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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

MELVIN JONES, JR.,	)	No. CV-F-05-148 OWW/DLB
)	
	)	MEMORANDUM DECISION AND
Plaintiff,	)	ORDER GRANTING DEFENDANT'S
	)	MOTION FOR ATTORNEYS' FEES
vs.	)	(Doc. 376); DENYING
	)	PLAINTIFF'S SPECIAL MOTION
	)	TO STRIKE COUNTER-MOTION
JOHN J. HOLLENBACK, JR.,	)	FOR SANCTIONS UNDER RULE 11
	)	(Doc. 395); STRIKING DOCS.
	)	380, 384, 386, 387, 388,
	)	397, 400, 405, 406; AND
Defendant.	)	DENYING AS MOOT PLAINTIFF'S
	)	MOTIONS FOR SANCTIONS (Docs.
	)	397, 400, 405, 406)

On June 12, 2007, Defendant John Hollenback timely moved for an award of attorneys' fees against Plaintiff, Melvin Jones, Jr., pursuant to 42 U.S.C. § 1988 in the amount of \$92,975.50. Defendant's motion for attorney's fees was heard on February 11, 2008 and taken under submission.

A. PLAINTIFF'S WITHDRAWAL OF VARIOUS OPPOSITIONS AND/OR COUNTER-MOTIONS.

1 Plaintiff filed the following described oppositions and/or
2 counter-motions in connection with Defendant's motion for
3 attorney's fees:

4 1. July 19, 2007: Plaintiff's "Response in Opposition
5 to defendant's Motion for FEES" (Doc. 380);

6 2. September 5, 2007: "Plaintiff's Counter-Motion as
7 to Defendant's Motion for FEES" (Doc. 384);

8 3. September 19, 2007: "Plaintiff's: Supplemented
9 Motion (Doc # 384)" (Doc. 386);

10 4. September 24, 2007: "Plaintiff's Additional CROSS-
11 MOTION in opposition to Defendant's FEE MOTION" (Doc. 387);

12 5. September 27, 2007: "PLAINTIFF'S: Final Response in
13 opposition to FEE MOTION, and Request Per FRCP 59(d)" (Doc. 388);

14 6. October 9, 2007: "Plaintiff's: Rule 18, 19, 20 and
15 22 CROSS-MOTION in opposition to defendants FEE MOTION as to
16 SILVERIA" (Doc. 389);

17 7. October 9, 2007: "Plaintiff's supplement to Doc #
18 387, and Doc # 388 (Rule 54(d)(2)(8) Request and other requests
19 and notices" (Doc. 390);

20 8. October 17, 2007: "Plaintiff's: counter-motion in
21 opposition to defendant's MOTION FOR FEES (Request under Rule 21,
22 20, 19 & 18)" (Doc. 391);

23 9. November 5, 2007: "Plaintiff's (1.) counter-motion
24 for costs in opposition to defendants post judgment fee motion.
25 [¶] (2.) SPECIAL MOTION TO STRIKE. [¶] (3.) counter-motion for
26 sanctions as to material misrepresentations made to the Court.

1 [¶] (4.) and/or in alternative to opposition to defendant Post
2 judgment fee motion, request for limited discovery as to ANY/ALL
3 fee or cost agreements as to defendant. [¶] (5.) and/or in the
4 alternative, opposition to defendant's post judgment fee motion,
5 as NOT being proper per S. 1988, as to the S. 1988 prevailing
6 party-rule. [¶] (6.) and/or in the alternative, opposition to
7 defendant's post judgment fee motion as Pro Se Jones being
8 technically the prevailing party. [¶] (7.) and/or in the
9 alternative, opposition to defendant's post judgment fee motion
10 due to defendant having WAIVED proper assertion of the
11 prevailing-party rule. [¶] (8.) and or in the alterative,
12 opposition to defendant's post judgment fee motion as said claim
13 NOT having been tried at trial, and/or DOES NOT arise from common
14 nucleus of operative fact with any claims tried at trial." (Doc.
15 395). Doc. 395 states: "This Counter-Motion/Opposition as to
16 post-Judgment FEE MOTION SUPERSEDES Plaintiff's previous filings
17 Regarding opposition to said FEE MOTION";

18 10. November 5, 2007: "Plaintiff's: Additional
19 Evidence to support Request(s) in Plaintiff's DOC # (Sanctions
20 Motion)." (Doc. 397);

21 11. November 26, 2007: "Plaintiff's: (Counter-Motion)
22 Request for Sanctions against Defense Counsel Daniel Wainwright,
23 in opposition/response to Defendant's Motion FOR FEES." (Doc.
24 400);

25 12. January 2, 2008: "Plaintiff's: Separate Motion for
26 Sanctions, in Response/Opposition to Defendant's fee motion."

1 (Doc. 405);

2 13. January 2, 2008: "Plaintiff's: Rule 26 REQUESTS
3 FOR SANCTIONS DUE TO 'IMPROPER CERTIFICATION" In Opposition to
4 DEFENDANTs MOTION FOR FEES (Response in Opposition to defendant's
5 FEE MOTION)." (Doc. 406);

6 14. February 7, 2007: "PLAINTIFF's: request for
7 JUDICIAL NOTICE OF ATTACHMENT 'A' AND NOTICE OF REQUEST." (Doc.
8 413).

9 Because of Plaintiff's representation in Doc. 395 filed on
10 November 5, 2007 that he intends Doc. 395 to supersede all
11 previous filings in connection with Defendant's motion for
12 attorney's fees, Docs. 380, 384, 386, 387, 388, 389, 390, and 391
13 are ORDERED STRICKEN.

14 By email to Mr. Wainwright dated February 6, 2007 (forwarded
15 to Courtroom Deputy Timken), Plaintiff stated that on February
16 11, 2008 "Plaintiff Jones will supplement and re-notice his
17 pending Rule 60 motion set to be heard on 3/3/2008 as an
18 independent action for fraud upon the court. [¶] Also, I will
19 present NO ARGUMENT, etc. as to the pending Rule 60 motion, and
20 will withdraw any request(s) that said Rule 60 motion be
21 considered on 2/11/2008. [¶] Hearing date for said re-noticed
22 Rule 60 motion will be set (re-set) for APRIL 28, 2008."

23 On February 7, 2008, Plaintiff filed "PLAINTIFF's request
24 for JUDICIAL NOTICE OF ATTACHMENT 'A' AND NOTICE OF REQUEST."
25 Plaintiff asserts that, at the February 11, 2008 hearing on
26 Defendant's motion for attorney's fees, he will request "to have

1 his pending motions (any/all) which relate to Defense
2 misconduct/FRAUD to BE TREATED as motions brought under Rule 60,
3 or in the alternative Jones withdraws (will on 2/11/2008) at oral
4 argument any/ALL Requests/Motions pertaining to/Related to
5 defense misconduct DUE to the FACT, Jones will File (on/about
6 2/12/2008) a complaint/ACTION FOR Independent Relief [See
7 Attachment 'A' affixed hereto - a true copy of said independent
8 ACTION]."

9 At the hearing on February 11, 2008, Plaintiff withdrew all
10 oppositions, motions or counter-motions to Defendant's motion for
11 attorney's fees except Doc. 395. Consequently, the motions for
12 sanctions set forth in Docs. 397, 400, 405, 406 are DENIED AS
13 MOOT.

14 B. GOVERNING STANDARDS.

15 Rule 54-293, Local Rules of Practice, governs the award of
16 attorneys' fees in the Eastern District. The motion for
17 attorneys' fees must include an affidavit of counsel showing:

18 (1) that the moving party was a prevailing
19 party, in whole or in part;

20 (2) the moving party is eligible to receive
21 an award of attorneys' fees, and the basis
22 for such eligibility;

23 (3) the amount of attorneys' fees sought;

24 (4) the information pertaining to each of the
25 criteria set forth in subsection (c) of this
26 Rule; and

(5) such other matters as are required under
the statute under which the fee award is
claimed.

1 *Id.*

2 The district court has discretion to award reasonable
3 attorneys' fees to a prevailing party in a civil rights action.
4 42 U.S.C. § 1988. A prevailing defendant in a civil rights
5 action is not entitled to attorney fees under § 1988 merely
6 because the defendant prevails on the merits of the suit. *Vernon*
7 *v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir.1994).

8 "District courts are authorized to award attorneys' fees to a
9 prevailing defendant in civil rights cases only in those
10 exceptional cases when the action is unreasonable, frivolous,
11 meritless, or without foundation, or when the plaintiff continues
12 to litigate after it clearly becomes so." *Herb Hallman*

13 *Chevrolet, Inc. v. Nash*, 169 F.3d 636, 645 (9th Cir.1999) (citing
14 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).

15 "[I]f a plaintiff is found to have brought or continued such a
16 claim in *bad faith*, there will be an even stronger basis for
17 charging him with the attorney's fees incurred by the defense."

18 *Christiansburg, id.* "In determining whether this standard has
19 been met, a district court must assess the claim at the time the
20 complaint was filed, and must avoid *'post hoc* reasoning by

21 concluding that, because a plaintiff did not ultimately prevail,
22 his action must have been unreasonable or without foundation.'" "

23 *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th
24 Cir.2006). This standard is applied with special force when the
25 plaintiff is proceeding pro se and may not be able to recognize
26 the "subtle factual or legal deficiencies in his claims." *Hughes*

1 v. *Rowe*, 449 U.S. 5, 15 (1980). The *Christiansburg Garment* court
2 reasoned:

3 This kind of hindsight logic could discourage
4 all but the most airtight claims, for seldom
5 can a prospective plaintiff be sure of
6 ultimate success. No matter how honest one's
7 belief that he has been the victim of
8 discrimination, no matter how meritorious
9 one's claim may appear at the outset, the
10 course of litigation is rarely predictable.
11 Decisive facts may not emerge until discovery
12 or trial. The law may change or clarify in
13 the midst of litigation. Even when the law
14 or facts appear questionable or unfavorable
15 at the outset, a party may have an entirely
16 reasonable ground for bringing suit.

17 *Id.* at 422. A Defendant seeking attorneys' fees has the burden
18 of establishing that the action is frivolous or vexatious. *Klotz*
19 *v. United States*, 602 F.2d 920, 924 (9th Cir.1979). Where each
20 claim involved complex constitutional questions which were not
21 easily resolved, the trial court did not abuse its discretion in
22 denying attorneys' fees. See *Park v. Watson*, 716 F.3d 646, 664
23 (9th Cir.1983).

24 In *E.E.O.C. v. Bruno's Restaurant*, 13 F.3d 285, 288 (9th
25 Cir.1993), the Ninth Circuit rejected application of the test set
26 forth in *EEOC V. Kip's Big Boy, Inc.*, 424 F.Supp. 500, 503
(N.D.Tex.1977):

which invites consideration of the
credibility of the plaintiff's witnesses and
whether the defendant came forth with
convincing and highly credible evidence to
rebut each individual charge of
discrimination. Such an inquiry potentially
invites the court to engage in the kind of
post-hoc reasoning condemned by *Christiansburg*
....

1 B. MERITLESS OR FRIVOLOUS NATURE OF PLAINTIFF'S ACTION.

2 In contending that this lawsuit was frivolous and vexatious,
3 Defendant submits the Declaration of Daniel L. Wainwright, his
4 attorney in this litigation. Mr. Wainwright avers in pertinent
5 part:

6 7. At the conclusion of the May 10, 2007
7 jury trial, I had a chance to speak with 4 or
8 5 of the jurors. Each expressed disbelief
9 that this matter even went to trial because
10 Plaintiff had no evidence, made ridiculous
11 and unbelievable accusations, and the jurors
12 had absolutely no questions, whatsoever, that
13 my client had done nothing wrong and that he
14 was a victim of a frivolous lawsuit. In
15 fact, one or more of the jurors even
16 apologized to my client for the fact that he
17 had to subjected [sic] to such a baseless
18 lawsuit.

19 8. The above entitled action was brought by
20 Plaintiff to seek damages under 42 U.S.C. §§
21 1985 and 1986. This litigation initially
22 began in February 2005. I was only retained
23 in this case in December 2005. This lawsuit
24 has now been resolved, by way of a defense
25 jury verdict, on May 10, 2007

26 9. My client did not have any insurance
coverage for Plaintiff's claims. Thus, I
have been billing him directly for the legal
fees and costs incurred in this case. Each
and every dollar billed in this case is to be
paid by my client and not some deep-pocket
insurance company. As such, my client has
incurred a huge financial set-back by having
to pay for the defense of his good name and
professional reputation.

...

11. This litigation has involved numerous
Court hearings, numerous filings and
pleadings (in excess of 370 documents, and
counting), complex legal issue, ever changing
factual allegations, numerous witnesses and a
great deal of my professional time.

1 Plaintiff's behavior made the litigation of
2 this matter much more difficult since my
3 client consistently had numerous filings and
4 Motions to respond to all of which carried
5 sensitive deadlines. This required constant
6 attention to this matter and excluded my
7 acceptance of other work.

8
9 12. During the time that Plaintiff was
10 claiming a § 1981 violation and various state
11 court claims, I filed a Motion to Dismiss and
12 Anti-SLAPP Motion. This Motion to Dismiss
13 was granted and Plaintiff filed the subject
14 Complaint.

15
16 13. Thereafter, I brought a Motion for
17 Summary Judgment. The Court deferred ruling
18 on this Motion in order to allow Plaintiff
19 time to conduct discovery. The Court granted
20 portions of theist [sic] Motion and allowed
21 Plaintiff more time to complete more
22 discovery.

23
24 14. Extensive written discovery (consisting
25 of hundreds and hundreds of request for
26 admission) was propounded by Plaintiff and
27 responded to by Defendant.

28
29 15. Thereafter, I caused to be filed a
30 Renewed Motion for Summary Judgment. In
31 response to this Motion, Plaintiff created
32 and invented new facts. Ultimately, the
33 Court denied our motion and said that this
34 matter must be adjudicated by a jury after
35 trial.

36
37 16. In February 2007, I took Plaintiff's
38 deposition.

39
40 17. Thereafter, I prepared this matter for
41 trial. This involved numerous hearings,
42 numerous pre-trial documents and extensive
43 time and efforts. Because of the numerous
44 witnesses in this case, I spent a great deal
45 of time interviewing witnesses and preparing
46 for their trial testimony. Plaintiff even
47 failed to attend the pre-trial document
48 exchange conference in Modesto, as had been
49 set forth in the Pretrial order.

50
51 This case arose out of a child custody dispute between

1 Plaintiff and Kea Chhay, the mother of Plaintiff's minor child.
2 The child custody dispute appears to have been first filed in the
3 Santa Clara County Superior Court. During a hearing held on
4 November 15, 2001, the presiding judge in Santa Clara warned
5 Plaintiff that he would be declared a vexatious litigant if he
6 filed additional motions in that case. The child custody dispute
7 was subsequently transferred to the Stanislaus County Superior
8 Court. Plaintiff's allegations of race-based conspiracy arose
9 following Plaintiff's defeat in the family law matter in the
10 Stanislaus County Superior Court and during two hearings in the
11 Stanislaus County Superior Court, the first on April 15, 2004 for
12 contempt and the second on April 22, 2004 for child support. The
13 record of Plaintiff's filings in this Court in other actions
14 related to the family law proceedings in the Stanislaus County
15 Superior Court as well as in this action detailed below
16 establishes Plaintiff's penchant for meritless, vexatious, ever-
17 evolving theories and charging factual allegations.

18 1. PLAINTIFF'S RELATED ACTIONS.

19 a. Melvin Jones, Jr. v. State of California, No.
20 CV-F-04-6566 OWW/DLB.

