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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

6 LING LA,

7 Plaintiff,

8 v.

9 SAN MATEO COUNTY TRANSIT  
10 DISTRICT, et al.,

11 Defendants.

Case No. 14-cv-01768-WHO

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS THE SECOND  
AMENDED COMPLAINT**

Re: Dkt. No. 36

12 **INTRODUCTION**

13 Plaintiff Ling La was terminated from her job as an accountant for defendant San Mateo  
14 County Transit District (“SamTrans”) after repeatedly complaining to coworkers, supervisors, and  
15 several outside authorities about accounting irregularities she suspected were taking place within  
16 SamTrans. She then filed this employment retaliation action against SamTrans and two individual  
17 defendants – Michael Scanlon, SamTrans’s Chief Executive Officer, and Sheila Tioyao, her  
18 supervisor during most of her period of employment – for: (i) retaliation in violation of Cal.  
19 Labor Code § 1102.5(b); (ii) retaliation in violation of 42 U.S.C. § 1983 and the First Amendment;  
20 and (iii) deprivation of substantive due process in violation of 42 U.S.C. § 1983 and the  
21 Fourteenth Amendment; and (iv) retaliation in violation of Cal. Gov. Code § 12653, the  
22 whistleblower retaliation provision of the California False Claims Act.

23 Defendants move to dismiss La’s Second Amended Complaint (“SAC”) under Federal  
24 Rule of Civil Procedure 12(b)(6), arguing, among other things, that the Cal. Lab. Code § 1102.5(b)  
25 and Cal. Gov. Code § 12653 causes of action are barred by La’s failure to allege compliance with  
26 the California Tort Claims Act. They are correct, and further amendment would be futile. Those  
27 causes of action are DISMISSED WITHOUT LEAVE TO AMEND. Scanlon and Tioyao contend  
28 that La has failed to allege sufficient facts to hold either of them liable under the section 1983

1 causes of action. That is also true, and those claims are DISMISSED WITH LEAVE TO  
2 AMEND. Because La adequately alleges that she spoke as a private citizen when making her  
3 complaints, the motion to dismiss the First Amendment retaliation claims against SamTrans is  
4 DENIED.

5 **BACKGROUND**

6 **I. FACTUAL BACKGROUND**

7 La’s allegations are set out in detail in the September 16, 2014 order on SamTran’s motion  
8 to dismiss the First Amended Complaint (“FAC”), so I have only briefly summarized them here.  
9 Where relevant, I have included more detailed explanations of La’s allegations in the discussion  
10 section below.

11 La was hired by SamTrans as a Senior Accountant in May 2011. SAC ¶ 4. In February  
12 2012, La was transferred from the Treasury Division to the General Ledger and Accounts Payable  
13 Division, at which point Tioyao, who was the manager of that division, became La’s supervisor.  
14 SAC ¶ 9. Between November 2012 and July 2013, La repeatedly complained to Tiaoyao, other  
15 supervisors, and various outside entities about accounting irregularities she suspected were taking  
16 place within SamTrans. In March 2013, Tioyao gave La a negative performance review, a  
17 “Performance Improvement Plan,” and a six month probation. SAC ¶ 29. On July 31, 2013, La  
18 received a Notice of Intent to Terminate. SAC ¶ 73. She alleges the Notice “was issued pursuant  
19 to SamTrans’s policy and/or custom of terminating the employment of SamTrans employees who  
20 report suspected financial irregularities, fraud, waste, and abuse.” SAC ¶ 74. Defendant Scanlon  
21 is SamTrans’s Chief Executive Officer. SAC ¶ 8. The SAC does not allege that either Tioyao or  
22 Scanlon participated in the decision to terminate La.

23 The primary difference between the FAC and the SAC is that the SAC alleges with greater  
24 detail and clarity the particular regulations and statutes which La complained were being violated  
25 by the alleged accounting irregularities. The regulations and statutes include:

- 26 • 2 C.F.R. § 200.303. SAC ¶ 17.
- 27 • Cal. Pub. Con. Code §§ 20330-20331. SAC ¶ 36.
- 28 • Cal. Pub. Con. Code § 20207.6. SAC ¶ 37.

- 1 • 29 C.F.R. § 3.4. SAC ¶ 45.
- 2 • 49 U.S.C. § 5325 and 49 C.F.R. § 18.36. SAC ¶ 47-48.
- 3 • Cal. Gov. Code §§ 29120, 29121, and 29125. SAC ¶ 67.

4 The SAC also includes new allegations regarding communications between La and  
5 SamTrans following her receipt of the July 31, 2013 Notice of Intent to Terminate. *See* SAC ¶¶  
6 79-84. The communications concern La’s request for “information concerning the reasons for the  
7 Notice of Intent to Terminate,” including “documentation supporting all discipline issued to Ms.  
8 La[,] email correspondence concerning the basis for Ms. La being placed on a Performance  
9 Improvement Plan[,] and email correspondence concerning why she is not being permitted to  
10 complete the Performance Improvement Plan.” SAC ¶ 79. La eventually reviewed the requested  
11 documents at SamTrans’s counsel’s office on August 23, 2013. SAC ¶ 84.

## 12 **II. PROCEDURAL BACKGROUND**

13 La filed her initial complaint on April 16, 2014. Dkt. No. 1. On June 9, 2014, SamTrans  
14 responded with a motion to dismiss under Rule 12(b)(6). Dkt. No. 10. Rather than oppose the  
15 motion, on July 8, 2014, La filed the FAC, alleging four causes of action: (i) retaliation in  
16 violation of Cal. Labor Code § 1102.5(b); (ii) retaliation in violation of 42 U.S.C. § 1983 and the  
17 First Amendment; (iii) deprivation of substantive due process in violation of 42 U.S.C. § 1983 and  
18 the Fifth and Fourteenth Amendments; and (iv) retaliation in violation of Cal. Gov. Code § 12653,  
19 the whistleblower retaliation provision of the California False Claims Act (“CFCA”). Dkt. No.  
20 19.

