Court with an explanation or justification for his failure to serve timely  
3 objections or responses to Defendant's interrogatories." *Id.* at 7. In that ruling, the  
4 magistrate judge further ordered that, "on or before September 30, 2016," Plaintiff "serve  
5 interrogatory responses on Defendant and provide the responsive documents to  
6 Defendant." *Id.*

7 On November 8, 2016, Defendant filed a motion to enforce the Court's August 15,  
8 2016 Order because Plaintiff had failed to comply with the magistrate judge's September  
9 30, 2016 deadline. Dkt. No. 39. A party who fails to obey a discovery order may be  
10 subject to sanctions under Rule 37(b)(2)(A) including staying of proceedings, dismissal  
11 of the action, default judgment, or being held in contempt of court. Fed. R. Civ. P.  
12 37(b)(2)(A). Although the magistrate judge has yet to rule on Defendant's motion to  
13 enforce, this would not be the first instance of Plaintiff flouting a court order. On August  
14 16, 2016, the Court issued a briefing schedule to address Defendant's motion for  
15 summary judgment as to Defendant's counter claims, but Plaintiff never filed a response.  
16 Dkt. No. 25.

17 In sum, the record before the Court makes clear that Plaintiff's case is one of the  
18 "exceptional" cases where dismissal is justified. Plaintiff's federal claims are immaterial,  
19 insubstantial, and frivolous. Plaintiff's complaint offered no specific allegations or  
20 evidence in support of his federal claims. Plaintiff's response to the Court's order to  
21 show cause, which was filed a year after the complaint and long after the close of  
22 discovery, also provided no factual basis for his federal claims. Finally, Plaintiff's  
23 conduct before this Court, as recounted above, confirms the frivolous nature of his  
24 federal action. As such, the Court **DISMISSES** this action for lack of subject matter  
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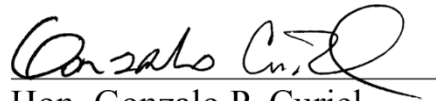
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27 <sup>2</sup> Specifically, the magistrate judge granted Defendant's request to compel production of documents, to  
28 compel answers without objections, and to deem all "Requests for admission" as admitted. Dkt. No. 31  
at 10. The only request that the magistrate denied was that for sanctions under Rule 37. *Id.*

1 jurisdiction. *See* Rule 12(h)(3) (“If the court determines at any time that it lacks subject  
2 matter jurisdiction, the court must dismiss the action.”); *see also* *Arbaugh v. Y&H Corp.*,  
3 546 U.S. 500, 500 (2006) (lack of subject matter jurisdiction may be raised at any stage  
4 of the litigation, even after trial and the entry of judgment). Accordingly, Plaintiff must  
5 refile in state court.

6 **IT IS SO ORDERED.**

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8 Dated: November 18, 2016

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10 Hon. Gonzalo P. Curiel  
11 United States District Judge  
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