21 On September 9, 2004, Plaintiff filed *Melvin Jones, Jr. v.*
22 *State of California*, in the United States District Court for the
23 Eastern District of California, Sacramento Division. Plaintiff
24 filed four Amended Complaints in this action before the action
25 was transferred to this Court and assigned Case No. CV-F-04-6566
26 OWW/DLB. Plaintiff never requested leave to file, and rather,

1 simply filed the second, third and fourth amended complaints.
2 The last amended complaint was filed on October 18, 2004 and
3 named only the State of California as defendant. The October 18,
4 2004 amended complaint alleged that Judge Sovey-Silveria, Judge
5 Mayhew, Judge Siefkin, Judge Vanderwall, Judge Ritchey, and Judge
6 Jack Jacobsen of the Stanislaus County Superior Court, Stanislaus
7 County Superior Court Commissioner Richard Allen, and Michael
8 Tozzi, Executive Officer of the Stanislaus County Superior Court
9 failed to comply with various California Rules of Court and
10 California statutes during child custody proceedings in 2002-
11 2004, thereby violating Plaintiff's rights to due process and
12 equal protection under the law and the California Constitution;
13 and alleged that Stanislaus County Superior Court mediator Don
14 Strangio had conflicts of interest with Stanislaus County
15 Superior Court custody evaluator Steven Carmichael and Attorney
16 Leslie Jensen, prior counsel for the mother of Plaintiff's child,
17 Ms. Chhay, who was the adverse parent party in the family law
18 dispute against Plaintiff. Paragraph 28 of the Amended Complaint
19 alleged:

20 28. On 01/22/04 A hearing took place in
21 dept. 16 of the Superior Court of Stanislaus
22 County; Commissioner, Richard Allen
23 presiding. During said hearing, John
24 Hollenback, the attorney for the Respondent
25 (a high level employee of the same Superior
26 Court) was allowed to threaten the Plaintiff.
Said threat is in violation of CCP 128.5 and
CCP 128.6 as said threat was a deliberate
attempt to harass Plaintiff and in direct
violation of the Plaintiff's XIV amendment
rights. Plaintiff has ordered a tape of said
proceedings from said Superior Court and will

1 provide transcription of said tape as
2 evidence at trial.

3 The Amended Complaint prayed for damages in the amount of
4 \$4,100,000, and specified injunctive relief. When Plaintiff
5 moved for a preliminary injunction nullifying the Stanislaus
6 Court's October 2, 2003 order regarding child custody, and
7 requiring the withdrawal of Penny Lane, the minor child's court-
8 appointed counselor, from the family law case, this Court ruled
9 that it had no jurisdiction to issue any type of injunctive order
10 against the family law proceeding in the Stanislaus Superior
11 Court and denied the motion for preliminary injunction. (Order
12 filed on January 18, 2005, Doc. 27, No. CV-F-04-6566 OWW/DLB).
13 Plaintiff then moved for "voluntary discontinuance and voluntary
14 non-suit" and the case was dismissed without prejudice by Order
15 filed on August 4, 2005. (Doc.29, No. CV-F-04-6566 OWW/DLB).

16 On June 21, 2007, Plaintiff filed an Amended Complaint in
17 this action, naming as defendants the Stanislaus County Superior
18 Court, Leslie Jensen, and Sandra Lucas. (Doc. 30) The Amended
19 Complaint was stricken by Order filed on June 27, 2007 (Doc. 31).

20 b. Melvin Jones, Jr. v. Don Strangio and Steven
21 Carmichael, No. CV-F-04-6567 OWW/SMS.

22 On September 7, 2004, Plaintiff filed *Melvin Jones, Jr. v.*
23 *Don Strangio and Steven Carmichael*, in the United States District
24 Court for the Eastern District of California, Sacramento
25 Division. Plaintiff filed an amended complaint on September 27,
26 2004. The amended complaint alleged that court-appointed

1 mediator Strangio and custody evaluator Carmichael had conflicts
2 of interest; that failure to disclose these conflicts of interest
3 deprived Plaintiff of his rights to due process and equal
4 protection; and sought \$800,000 damages and specified injunctive
5 relief. The action was transferred to this Court on November 17,
6 2004 and assigned Case No. CV-F-04-6567 OWW/SMS. Plaintiff's
7 motion for injunction to compel Strangio and Carmichael to
8 withdraw from Plaintiff's family law case immediately, was denied
9 by Order filed on January 14, 2005, because no federal
10 jurisdiction existed to issue any type of injunctive order
11 against the Stanislaus County Superior Court family law
12 proceeding. (Doc. 41, p.4). The Court granted summary judgment
13 for the defendants because the *Rooker-Feldman* doctrine barred the
14 allegations in Plaintiff's complaint, because the defendants
15 enjoy absolute immunity from suit, and because Plaintiff could
16 not establish a constitutional violation. (Order filed on March
17 16, 2005, Doc. 72, No. CV-F-04-6567 OWW/SMS). This summary
18 judgment was affirmed by the Ninth Circuit on December 7, 2006.

19 c. Melvin Jones, Jr. v. Don Strangio, No. CV-F-
20 05-410 OWW/DLB.

21 *Melvin Jones, Jr. v. Don Strangio, No. CV-F-05-410 OWW/DLB,*
22 *was commenced on March 28, 2005, against Don Strangio. The*
23 *Complaint alleged:*

24 6. ... [D]efendant and co-conspirators
25 Michael Tozzi, Marie Sovey-Silveria, Leslie
26 Jensen, and John Hollenback did corruptly
conspire (out of court) ... with the
mediator/evaluator of Plaintiff's family law

1 case to suppress, and conceal defendant
2 Strangio, and Leslie Jensen's OMISSION of the
3 fact that defendant Strangio and (Leslie
4 Jensen) Attorney for the opposing party in
5 Plaintiff's family law case DO HAVE A
6 PSYCHOLOGIST-PATIENT relationship. And did
7 conspire (out-of-court) with personal, and
8 class-based animus. And is so doing, did
9 deprive Plaintiff of his Civil Rights.
Further, defendant and fore mentioned [sic]
co-conspirators did conspire (out-of-court)
... for the purpose of impeding, hindering,
obstructing, and defeating the due course of
justice, with the intent to deny Plaintiff
equal protection of the law(s). And did so
by intimidation, threat, and retaliation, and
did so with personal, and class-based animus.

10 The Complaint was dismissed with prejudice because the March 16,
11 2005 Order in No. CV-F-04-6567 concluded that Strangio was
12 absolutely immune from liability and on the ground of res
13 judicata. Plaintiff was cautioned "that the filing of meritless
14 or vexatious claims is not permissible." (Order filed on April
15 20, 2005, Doc. 4, No. CV-F-05-410 OWW/DLB).

16 Defendant argues that Plaintiff's "pattern of vindictive
17 retaliatory litigation evidences improper motivation on the part
18 of the Plaintiff designed to burden and harass the Defendant and
19 is of the type which Congress intended to discourage by awarding
20 attorney fees to the Defendant." Defendant contends:

21 The evidence is undisputed that Plaintiff
22 filed numerous different claims and
23 allegations against innocent defendants,
24 including suits against attorneys, bailiffs,
25 and judges following his repeated unfavorable
26 results in the family law actions in which he
was involved. Even in this case, he
initially alleged a § 1983 claim, then §
1981, then state tort claims, and then
finally in his tenth version of this
Complaint, he alleged a § 1985/1986 claim.

1 Plaintiff is a litigious man who continues to
2 emphasize this characteristic via
3 multiplicitious groundless lawsuits where the
4 only thing he can ultimately prove is that he
5 has the power to cause an amazing amount of
6 inconvenience, hassle and embarrassment
7 through abuse of the legal system.
8 Plaintiff's vexatious litigiousness has
9 subjected and will continue to subject
10 innocent defendants to considerable expenses
11 in preparation for essentially useless
12 trials. Plaintiff must accept responsibility
13 for the burden which he imposes and pay for
14 Defendant's reasonable attorney fees.

15 Defendant argues that he has been forced to incur substantial
16 costs in defending Plaintiff's meritless claims and that "[i]f
17 this Court does not punish Plaintiff with paying the defense
18 legal fees for his repeated abuse of the court system, many more
19 innocent people will surely fall victim to his bad faith bullying
20 tactics." Defendant asserts:

21 During closing argument on May 10, 2007,
22 Plaintiff displayed his litigious nature by
23 claiming he was going to make complaints
24 against two trial witnesses, namely Leslie
25 Jensen and Sandra Lucas. Since the defense
26 verdict Plaintiff continues to make claims
that he will bring civil actions and/or other
types of claims against all of those
individuals involved in the underlying family
law case.

27 Defendant further argues that Plaintiff's claims lacked
28 evidentiary foundation. Although Plaintiff was able to create a
29 triable issue of fact in defeating summary judgment motions,
30 Defendant argues that this does not render Plaintiff's claims
31 meritorious:

32 Instead, it means that Plaintiff is able to
33 lie, misstate facts, jump to ridiculous
34 conclusions and invent further alleged bad

1 acts. In short, it means that Plaintiff is
2 able to create fiction and change his story
3 in order to meet his needs. Plaintiff was
4 only ably [sic] to defeat the two Motions for
5 Summary Judgment (even though portions of the
6 Motions were granted as was Defendant's
7 earlier Motion to Strike), he was only able
8 to do this because Plaintiff was willing to
9 perjure himself without any fear of
10 punishment or financial repercussions.

11 Defendant argues that the record shows that all of the claims
12 remaining at the time of trial lacked evidentiary foundation:

13 Plaintiff created his own evidence, relied on
14 hearsay evidence, repeatedly revised his
15 testimony to overcome dispositive motions,
16 and generally invented testimony. In sum,
17 Plaintiff's ever changing evidence was
18 implausible and unbelievable. Plaintiff had
19 absolutely no supporting evidence of his
20 claims. Instead, he merely relied on his own
21 testimony and a few self-serving and
22 immaterial documents.

23 Plaintiff argues that Defendant has not carried his burden
24 of demonstrating that Plaintiff's action was frivolous or
25 vexatious. Plaintiff points to the denials of Defendant's
26 motions for summary judgment.

27 2. PLAINTIFF'S FILINGS IN THIS ACTION.

28 Plaintiff commenced this action by Complaint filed on
29 February 3, 2005 pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1985
30 (conspiracy to interfere with civil rights), and 42 U.S.C. § 1986
31 (action for neglect to prevent interference with civil rights).
32 Defendants were Stanislaus County Superior Court Executive
33 Officer Michael Tozzi, Stanislaus County Superior Court Judge
34 Marie Sovey-Silveria, Leslie Jensen, and John Hollenback. The
35 Complaint alleged an undisclosed conflict of interest between
36

1 court-appointed mediator Strangio and custody evaluator
2 Carmichael in violation of Plaintiff's "fundamental Fourteenth
3 Amendment rights"; that Judge Sovey-Silveria and Leslie Jensen,
4 John Hollenback and Michael Tozzi failed to comply with
5 California Rules of Court, California Rules of Professional
6 Conduct, and the California Code of Civil Procedure during
7 proceedings in the Stanislaus County Superior Court involving
8 Plaintiff's family law matter on October 8, 2002, December 10,
9 2002, April 22, 2003, May 15, 2003, May 27, 2003, June 3, 2003,
10 September 24, 2003, January 22, 2004, March 2, 2004, March 15,
11 2004, and March 29, 2004. The only specific allegations against
12 Defendant Hollenback were:

13 27. On 01/22/04 A hearing took place in
14 dept. 16 of the Superior Court of Stanislaus
15 County; During hearing, John Hollenback,
16 attorney for the Respondent in Plaintiff's
17 family law case (and high level employee of
18 the same Superior Court) threatened
19 Plaintiff. Said threat is in violation of:
20 CCP 128.5, CCP 128.6, applicable CA. State
21 Bar Ethical Codes, and the principal of
22 fundamental fairness, said harassment
23 violates Plaintiff's 14th amendment rights.
24 Plaintiff has ordered a tape of said
25 proceedings, which will be presented at
26 evidence at trial.

27 28. On or about 02/2004 - Attorney Leslie
28 Jensen appeared at a hearing in dept. 16 on
29 behalf of Attorney John Hollenback. Both
30 Attorney's Jensen and Hollenback failed to
31 comply with CA. rule of Court 5.210, 5.220,
32 applicable CA. State Bar Ethical Standards,
33 and applicable Civil Code of Procedure
34 related to Attorney Jensen's conflicted
35 status with Mediator Strangio.

36 29. On 03/02/04 - A hearing was held in
dept. 13 of the Superior Court of Stanislaus.

1 Attorney Hollenback failed to comply with CA.
2 rule of Court 5.210, 5.220, applicable CA.
3 State Bar Ethical Standards, and applicable
4 Civil Code of Procedure related to Attorney
5 Jensen's conflicted status with Mediator
6 Strangio.

7 32. On or about 03/29/04 - Attorney
8 Hollenback unduly interfered with Plaintiff's
9 Job Search with the Stanislaus County Housing
10 Department, which is harassment and violates
11 Plaintiff's fundamental XIV Amendment Rights.
12 Attorney Hollenback failed to comply with CA.
13 rule of Court 5.210, 5.220, applicable CA.
14 State Bar Ethical Standards, and applicable
15 Civil Code of Procedure related to Attorney
16 Jensen's conflicted status with Mediator
17 Strangio.

18 The Complaint prayed for \$1,500,000.00 damages and \$4,100,000.00
19 punitive damages and the following injunctive relief:

20 1.) This Honorable Federal Court initiate a
21 Federal investigation into All relevant
22 departments, judicial functions, and court
23 personnel of Stanislaus Superior Court as
24 this Court deems in the interest of justice.

25 2.) Defendant Michael Tozzi disclose to this
26 Honorable Court any/all cases referred from
the Probate department of Stanislaus County
Superior Court for custody evaluation and/or
mediation to 706 13th Street - Modesto, Ca.
within the past 36 months.

3.) Defendant Leslie Jensen disclose to this
Honorable Federal Court any/all Stanislaus
County family law probate cases within the
past 36 months wherein she acted as the
Attorney, and note the specific probate
investigator.

4.) Defendant John Hollenback disclose to
the Honorable Federal Court any/all
Stanislaus County family law probate cases
within the past 36 months wherein he acted as
the Attorney, and not the specific probate
investigator.

On March 3, 2005, Plaintiff filed a First Amended Complaint

1 against the same Defendants (Doc. 7). The First Amended
2 Complaint is essentially identical to the Complaint, except that
3 it alleges:

4 33. On 4/15/2004 - during a trial
5 in dept. 13 of said Superior Court
6 (wherein Respondent of Plaintiff's
7 family law case [and employee of
8 the same Superior Court] faced
9 numerous contempt charges), Marie
10 Silveria interrupted the trial
11 (Judge Jack Jacobsen was presiding)
12 - Silveria's non-verbal gestures,
13 and conduct were sensed and
14 observed by Plaintiff to be
15 harassment, reprisal/retaliatory,
16 and a furtherance of conspiracy.
17 Silveria was not presiding in the
18 case at hand, her comments were at
19 best administrative actions, non
20 judicial in nature; thereby not
21 shielded by judicial immunity. A
22 tape of the proceeding has been
23 ordered by Plaintiff, and will be
24 provided at trial as further
25 evidence.

26 34. On or about 2/2005 - Michael Tozzi
issued a declaration in support of Mediator
Don Strangio. Said declaration authenticates
Plaintiff's correspondence with, and from
Tozzi, and is furtherance of conspiracy.