21 SamTrans once again moved to dismiss under Rule 12(b)(6). Dkt. No. 21. On September  
22 16, 2014, I issued an order granting in part and denying in part the motion. Dkt. No. 33. I  
23 dismissed the state law whistleblower claims on the ground that La had failed to adequately plead  
24 protected activity within the meaning of either Cal. Labor Code § 1102.5(b) or Cal. Gov. Code §  
25 12653. *Id.* at 7-10, 18-20. I gave La leave to amend both causes of action. *Id.* at 21. I also  
26 dismissed with prejudice La’s claims under the Fifth Amendment on the ground that SamTrans is  
27 not part of the federal government. *Id.* at 16. I denied SamTrans’s motion to dismiss La’s section  
28 1983 claims for First Amendment retaliation and deprivation of substantive due process in

1 violation of the Fourteenth Amendment. *Id.* at 10-18.

2 La filed the SAC on October 6, 2014. Dkt. No. 35. The SAC alleges the same four causes  
3 of action as the FAC, minus any claims under the Fifth Amendment. SAC ¶¶ 89-138. The state  
4 law whistleblower causes of action are alleged against only SamTrans, while the section 1983  
5 causes of action are alleged against all defendants. *Id.* Defendants filed the instant motion on  
6 October 20, 2014. Dkt. No. 36.<sup>1</sup> Although Scanlon and Tioyao did not join in SamTrans’s prior  
7 motions to dismiss, they do join in this one. This appears to be because Scanlon and Tioyao were  
8 not served until after the FAC had been filed. *See* Mot. 6 (Dkt. No. 36). Pursuant to Local Rule  
9 7-1(b), I found the motion suitable for resolution without oral argument and vacated the hearing  
10 set for December 3, 2014.

#### 11 **LEGAL STANDARD**

12 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
13 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A complaint  
14 “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible  
15 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A  
16 claim is facially plausible when it “allows the court to draw the reasonable inference that the  
17 defendant is liable for the misconduct alleged.” *Id.* In considering whether the complaint is  
18 sufficient to state a claim, the court accepts as true all factual allegations contained in the  
19 complaint. *Id.* However, the court need not accept as true “allegations that contradict matters  
20 properly subject to judicial notice.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
21 2008) (internal quotation marks omitted). “Nor is the court required to accept as true allegations  
22 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Id.* “[I]t  
23 is within [the court’s] wheelhouse to reject, as implausible, allegations that are too speculative to  
24 warrant further factual development.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013).

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26 \_\_\_\_\_  
27 <sup>1</sup> Defendants filed a request for judicial notice in conjunction with this motion. *See* Dkt. No. 37.  
28 Defendants’ request for judicial notice of the joint case management statement submitted by the  
parties on September 3, 2013 is GRANTED. Defendants’ request for judicial notice of excerpts  
from SamTrans’s Personnel Policies and Procedures Manual is DENIED AS MOOT, as the  
excerpts are not relevant to resolution of defendants’ motion to dismiss.

1 **DISCUSSION**

2 **I. FIRST AND FOURTH CAUSES OF ACTION: STATE LAW WHISTLEBLOWER**  
3 **CLAIMS**

4 Defendants contend that La’s first and fourth causes of action under Cal. Gov. Code §  
5 1102.5(b) and the CFCA’s retaliation provision, Cal. Gov. Code § 12653, must be dismissed  
6 because La has not alleged compliance with the California Tort Claims Act (“CTCA”). Mot. 10-  
7 12; Reply 3-5 (Dkt. No. 43). I agree.

8 Under the CTCA, with limited exceptions not applicable here, “no suit for money or  
9 damages may be brought against a public entity . . . until a written claim . . . has been presented to  
10 the public entity and has been acted upon . . . or has been deemed to have been rejected.” Cal.  
11 Gov. Code § 945.4. Failure to present a timely written claim to the relevant public entity “bars a  
12 plaintiff from filing a lawsuit against that entity.” *City of Stockton v. Superior Court*, 42 Cal.4th  
13 730, 738 (2007). Thus, in state and federal court alike, “[t]imely compliance with the claim filing  
14 requirements . . . must be pleaded in a complaint . . . to state a cause of action.” *Konig v. State Bar*  
15 *of California*, No. 04-cv-02210-MJJ, 2004 WL 2091990, at \*6 (N.D. Cal. Sept. 16, 2004) (internal  
16 quotation marks omitted); *see also, Dowell v. Contra Costa Cnty.*, 928 F. Supp. 2d 1137, 1151  
17 (N.D. Cal. 2013) (“The requirement that a plaintiff must affirmatively allege compliance with the  
18 CTCA applies in federal court.”) (internal quotation marks omitted).

19 Cal. Gov. Code § 910 requires that the claim presented to the public entity include the  
20 following information:

- 21 (a) The name and post office address of the claimant.
- 22 (b) The post office address to which the person presenting the claim desires  
23 notices to be sent.
- 24 (c) The date, place and other circumstances of the occurrence or transaction which  
25 gave rise to the claim asserted.
- 26 (d) A general description of the indebtedness, obligation, injury, damage or loss  
27 incurred so far as it may be known at the time of presentation of the claim.
- 28 (e) The name or names of the public employee or employees causing the injury,  
damage, or loss, if known.

1 Cal. Gov. Code § 910. Cal. Gov. Code § 910.2 provides that “[t]he claim shall be signed by the  
2 claimant or by some person on his behalf.” Cal. Gov. Code § 910.2. “[A] claim need not contain  
3 the detail and specificity required of a pleading;” however, the claim must “fairly describe what  
4 [the] entity is alleged to have done.” *Stockett v. Ass'n of California Water Agencies Joint Powers*  
5 *Ins. Auth.*, 34 Cal.4th 441, 446, (2004) (internal quotation marks omitted). This aligns with the  
6 CTCA’s purpose, which is “not to prevent surprise, but to provide the public entity sufficient  
7 information to enable it to adequately investigate claims and to settle them, if appropriate, without  
8 the expense of litigation.” *DiCampli-Mintz v. Cnty. of Santa Clara*, 55 Cal.4th 983, 991 (2012).