Defendants Tozzi and Sovey-Silveria filed a motion to dismiss
(Doc. 8). Plaintiff filed a motion to enter default judgment
against Defendants Hollenback and Jensen (Doc. 14). Plaintiff
filed a counter-motion in opposition to the motion to dismiss and
a motion to file a Second Amended Complaint (Doc. 16). Without
obtaining leave of Court, Plaintiff filed a Second Amended
Complaint on March 28, 2005 (Doc. 19). On March 29, 2005, an
Order to Show Cause was issued:

1 In light of the March 16, 2005 order
2 dismissing Plaintiff's complaint in *Jones v.*
3 *Strangio*, Plaintiff is ORDERED TO SHOW CAUSE
4 in writing ... why the complaint in this case
5 should not also be dismissed as to all
6 defendants for failure to state a federal
7 claims and/or is barred for the reasons
8 stated in the March 16, 2005 decision issued
9 in *Jones v. Strangio*

10

11 Various joint motions to dismiss were then filed as well as
12 Defendant Hollenback's response to Plaintiff's motion for default
13 judgment against him. At the hearing on these matters on May 3,
14 2005, Plaintiff's improperly filed second amended complaint was
15 stricken (Doc. 42). On May 9, 2005, Plaintiff filed a motion for
16 sanctions (Doc. 43). On May 10, 2005, Plaintiff filed a motion
17 to strike Defendants' joint motion to dismiss the Complaint. On
18 May 11, 2005, in a 22-page Memorandum Decision (Doc. 47), the
19 Court noted:

20 This case arises out of a child custody
21 dispute between Plaintiff and Kea Chhay, the
22 mother of Plaintiff's minor child. Although
23 the record contains limited information about
24 the underlying child custody case, it appears
25 to have first been filed in Santa Clara
26 Superior Court. During a hearing held on
November 15, 2001, the presiding judge in
Santa Clara warned Plaintiff that he would be
declared a vexatious litigant if he filed
additional motions in that case. The case
was subsequently transferred to Stanislaus
County.

(Doc. 47, 5:6-14). In the May 11, 2005 Memorandum Decision, the
Order to Show Cause was discharged; Defendants Tozzi and
Silveria's motion to dismiss was granted with prejudice on the
grounds that Plaintiff failed to allege a procedural due process

1 claim by failing to plead any facts that he exhausted state
2 remedies, that the domestic relations exception barred
3 Plaintiff's substantive due process claims, on the ground of
4 absolute and quasi-judicial immunity; Plaintiff's motion for
5 default judgment was denied, and Plaintiff was ordered not to
6 file any amended complaint until the pending motion to dismiss
7 (Doc. 32) was decided.

8 On June 22, 2005, a Memorandum Opinion and Order Granting
9 Defendants' Jensen and Hollenback's Motion to Dismiss (Doc. 61)
10 issued. As it pertains to Defendant Hollenback the June 22, 2005
11 Opinion and Order stated:

12 ... Hollenback's ... motion to dismiss raises
13 the same legal issues as Defendants Tozzi and
14 Silveria's previous motion to dismiss.
15 Plaintiff has already been informed in the
16 decision granting Tozzi and Silveria's
17 motion, Doc. 47, that his claims are not
18 viable under federal law. For the reasons
19 set forth below, the first amended complaint
20 (doc. 7, the currently operative complaint in
21 this case) also fails to properly state any
22 claims under federal law against Defendant[]
23 ... Hollenback. Rather than order Plaintiff
24 to defend a complaint that must be dismissed
25 for failure to state a claim, Plaintiff will
26 instead be given one last opportunity to
amend his complaint to set forth viable
claims under federal law against Defendant[]
... Hollenback.

22 C. Plaintiff's Claims

23 In the first amended complaint, Plaintiff
24 makes the following allegations:

25 (1) There existed potential conflicts of
26 interest between several of the Defendants.
The failure to Defendants to disclose those
conflicts violated Plaintiff's procedural due
process rights. *Id.* at ¶ 15.

1 (2) Defendants' conduct throughout the family
2 law proceedings interfered with Plaintiff's
3 liberty interests and/or rights as a parent.
4 *Id.* at ¶ 7.

5 (2) [sic] Defendants' conduct violated
6 various provisions of the California Rules of
7 Court, State Bar Ethical Standards, and
8 provisions of the California Code of Civil
9 Procedure. As a result, Plaintiff's due
10 process rights under the Fourteenth Amendment
11 were violated. *Id.* at ¶¶ 16-33.

12 (Doc. 61, 7:17-8:13). The June 22, 2005 Order ruled that
13 Plaintiff's procedural due process claims alleged in the First
14 Amended Complaint fail as a matter of law:

15 As explained in previous memorandum opinions
16 in this case and related cases, Plaintiff has
17 attempted to set forth procedural due process
18 claims twice before. Specifically, he
19 alleges that conflicts of interests existed
20 between Defendants and that those conflicts
21 interfered with the fair adjudication of his
22 family law case. These allegations are
23 strikingly similar, if not identical, to
24 those alleged and *dismissed* in his
25 Plaintiff's [sic] prior lawsuits. ...
26 Plaintiff has again failed to state a
procedural due process claim. He has utterly
failed to plead any facts that suggest he
exhausted his state remedies. As such,
Plaintiff's procedural due process claims, if
any are stated, are DISMISSED for failure to
state a claim.

(Doc. 61, 8:16-9:16). The June 22, 2005 Order ruled that
Plaintiff's claims concerning his liberty interests and/or rights
as a parent are barred by the domestic relations exception, "[a]s
was explained in the May 11, 2005 memorandum opinion and order."

(Doc. 61, 9:2). The June 22, 2005 Order dismissed Plaintiff's
Section 1983 claims against Defendant Hollenback that he violated
Plaintiff's right to equal protection by impeding Plaintiff's

1 access to the judicial system because of his race on the ground
2 that Defendant Hollenback was a private individual, not a state
3 actor. (Doc. 61, 11:12-23). The June 22, 2005 Order then
4 stated:

5 Plaintiff has established a pattern of filing
6 multiple complaints without leave to amend
7 and without providing justification for the
8 amendment. Plaintiff has attempted to evade
9 dismissal by set [sic] forth additional
10 claims, under 28 U.S.C. §§ 1981, 1985 and
11 1986. The May 11, 2005 memorandum opinion
12 and order denied Plaintiff leave to amend on
13 the grounds that these claims, as presented
14 in his several proposed amended complaints,
15 would fail to properly state a claim under
16 any federal law.

17 Defendant[] ... Hollenback correctly point[s]
18 out that participants in the court process
19 are immune from civil liability for damages
20 in the context of a § 1983 claim ... However,
21 such immunity would not protect them from
22 liability in the context of a properly
23 alleged claim that they conspired with a
24 judge to violate Plaintiff's civil rights
25

26 A district court shall grant leave to amend
freely 'when justice so requires,' unless the
amendment (1) would be futile, (2) is
proposed in bad faith, or would result in (3)
undue delay or (4) prejudice to the opposing
party

In this case, Plaintiff has filed numerous
proposed amended complaints aimed at evading
dismissal for lack of jurisdiction. Although
Plaintiff's claims under 42 U.S.C. § [sic]
1981, 1985, and 1986 are of dubious merit, he
will be afforded one final opportunity to
amend to properly allege claims under §§
1981, 1985, and 1986.

(Doc. 61, 12:3-13:7). By Order filed on June 29, 2005 (Doc. 65),
Plaintiff's motion for Rule 11 sanctions against Defendant

1 Hollenback in the amount of \$144,500.00, "a figure based in part
2 upon Plaintiff's 'earnings capacity'", because counsel for
3 Defendant had one digit wrong in Plaintiff's address for service,
4 was denied, the Court further commenting:

5 Based on the excessive and unjustified burden
6 placed on the court by Plaintiff's serial and
7 meritless filings, it is Plaintiff who more
8 appropriately could be subject to Rule 11
9 sanctions.

10 (Doc. 65, 3:10-13).

11 On 6, 2005, Plaintiff filed a notice of voluntary dismissal
12 of Defendant Leslie Jensen (Doc. 66).

13 Plaintiff filed a second amended complaint against Defendant
14 Hollenback on July 6, 2005 (Doc. 67). The second amended
15 complaint was brought pursuant to 42 U.S.C. § 1981 and alleged in
16 pertinent part:

17 10. At all times relevant hereto
18 Hollenback's threats and statements to Mr.
19 Jones were made OUT OF COURT; literally not
20 within the actual court building.

21 11. At all times relevant hereto Defendants
22 Hollenbcak' [sic] threats and statements to
23 Mr. Jones were made after the child support
24 trial of 4/22/2004.

25 ...

26 44. On or about 12/2003, defendant
Hollenback became involved with Mr. Jones'
family law case as counsel for the opposing
party.

 45. On or about 1/2004 Mr. Jones filed
contempt charges against the opposing party
in his family law case.

 ...

1 47. On 4/22/2004 defendant Hollenback made
2 statements to Mr. Jones that, 'he called the
3 Stanislaus County Housing Authority and told
4 them what a lazy low-life black piece of shit
5 you are ... you get nigger justice.'

6 48. On 4/22/2004 defendant Hollenback
7 threatened Mr. Jones that, 'he would knock
8 the teeth out of his black greasy face ...
9 and rattle them out of his jive-monkey ass if
10 he showed up for the contempt hearings.'

11 ...

12 50. As a direct and proximate cause of the
13 defendant's threats, Mr. Jones feared for his
14 safety, if he were to attend the pending
15 contempt proceedings.

16 51. As a direct and proximate result of the
17 defendant's threats, Mr. Jones withdrew the
18 contempt Charges against the opposing party
19 in his family law case on 5/7/2004 and
20 6/7/2004.

21 52. As a direct and proximate cause of the
22 defendant's threats, Mr. Jones did not attend
23 the contempt proceedings on 5/10/2004 and
24 6/10/2204.

25 ...

26 54. On or about 7/2004 the Statute of
Limitations for the withdrawn contempt
charges ran/expired.

55. As a direct and proximate cause of the
defendant's threats, Mr. Jones' access to the
judicial system was deprived.

The Second Amended Complaint alleged that Defendant's actions
deprived Plaintiff of his civil rights in violation of 42 U.S.C.
§ 1981 because they deprived Plaintiff of: (1) his "federal right
to sue on account of his race and ethnicity"; (2) his "federal
right to enforce contracts on account of his race and ethnicity";
(3) his "federal right to be a party to proceedings on account of

1 his race and ethnicity; (4) his "federal right to give evidence
2 at proceedings on account of his race and ethnicity"; (5) his
3 "federal right to full benefit of proceedings on account of his
4 race and ethnicity"; (6) his "federal right to equal benefit of
5 all proceedings on account of his race and ethnicity"; and (7)
6 his "federal right to equal benefit of all laws on account of his
7 race and ethnicity."

8 Defendant moved to dismiss the second amended complaint. By
9 Memorandum Opinion and Order filed on October 21, 2005 (Doc.
10 103), Defendant's motion to dismiss was denied. The Court
11 rejected Defendant's argument that Plaintiff's "Notice of
12 Withdrawal [of] Contempt Without Prejudice" filed by Plaintiff in
13 the family law case estops Plaintiff from alleging that he
14 withdrew the pending contempt charges because of Defendant
15 Hollenback's alleged derogatory statements:

16 Accepted as true, the Notice is not
17 inconsistent with the allegation in the
18 second amended complaint that Plaintiff
19 withdrew the contempt charges because of
20 Hollenback's threats. Specifically, the
21 Notice acknowledges that among the reasons
22 for Plaintiff's withdrawal of the contempt
23 claims are his 'overwhelming concern for the
24 safety of [himself], and [his] perspective
25 witness ...' and his 'concern that further
26 violation(s) of [his] Civil and
Constitutional rights will occur.' This
general statement of reasons is arguably a
reference to the alleged comments/threats
made by Mr. Hollenback. Although the Notice
presented by Defendants [sic] is relevant to
the weight a finder of fact might afforded
[sic] Plaintiff's allegations, it does not on
its own require dismissal.⁴

...

1 4This conclusion is not an endorsement of the
2 veracity or plausibility of Plaintiff's
3 claims. As the district court has stated in
4 the past, this Plaintiff has exhibited a
5 tendency to change or supplement his factual
6 submissions over time with previously
7 unasserted matters in an apparent effort to
8 evade dismissal.

9 (Doc. 103, 6-8). The Memorandum Decision denied dismissal of
10 Plaintiff's Section 1981 claim:

11 'Section 1981 cannot be construed as a
12 general proscription of racial discrimination
13 ... for it expressly prohibits discrimination
14 only in the making and enforcement of
15 contracts.'

16 Here, Plaintiff suggests that bringing a
17 contempt proceeding in state court against
18 Ms. Chhay was an effort to enforce the family
19 law visitation agreement he and Ms. Chhay
20 signed. Neither party offers legal authority
21 supporting or refuting the proposition that
22 such a contract is covered by section 1981.
23 Legal authority applicable to this issue
24 suggests that a wide range of contracts are
25 covered by the provision. See *Runyon v.*
26 *McCrary*, 427 U.S. 160 (1976) (section 1981
 reached discrimination in private education
 where private schools denied admission to
 minority children thereby interfering with
 parents' right to contract for educational
 services).

 (Doc. 103, 8-10).

 On October 31, 2005, Plaintiff filed a motion for summary
 judgment (Doc. 104). On January 24, 2006, Plaintiff filed a
 motion for leave to file a second amended complaint (Doc. 166).
 These motions, among others, were heard on January 30, 2006 and
 taken under submission (Doc. 172). On February 8, 2006,
 Plaintiff filed a "second amended complaint."

 By Memorandum Opinion and Order filed on February 15, 2006

1 (Doc. 185), Plaintiff's motion for summary judgment was denied.

2 The Court noted:

3 The Court has been unable to locate any cases
4 imposing liability under § 1981 in
5 circumstances that are even remotely
6 comparable to the facts of this case.
7 Nevertheless, for the purposes of this
8 motion, § 1981 is applied to a private party
9 accused of interfering with an individual's
10 efforts access [sic] a state court to enforce
11 a private child custody settlement contract.

12 (Doc. 185, 11:22-28). Summary judgment for Plaintiff was
13 nonetheless denied because Defendant denied making any racially
14 derogatory statements to Plaintiff, thereby creating a factual
15 dispute as to the racial animus element of Plaintiff's Section
16 1981 claims. (Doc. 185, 14:4-8). Plaintiff's motion for leave
17 to amend to add 21 state law tort claims (five counts of
18 intentional interference with a contractual relationship, 15
19 counts of intentional infliction of emotional distress, and one
20 count of slander) was granted. (Doc. 185, 14-15).

21 On February 16, 2006, Plaintiff filed a motion for leave to
22 file a third amended complaint (Doc. 187) and filed a third
23 amended complaint on February 22, 2006 (Doc. 190), before
24 Plaintiff's motion for leave to do so had been heard. On
25 February 28, 2006, Defendant moved to dismiss the second amended
26 complaint filed by Plaintiff on February 1, 2006 (Doc. 191). On
March 8, 2006, Plaintiff filed an "Anti SLAPP Special Motion to
Strike and Motion for Fees" (Doc. 204). Before any of these
motions were heard, on April 25, 2006, Plaintiff filed a third
amended complaint against Michael Tozzi, Marie Sovey-Silveria,

1 Leslie Jensen and Defendant Hollenback. (Doc. 217). These
2 various motions were heard on May 1, 2006 (Doc. 219). Before any
3 rulings were issued, on May 4, 2006, Plaintiff filed without
4 leave a fourth amended complaint against Michael Tozzi, Marie
5 Sovey-Silveria, Leslie Jensen and Defendant Hollenback. (Doc.
6 221). On May 6, 2006, Defendant filed a motion to strike the
7 fourth amended complaint (Doc. 223). By Memorandum Decision and
8 Order filed on June 2, 2006 (Doc. 227), Defendant's motion to
9 strike the fourth amended complaint was granted and the fourth
10 amended complaint filed on May 4, 2006 was stricken:

11 Plaintiff has been previously warned that his
12 practice of filing amended complaints without
13 leave to amend unnecessarily confuses the
14 docket and prevents the parties from
15 receiving the court's analysis and decision
16 on the pending motions addressing the
17 operative complaint. Plaintiff must wait for
18 a written decision and order on motions
19 submitted for decision that actually grants
20 him leave before filing any amended
21 complaint. To protect the integrity of the
22 judicial process, Plaintiff's unauthorized
23 fourth amended complaint must be stricken.