9 As to timing, where, as here, the claim “relat[es] to a cause of action for . . . injury to  
10 person,” the claim must be presented to the public entity “not later than six months after the  
11 accrual of the cause of action.” Cal. Gov. Code § 911.2. “For the purpose of computing time  
12 limits [under the CTCA,] the date of the accrual of a cause of action . . . is the date upon which the  
13 cause of action would be deemed to have accrued within the meaning of the [applicable] statute of  
14 limitations.” Cal. Gov. Code § 901. The latest date on which the statute of limitations for La’s  
15 state law whistleblower causes of action could have accrued is the date of her termination,  
16 September 23, 2013. *See Shoemaker v. Myers*, 2 Cal. App. 4th 1407, 1427 (1992).<sup>2</sup> Thus, to  
17 comply with the CTCA, La was required to submit a written claim to SamTrans by March 23,  
18 2014, or, alternatively, to submit an application for leave to present a late claim by September 23,  
19 2014. *See* Cal. Gov. Code §§ 911.2, 911.4. Defendants assert that because the SAC does not  
20 allege that La did either, the Cal. Gov. § 1102.5(b) and CFCA retaliation causes of action must be  
21 dismissed.

22 La concedes that the SAC does not allege that she submitted a written claim to SamTrans  
23 within the applicable time period. Opp. 3-6 (Dkt. No. 42). La asserts instead that she has satisfied  
24 the CTCA’s claim filing requirements by pleading facts showing that she “substantially complied”  
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26 <sup>2</sup> Although the SAC does not identify the specific date on which La was terminated, the “Agreed-  
27 Upon Facts” section of the parties’ September 3, 2014 joint case management statement states that  
28 SamTrans terminated La on September 23, 2013. Dkt. No. 31 at 2. I take this is a judicial  
admission. *See Sethi v. Seagate U.S. LLC Grp. Disability Income Plan*, No. 11-cv-06188-WHA,  
2012 WL 3834948, at \*6 (N.D. Cal. Sept. 4, 2012) (holding that statement in joint case  
management statement constituted binding judicial admission).

1 with the Act. *Id.* Specifically, La points to various paragraphs in the SAC alleging that she (i)  
 2 corresponded with SamTrans following her receipt of the July 31, 2013 Notice of Intent to  
 3 Terminate and requested documentation of the basis for her termination; (ii) attended a meeting  
 4 with SamTrans on August 28, 2013 “where whistleblower retaliation was specifically raised;” and  
 5 (iii) filed a complaint with the California Labor Commissioner on October 17, 2013. *See* Opp. 5-6;  
 6 SAC ¶¶ 79-85, 108.

7 The CTCA “is not designed to eliminate meritorious lawsuits or to snare the unwary when  
 8 the [Act’s] purpose has been satisfied. Thus, claims are not required to be technically perfect.”  
 9 *Perez v. Golden Empire Transit Dist.*, 209 Cal. App. 4th 1228, 1234 (2012) (internal citations  
 10 omitted). “Substantial compliance” with the requirements of Cal. Gov. Code §§ 910 and 910.2 is  
 11 generally enough. *Connelly v. Cnty. of Fresno*, 146 Cal. App. 4th 29, 38 (2006). In line with the  
 12 CTCA’s purpose, “the test for substantial compliance is whether the face of the claim discloses  
 13 sufficient information to enable the public entity to make an adequate investigation of the claim's  
 14 merits and settle it.” *Id.* at 42.

15 La relies principally on *Phillips v. Desert Hospital District*, 49 Cal.3d 699 (1989) to urge  
 16 that she substantially complied with the CTCA. *See* Opp. 3-6. In that case, the plaintiffs, Mr. and  
 17 Mrs. Phillips, mailed to the defendant public hospital a signed letter stating that the plaintiffs  
 18 “intend[ed] to commence an action” against the hospital on the basis of “the diagnosis, care,  
 19 treatment, operation and related services rendered to [Mrs. Phillips] on or about September 12,  
 20 1983.” *Phillips*, 49 Cal.3d at 703. The letter also stated that “Mr. Phillips will claim damages for  
 21 loss of consortium and for his mental and emotional suffering resulting from the damages and  
 22 disfigurement to his wife.” *Id.* The California Supreme Court held that while the letter did not  
 23 substantially comply with the CTCA, it nevertheless qualified as a “claim as presented” and  
 24 therefore triggered the hospital’s statutory duty – under Cal. Gov. Code §§ 910.8, 911, and  
 25 911.3(b) – to respond to defective claims. *Id.* at 707-09.<sup>3</sup> The court explained:

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26  
 27 <sup>3</sup> Under Cal. Gov. Code §§ 910.8, 911, and 911.3(b), the filing of a claim which fails to  
 28 “substantially comply” with Cal. Gov. Code §§ 910 or 910.2 “triggers a duty by the public entity  
 to notify the potential claimant of the claim's insufficiency.” *Green v. State Ctr. Cmty. Coll. Dist.*,

1 A public entity's receipt of *written notice that a claim for monetary damages*  
2 *exists and that litigation may ensue* places upon the public entity the  
3 responsibility, and gives it the opportunity, to notify the potential plaintiff . . . of  
4 the defects that render the document insufficient under sections 910 and 910.2 and  
5 thus might hamper investigation and possible settlement of the claim. Such a  
6 written notice claiming monetary damages thereby satisfies the purposes of the  
7 claims act – to facilitate investigation of disputes and their settlement without trial  
8 if appropriate.

6 *Id.* at 709 (emphasis added). The court concluded that because the letter activated the hospital’s  
7 statutory duty to notify the plaintiffs of the letter’s insufficiencies, and the hospital had not done  
8 so, the hospital had “waived any defenses it may have otherwise asserted based on such  
9 insufficiencies.” *Id.* at 711.