18 By Memorandum Decision and Order filed on June 2, 2006 (Doc.
19 228), the court addressed: (1) Plaintiff's motion to recuse
20 Magistrate Judge Beck; (2) Plaintiff's motion to file a third
21 amended complaint; (3) Defendant's motion to dismiss the
22 operative second amended complaint; (4) Defendant's motion to
23 strike state law claims from the second amended complaint
24 pursuant to California's anti-SLAPP statute; (5) previously
25 dismissed defendant Leslie Jensen's motion to strike state law
26 claims from the second amended complaint pursuant to California's

1 anti-SLAPP statute; and (6) Plaintiff's motion to strike pursuant
2 to California's anti-SLAPP statute. The Court granted previously
3 dismissed Defendant Leslie Jensen's motion to strike her status
4 as a defendant:

5 Here, Plaintiff now seeks to assert (for the
6 first time) that Jensen also made racially
7 derogatory remarks toward Plaintiff, an
8 allegation he has never mentioned in the
9 almost two years that this dispute has been
10 pending. It is inconceivable that Plaintiff
11 has not had full knowledge of any such facts
12 for over two years. Plaintiff has been
13 afforded multiple opportunities to amend the
14 complaint ... Unjustified delay, unjustified
15 failure to even mention this purported claim,
16 unjustified failure to allege the claim while
17 Jensen was a party to the case are all
18 grounds to deny leave to rejoin Jensen as a
19 defendant.

20 (Doc. 228, 12). Plaintiff's motion for leave to file a third
21 amended complaint was denied:

22 Plaintiff has been warned in the past that
23 his practice of filing multiple complaints
24 unfairly creates a moving target for opposing
25 parties and necessary [sic] burdens on an
26 overtaxed court. Defendants are entitled to
27 have their motions to dismiss and to strike
28 heard as to the second amended complaint.
29 Plaintiff has provided no explanation as to
30 why he could not have included information
31 contained in the third amended complaint in
32 the previously-filed second amended
33 complaint. This is in substance the fifth
34 time Plaintiff has endeavored to alter the
35 facts of his lawsuit.

36 The Court dismissed with prejudice the claims against Defendant
37 for violation of Section 1981 because the "visitation and custody
38 order is not a contract" and "Plaintiff's efforts to 'enforce'
39 the order are not protected by section 1981." (Doc. 228, 18:17-

1 20) :

2 In order to establish a claim under § 1981, a
3 plaintiff must establish that (1) he or she
4 is a member of a racial minority; (2) the
5 defendant intended to discriminate against
6 the plaintiff on the basis of race; and (3)
7 the discrimination concerned one or more of
8 the activities enumerated in the statute
9 (i.e., the right to make and enforce
10 contracts, sue and be sued, give evidence,
11 etc.).'

12 Plaintiff continues to suggest that his
13 section 1981 claim may rest on deprivations
14 separate and distinct from those founded on
15 contract. For example, Plaintiff alleges
16 that Defendant Hollenback's actions deprived
17 him of his federal 'right to sue,' 'to be a
18 party to proceedings,' 'to give evidence at
19 proceedings,' 'to full benefit of
20 proceedings,' 'to equal benefit of all
21 proceedings,' and 'to equal benefit of all
22 laws on account of Plaintiff's race and
23 ethnicity. (See Compl. at ¶¶ 64-77.) But,
24 section 1981 has not been construed as a
25 'general proscription of racial
26 discrimination' *Patterson v. McClean*
Credit Union, 491 U.S. 164, 176 (1989). Its
reach has been limited and interpreted to
prohibit discrimination 'only in the making
and enforcement of contracts.' *Id.* The
Supreme Court recently reiterated that 'a
plaintiff cannot state a claim under § 1981
unless he has (or would have) rights under
[an] existing (or proposed) contract that he
wishes "to make and enforce."' *Domino's*
Pizza, Inc. v. McDonald, 126 S.Ct. 1246, 1252
(2006).

27 Plaintiff continues to insist that bringing
28 the contempt proceeding in state court
29 against Ms. Chhay was an effort to enforce a
30 family law visitation 'contract' between
31 Plaintiff and Ms. Chhay. Doubt has
32 previously been expressed as to whether
33 imposing liability under section 1981 is
34 appropriate in this case. The legal issue
35 has not been squarely raised or adequately
36 addressed by any party in any prior
proceeding.² Defendant now challenges the

1 sufficiency of the complaint on the ground
2 that the family law visitation agreement is
3 not a contract.

4 In California, a contract is defined as an
5 agreement to do or not to do a particular
6 thing. Cal. Civ. Code § 1549. In order for
7 a contract to exist [sic], (1) there must be
8 two or more parties capable of contracting,
9 (2) they must consent, (3) to a lawful
10 object, and (4) there must be 'sufficient
11 cause or consideration.' Cal. Civ. Code §
12 1550.

13 The header for the document in question
14 provides as follows:

15 Melvin Jones, Jr. vs. Kea Chhay
16 Petitioner Respondent

17 Case # 285954 Hearing Date: December 10, 2002
18 This order applies to the following minor
19 child:

20 Lauren Jones DOB 9/01-97

21 (Doc. 193-2 at 3) (page 1 of 5 of the
22 document). The first paragraph provides:

23 1. The following custody and
24 visitation orders are imposed by
25 the Court based upon the agreement
26 of the parties. This order shall
supersede all prior orders.

(Id.) The subsequent five pages of text
contain various provisions pertaining to the
custody and visitation arrangement.
Plaintiff relies heavily on the fact that the
first paragraph contains the language 'based
upon the agreement of the parties.' This,
Plaintiff suggests, is evidence that the
document is a contract. Hollenback objects
that the 'findings and order' that
constituted the custody/visitation agreement
in no way depends on the parties' mutual
consent to the custody arrangement and its
related provisions.

Even assuming the truth of Plaintiff's
assertion that the order was based upon an

1 agreement between Plaintiff and Chhay, that
2 agreement was reduced to an order of the
3 family court. Once the order was entered,
4 any agreement merged in the order and a party
5 can no longer bring a breach of contract
6 action to enforce the agreement. The only
7 remedy is by way of a contempt proceeding ...
8 Under the doctrine of merger, the 'contract'
9 has been merged into the order which governs
10 the parties' rights and obligations.

11 Plaintiff's conduct admits this, as he was in
12 the process of prosecuting a contempt action
13 when the alleged racially derogatory remarks
14 were purportedly made. As additional support
15 for his contention that the custody and
16 visitation order is not a contract,
17 Hollenback points out that such orders are
18 modifiable at any time by the court if such
19 modification would serve the best interest of
20 the child.

21 The visitation and custody order is not a
22 contract. Accordingly, Plaintiff's efforts
23 to 'enforce' the order are not protected by
24 section 1981.

25 ...

26 ²Plaintiff argues that the merits of the
section 1981 claim have been addressed by the
district court and suggests that this motion
to dismiss is therefore not properly before
the court. This is incorrect for two
reasons. First, although Defendants did
previously challenge the sufficiency of the §
1981 claim, they did so in response to a
previously-filed complaint. Plaintiff
subsequently moved for and was granted leave
to amend. Upon the filing of any amended
complaint, Defendant is entitled to file new
Rule 12 motions. Second, the sufficiency of
the § 1981 claim was never completely
resolved by the district court. Specific
questions were raised as to whether the
custody and visitation document constituted a
contract covered by § 1981. (See Doc. 185 at
11.)

The Court ruled that the second amended complaint did not

1 adequately allege specific facts from which a conspiracy to
2 violate 42 U.S.C. § 1985(2) could be inferred (i.e., which
3 defendants conspired, how they conspired and how the conspiracy
4 led to a deprivation of his constitutional rights), but that
5 "Plaintiff will be afforded one final opportunity to amend to
6 assert section 1985 and 1986 claims against Defendant
7 Hollenback." (Doc. 228, 21:10-11). The Court dismissed with
8 prejudice all of the state law claims against Defendant
9 Hollenback pursuant to the litigation privilege set forth in
10 California Civil Code § 47(b). (Doc. 228, 27:6-7). The Court
11 dismissed with prejudice the slander per se state law cause of
12 action as barred by the statute of limitations; dismissed with
13 prejudice the state law claims for intentional interference with
14 contractual relations because the visitation and custody order is
15 not a contract; and dismissed with prejudice the state law claims
16 for intentional infliction of emotional distress. (Doc. 228, 27-
17 30). The Court dismissed the state law claims of negligent
18 infliction of emotional distress because Plaintiff had not
19 pleaded the elements of a claim for negligence and the
20 intentional conduct alleged was wholly inconsistent with a
21 negligence claim. (Doc. 228, 30).

22 Because of these rulings, Defendant's motion to strike
23 pursuant to California's Anti-SLAPP statute was denied as moot.
24 (Doc. 228, 32). The Court denied Plaintiff's motion to strike
25 pursuant to the Anti-SLAPP statute because the Ninth Circuit has
26 specifically ruled that California's anti-SLAPP statute is not

1 preempted by the Federal Rules of Civil Procedure and is
2 applicable in federal cases where supplemental claims are pled
3 under California law, because Defendant has not asserted any
4 federal or state claims against Plaintiff, and because California
5 Code of Civil Procedure § 425.6(e) (2) does not require as "issue
6 of public interest." (Doc. 228, 37-39). Plaintiff was given
7 "one final opportunity to frame a complaint under 42 U.S.C. §§
8 1985 and 1986 in accordance with this decision." (Doc. 228, 40).

9 Plaintiff filed a fifth amended complaint against Defendant
10 on June 13, 2006 (Doc. 230). As described in the Memorandum
11 Decision and Order filed on August 24, 2006 (Doc. 234):

12 Plaintiff's FAC appears to allege that
13 Defendant Hollenback participated in four
14 separate conspiracies, along with various
15 other individuals, to deprive Plaintiff of
16 his civil rights in violation of 42 U.S.C. §§
17 1985 and 1986. Three of the alleged
18 conspiracies are at least tangentially
19 related to Plaintiff's efforts to litigate in
20 state court (the 'state court conspiracies';
21 [sic] the fourth is distinct, in that it
22 alleges a conspiracy to impede access to
23 federal court (the 'federal court
24 conspiracy').

25 First, Plaintiff describes an alleged
26 conspiracy between Hollenback and Leslie
Jensen. (FAC, ¶¶ 45-58.) It is not easy to
determine the nature of the conspiracy from
the text of the complaint, but it appears
that Plaintiff is asserting that, together,
Jensen and Hollenback through threats and
intimidation: (a) impeded Plaintiff's access
to state court, (b) impeded his ability to
pursue his rights under the custody order
issued by the Stanislaus Court, and (c)
impeded his ability to apply for employment
with the Stanislaus County Housing Authority.
Specifically, Plaintiff alleges that
Hollenback told Plaintiff that '[Hollenback]

1 called the Stanislaus County Housing
2 Authority,' where plaintiff had recently
3 applied for employment 'and told them what a
4 lazy low life black piece of shit [Plaintiff
5 is]' and exclaimed 'you get nigger justice.'
6 (FAC at ¶ 47.) Plaintiff further alleges
7 that Hollenback threatened that 'he would
8 knock the teeth out of his black greasy fact
9 ... and rattle them out of his jive-monkey
10 ass if he showed up for the contempt
11 hearings.' (*Id.*) Separately, Plaintiff
12 alleges that Ms. Jensen threatened that
13 Plaintiff would 'get his black ass kicked if
14 he continued to make trouble for the court
15 and if Plaintiff continued with the contempt
16 proceedings.' (*Id.*) Plaintiff alleges that
17 there is circumstantial evidence that
18 Hollenback and Jensen conspired with one
19 another to intimidate him. Specifically,
20 Plaintiff notes that Hollenback and Jensen
21 have been colleagues practicing before the
22 Stanislaus Superior Court for many years.
23 Plaintiff also alleges that Hollenback and
24 Jensen contracted with one other to cover
25 each other's court appearances.

14 Next, Plaintiff alleges that Hollenback
15 conspired with state courtroom bailiff Jane
16 Doe. (*Id.* at ¶ 52.) Specifically, Plaintiff
17 asserts that he heard Hollenback tell the
18 bailiff that Plaintiff was a 'low life
19 black.' The bailiff apparently became
20 agitated as a result. However, Jones asserts
21 that he continued with his scheduled hearing
22 after reassuring the bailiff that he was 'not
23 a low life black.'

20 In the final purported state court
21 conspiracy, Plaintiff names as co-
22 conspirators various individuals who were
23 previously named as Defendants in this case.
24 He alleges that Michael Tozzi (the Executive
25 Officer of the Stanislaus County Superior
26 Court), Steven Carmichael (the Court
appointed Evaluator), Don Strangio (the Court
appointed Family Law Mediator), Ms. Jensen,
the 'Jane Doe' bailiff from the April 22,
2004 hearing, and Marie Sovey-Silveria (the
Family Law Judge who issued the December 10,
2002 custody [sic] order), agreed to deprive
Plaintiff of the opportunity to access state

1 court and to pursue his rights under a
2 custody order entered by the Stanislaus
3 court. Plaintiff also alleges a separate
4 conspiracy involving all of these individuals
5 to retaliate against him. Plaintiff alleges
6 that Tozzi, Silveria, Strangio, and
7 Carmichael all conspired to aid in planning
8 this conspiracy and in concealing the
9 existence of the conspiracy. (*Id.* at ¶ 81.)
10 More specifically, Plaintiff alleges (a) that
11 Carmichael acted in furtherance of the
12 conspiracy when he commented that Whites and
13 Asians are 'better at education than Blacks;'
14 and (b) that Tozzi contributed to the
15 conspiracy by failing to comply with a
16 subpoena sent to him by Plaintiff. No
17 specific factual allegations are made with
18 regard to Silveria or Strangio.

19 Finally, Plaintiff describes a conspiracy
20 between Hollenback, Leslie Jensen, and Lonnie
21 Ashlock to impede Plaintiff's ability to
22 access federal court. (*Id.* at ¶ [sic] 59-
23 68.) Apparently, Plaintiff and Lonnie
24 Ashlock were parties to several real estate
25 agreements, including an a [sic] rental
26 agreement and an agreement pursuant to which
27 Plaintiff sold a house to Ashlock. Leslie
28 Jensen admits that she has served as Lonnie
29 Ashlock's attorney on many occasions.
30 Plaintiff asserts that Mr. Ashlock threatened
31 Plaintiff that if Plaintiff did not drop his
32 litigation against Jensen he would 'not pay
33 him one cent' pursuant to the house sale.
34 Plaintiff was later evicted from his
35 residence and now asserts that this eviction
36 was in retaliation for Plaintiff's legal
37 actions and in furtherance of the
38 'conspiracy.' Plaintiff claims that Ms.
39 Jensen made misrepresentations to the Court
40 in an effort to 'conceal' this perceived
41 'conspiracy.' The Complaint does not clearly
42 explain how Hollenback was involved in this
43 conspiracy and the only stated explanation of
44 Hollenback's wrongful conduct was 'his
45 apparent silence' about the alleged
46 conspiracy.' (*Id.* at ¶ 67).

47 (Doc. 253, 7:25-11-3). The fifth amended complaint prayed for
48 \$1,700,000.00 damages. The majority of the racially charged

1 allegations had never been pleaded in any prior complaint.
2 Defendant filed a motion to dismiss the fifth amended complaint
3 or, in the alternative, for summary judgment. (Doc. 234). By
4 Memorandum Decision and Order filed on August 24, 2006 (Doc.
5 253), Defendant's motion to dismiss on statute of limitations
6 grounds was denied; his motion to dismiss with respect to the
7 conspiracy claim based on alleged threats to dissuade Plaintiff
8 from participating in the contempt proceeding was denied; and the
9 motion to dismiss as to all of the other, related conspiracy
10 claims was granted as those claims were dismissed because
11 Plaintiff failed to specifically state how the alleged
12 conspiracies harmed him.

13 Defendant's alternative motion for summary judgment was
14 continued based on Plaintiff's representations that he had not
15 had an adequate opportunity to conduct discovery "on his new
16 legal theory, based on 42 U.S.C. §§ 1985 and 1986, in part
17 because he has not possessed adequate funds to conduct thorough
18 discovery." (Doc. 253, 32-33). Thereafter, the parties filed
19 cross-motions for summary judgment which were heard on January
20 22, 2007 (Doc. 287). The Memorandum Decision and Order filed on
21 February 7, 2007, (Doc. 293), set forth summaries of Plaintiff's
22 and Defendant's factual positions:

23 1. Summary of Plaintiff's Evidence

24 Plaintiff presents his own declaration and
25 various amendments thereto, which provide a
26 detailed chronology of the events from his
point of view.

1 The custody dispute between Plaintiff and Ms.
2 Chhay began in May 2002 and was litigated in
3 Stanislaus County Superior Court. (Doc. 255
4 at 4.) At that time, Plaintiff maintains
5 that Ms. Chhay was employed as a Family Law
6 Investigator with the Stanislaus Superior
7 Court. (*Id.*)

8 It is undisputed that Judge SILVERIA became
9 the presiding family law judge; Donald
10 Strangio was appointed by the state court as
11 a mediator in the dispute; Steven Carmichael
12 became the court-appointed custody evaluator
13 in the case; and Michael Tozzi served as the
14 Executive Officer of the Stanislaus Superior
15 Court during the relevant time period.

16 It is also undisputed that Leslie Jensen
17 associated as counsel for Ms. Chhay in 2002.
18 In 2003, Defendant Hollenback replaced Ms.
19 Jensen as counsel for Ms. Chhay, but, in
20 2004, Ms. Jensen appeared for Defendant
21 Hollenback at a hearing on behalf of Ms.
22 Chhay. Plaintiff maintains that Hollenback
23 and Jensen maintained an association
24 throughout the relevant time period,
25 conspiring together, and with other alleged
26 co-conspirators, to dissuade Plaintiff,
through threats of violence, from pursuing
his legal rights in state court.

Plaintiff next details various racist or
impliedly racist remarks that were allegedly
directed at Plaintiff by the alleged co-
conspirators. For example, Plaintiff avers
that, in October 2002, Carmichael indicated
that "Blacks [are] inferior to Whites and
Asians in learning/education." (*Id.* at 5.)
Plaintiff then sent a letter to Carmichael
expressing concern that Carmichael's ability
to participate in his custody dispute was
compromised because Carmichael was biased
against Plaintiff. Soon thereafter,
according to Plaintiff, Jensen called
Plaintiff and said "were going to shut you
down boy...[W]hen we get finished with
you...you'll wish you stayed in San Jose."
(*Id.*) Plaintiff claims that he responded by
asking: "Who is we?" Jensen allegedly
replied: "You'll find out soon enough...Dr
Carmichael, and Dr. Strangio have assured me

1 that you won't know what hit you....we have
2 something for your black ass?.... Don
3 Strangio is my friend...he and I have spoken
4 to Judge SILVERIA...you just wait and see."
(*Id.* at 5-6.)

4 In addition, at various times in or around
5 2002, Plaintiff alleges that Judge SILVERIA,
6 Mr. Strangio, and Ms. Jensen made racially
7 offensive remarks regarding Plaintiff's
8 desire to spend Martin Luther King day with
9 his daughter. For example, in a December
10 2002 hearing when Plaintiff attempted to
11 discuss that visitation issue with Judge
12 SILVERIA, she allegedly told Plaintiff "shut
13 up and go sit down." A few months later in
14 April 2003, Plaintiff tried to raise the
15 concern again with Judge SILVERIA, but
16 Plaintiff avers that she told him to "shut up
17 and stop playing the race card." (*Id.* at 6-
18 7.) After that hearing, Plaintiff asserts
19 that he asked Mr. Strangio directly about
20 spending Martin Luther King day with his
21 daughter, to which Strangio allegedly
22 responded: "Martin Luther King was the
23 biggest trouble maker of them all... if you
24 continue your trouble making you will be
25 stopped in your tracks." (*Id.* at 7.)

16 Also in May 2003, Jensen served Plaintiff
17 with a document. Plaintiff alleges that
18 Jensen threw the document on the ground and
19 stated: "Your ignorant trouble making black
20 ass has been served." When Plaintiff asked
21 why she threw the document on the ground, she
22 stated: "I did not want to touch your filthy
23 ape hands." She then allegedly stated; "if
24 you know what is good for your stinky black
25 ass, you'll knock it off... you trouble
26 making black bastard...you're going down,
you'll be celebrating Rodney King Day." When
Plaintiff responded "You mean Dr. King
Holiday?", Jensen replied "No, idiot, you
will never have that day added to the custody
order...poor tar baby your crying to County
Counsel did not help you did it?"

25 In late 2003, after another family court
26 hearing, Plaintiff maintains that Defendant
Hollenback called him "an unkempt lazy
lowlife black." When Plaintiff stated "I

1 have never even met you before...what is your
2 problem...," Hollenback allegedly responded:
3 "my problem is you... you stupid porch
4 monkey...I know that you're a trouble making
5 black sambo." Later during that
6 conversation, Plaintiff asserts that
7 Hollenback warned: "[L]isten lazy nigger boy,
8 I am going to show you how to make
9 trouble...if you know what is good for you,
10 you will stop your bullshit...do me a favor
11 and take your dead beat black ass back to San
12 Jose...You only want Martin Luther King day
13 so that you have an excuse to have a day off
14 work...that day is for nigger lovers...you'll
15 never get that day added to your visitation
16 in this court."

17 In February 2004, Jensen appeared on behalf
18 of Mr. Hollenback. Plaintiff claims that,
19 outside the hearing, Ms. Jensen stated: "Mr.
20 Hollenback and I are known in this
21 court...you're going to get yours if you keep
22 it up...[Y]ou just wait[,] Mr. Hollenback and
23 I have something planned for you boy...we're
24 going to put your black ass down...payback is
25 going to be hell." In addition, Plaintiff
26 asserts that Jensen made other racially
derogatory statements to him regarding the
Dr. Martin Luther King Holiday. (*Id.* at 10.)
Among other things, Plaintiff alleges that
Jensen told him to "stay tuned you black
ape...you're fucking with the wrong
people...you're going down...I don't care
about your damn nigger holiday or what facts
you want on record, you lazy black trouble-
making asshole." Finally, although
Plaintiff does not specify when this
statement was made, he asserts that Jensen
threatened him that he "would get my black
ass kicked if [he] continued to make trouble
for the court and if [he] continued with the
contempt proceedings." (*Id.* at 11.)

Plaintiff then discusses certain events
surrounding a hearing on March 29, 2004, at
which Defendant Hollenback insisted that
Plaintiff be ordered to disclose the name of
the Stanislaus County Agency with which
Plaintiff was seeking employment. (*Id.* at
12.) Plaintiff objected, but was apparently
ordered to disclose the information.

1 Hollenback allegedly then threatened to tell
2 that particular agency (the Housing
3 Authority) that he was a "low life black dead
beat dad...." (*Id.* at 13.)

4 It is undisputed that in 2004, Plaintiff
5 filed two sets of contempt charges against
6 Ms. Chhay in the family law case. The first
7 set of charges was set for trial on May 15,
8 2004. The second set of charges were set for
9 hearings on May 10 and June 10, 2004,
10 respectively.

11 At the trial on the first set of charges,
12 presided over by Judge Jacobsen, Plaintiff
13 alleges that Judge SILVERIA interrupted the
14 proceedings and communicated with Judge
15 Jacobson. Plaintiff conclusorily describes
16 Judge SILVERIA's conduct as "retaliatory" but
17 does not describe how.

18 Before the second set of contempt charges
19 came to trial, a trial was held on April 22,
20 2004, regarding the issue of Child Support.
21 Defendant Hollenback was present, as was a
22 bailiff whom Plaintiff refers to as Jane Doe
23 (her actual name is Vivian Holliday).
24 Plaintiff observed Hollenback conversing with
25 the bailiff and claims to have heard
26 Hollenback explain to the bailiff that
27 Plaintiff was a "low life black." The
28 bailiff then pointed at Plaintiff and "became
29 unduly excited towards [him]." (*Id.* at 14.)
30 Although Plaintiff was concerned by this
31 conduct, he proceeded with the trial after
32 "reassuring the bailiff" that he was not a
33 "low life black."

34 After the April 22, 2004 hearing, Plaintiff
35 asserts that Defendant Hollenback claimed to
36 have "called the Stanislaus County Housing
37 Authority and told them what a lazy low life
38 black piece of shit you are...you get nigger
39 justice." In addition, Plaintiff claims that
40 Defendant Hollenback threatened that "he
41 would knock the teeth out of my black greasy
42 face...and rattle them out of my jive-monkey
43 ass if I showed up for the contempt
44 hearings." Plaintiff believed that
45 Hollenback was "angry" and Plaintiff
46 "fear[ed] for [his] safety if [he] were to

1 continue with the contempt hearings on May 10
2 and June 10, 2004." (*Id.* at 15-16.)
3 Plaintiff claims that, as a result of this
4 fear, he withdrew the pending contempt
5 charges. Plaintiff maintains that he remains
6 in fear today, and that, as a result, he did
7 not attend a separate state court proceeding
8 in a different matter.

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2. Defendant's Evidence.

Defendant presents his own declarations,
along with supporting declarations from
Leslie Jensen, Michael Tozzi, and Vivian
Holliday. Defendant also requests that
judicial notice be taken of declarations
filed by Donald Strangio and other alleged
co-conspirators in other related cases filed
by Plaintiff in federal court.

In sum, Defendant and all of the alleged co-
conspirators deny ever having made racially
derogatory remarks to Plaintiff, and deny
having participated in or having knowledge of
any kind of conspiracy to deny Plaintiff
access to court.

More specifically, Defendant denies having
had any involvement with Plaintiff's child
support case prior to his first contact with
Ms. Chhay on December 24, 2003. In fact,
Hollenback asserts that he and Ms. Jensen
never represented Ms. Chhay on the same
issue. Jensen was retained pursuant to a
"limited scope representation" only on the
child custody and visitation issues.
Hollenback claims that during the time he
represented Ms. Chhay, he had no
communications with Leslie Jensen about
"anything related to what happened previously
in the *Jones v. Chhay* [matter]...At no time
was there an 'overlap' of the representation
of Ms Jensen and myself." The one time
Jensen made a special appearance on
Hollenback's behalf because Hollenback had a
scheduling conflict, this was done as a
customary courtesy and involved no direct
contact between them. Hollenback further
asserts that, in connection with the defense
of this lawsuit, "there were no
communications, direct or indirect, between

1 Ms. Jensen and [Hollenback] that went beyond
2 the necessary and proper matters connected
3 with defending against this lawsuit." (Doc.
4 260 at ¶48.)

5 Defendant also asserts that, because he only
6 represented Ms. Chhay in regards to the child
7 support issue, he was never involved in the
8 dispute over the custody and visitation
9 orders, so he had absolutely no contact with
10 either Mr. Strangio or Mr. Carmichael.
11 Moreover, Defendant claims not to have had
12 contact with Judge SILVERIA concerning the
13 underlying custody dispute. As a result,
14 Defendant asserts that he had no involvement
15 in any conversations concerning Plaintiff's
16 requests to spend Martin Luther King Holiday
17 with his daughter, a custody issue.

18 Defendant claims to have had no knowledge of
19 any of the allegedly threatening/derogatory
20 remarks made by any of the co-conspirators
21 (except to the extent that he learned of
22 Plaintiff's allegations during his
23 involvement in this lawsuit). For example,
24 Plaintiff alleges that Ms. Jensen made
25 threatening remarks to Jones in April 2003.
26 Those statements, if they were made, would
have occurred many months before Hollenback
became an attorney in the case.

(Doc. 293, 6:2-12:23). Although the Court denied the cross-
motion for summary judgment, the Memorandum Decision and Order
did state:

Defendant raises essentially identical
objections to numerous other factual
allegations, including statements allegedly
made or actions allegedly taken by all of the
alleged co-conspirators, including Ms.
Jensen, Judge SILVERIA, Mr. Tozzi, Mr.
Carmichael, Mr. Strangio, and the bailiff.
Defendant argues that many of these alleged
acts and/or statements are simply
"mind-boggling and delusional."

The type of information put forth
by plaintiff is so remarkable,
unreliable and unthinkable that it

1 cannot serve as an "inference" of
2 the existence of a conspiracy.
3 This is not a situation where
4 plaintiff has repeatedly made
5 general allegations of racist,
6 threatening and improper
7 communications between HOLLENBACK
8 and plaintiff in late December 2003
9 and is only now providing us with
10 the specifics. Plaintiff never
11 once made any such allegation of
12 any improper conduct between
13 HOLLENBACK and Jensen in late 2003
14 until the filing of this Renewed
15 Affidavit. It is not included in
16 any of the Complaints, to and
17 including the operative pleading.
18 As such, it should not be
19 considered whatsoever by this
20 Court.

(Doc. 258 at 34-35.) This is not an
unreasonable description of some of the
outrageous language and conduct described in
Plaintiff's affidavits. However, apart from
limited circumstances described in the cases
discussed below, whether a party's affidavits
are "mind-boggling" and/or "delusional" are
issues that a jury must determine.

(Doc. 293, 27:19-28:13).

A three day jury trial was conducted on May 8, 9 and 10,
2007. The jury was instructed on May 10 and returned a defense
verdict after 15 minutes of deliberation.

3. ANALYSIS.

Although Defendant's burden is high, this is a case that
cries out for the imposition of attorneys in favor of Defendant
pursuant to Section 1988. The record in this action makes
inescapable the conclusion that this action was frivolous and
vexatious and that Plaintiff is, as Defendant asserts, pursuing
any and all persons even remotely involved in the underlying

1 family law dispute for the purpose of harassment and revenge.¹
2 Although the fact that Plaintiff was proceeding *in pro per* must
3 be taken into account and although resolution of this motion for
4 attorneys' fees cannot be based on *post hoc* reasoning, the record
5 establishes that Plaintiff's ever-changing allegations and
6 theories of relief against this Defendant and the many other
7 Defendants named in this and the other related actions were a
8 figment of Plaintiff's imagination from the outset and asserted
9 every time a claim was eliminated by dispositive motion and
10 Plaintiff was advised of the governing law by the Court. As
11 Defendant argued on summary judgment, Plaintiff's claims appear
12 delusional and ever more lurid. The inference is well-supported
13 by the evidence that Plaintiff simply made up whatever
14 allegation he believed would suffice to survive, under the

16 ¹Examples of Plaintiff's continuing compulsive pursuit of any
17 persons involved in the underlying family law dispute is the filing
18 of an Amended Complaint in *Melvin Jones, Jr. v. State of*
19 *California*, No. CV-F-04-6566 OWW/DLB, on June 21, 2007, almost two
20 years after this action was dismissed. In this action, on January
21 15, 2008, Plaintiff filed a motion to set aside the judgment
22 pursuant to Rule 60(b)(1) and (b)(3), Federal Rules of Civil
23 Procedure, based on alleged fraud on the Court because of
24 Defendant's and Defendant's counsel's alleged mischaracterization
25 of one of Plaintiff's prior convictions (Doc. 409). Plaintiff's
26 motion was noticed for hearing on March 3, 2008. Plaintiff
withdrew this motion at the hearing on February 11, 2008, advising
that he intended to file an independent action to set aside the
judgment. On March 5, 2008, Plaintiff filed *Melvin Jones, Jr. v.*
Daniel Wainwright, No. CV-F-08-318 OWW/DLB, based on the same
allegations of fraud on the court and seeking to set aside the
verdict, a new trial, a fine in the amount of \$800,000.00 or of the
costs incurred "for BOTH TRIALS and ANY/ALL Hearings as to the
same" payable to Plaintiff, fees in the amount of \$25,000.00,
and/or preclusion of the impeachment evidence, all against
Defendant's counsel, Mr. Wainwright.