10 The other cases cited by La likewise involve written communications delivered to the  
11 appropriate public entity which clearly conveyed the message that “a claim for monetary damages  
12 exists and litigation may ensue.” *Phillips*, 49 Cal.3d at 709. In *Alliance Financial v. City and*  
13 *County of San Francisco*, 64 Cal. App. 4th 635 (1998), the court held that a letter regarding a debt  
14 allegedly owed to the plaintiffs by the City qualified as a claim as presented where the letter stated:  
15 “We look forward to your confirmation of the date and time when [the debt] will be paid. I would  
16 be happy to meet . . . prior to filing an action for recovery.” *Id.* at 647. The court observed that the  
17 letter “informs [the City] that the claim is ripe and that litigation can be expected if the matter is  
18 not resolved.” *Id.* In *Wilson v. Tri-City Hospital District*, 221 Cal. App. 3d 441 (1990), the court  
19 found a claim as presented in a letter written by Wilson’s attorney and sent to the defendant’s  
20 attorney which stated: “I am most certainly going to be asking for substantial money on  
21 [Wilson’s] behalf as a ‘reasonable settlement’ . . . Will the [defendant] waive any further  
22 discussions between us and administrative actions so I can file a lawsuit on Wilson’s behalf? . . .  
23 Finally, will you accept service on behalf of your client?” *Id.* at 445. In *Foster v. McFadden*, 30  
24 Cal. App. 3d 943 (1973), the plaintiff was injured when he was struck by a bulldozer operated by a

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26 34 Cal. App. 4th 1348, 1354 (1995). The notice must state, “with particularity, the defects or  
27 omissions.” *Id.* “If the public entity fails to send this notice, it waives any defenses as to the  
28 sufficiency of the claim based upon a defect or omission.” *Id.* (emphasis omitted).



1 sanitation district employee. *Id.* at 945. The court held the plaintiff’s attorney had submitted a  
2 claim as presented by sending the employee a letter “advising him of his client's name, the date  
3 and place of the accident and asking [the employee], if insured, to forward the letter to his  
4 insurance carrier and, if not insured, to contact the attorney at once and inform the attorney what  
5 he wished to do about the matter.” *Id.* The letter closed with the expressed hope that the parties  
6 could avoid the necessity for “initiating formal proceedings.” *Id.* at 945. The attorney also sent a  
7 copy of the letter to the district. *Id.* at 946.

8           These cases do not help La. The key question under these cases is not whether La  
9 substantially complied with the CTCA, but whether she submitted a claim as presented – i.e., a  
10 claim sufficient to activate the CTCA’s notice and defense-waiver provisions. *See Phillips*, 49  
11 Cal. 3d at 707 (“[T]he [CTCA’s] notice and defense-waiver provisions . . . use the phrase ‘claim as  
12 presented’ to identify a ‘claim’ which is defective due to its failure to comply substantially with  
13 sections 910 and 910.2 and . . . it is only a ‘claim as presented that fails to comply substantially’  
14 that triggers sections 910.8, 911 and 911.3.”) (internal modifications and emphasis omitted). She  
15 did not.

16           La’s correspondence with SamTrans concerned her request for documentation of the  
17 reasons for the July 31, 2013 Notice of Intent to Terminate; it did not concern her potential legal  
18 claims against defendants. *See* SAC ¶¶ 79-84. The SAC alleges that on August 7, 2013, La  
19 “requested information concerning the reasons for the Notice of Intent to Terminate,” including  
20 “documentation supporting all discipline issued to Ms. La[,] email correspondence concerning the  
21 basis for Ms. La being placed on a Performance Improvement Plan[,] and email correspondence  
22 concerning why she is not being permitted to complete the Performance Improvement Plan.” SAC  
23 ¶ 79. The next day, a SamTrans attorney responded, stating that La was “entitled to documents  
24 regarding the tentative decision to terminate her employment,” and rescheduling a meeting with La  
25 from August 12, 2013 to August 16, 2013. SAC ¶ 80. The attorney also stated that if La wished to  
26 review the other documents she had requested, the meeting would need to be pushed even further  
27 back, to August 28, 2013. SAC ¶ 81. On August 12, 2013, La “again requested access to the  
28 documents . . . supporting the discipline issued to [her].” SAC ¶ 82. SamTrans responded by

1 rescheduling the meeting from August 16, 2013 to August 28, 2013, and on August 23, 2013,  
2 SamTrans “informed [La] that the documents supporting her discipline were available for review  
3 on August 26, 2013 at [SamTrans’s] counsel’s office.” SAC ¶¶ 83-84. The SAC states that La  
4 reviewed the documents at that time. SAC ¶ 84.

5 This is the extent of the correspondence on which La bases her assertion that she has  
6 alleged substantial compliance with the CTCA. At no point during the course of this  
7 correspondence did La convey to SamTrans, either explicitly or implicitly, that “a claim for  
8 monetary damages exists and that litigation may ensue,” *Phillips*, 49 Cal.3d at 709, or that a “claim  
9 is ripe and that litigation can be expected if the matter is not resolved,” *Alliance*, 64 Cal. App. 4th  
10 at 647. Rather, the correspondence was focused exclusively on La’s requests for documents and  
11 the timing of the meeting between La and SamTrans. See SAC ¶¶ 79-84. To constitute a claim as  
12 presented, “the content of the correspondence to the recipient entity must at least be of such nature  
13 as to make it readily discernible by the entity that the intended purpose thereof is to convey the  
14 assertion of a compensable claim against the entity which, if not otherwise satisfied, will result in  
15 litigation.” *Green*, 34 Cal. App. 4th at 1358. Viewed in the light most favorable to La, her  
16 correspondence with SamTrans did not satisfy this standard. Likewise, because La’s requests for  
17 documents and her statements regarding the meeting’s timing did not “provide [SamTrans] with  
18 sufficient information to enable it to adequately investigate [La’s] claims and to settle them, if  
19 appropriate, without the expense of litigation,” the correspondence did not rise to the level of  
20 substantially complying with the CTCA. *DiCampli-Mintz*, 55 Cal.4th at 991; see also, *Connelly*,  
21 146 Cal. App. 4th at 38.