1 standards governing motions to dismiss for failure to state a
2 claim and for summary judgment, Defendant's dispositive motions.
3 Plaintiff's evidence at trial in no way substantiated, and often
4 contradicted, Plaintiff's claims against Defendant. The state
5 judge in Santa Clara warned Plaintiff about the meritless and
6 vexatious nature of Plaintiff's claims.

7 C. Amount of Award of Attorney's Fees.

8 Rule 54-293, Local Rules of Practice, governs the award of
9 attorneys' fees in the Eastern District. Rule 54-293(b) provides
10 in pertinent part that the motion for attorneys' fees must
11 include an affidavit of counsel, showing, *inter alia*:

12 (3) the amount of attorneys' fees sought;

13 (4) the information pertaining to each of the
14 criteria set forth in subsection (c) of this
Rule; and

15 (5) such other matters as are required under
16 the statute under which the fee award is
claimed.

17 ``In determining what a reasonable attorneys' fee entails,
18 the district court must apply the hybrid approach adopted in
19 *Hensley v. Eckerhart*, 461 U.S. 424, 423 ... (1983).' ... 'The
20 most useful starting point for determining the amount of a
21 reasonable fee is (1) the number of hours reasonably expended on
22 the litigation (2) multiplied by a reasonable hourly rate.' ...
23 The resulting figure is known as the 'Lodestar.'" *Wal-Mart*
24 *Stores, Inc. v. City of Turlock*, 483 F.Supp.2d 1023, 1040
25 (E.D.Cal.2007). Although there is a strong presumption that the
26 lodestar represents a reasonable fee, *Burlington v. Dague*, 505

1 U.S. 557, 562 (1992), the district court has the discretion to
2 exclude from the initial fee calculation hours that were not
3 reasonably expended, for example, cases that are overstaffed.

4 Furthermore, the Supreme Court in *Hensley* held:

5 Counsel for the prevailing party should make
6 a good faith effort to exclude from a fee
7 request hours that are excessive, redundant,
8 or otherwise unnecessary, just as a lawyer in
9 private practice ethically is obligated to
10 exclude such hours from his fee submission.
11 'In the private sector, "billing judgment" is
12 an important component in fee setting. It is
13 no less important here. Hours that are not
14 properly billed to one's client also are not
15 properly billed to one's adversary pursuant
16 to statutory authority.'

17 *Id.* at 434. As explained in *Wood v. Sunn*, 865 F.2d 982, 991 (9th
18 Cir.1988):

19 Many factors previously identified by courts
20 as probative on the issue of 'reasonableness'
21 of a fee award, see e.g., *Kerr v. Screen*
22 *Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th
23 Cir.1975), *cert. denied*, 425 U.S. 951 ...
24 (1976), are now subsumed within the initial
25 calculation of the lodestar amount. *Blum v.*
26 *Stenson*, 465 U.S. 886, 898-900 ...
(1984) ('the novelty and complexity of the
issues,' 'the special skill and experience of
counsel,' the 'quality of the
representation,' and the 'results obtained'
are subsumed within the lodestar);
Pennsylvania v. Delaware Valley Citizen's
Council, 478 U.S. 546 ... (1986), *rev'd after*
rehearing on other grounds, 483 U.S. 711 ...
(1987) (an attorney's 'superior performance'
is subsumed).

27 See also *Clark v. City of Los Angeles*, 803 F.2d 987, 990 & n.3
28 (9th Cir.1986). As the *Clark* court explained:

29 [T]he Supreme Court has recognized that
30 adjustments, both upward and downward to the
31 lodestar amount are sometimes appropriate,

1 albeit in 'rare' and 'exceptional' cases ...
2 *Blum*, 465 U.S. at 898-901 ... The possibility
3 of adjustments to the lodestar amount
4 necessitates an analysis of various factors
5 that could justify an adjustment. In this
6 circuit, the relevant factors were identified
7 in *Kerr v. Screen Extras Guild, Inc.*, 526
8 F.2d 67, 70 (9th Cir.1975). Although several
9 of these factors are now considered to be
10 subsumed within the calculation of the
11 lodestar figure ..., review of the *Kerr*
12 factors remains the appropriate procedure for
13 considering a request for a fee-award
14 adjustment.

15 *Id.* The *Kerr* factors, as modified by *Stewart v. Gates*, 987 F.2d
16 1450, 1453 (9th Cir.1993), are:

17 (1) the time and labor required of the
18 attorney(s);

19 (2) the novelty and difficulty of the
20 questions presented;

21 (3) the skill requisite to perform the legal
22 service properly;

23 (4) the preclusion of other employment by the
24 attorney(s) because of the acceptance of the
25 action;

26 (5) the customary fee charged in matters of
 the type involved;

 (6) any time limitations imposed by the
 client or the circumstances;

 (7) the amount of money, or the value of the
 rights involved, and the results obtained;

 (8) the experience, reputation and ability of
 the attorney(s);

 (9) the 'undesireability' of the action;

 (10) the nature and length of the
 professional relationship between the
 attorney and the client;

 (12) awards in similar actions.

1 *Id.*; see also Rule 54-293(c), Local Rules of Practice.

2 a. LODESTAR.

3 The fee applicant bears the burden of documenting the
4 appropriate hours expended in the litigation and must submit
5 evidence in support of those hours worked. *Hensley, supra*, 461
6 U.S. at 433, 437. The party opposing the fee application has a
7 burden of rebuttal that requires submission of evidence to the
8 district court challenging the accuracy and reasonableness of the
9 hours charged or the facts asserted by the prevailing party in
10 its submitted affidavits. *Blum v. Stenson, supra*, 465 U.S. at
11 892 n.5 (1984); *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th
12 Cir. 1987).

13 i. Hours Expended and Supporting
14 Documentation.

15 Daniel Wainwright has detailed the hours incurred by himself
16 and members of his law firm in defending this action. Attached
17 to Mr. Wainwright's declaration are detailed copies of billing
18 statements with descriptions of the tasks performed, by whom, and
19 the time incurred. The billing statements set forth numerous
20 entries of "no charge". Mr. Wainwright avers in pertinent part:

21 11. This litigation has involved numerous
22 Court hearings, numerous filings and
23 pleadings (in excess of 370 documents, and
24 counting), complex legal issues, ever
25 changing factual allegations, numerous
26 witnesses and a great deal of my professional
time. Plaintiff's behavior made the
litigation of this matter much difficult
since my client consistently had numerous
filings and Motions to respond to all of
which carried sensitive deadlines. This

1 required constant attention to this matter
2 and excluded my acceptance of other work.

3 12. During the time that Plaintiff was
4 claiming a §1981 violation and various state
5 court claims, I filed a Motion to Dismiss and
6 Anti-SLAPP Motion. This Motion to Dismiss was
7 granted and Plaintiff filed the subject
8 Complaint.

9 13. Thereafter, I brought a Motion for
10 Summary Judgment. The Court deferred ruling
11 on this Motion in order to allow Plaintiff
12 time to conduct discovery. The Court granted
13 portions of this Motion and allowed Plaintiff
14 time to complete more discovery.

15 14. Extensive written discovery (consisting
16 of hundreds and hundreds of request for
17 admissions) was propounded by Plaintiff and
18 responded to by Defendant.

19 15. Thereafter, I caused to be filed a
20 Renewed Motion for Summary Judgment. In
21 response to this Motion, Plaintiff created
22 and invented new facts. Ultimately, the Court
23 denied our Motion and said that this matter
24 must be adjudicated by a jury after trial.

25 16. In February 2007, I took Plaintiff's
26 deposition.

17 17. Thereafter, I prepared this matter for
18 trial. This involved numerous hearings,
19 numerous pre-trial documents and extensive
20 time and efforts. Because of the numerous
21 witnesses in this case, I spent a great deal
22 of time interviewing witnesses and preparing
23 for their trial testimony. Plaintiff even
24 failed to attend the pre-trial document
25 exchange conference in Modesto, as had been
26 set forth in the Pretrial order.

...

19. All told, this firm devoted over 548
hours to this litigation. Pursuant to our Fee
Agreement, my client was to pay for hourly
services. This was not a contingency fee
relationship.

20. From December 2005 through May 2007, I

1 expended 475.90 hours on behalf of Defendant
2 in the subject action. In December 2005 I
3 billed 24.3 hours at \$160 per hour, or
4 \$3,888. Once I became a partner in this firm
5 my billing rate increased to \$195.00 an hour.
6 According to the bills submitted I billed
7 422.40 hours at \$195 per hour from January
8 2006 through May 2007, or \$82,368.00.

9
10 21. In addition, more time has been incurred
11 by myself and others in my office in June
12 2007 (through June 8, 2007). I have incurred
13 3 hours in June 2007 or \$585.00.

14
15 22. My law clerk, Alison Laird incurred 24.8
16 hours of legal time at a billing rate of \$120
17 per hour or \$2,976.00 through June 8, 2007.

18
19 23. Thus, as of Friday, June 8, 2007, an
20 additional \$3034.50 in fees have been
21 incurred. Again, I reserve the right to file
22 a supplemental Affidavit setting for the
23 additional fees and costs that have been and
24 will be incurred in handling the continued
25 legal issues of this case and dealing the
26 extremely litigious plaintiff.

27
28 24. Therefore, as of the closing of business
29 on Friday, June 8, 2007, the total sum of
30 \$92,975.50 has been incurred by my client as
31 a direct and proximate result of my office's
32 legal representation of JOHN J. HOLLENBACK,
33 JR., in this civil rights case.

34
35 25. Note that according to the billing
36 records, my paralegal, Diana Thompson,
37 expended 11 hours on behalf of the Defendant
38 in the subject action billed at \$95 per hour,
39 therefore totaling \$1,045.00.

40
41 26. Associate, Alice Dostalova, expended 3.8
42 hours on behalf of the Defendant in the
43 subject action billed at \$160 per hour,
44 therefore totaling \$608.00.

45
46 27. Associate, Kurt Wendlenner at this firm
47 expended 12.7 hours on behalf of the
48 Defendant in the subject action billed at
49 \$160 per hour, therefore totaling \$2,032.00.

50
51 28. The billing rates of \$195.00 for

1 partners, \$160.00 for associates and \$95.00
2 for paralegals is extremely reasonable. Based
3 on my experience in the legal community most
4 civil rights attorneys in San Francisco and
5 Los Angeles bill at rates closer to \$300.00
6 to \$400.00 per hours. Even in Fresno, the
7 average billing rate for civil rights defense
8 attorneys is well above the rate that I
9 charged in this case. In fact, other partners
10 within my firm bill over \$250.00 per hour for
11 defense of similar cases. Obviously, this was
12 an extremely reasonable billing rate and well
13 below what others would charge for similar
14 professional services.

15 29. The amount of time spent defending this
16 case is reasonable and appropriate. Plaintiff
17 is extremely litigious and has filed hundreds
18 and hundreds of pleadings. Plaintiff's
19 lawsuit has been ever changing and has
20 continually been morphing between December
21 2005 and today. Thus, I was forced to
22 research and investigate numerous different
23 claims and allegations. At first it involved
24 a §1981 claim, then numerous state tort
25 claims were added. Each of these claims were
26 successfully attacked by the pleadings that I
27 filed in this case. Plaintiff's claim that
28 his December 2002 Family Law
29 custody/visitation Order actually was a
30 "contract" and falls under §1981 was a
31 unique argument that had never been addressed
32 by this (or any other) Court. Thus, new and
33 persuasive arguments had to be researched and
34 crafted to refute these claims. Ultimately,
35 the Court agreed with our analysis and
36 dismissed any such contention.

37 30. Later, when Plaintiff created the
38 §§1985/1986 claims, new work, research and
39 investigation was required. Furthermore,
40 since Plaintiff's factual claims were ever
41 changing additional work was needed to
42 investigate his new claims after they were
43 invested by Plaintiff.

44 31. Plaintiff has called my office numerous
45 times. On some days I would get three or four
46 calls from Plaintiff and he would ramble on
47 for lengthy conversations. For the most part
48 there was absolutely no reason for Plaintiff

1 to call me other than harass, annoy and
2 inconvenience me, to my clients expense.

3 32. Because Plaintiff was representing
4 himself additional fees and costs were
5 incurred in dealing with him. Typically, when
6 dealing with another attorney one would
7 expect certain professional courtesies,
8 conduct, etc. Here, nothing like this
9 existed. Plaintiff was actively trying to do
10 whatever he could to cause the legal fees to
11 increase in this case. This resulted in
12 numerous filings, Motions and other actions
13 by Plaintiff that served no legal purpose
14 other than to cause the fees incurred to
15 increase. I was unable to rely upon any
16 agreement or other informal arrangement ever
17 reached with Plaintiff. He would continue to
18 change his position on requests, continually
19 seek favors from me, all the while working as
20 diligently as possible to run up the fees and
21 costs associated with the defense of these
22 bogus claims.

23 33. One example of this wrongful,
24 unprofessional and costly conduct was the
25 fact that Plaintiff elected to NOT attend the
26 Court Ordered April 19, 2007 document
exchange conference.

34. My client's professional and personal
reputation was being attacked by Plaintiff.
The type of language and conduct attributed
to my client by Plaintiff was egregious,
racist in nature and, if true, substantially
undesirable. Obviously the claims were false.
However, it was imperative to my client that
his good name be cleared and that he be
exonerated of any racist or other wrongful
conduct by a jury of his peers. My client's
livelihood was premised on the fact that he
was an honest, fair, reasonable,
knowledgeable and non-racist attorney in the
Modesto legal community. Thus, his good
reputation was imperative to defend as any
smearing by Plaintiff would result in a
substantial financial drop off.

35. Plaintiff had sought millions and
millions of dollars for the alleged damages
in both general, special and punitive

1 damages. Thus, if Plaintiff were successful
2 then my client would have likely been
3 responsible for an extremely substantial
4 monetary judgment. Obviously, since we were
able to successfully defend these conspiracy
claims, I was able to obtain for my client
the best possible result, after trial.

5 36. I have reviewed the referenced fees and
6 find them to be reasonable in light of the
substantial amount of time and labor required
7 to litigate this matter and the customary fee
charged
8 in matters of the type involved. Furthermore,
as can be seen, a great deal of time has been
"written-off" and not billed to my client. In
9 addition, there has been numerous billing
entries at
10 1/10th of an hour increments. These billing
practices have actually resulted in a
11 reduction of the actual amount of legal fees
incurred, even when the work was performed.

12 Plaintiff requests that he be allowed limited discovery
13 under "Rule 59" because the documentation provided by Defendant
14 "appears questionable":

15 Specifically, the copies of checks show being
16 drawn on Hollenback's now dissolved LAW-FIRM
PARTNERSHIP, which was apparently dissolved
17 at/around MAY 2007

18 Also, there appears to be a copy of a check
19 purportedly paid to 'defense witness Don
Strangio' - However said 'witness' did not
20 testify at trial.