22 The other allegations La cites as demonstrating substantial compliance are also insufficient.  
23 The allegation regarding the August 28, 2013 meeting fails because the SAC says nothing about  
24 what was discussed at the meeting. See SAC ¶ 85. Although La asserts in her opposition that  
25 “whistleblower retaliation was specifically raised,” Opp. 5-6, there is no corresponding allegation  
26 in the SAC. See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (“[W]hen the legal  
27 sufficiency of a complaint’s allegations is tested by a motion under Rule 12(b)(6), review is limited  
28 to the complaint.”) (internal quotation marks and modifications omitted); *Car Carriers, Inc. v.*

1 *Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (“[I]t is axiomatic that the complaint may  
2 not be amended by the briefs in opposition to a motion to dismiss.”). Moreover, Cal. Gov. Code §  
3 945.4 requires the presentation of a “written claim” to the public entity, and there is no authority  
4 for the proposition that an oral claim may either substantially comply with the CTCA or constitute  
5 a claim as presented. *See Jefferson v. City of Fremont*, No. 12-cv-00926-EMC, 2013 WL  
6 1747917, at \*10 (N.D. Cal. Apr. 23, 2013) (holding that plaintiff’s allegations of “face-to-face  
7 meetings” with City representatives could not satisfy the CTCA where plaintiff “has not submitted  
8 any authority establishing that there can be substantial compliance via an oral claim at a meeting”);  
9 *Wilhite v. City of Bakersfield*, No. 11-cv-01692, 2012 WL 273088, at \*7 (E.D. Cal. Jan. 30, 2012)  
10 (“[T]he [CTCA] requires that a written claim be presented to the public entity. It goes without  
11 saying that a telephone conversation is not a written claim.”).

12 The allegation regarding the complaint filed with the California Labor Commissioner fails  
13 for a different reason. The California Supreme Court has made clear that a claim must be  
14 presented in strict compliance with Cal. Gov. Code § 915, which requires that a claim to a public  
15 entity be presented by being (i) “deliver[ed] to the clerk, secretary, or auditor” of the public entity,  
16 Cal. Gov. Code § 915(a)(1); (ii) “mail[ed] to the clerk, secretary, auditor, or to the [public entity’s]  
17 governing body at its principal office,” Cal. Gov. Code § 915(a)(2); or, if the claim is initially  
18 misdirected, (iii) “actually received by the clerk, secretary, auditor or board,” Cal. Gov. Code §  
19 915(e)(1). *See DiCampli-Mintz*, 55 Cal.4th at 991-92 (“It is uncontested that the claim was never  
20 delivered or mailed to the clerk, secretary or auditor as required by section 915(a). Likewise, the  
21 clerk, secretary, auditor or board never actually received the claim . . . Nevertheless, the Court of  
22 Appeal held that there was substantial compliance. This was error.”) (internal quotation marks  
23 omitted); *see also, Jefferson*, 2013 WL 1747917, at \*9 (“[A]fter *DiCampli-Mintz*, either there must  
24 be strict compliance with section 915(a) or the only way to substantially comply with section  
25 915(a) is if there is actual receipt of the misdirected claim by one of the statutorily designated  
26 recipients.”) (internal quotation marks omitted). La’s allegation that she filed a complaint not with  
27 SamTrans or any employee thereof, but with the California Labor Commissioner, does not satisfy  
28 this requirement. *See also, LaCava v. Merced Irr. Dist.*, No 10-cv-00853, 2012 WL 913697, at

1 \*14 (E.D. Cal. Mar. 16, 2012) (holding that plaintiff’s submission of a complaint regarding  
2 retaliation in violation of section 1102.5 to a state agency was not “a substitute for presenting a . . .  
3 claim under [the CTCA]”); *Imel v. Cnty. of El Dorado*, No. 10-cv-00688, 2010 WL 2606493, at \*4  
4 (E.D. Cal. June 28, 2010) (“[Plaintiff’s claim] was not submitted to the public entity against whom  
5 plaintiff filed suit, the County. Rather, it appears to [have been] submitted to the State. As such,  
6 plaintiff has failed to plead compliance with the CTCA.”).

7 The rest of La’s arguments are unconvincing. La contends that because she requests an  
8 injunction against SamTrans, the CTCA’s claim filing requirements do not apply. Opp. 3 n.1. It is  
9 true that Cal. Gov. Code § 945.4 applies only to “suit[s] for money or damages” and not to claims  
10 for injunctive or declaratory relief. Cal. Gov. Code § 945.4; *see also, Snipes v. City of Bakersfield*,  
11 145 Cal. App. 3d 861, 869-71 (1983) (noting that the CTCA’s “language exempts actions seeking  
12 specific relief other than money or damages, such as injunctive or declaratory relief”). This  
13 general rule “has no application, however, where a petition for extraordinary relief is merely  
14 incidental or ancillary to a prayer for damages,” and the “primary purpose of [the] claims is  
15 pecuniary in nature.” *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1081-82  
16 (1983). While La states in her prayer for relief that she seeks “an injunction against . . . SamTrans  
17 prohibiting the continued exercise of policies violating applicable law,” this relief is merely  
18 ancillary to La’s request for compensatory and punitive damages. *See* SAC 21-22.

19 La asserts that under *Snipes v. City of Bakersfield*, the CTCA’s claim filing requirements  
20 are inapplicable to actions to enforce Cal. Lab. Code § 1102.5(b) and Cal. Gov. Code § 12653.  
21 Opp. 3 n.2 (citing *Snipes*, 145 Cal. App. 3d 861). But *Snipes* held only that the CTCA does not  
22 apply to actions brought under the California Fair Employment and Housing Act (FEHA). *See* 145  
23 Cal. App. 3d at 865 (“[T]he purposes and procedures of the FEHA demonstrate a legislative intent  
24 that actions against governmental entities brought under the FEHA are to be excepted from the  
25 general requirements of the [CTCA].”). *Snipes* says nothing about Cal. Gov. Code § 1102.5(b) or  
26 Cal. Gov. Code § 12653, and La offers no authority to support her position that these statutes are  
27 excepted from the CTCA’s claim filing requirements. Accordingly, I decline to except them here.  
28 *See also, Olson v. Palm Drive Hosp.*, No. 11-cv-04606-MMC, 2012 WL 440559, at \*2-4 (N.D.

1 Cal. Feb. 10, 2012) (dismissing Cal. Lab. Code § 1102.5(b) cause of action for failure to comply  
2 with the CTCA); *Conwright v. City of Oakland*, No. 09-cv-02572-TEH, 2010 WL 3515741, at \*5  
3 (N.D. Cal. Sept. 8, 2010) (same); *Chappell v. City of Pittsburg*, No. 04-cv-04400-SI, 2005 WL  
4 756617, at \*5-7 (N.D. Cal. Mar. 25, 2005) (dismissing CFCA retaliation cause of action for failure  
5 to comply with the CTCA).

6 Finally, La’s reliance on *Lloyd v. County of Los Angeles*, 172 Cal. App. 4th 320 (2009), is  
7 misplaced. *See* Opp. 3 n.3. The court in that case held that the plaintiff’s common law tort claims  
8 against the County were barred by Cal. Gov. Code § 815 which, in the words of the court,  
9 “abolishes common law tort liability for public entities.” 172 Cal. App. 4th at 328-330. The case  
10 does not address the CTCA’s claim presentation requirements at all, in particular as applied to  
11 statutory claims like those brought under Cal. Lab. Code § 1102.5(b) and Cal. Gov. Code § 12653.

12 Given the allegations in La’s Second Amended Complaint and the arguments in her  
13 opposition to the motion to dismiss, it is clear that she cannot satisfy the requirements of the  
14 CTCA. Defendants’ motion to dismiss the first and fourth causes of action, for violations of Cal.  
15 Lab. Code § 1102.5 and Cal. Gov. Code § 12653, is GRANTED WITHOUT LEAVE TO  
16 AMEND.

17 **II. SECOND CAUSE OF ACTION: FIRST AMENDMENT RETALIATION (42 U.S.C.**  
18 **§ 1983)**

19 “The First Amendment shields public employees from employment retaliation for their  
20 protected speech activities.” *Hagen v. City of Eugene*, 736 F.3d 1251, 1257 (9th Cir. 2013). This  
21 right is not absolute; courts must “seek a balance between the interests of the employee, as a  
22 citizen, in commenting upon matters of public concern and the interest of the State, as an  
23 employer, in promoting the efficiency of the public services it performs through its employees.”  
24 *Connick v. Myers*, 461 U.S. 138, 142 (1983) (internal quotation marks and modifications omitted).

25 The Ninth Circuit strikes this balance by applying a five-factor test:

- 26 (1) whether the plaintiff spoke on a matter of public concern; (2) whether the  
27 plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s  
28 protected speech was a substantial or motivating factor in the adverse  
employment action; (4) whether the state had an adequate justification for treating  
the employee differently from other members of the general public; and (5)

1 whether the state would have taken the adverse employment action even absent  
2 the protected speech.

3 *Hagen*, 736 F.3d at 1257 (internal quotation marks omitted). Each of these factors is necessary,  
4 in that failure to satisfy any one of them is “fatal to the plaintiff’s case.” *Dahlia*, 735 F.3d at 1067  
5 n.4.

6 Defendants contend that the SAC fails to state a claim for First Amendment retaliation  
7 because it does not adequately allege the second factor, i.e., that La’s speech was made in her  
8 capacity as a private citizen and not as part of her job duties as a public employee. Mot. 20-22.  
9 Defendants point out that under the First Amendment retaliation cause of action, the sole allegation  
10 concerning the capacity in which La made her complaints states only that La’s “speech was made  
11 as a private citizen because she had no official duty to speak against mismanagement and  
12 wrongdoing within SamTrans,” and that her “speech was [not] part of the tasks she was paid to  
13 perform.” SAC ¶ 112. Defendants argue this allegation “is simply a recitation of the law” and is  
14 too devoid of specific facts to support La’s claims. Mot. 21.

15 La does not defend the adequacy of SAC ¶ 112. Opp. 7-9. La asserts instead that the  
16 following allegations, which the SAC incorporates into the First Amendment retaliation cause of  
17 action through SAC ¶ 110, are sufficient to show that she spoke as a private citizen:

18 (i) On or around July 2, 2013, La contacted the San Mateo County  
19 Whistleblowing Hotline, which transferred her to the office of County Supervisor  
20 Carol Groom. SAC ¶ 59. La “duly reported the fraud” to Groom’s office. *Id.*

21 (ii) On July 3, 2013, La contacted the San Mateo County District Attorney’s  
22 Office to file an official complaint. SAC ¶ 61. She provided information  
23 regarding the “questionable invoices” and “the extreme excesses in [SamTrans’s]  
24 contingency fund.” *Id.*

25 (iii) Also on July 3, 2013, La approached Vicki Nguyen, a reporter for NBC Bay  
26 Area News, “to expose the mismanagement and wrongdoings of SamTrans.” *Id.*

27 (iv) On or around July 6, 2013, La sent an email to the San Mateo County  
28 Controller’s Office, two presidents of the San Mateo County Board of  
Supervisors, and a civil grand jury “complaining about [the County’s]  
whistleblowing process.” SAC ¶ 69.

*See* Opp. 8 n.5.