21 Plaintiff requests that the Court allow Jones
to review satisfactory copies of all
22 cancelled checks [Front and back] to support
Hollenback's fee claim, and that Jones be
23 allowed to review satisfactory copies of all
fee/cost agreements and/or arrangement
24 pertaining to Hollenback's purported fees,
and costs.

25 Plaintiff is not referring to Mr. Wainwright's declaration
26 and attached documentation in support of the motion for

1 attorney's fees; rather, Plaintiff is referring to Bill of Costs
2 submitted by Defendant on May 21, 2007 (Docs. 366 & 367). Costs
3 were taxed by the Clerk on June 21, 2007 (Doc. 379).

4 Plaintiff's own exhibit establishes that Mr. Hollenback's law
5 firm dissolved on May 31, 2007, approximately ten days after the
6 Bill of Costs was filed. No check drawn on Mr. Hollenback's now
7 dissolved law firm is dated after May 31, 2007. The Bill of
8 Costs does request taxation of a \$40.00 subsistence fee and
9 \$38.00 charge for mileage for Donald Strangio. The sole
10 opposition to Defendant's motion for attorney's fees upon which
11 Plaintiff relies, Doc. 395, was not filed until November 5, 2007.
12 Pursuant to Rule 54-292(c), Local Rules of Practice, specific
13 objections to items in the Bill of Costs must be filed within 10
14 days from service of the Bill of Costs. Pursuant to Rule 54-
15 292(d), if no objections are filed, "the Clerk shall proceed to
16 tax and enter costs." Rule 54-292(e) provides: "On motion filed
17 and served within five (5) court days after notice of the taxing
18 of costs has been served, the action of the Clerk may be reviewed
19 by the Court as provided in Fed. R. Civ. P. 54(d)." Plaintiff
20 did not file any objections to the Bill of Costs or move the
21 Court to review the taxed costs within the times set forth in
22 Rule 54-292. Plaintiff's objections to the Bill of Costs set
23 forth in Doc. 395 are untimely.

24 This constitutes Plaintiff's sole objection challenging the
25 attorney fee documentation submitted by Defendant. Plaintiff has
26 not submitted any evidence challenging the accuracy and

1 reasonably of the hours charged or the facts asserted by the
2 prevailing party in its submitted affidavits. From the Court's
3 independent review of Mr. Wainwright's billing statements,
4 this aspect of the lodestar is established.

5 ii. Reasonable Hourly Rate.

6 The reasonable hourly rate corresponds to the prevailing
7 market rate in the relevant community, considering the
8 experience, skill, and reputation of the attorney in question.
9 *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th
10 Cir.1985). The community where the court sits is the relevant
11 market for determining reasonable fees. *Gates v. Deukmejian*, 987
12 F.2d 1392, 1405 (9th Cir.1992). "[T]he determination of a
13 reasonable hourly rate 'is not made by reference to the rates
14 actually charged the prevailing party.'" *Welch v. Metropolitan*
15 *Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir.2007). "Rather,
16 billing rates 'should be established by reference to the fees
17 that private attorneys of an ability and reputation comparable to
18 that of prevailing counsel charge their paying clients for legal
19 work of similar complexity.'" *Id.*

20 Plaintiff poses no objection to the hourly rates set forth
21 in Mr. Wainwright's declaration and the supporting billing
22 documents. The hourly rates of \$195, \$160 and \$95 are reasonable
23 in this community, given that awards based on higher hourly rates
24 (\$250 - \$285) for attorneys and paralegals of similar competence
25 and reputation for business litigation prevailing in this legal
26 community have been affirmed.

1 D. Plaintiff's "Special Motion to Strike".

2 Plaintiff characterizes Defendant's motion for attorney's
3 fees as a SLAPP claim governed by California law. Plaintiff
4 reaches this conclusion by selective mis-citation of case law.
5 Plaintiff cites *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395
6 (1990). In *Cooter & Gell*, the Supreme Court held that a district
7 court could impose Rule 11 sanctions after a plaintiff
8 voluntarily dismissed the action. The Supreme Court stated:

9 It is well established that a federal court
10 may consider collateral issues after an
11 action is no longer pending ... This Court
12 has indicated that motions for costs or
13 attorney's fees are 'independent
14 proceeding[s] supplemental to the original
15 proceeding and not a request for a
16 modification of the original decree.

17 Plaintiff then refers to *Carnes v. Zamani*, 400 F.3d 1057 (9th
18 Cir. 2007). *Zamani* involved a diversity action arising out of a
19 commercial real estate transaction. The Ninth Circuit held that
20 a motion for attorney's fees incurred in enforcing a judgment
21 constituted a supplementary proceeding to, and in aid of,
22 judgment, and that California's Enforcement of Judgments Law
23 applied to the motion in federal court in California for
24 attorney's fees incurred in enforcing the judgment in a diversity
25 case. Plaintiff argues that Rule 69(a), Federal Rules of Civil
26 Procedure, pertaining to process to enforce a judgment, requires
this Court to apply California law:

Accordingly, Pro Se Plaintiff Jones, under
California state law, Cal. Civ. Proc. Code
Section 425.16 [Special Motion to Strike] -
respectfully requests the Honorable District

1 Court to STRIKE defenddant's [sic] post-
2 judgment claim for fees and costs.

3 Here, Hollenback (is the plaintiff), and Pro
4 Se Jones (is the defendant) - as to said
5 SLAPP claim (post judgment claim for
6 fees/costs).

7 Simply put, Hollenback's claim is a SLAPP,
8 aimed at interfering with Jones' Legitimate
9 First Amendment Rights.

10 Therefore, the Honorable District Court must
11 apply section 425.16 [California anti-SLAPP
12 statute - C.C.P. S. 425.16] - as mandated by
13 42 U.S.C. S. 1988(a).

14 Plaintiff's contention is frivolous. Defendant is not
15 seeking to enforce a judgment; he is seeking an award of
16 attorney's fees pursuant to a federal statute, 42 U.S.C. § 1988,
17 because he prevailed against Plaintiff in federal court with
18 regard to Plaintiff's claims of civil rights violations.
19 California law, and specifically California Code of Civil
20 Procedure § 425.16, has no application to Defendant's motion for
21 attorneys' fees.

22 Plaintiff's Special Motion to Strike is DENIED.

23 E. Plaintiff's Counter-Motion for Sanctions Under Rule 11,
24 Federal Rules of Civil Procedure.

25 In opposing Defendant's motion for attorneys' fees,
26 Plaintiff moves for sanctions pursuant to Rule 11, Federal Rules
of Civil Procedure and/or 28 U.S.C. § 1927 and/or Rule 26,
Federal Rules of Civil Procedure against defense counsel Daniel

1 Wainwright and/or Defendant John Hollenback.²

2 Plaintiff's scenario that Defendants violated Rule 11 is
3 complicated. Plaintiff contends that Defendant violated Rule 11
4 when Defendant characterized Plaintiff's prior criminal
5 conviction in Case No. #E9488120 as a misdemeanor offense of
6 forgery related to documents related to Ms. Chhay in violation of
7 California Penal Code § 476(a).

8 Plaintiff refers to his Motion in Limine filed on February
9 7, 2007 (Doc. 295), wherein Plaintiff moved to exclude evidence
10 pertaining to three criminal cases against Plaintiff on the
11 ground that "[a]ll three cases were misdemeanor pleas-
12 negotiations and all are now cleared (record clearance) pursuant
13 to 1203.4 PC." Plaintiff's motion listed the three cases as:

14 (i) #8465500 (plea date 11-01-1984) - record
15 clearance on or about 11/1985

16 (ii) #E9488120 (plea date 12/13/95) - record
17 clearance on or about 12/6/1996

18 (iii) #CC066134 (plea date 8/23/2000) -
19 record clearance on or about 2/20/2004

20 Conviction C8465500 is described in Attachment A to this Motion
21 in Limine as a violation of California Penal Code §§ 484-487
22 (generally theft of property). Conviction #E9488120 is described
23 in Attachment B to this Motion in Limine as a misdemeanor
24 violation of California Penal Code § 476A (forgery and

25 ²Although Plaintiff withdrew the motions for sanctions set
26 forth in Docs. 397, 400, 405 and 406, Doc. 395, the sole pleading
upon which Plaintiff now relies in opposing Defendant's motion for
attorneys' fees, includes a counter-motion for sanctions under Rule
11.

1 counterfeiting). Conviction #CC066134 is described in Attachment
2 C to this Motion in Limine as a violation of California Penal
3 Code § 273.5(a) (infliction of corporal injury on spouse).

4 Plaintiff then refers to the Pretrial Statement filed on March
5 22, 2007 (Doc. 301) as indicating Defendant's "awareness of
6 Jones' DOC # 295, and also indicates the defense's knowledge of
7 criminal case #E9488120 involving Jones." Specifically,
8 Plaintiff refers to the section of Defendant's Pretrial Statement
9 captioned "(11) Exhibits - Schedules and Summaries", where

10 Defendant states he expects to offer the following
11 documents/exhibits at trial: "All documents from the Santa Clara
12 County Judicial District involving the case of The People of the
13 State of California vs. Melvin Jones (Case No. E9488120)."

14 Plaintiff refers to Defendant's opposition to his Motion in
15 Limine (Doc. 295) filed on April 23, 2007 (Doc. 315). Plaintiff
16 states that "the defense stated that said case #E9488120 was
17 connected to [involved plaintiff committing a crime against Ms.
18 Chhay] Domestic violence re: Ms. Chhay." Defendant's opposition
19 to the Motion in Limine states:

20 There are three prior misdemeanor convictions
21 that may potentially be used to impeach
 plaintiff during his trial testimony.

22 The first occurred on or about November 1,
23 1984 when he plead *nolo contendere* to charges
24 that he committed theft via fraud and
 wrongfully appropriated property. (Cal.
25 Penal Code §§ 484-487.) The second, occurred
 on December 13, 1995 when plaintiff was
26 convicted of the misdemeanor offense of
 forgery related to documents related to Ms.
 Chhay. (Cal. Penal Code § 476(a).) The third

1 incident took place on August 23, 2000, when
2 plaintiff was convicted of the misdemeanor
3 offense of willfully inflicting onto the
4 mother (Ms. Chhay) of his, [sic] corporal
injury resulting in a traumatic condition.
(Cal. Penal Code § 273.5(a).)

5 Plaintiff asserts that, during the hearing on the parties'
6 motions in limine conducted on May 1, 2007:

7 [D]efense counsel repeated/ [sic] (defended
8 Jones' motion by making) statement to Court
9 that Case #E9488120, was a conviction as to
10 fraud upon Ms. Chhay ... [T]he District Court
11 relied upon defense counsel's representations
12 as to CASE #E9488120. The District Court
indicated that because Case #E948812, and
case # CC066134 involve Domestic violence
(pattern) - that both cases would be
admissible. Defense counsel reassured the
Court that Case #E9488120 involved Plaintiff
committing Fraud against Ms. Chhay.

13 Plaintiff then refers to the "Order of the Court Regarding the
14 Parties' Motions *In Limine*" filed on May 8, 2007 (Doc. 352):

15 1. The Court GRANTS plaintiff's Motion
16 regarding the exclusion of evidence of
17 plaintiff's November 1, 1984 Cal. Penal Code
§§ 488-487 conviction.

18 2. The Court DENIES plaintiff's Motion
19 regarding the exclusion of evidence
20 pertaining to plaintiff's December 13, 1995
fraud conviction pursuant to Cal. Penal Code
§ 476(a). The dismissal shall be attached.

21 3. The Court DENIES, in part, plaintiff's
22 Motion regarding the exclusion of evidence
23 pertaining to the domestic violence
24 conviction of plaintiff, for the purpose of
establishing a possible bias on the part of
plaintiff and the victim of said domestic
violence, Kea Chhay. The dismissal shall be
attached.

25 Plaintiff then asserts that, during the October 29, 2007 hearing
26 on Plaintiff's Motion for a New Trial:

1 Relying upon Defense Counsel's previous
2 representation as to CASE #E9488120 being
3 Fraud against Ms. Chhay (Domestic Violence)
4 as to 'forging a check of Ms. Chhay - as
5 defense counsel has represented to the
6 District Court - the district court verbally
7 referenced said representation by defense
8 counsel - relying upon said representation to
9 be true [WHICH IS NOT TRUE].

6 Plaintiff argues that his conviction in Case #E9488120 did
7 not involve Ms. Chhay but "involved a business dispute with an
8 automobile dealer in Sunnyvale, CA. [Larry Hopkins]." Plaintiff
9 submits documentary evidence substantiating this fact.

10 Defendant opposes Plaintiff's requests for sanctions,
11 contending they "are not based on fact, law or other evidence."
12 Defendant contends that these motions "are nothing more than
13 Plaintiff's continued claims that he was somehow wronged or
14 harmed during the three day jury trial [and] that the Motions are
15 nothing more than renewed arguments and claims that Plaintiff is
16 entitled to a new trial." Defendant asserts that the Court has
17 summarily rejected Plaintiff's claims in denying his motion for a
18 new trial.

19 In the Memorandum Decision and Order Denying Plaintiff's
20 Motion for New Trial filed on November 9, 2007 (Doc. 398),
21 Plaintiff's claim was rejected that he was entitled to a new
22 trial because of defense misconduct that "'defense counsel
23 attempted to use the trust of the Court during the final
24 evidentiary hearing(s) PRIOR TO TRIAL ... [by] FLAT OUT LIED to
25 the Court verbally and in written pleading regarding Jones' "no
26 contest" plea in 1994 [sic] - [which was subsequently dismissed

1 in 1995 pursuant to CA Statute] - the FLAT OUT LIE was that said
2 misdemeanor plea was related to defense witness, Ms. Chhay, which
3 is unequivocally a TOTAL LIE.'" In rejecting Plaintiff's claim
4 for a new trial on this ground, the Court ruled:

5 The Court will not consider grounds for a new
6 trial not raised in the initial papers in
7 support of the motion. Further, a new trial
8 may only be granted when discovery misconduct
9 is alleged and the movant can: (1) prove by
10 clear and convincing evidence that the
11 verdict was obtained through fraud,
12 misrepresentation, or other misconduct; and
13 (2) establish that the conduct complained of
14 prevented the losing party from fully and
fairly presenting his case or defense. *Wharf*
v. Burlington Northern R. Co., 60 F.3d 631,
637 (9th Cir.1995); *Jones v. Aero/Chem Corp.*,
921 F.2d 875, 878-879 (9th Cir.1990). The
examples asserted by Plaintiff do not raise
any issues that impacted the trial.
Plaintiff has not made the showing required
to obtain a new trial based on alleged
discovery abuse.

15 (Doc. 398, p. 14:12-24). The Court also rejected Plaintiff's
16 claim he was entitled to a new trial because of judicial error in
17 Jury Instruction No. 6:

18 Jury Instruction No. 6 states:

19 The evidence that plaintiff has
20 been convicted of the crime of
21 fraudulently passing a bad check
22 may be considered only as it may
affect the believability of
plaintiff as a witness and for no
other purpose.

23 The evidence that plaintiff has
24 been convicted of the crime of
25 domestic violence may be considered
26 only as it may affect the motive or
the bias of plaintiff and the
victim, Ms. Chhay, as it bears on
their believability and for no

1 other purpose.

2 Plaintiff filed motions in limine to exclude
3 evidence of these two convictions. In the
4 Order resolving the motions in limine (Doc.
5 352), the Court ruled in pertinent part:

6 2. The Court DENIES plaintiff's
7 Motion regarding the exclusion of
8 evidence pertaining to plaintiff's
9 December 13, 1995 fraud conviction
10 pursuant to Cal. Penal Code §
11 476(a). The dismissal shall be
12 attached.

13 3. The Court DENIES, in part,
14 plaintiff's Motion regarding the
15 exclusion of evidence pertaining to
16 the domestic violence conviction of
17 plaintiff, for purpose of
18 establishing possible bias on the
19 part of plaintiff and the victim of
20 said domestic violence, Kea Chhay.
21 The dismissal shall be attached.

22 Plaintiff argues that "because this
23 information was not set forth with the FACT
24 that both 'convictions' have been dismissed
25 per CA law [it] is fundamentally unjust to
26 Pro Se Plaintiff, as the Jury would be
confused re: Plaintiff's direct testimony re:
dismissal." Plaintiff further asserts that
Jury Instruction No. 6, when combined with
Jury Instruction No. 7 (Witness Materially
False), "have the force and effect of a
DIRECTING A VERDICT, As Jury Instruction # 6
... is contrary to the Courts Order on MIL,
and Plaintiff's testimony as TO THE SAME."
Plaintiff contends that his 1995 fraud
conviction by plea of no contest, "which has
been withdrawn/dismissed per California
statute, should not, and is not admissible
Due to an unrebutted Presumption of
Rehabilitation due to No conviction since of
a crime of dishonesty/FRAUD." Plaintiff
argues that "defendant has provided NO
evidence prior or during 1st trial of
Plaintiff's presumption of Rehabilitation -
being disproven." Plaintiff makes similar
arguments with regard to his domestic
violence conviction.

1 Plaintiff is not entitled to a new trial on
2 this ground. As Defendant avers in his
3 Declaration in opposition to the motion for
4 new trial:

5 37. At trial, Plaintiff chose to
6 introduce evidence of his prior
7 convictions for check fraud and
8 battery against a spouse or
9 domestic partner. He also
10 introduced evidence, through his
11 testimony, that following
12 successful completion of probation,
13 he had been permitted to withdraw
14 his 'nolo contendere' pleas to
15 these charges and to enter 'not
16 guilty' pleas with the charges
17 being dismissed. Plaintiff choose
18 [sic] not to introduce any
19 documentary evidence of his change
20 of pleas. Furthermore, it should
21 be noted that the defense never
22 introduced any documents regarding
23 the convictions in the first place.

24 38. Plaintiff, not the defense,
25 raised these matters during Jury
26 *voir dire*, in his Opening
Statement, in his case-in-chief and
again in his closing statements.

39. The jury was properly
instructed by this Court that it
could consider the 'domestic
violence' charge as possibly
diminishing the credibility of Kea
Chhay, since it gave her a motive
for testifying against Plaintiff
and vice versa. As to the
fraudulent check charge, the jury
[was] properly instructed that
Plaintiff being convicted of a
crime involving moral turpitude
could be considered as adversely
affecting Plaintiff's credibility.
There had never been a factual
finding of innocence on the part of
Plaintiff with respect to either of
his criminal convictions,
notwithstanding the fact that he
had been permitted to withdraw his

1 'nolo contendere' pleas upon
2 completion of his probation in each
3 instance. More important,
4 Plaintiff did not deny committing
5 the underlying criminal acts
6 particularly the fraudulent check
7 offense in his testimony at trial.

8 Plaintiff himself introduced the subject of
9 his prior convictions; it was up to him
10 introduce the documents demonstrating that
11 these convictions had been dismissed.
12 Plaintiff's claimed errors were invited by
13 his introduction of these subjects without
14 presenting any documentary evidence of the
15 dismissal of these convictions. Instruction
16 No. 2 [sic] correctly stated the law.

17 (Doc. 398, 19:19-22:7).

18 For purposes of this Memorandum Decision, the Court accepts
19 Plaintiff's assertions that Defendant stated to the Court that
20 Case #E9488120 involved Plaintiff's forgery relating to Ms.
21 Chhay. Plaintiff does not represent and the Court has no
22 recollection that Plaintiff ever advised Defendant or the Court
23 that Case #E9488120 did not involve forgery relating to Ms. Chhay
24 during pretrial proceedings or the trial itself. It was not
25 until August 28, 2007, when Plaintiff filed his "Objections and
26 Requests as to Pending Motion for Fees and Motion for New Trial"
filed on August 28, 2007 (Doc. 383), a pleading deemed by the
Court to be Plaintiff's reply brief in support of his motion for
a new trial, that Plaintiff contended that this conviction did
not involve Ms. Chhay. Any misrepresentation to the Court was
caused by Plaintiff's lack of candor concerning the actual facts
underlying this prior conviction. Plaintiff essentially laid in
the weeds to ambush the verdict against him based on information

1 of which he was aware from Day One. There is no basis for
2 imposition of sanctions against Defendant on this ground and
3 certainly no basis to deny the motion for attorney's fees on this
4 ground. The error, if it be such, is nonetheless harmless as the
5 forgery conviction, a crime adversely reflecting on truth-telling
6 ability, was independently admissible.

7 Plaintiff's Counter-Motion for Sanctions Under Rule 11,
8 Federal Rules of Civil Procedure is DENIED.

9 F. Plaintiff's Grounds for Denial of Motion for
10 Attorney's Fees.

11 Plaintiff asserts a number of grounds in opposition to
12 Defendant's motion for attorney's fees.

13 1. Jury Trial.

14 Plaintiff argues that Defendant's motion for attorney's fees
15 is "defective" because the fee claim was not tried to the jury
16 during trial.

17 Plaintiff's contention is without merit. "It is the trial
18 court, not the jury, that has the responsibility of determining
19 attorney's fees awards pursuant to statute." *Bingham v. Zolt*, 66
20 F.3d 553, 565 (2nd Cir.1995), *cert. denied*, 517 U.S. 1134 (1996);
21 *see also Gagne v. Town of Enfield*, 734 F.2d 902, 904 (2nd
22 Cir.1984).

23 2. Common Nucleus of Operative Fact.

24 Plaintiff argues that Defendant's motion is "defective"
25 because the motion for attorney's fees does not arise from a
26 common nucleus of operative fact with any of the claims tried to

1 the jury.

2 The cases relied upon by Plaintiff do not stand for this
3 proposition. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725
4 (1966), involved pendent jurisdiction over a state law claim
5 coupled with a federal claim:

6 The federal claim must have substance
7 sufficient to confer subject matter
8 jurisdiction on the court ... The state and
9 federal claims must derive from a common
10 nucleus of operative fact. But if,
11 considered without regard to their federal ro
12 state character, a plaintiff's claims are
13 such that he would ordinarily be expected to
14 try them all in one judicial proceeding,
15 then, assuming substantiality of the federal
16 issues, there is power in federal courts to
17 hear the whole.

18 In *Maher v. Gagne*, 448 U.S. 122 (1980), the Supreme Court ruled
19 that Section 1988 applies to all civil rights actions, including
20 actions based solely on Social Security Act violations; that the
21 fact the recipient prevailed through a settlement rather than
22 litigation did not preclude a claim for attorney's fees as the
23 prevailing party; and, where the recipient alleged constitutional
24 violations which were sufficiently substantial to support federal
25 jurisdiction, and the constitutional claims remained in the case
26 until the consent decree was entered, the award of attorney's
fees was not barred by the Eleventh Amendment. In *Gerling Global
Reinsurance Corp. of America v. Garamendi*, 400 F.3d 803, opinion
amended on denial of rehearing, 410 F.3d 531 (9th Cir.), cert.
denied, 546 U.S. 978 (2005), the Ninth Circuit held that
insurance companies and a trade organization of insurance

1 companies doing business in California who sued the California
2 Commissioner of Insurance for declaratory and injunctive relief
3 to bar enforcement of the Holocaust Victim Insurance Relief Act,
4 were prevailing parties under Section 1988 due to having obtained
5 injunctive relief.

6 None of these cases stand for the proposition that a motion
7 for attorney's fees under Section 1988 must be denied merely
8 because the issues involving an award of Section 1988 fees do not
9 arise out of the same facts tried to the jury. If that were the
10 case, no award of attorney's fees under Section 1988 could be
11 considered by the district court. This is not the law.

12 3. Plaintiff "Prevailing Party".

13 Plaintiff further argues that "technically" he can be viewed
14 as "ostensibly the prevailing party". Plaintiff cites *Hensley v.*
15 *Eckerhart*, 461 U.S. 424, 433 (1983):

16 A plaintiff must be a 'prevailing party' to
17 recover an attorney's fee under § 1988. The
18 standard for making this threshold
19 determination has been framed in various
20 ways. A typical formulation is that
21 'plaintiffs may be considered "prevailing
22 parties" for attorney's fees purposes if they
23 succeed on any significant issue in
24 litigation which achieves some of the benefit
25 the parties sought in bringing suit.'

22 Plaintiff asserts that "Hollenback testified at trial that
23 Jones' letter(s) to his law partner(s) as potential 'trouble' as
24 to the same, (i.e. law partners not happy with Hollenback's
25 conduct as set forth by Jones in said correspondence)."
26 Plaintiff submits as Exhibit L to Doc. 395 a copy of a formal

1 printed notice advising that the Law Firm of Jones, Cochrane,
2 Hollenback, Nelson & Zumwalt, LLP will be dissolving its
3 partnership on May 31, 2007. Plaintiff contends:

4 Plaintiff's Exhibit 'L' ... evidencing
5 dissolution of Hollenbeck's [now previous]
6 law firm partnership - significantly changes
7 the legal relationship/behavior of Hollenback
8 - which directly benefits Jones. Also, very
9 telling as to this issue is NONE of
10 Hollenback's law partners [previous]
11 testified on his behalf.

12 ALSO, AT TRIAL THE IDENTITY OF A MAJOR-PLAYER
13 ACTING AGAINST JONES AS TO HIS CIVIL RIGHTS
14 (CHHAY'S SUPERVISOR) - LUCAS WAS FINALLY
15 FLUSHED OUT, WHICH IS A GOAL SOUGHT BY JONES
16 IN BRINGING HIS CIVIL RIGHTS ACTION.

17 Plaintiff's contention is utterly baseless and verges on
18 outrageous. In *Hewitt v. Helms*, 482 U.S. 755, 759-760, 764
19 (1987), a case surprisingly cited by Plaintiff, the Supreme Court
20 held:

21 In order to be eligible for attorney's fees
22 under § 1988, a litigant must be a
23 'prevailing party.' ... Respect for ordinary
24 language requires that a plaintiff receive at
25 least some relief on the merits of his claim
26 before he can be said to prevail ... Helms
obtained no relief. Because of the
defendants' official immunity he received no
damages award. No injunction or declaratory
judgment was entered in his favor. Nor did
Helms obtain relief without benefit of a
formal judgment - for example, through a
consent decree or settlement ... The most
that he obtained was an interlocutory ruling
that his complaint should not have been
dismissed for failure to state a
constitutional claim. That is not the stuff
of which legal victories are made.

27 Plaintiff was in no way a "prevailing party" in this action. The
28 jury rejected his claims and returned a defense verdict for

1 Defendant.

2 Plaintiff argues that Defendant "has waived proper assertion
3 of prevailing party rule." Plaintiff contends that "Hollenback's
4 fee motion (claim) is frivolous, lacks merit, and is baseless -
5 further it has no foundation in law or fact." Plaintiff asserts
6 that "said conduct by defendant [frivolous filing] can be
7 considered constructive waiver of the defendant's assertion
8 (timely) of the prevailing party rule."

9 Again, Plaintiff's contention is unfounded. Defendant
10 timely filed a motion for attorney's fees pursuant to Section
11 1988, which expressly authorizes recovery of attorney's fees by a
12 defendant upon the requisite showing. The merits of Defendant's
13 motion are at issue and have been determined by the Court.

14 4. Indigent Plaintiff.

15 Plaintiff argues that Defendant's motion for attorney's fees
16 "places undue burden upon Pro Se Plaintiff Jones (including undue
17 cost) to indigent Pro Se Civil Rights Plaintiff Jones)."

18 "Although the district court should consider the plaintiff's
19 ability to pay ..., a district court should not refuse to award
20 attorney's fees solely on the ground of the plaintiff's financial
21 situation." *Zimmerman v. Bishop Estate*, 25 F.3d 784, 790 (9th
22 Cir.), cert. denied, 513 U.S. 1043 (1994), citing *Miller v. Los*
23 *Angeles County Bd. of Educ.*, 827 F.2d 617, 621 n.5 (9th
24 Cir.1987). "While an award of attorney's fees for a frivolous
25 lawsuit may be necessary to fulfill the deterrent purposes of 42
26 U.S.C. § 1988 ..., the award should not subject the plaintiff to

1 financial ruin." *Miller, id.* "We have never and do not now
2 require a separate hearing on the question of ability to pay ...
3 [but] a district court should consider the financial resources of
4 the plaintiff in determining the amount of attorney's fees to
5 award to a prevailing defendant in a § 1983 action." *Patton v.*
6 *County of Kings*, 857 F.2d 1379, 1382 (9th Cir.1988).³

7 In opposing Defendant's motion for attorneys' fees,
8 Plaintiff presented no evidence by way of declaration or other
9 documentary evidence establishing his inability to pay any amount
10 of attorney's fees. However, in support of his motion for
11 transcripts at government expense filed on November 28, 2007
12 (Doc. 401), Plaintiff submitted an affidavit under penalty of
13 perjury:

14 I do not have enough money or other assets to
15 pay the pending Appeal FEES (\$455.00) I have
16 NO CAR, NO SAVINGS; I own NO real estate, or
17 any other asset(s) for that matter. I also
18 am currently unemployed, and have no other
19 monthly income by which to pay said FEES.

20 An award of \$92,975.50 is substantial and Plaintiff has

21 ³In *Kulas v. Arizona*, 156 Fed.Appx. 29 (9th Cir.2005), the
22 Ninth Circuit affirmed an award of attorney's fees against a pro se
23 plaintiff:

24 The district court also properly considered
25 Kulas' financial resources ..., finding that
26 Kulas' 'lack of resources has not deterred
[him] in the least.' The district court
further found that 'any "financial ruin" which
may potentially befall [Kulas] is due to
frivolous suits such as this, a situation
entirely of [Kulas'] own making. Thus, the
district court was within its discretion in
deciding to award attorney's fees to Arizona.

1 limited means. An award of the total amount of attorney's fees
2 sought by Defendant could lead to Plaintiff's financial ruin.
3 However, Plaintiff himself requested sanctions against Defendant
4 for his costs, which he estimated to range from \$1,000.00 to
5 \$25,000.00. Assuming the truth of Plaintiff's estimation of the
6 expenses he paid in litigating this action, his protestations of
7 present indigency ring hollow and clearly were caused, as in
8 *Kulas*, by Plaintiff's compulsive penchant for continuously filing
9 and litigating frivolous and vexations claims in more than one
10 lawsuit. An award of attorney's fees under Section 1988 in this
11 action is necessary to fulfill the deterrent purposes of Section
12 1988. There must be an end to this litigation. It appears
13 nothing else will influence Plaintiff as he continues raising
14 meritless claims, undeterred by any court ruling.

15 CONCLUSION

16 For the reasons stated above:

- 17 1. Documents No. 380, 384, 386, 387, 388, 397, 400, 405,
18 and 406 are STRICKEN;
- 19 2. Plaintiff's motions for sanctions (Docs. 397, 400, 405
20 and 406) are DENIED AS MOOT;
- 21 3. Plaintiff's "Special Motion to Strike" is DENIED;
- 22 4. Plaintiff's Counter-Motion for Sanctions under Rule 11,
23 Federal Rules of Civil Procedure is DENIED;
- 24 5. Defendant's motion for attorney's fees pursuant to 42
25 U.S.C. § 1988 is GRANTED and Defendant is awarded attorney's fees
26 in the amount of \$30,000.00.

1 6. Defendant's counsel shall prepare and lodge a form of
2 order reciting the rulings set forth in this Memorandum Decision
3 within five (5) days following the date of service of this
4 decision.

5 IT IS SO ORDERED.

6 **Dated: March 18, 2008**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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