1 I agree with La that these allegations plausibly demonstrate that, at least in these four  
2 instances, her speech was made in her capacity as a private citizen. A public employee speaks as a  
3 private citizen where she has “no official duty” to make the statements at issue – that is, where the  
4 statements were “not the product of performing the tasks the employee [is] paid to perform.” *Eng*  
5 *v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009) (internal quotation marks omitted). Determining  
6 the scope of a public employee’s official duties, and whether the employee’s speech falls within  
7 them, is a “practical, fact-specific inquiry.” *Dahlia*, 735 F.3d at 1071 (internal quotation marks  
8 omitted). The Ninth Circuit has identified a non-exhaustive list of three “guiding principles” to  
9 follow in making this determination. *Id.* at 1074-75. First, “whether or not the employee confined  
10 his communications to his chain of command is a relevant, if not necessarily dispositive, factor in  
11 determining whether he spoke pursuant to his official duties. When a public employee  
12 communicates with individuals or entities outside of his chain of command, it is unlikely that he is  
13 speaking pursuant to his duties.” *Id.* at 1074. Second, “the subject matter of the communication is  
14 . . . highly relevant.” *Id.* at 1074-75. A public employee’s “routine report, pursuant to normal  
15 departmental procedure, about a particular incident or occurrence, . . . is typically within his job  
16 duties.” *Id.* at 1075. “By contrast, if a public employee raises within the department broad  
17 concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be  
18 classified as being within the job duties of an average public employee.” *Id.* Third, “when a  
19 public employee speaks in direct contravention to his supervisor’s orders, that speech may often  
20 fall outside of the speaker’s professional duties.” *Id.*

21 In light of these guiding principles, La has alleged facts that give rise to the plausible  
22 inference that she spoke as a private citizen. Each of the communications identified by La was  
23 made to an entity outside of SamTrans; La complained to the San Mateo County Whistleblowing  
24 Hotline, County Supervisor Carol Groom, the San Mateo County District Attorney’s Office, an  
25 NBC Bay Area News reporter, the San Mateo County Controller’s Officer, two presidents of the  
26 Board of Supervisors, and a civil grand jury. SAC ¶¶ 59, 61, 69. It is more than plausible to infer  
27 that these communications were made “outside of [La’s] chain of command.” *Dahlia*, 735 F.3d at  
28 1074. Defendants accurately point out that La has not specifically alleged that her complaints to

1 the outside entities were beyond the scope of her official duties. Mot. 21-22. But La is not  
2 required to make such an allegation to state a claim for First Amendment retaliation. At this point  
3 in the proceedings, where there is no allegation regarding whether the complaints were part of La’s  
4 official duties, and it is plausible to infer that she spoke as a private citizen, the court “must resolve  
5 the ambiguity in [La’s] favor.” *Dahlia*, 735 F.3d at 1077; *see also*, *Preston v. City of Oakland*, No.  
6 14-cv-02022-NC, 2014 WL 3752064, at \*4 (N.D. Cal. July 29, 2014) (rejecting argument that “if  
7 the Court cannot definitively say whether [plaintiff’s] statements are within her job duties, the  
8 Court must dismiss [plaintiff’s] complaint because she has failed to plead her job duties in  
9 sufficient detail to state a claim for retaliation;” holding that “the Court need only determine that  
10 [plaintiff’s] pleadings support the reasonable inference that her actions were outside her official  
11 duties”). That La plausibly complained “outside of [her] chain of command” weighs heavily in her  
12 favor. *Dahlia*, 735 F.3d at 1074; *see also*, *Freitag v. Ayers*, 468 F.3d 528, 545-46 (9th Cir. 2006)  
13 (holding that correctional officer spoke as a public employee when she made internal reports of the  
14 prison’s failure to respond to inmate misconduct, but “acted as a citizen” when she communicated  
15 the same concerns to a state senator and a state agency).

16 La has also plausibly alleged that the complaints she made to outside entities regarded not  
17 “particular incident[s] or occurrence[s],” but “broad concerns about corruption [and] systemic  
18 abuse” within SamTrans. *Dahlia*, 735 F.3d at 1075. While the allegations regarding the content of  
19 her complaints are not a model of specificity, viewed in the light most favorable to La, the  
20 allegations are sufficiently detailed to indicate that she was voicing general concerns about “fraud”  
21 and “mismanagement” at SamTrans. *See* SAC ¶¶ 59, 61, 69. In this way, the subject matter of  
22 La’s complaints adds further support to the conclusion that her speech was made in her capacity as  
23 a private citizen and not as a public employee. *See Dahlia*, 735 F.3d at 1075.

24 Accordingly, defendants’ motion to dismiss the First Amendment retaliation cause of  
25 action on the ground that La has not adequately alleged that she spoke as a private citizen is  
26 DENIED.

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1       **III.    LIABILITY OF THE INDIVIDUAL DEFENDANTS UNDER THE SECOND AND**  
2       **THIRD CAUSES OF ACTION FOR FIRST AMENDMENT RETALIATION AND**  
3       **DEPRIVATION OF SUBSTANTIVE DUE PROCESS (42 U.S.C. § 1983)**

4       “Vicarious liability may not be imposed on a supervisor for the acts of lower officials in a  
5       section 1983 action.” *Lemire v. California Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074-75 (9th  
6       Cir. 2013). A supervisor may only be held liable under section 1983 upon a showing of either “(1)  
7       his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal  
8       connection between the supervisor’s wrongful conduct and the constitutional violation.” *Starr v.*  
9       *Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011); *see also, Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.  
10       1989) (“Liability under section 1983 arises only upon a showing of personal participation by the  
11       defendant . . . A supervisor is only liable for constitutional violations of his subordinates if the  
12       supervisor participated in or directed the violations, or knew of the violations and failed to act to  
13       prevent them.”). The requisite causal connection may be proven by (i) the supervisor’s “own  
14       culpable action or inaction in the training, supervision, or control of subordinates;” (ii) his or her  
15       “acquiescence in the constitutional deprivation of which a complaint is made;” or (iii) “conduct  
16       that showed a reckless or callous indifference to the rights of others.” *Cunningham v. Gates*, 229  
17       F.3d 1271, 1292 (9th Cir. 2000).

18       Defendants assert that La has failed to allege sufficient facts to support her section 1983  
19       claims against Scanlon and Tioyao. La’s defense of those claims is half-hearted at best. She  
20       recites the general rule for supervisory liability under section 1983, asserts without explanation  
21       that “[t]he SAC . . . sufficiently pleads such facts,” and cites to a series of paragraphs in the SAC.  
22       Opp. 9-10. None of the cited allegations, however, support a plausible inference of liability  
23       against either of the individual defendants.

24       La points to the following allegations regarding Scanlon:

25       (i) On June 14, 2013, La notified Scanlon of “the fraud.” SAC ¶ 54. Scanlon  
26       responded three days later with an email advising La to continue speaking with  
27       SamTrans’s Human Resources Department about her concerns. SAC ¶ 55.

28       (ii) Despite La’s “repeated attempts to notify . . . Scanlon of fraudulent conduct  
      within Sam Trans, [La] was consistently dismissed or told no investigative action  
      would be pursued.” SAC ¶ 101.

1 (iii) “Scanlon . . . did intend to retaliate against plaintiff for her exercise of rights  
2 protected under [Cal. Lab. Code § 1102.5] and cause plaintiff to suffer severe  
emotional distress.” SAC ¶ 105.

3 (iv) “Scanlon . . . committed the abusive acts alleged herein maliciously,  
4 fraudulently, and oppressively, with the wrongful intent of injuring plaintiff and  
5 from an improper and evil motive, amounting to malice, and in conscious  
disregard for plaintiff’s rights as an employee.” SAC ¶ 107.

6 Viewed in the light most favorable to La, these allegations do not plausibly demonstrate  
7 either Scanlon’s personal involvement in La’s alleged constitutional injuries or a sufficient causal  
8 connection between those injuries and Scanlon’s conduct. The only factual allegation regarding  
9 Scanlon states that, upon learning of La’s complaints, he advised her to continue speaking with the  
10 Human Resources Department. SAC ¶ 55. Standing alone, this fact is not enough to implicate  
11 Scanlon in a violation of La’s First or Fourteenth Amendment rights. There is no indication in the  
12 SAC of any connection between La’s communications with Scanlon and the Notice of Intent to  
13 Terminate she received approximately six weeks later or any other allegedly adverse employment  
14 action taken against her. The mere fact that on one occasion Scanlon advised La to continue  
15 speaking with the Human Resources Department, instead of responding more enthusiastically to  
16 her complaint, is an insufficient basis from which to infer that Scanlon inadequately trained,  
17 supervised, or controlled his subordinates, acquiesced in a constitutional deprivation, or exhibited a  
18 reckless or callous indifference for La’s constitutional rights. This is especially so given that the  
19 SAC does not reveal what information La communicated to Scanlon, except to state that she  
20 notified him of “the fraud.” SAC ¶ 54.

21 The other allegations regarding Scanlon are likewise inadequate. La’s reference to  
22 “repeated attempts to notify . . . Scanlon” is unsupported by the rest of the allegations in the SAC,  
23 which refer only to the June 14, 2013 communication with Scanlon discussed in the preceding  
24 paragraph and no other. The allegations in SAC ¶¶ 105 and 107 are vague, conclusory, and,  
25 notably, included not in the general allegations or under either of the section 1983 causes of action,  
26 but under the Cal. Lab. Code § 1102.5(b) cause of action. La appears to have highlighted these  
27 paragraphs in an attempt to cite to any paragraph in the SAC she could find with Scanlon or  
28 Tioyao’s name in it.

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As to Tioyao, La points to the following allegations:

(i) After Glenda Vierra, another SamTrans employee, reported to Tioyao that La had approved an invoice which short-paid a \$15.00 freight charge, La sent an email to Vierra, Tioyao, and another individual requesting that Vierra “stop defaming [her] in the workplace.” SAC ¶¶ 21-22. Tioyao subsequently issued La a counseling memo reprimanding La for using an “inappropriate tone” with coworkers. SAC ¶ 23.

(ii) After Tioyao asked La to categorize an expense from fiscal year 2013 as an expense from fiscal year 2011, La sent Tioyao an email informing her that mischaracterizing the expense was “wrong” and in violation of GAAP. SAC ¶¶ 25-27. Tioyao subsequently gave La a negative performance review, a “Performance Improvement Plan,” and a six-month probation. SAC ¶ 29.

(iii) “Tioyao . . . acted, in various capacities, as [a] duly appointed agen[t] . . . on behalf of SamTrans under color of state law.” SAC ¶ 93.

(iv) “Scanlon . . . did intend to retaliate against plaintiff for her exercise of rights protected under [Cal. Lab. Code § 1102.5] and cause plaintiff to suffer severe emotional distress.” SAC ¶ 105.

The allegations in (i) and (ii) come closest to stating a claim against Tioyao, on the ground that she was personally involved in First Amendment retaliation. The allegations fall short because La concedes in her discussion of her First Amendment retaliation cause of action that the only complaints she made that constitute protected speech were those communicated to outside entities, not those made within SamTrans. *See* Opp. 7-9. Even if La had not made this concession, she offers no basis for concluding that complaints about Vierra’s allegedly defamatory statements and Tioyao’s request that La mischaracterize an expense, both of which were made to La’s supervisor, qualify as protected speech. *See Dhalia*, at 735 F.3d at 1074-75 (“guiding principles” in determining whether a public employee spoke as a private citizen include “whether or not the employee confined his communications to his chain of command” and whether the employee was speaking about “a particular incident or occurrence” or “broad concerns about corruption or systemic abuse”); *see also, Hagen*, 736 F.3d at 1259 (“That [plaintiff] raised his concerns . . . internally and within the chain of command cements our conclusion that his comments were made as a public employee, and not as a private citizen.”). Finally, the allegations in (iii) and (iv) are vague, conclusory, and boilerplate, and they fall far short of raising a plausible inference of

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supervisory liability. *See Ashcroft*, 556 U.S. at 678-79.

Defendants’ motion to dismiss the claims against Scanlon and Tioyao in the second and third causes of action is GRANTED WITH LEAVE TO AMEND.

**CONCLUSION**

Because of La’s failure to comply with the CTCA, the first and fourth causes of action are DISMISSED WITHOUT LEAVE TO AMEND. The second and third causes of action are DISMISSED against defendants Scanlon and Tioyao WITH LEAVE TO AMEND. Defendant SamTrans’s motion to dismiss the second cause of action is DENIED. La shall file an amended complaint, if she wishes, within 20 days of the date of this Order.

**IT IS SO ORDERED.**

Dated: November 25, 2014

  
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WILLIAM H. ORRICK  
United States District Judge