

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

ROY JAMARILLO. CASE NO. CV-F-10-1283 LJO GSA

Plaintiffs,

**ORDER ON DEFENDANT'S MOTION TO
DISMISS (Docs. 9, 12)**

VS.

FOOD 4 LESS MADERA (aka GONG & GONG CO.),

Defendant.

INTRODUCTION

17 Plaintiff Roy Jamarillo (“Mr. Jamarillo”) asserts disability discrimination, retaliation, and
18 defamation claims against defendant Gong & Gong Company (“Gong”), doing business as Food 4 Less
19 Madera. Gong moves to dismiss to dismiss for lack of subject matter jurisdiction, pursuant to Fed. R.
20 Civ. P. 12(b)(1). Gong argues that this Court lacks federal jurisdiction over this action, because Mr.
21 Jamarillo’s sole federal claim is time-barred. Moreover, Gong contends that because Mr. Jamarillo’s
22 federal claim fails, this Court must dismiss the remaining claims rooted in state law. In the alternative,
23 Gong moves to dismiss five causes of action for failure to state a claim, pursuant to Fed. R. Civ. P.
24 12(b)(6). Mr. Jamarillo failed to oppose this motion in a timely fashion. The opposition was due on
25 September 9, 2010, but was filed midday on September 14, 2010. This Court STRIKES the opposition
26 as untimely. Nevertheless, this Court DENIES Gong’s Fed. R. Civ. P. 12(b)(1) motion, as the time
27 period for the filing of an EEOC charge is not jurisdictional. In addition, this Court GRANTS in part
28 and DENIES in part Gong’s Fed. R. Civ. P. 12(b)(6) motion.

BACKGROUND

Mr. Jamarillo is a former employee of Gong's Madera supermarket, where he worked as a stocker and receiver between May 1999 and August 2009. In June 2007, Mr. Jamarillo suffered an injury to his foot when a third-party vendor ran it over with a forklift at Gong's supermarket. Mr. Jamarillo took medical leave after the incident, and returned to work in September 2007.

When Mr. Jamarillo returned to work, he requested accommodation for his medical work restrictions. Gong complied with his work restrictions to provide accommodations. Other employees performed duties Mr. Jamarillo could not perform, and Mr. Jamarillo was permitted to sit down while operating the forklift. In addition, Gong assigned Mr. Jamarillo tasks that supported his work restrictions, such as doing paperwork.

Mr. Jamarillo filed a civil lawsuit against the third-party vendor to recover for his injuries related to the forklift incident. Between September 2007 and August 2009, Mr. Jamarillo took four days off to meet with his attorney, testify in deposition, and testify in court. Mr. Jamarillo's supervisor became upset with him, and told him not to take the day off to give his deposition in the case. Another time, Gong's Human Resources representative expressed anger when the parties of Mr. Jamarillo's lawsuit wanted to inspect Gong's premises.

In April 2009, Gong reduced Mr. Jamarillo's pay and forced him to work part-time. In June 2009, Gong told Mr. Jamarillo that it would no longer accommodate his work restrictions, because he was permanently disabled. Mr. Jamarillo was told that he had to return to stocking and doing physical work. If Mr. Jamarillo refused, he was told that Gong would stop providing him with medical insurance benefits. Mr. Jamarillo complained to Gong, asserting discrimination and retaliation. Gong did not investigate or take corrective action.

Gong terminated Mr. Jamarillo's employment on August 3, 2009. Mr. Jamarillo was told that Gong could not accommodate his work restrictions. Mr. Jamarillo alleges that Gong terminated his employment because of physical disability, in retaliation for consulting with an attorney about his working conditions, and for complaining about and reporting unsafe working conditions.

Mr. Jamarillo alleges that he exhausted his administrative remedies. To support this allegation, Mr. Jamarillo attaches a right-to-sue letter, which he alleges was issued by the California Department

1 of Fair Employment and Housing (“DFEH”). The right-to-sue letter appears on DFEH letterhead. The
2 April 22, 2010 letter reads, in pertinent part:

3 This is to advise you that the above-referenced complaint is being referred to the
4 California Department of Fair Employment and Housing (DFEH) by the U.S. Equal
Employment Opportunity Commission (EEOC). The complaint will be filed in
5 accordance with California Government Code section 12960. This notice constitutes
service pursuant to Government Code section 12962.

6 The EEOC will be responsible for the processing of this complaint. DFEH will not be
7 conducting an investigation into this matter. EEOC should be contacted directly for any
discussion of the charge. DFEH is closing its case on the basis of “processing waived
8 to another agency.”

9 Since DFEH will not be issuing an accusation, this letter is also your right-to-sue
notice....[Y]ou may bring a civil action under the provisions of the Fair Employment and
10 Housing Act...This lawsuit may be filed in a State of California Superior Court.

11 Remember: This Right-To-Sue Notice allows you to file a private lawsuit in State court.

12 The letter refers to “EEOC Number: 485-2010-00245.”

13 Mr. Jamarillo initiated this action on July 16, 2010. Gong moved to dismiss on August 23,
14 2010. Mr. Jamarillo failed to oppose this motion. This Court finds this motion suitable for a decision
15 without a hearing, vacates the September 23, 2010 hearing pursuant to Local Rule 230(c) and (g), and
16 issues the following order.

17 **STANDARDS OF REVIEW**

18 **Fed. R. Civ. P. 12(b)(1)**

19 In considering a motion to dismiss for lack of subject matter jurisdiction, the plaintiff, as the
20 party seeking to invoke the court’s jurisdiction, always bears the burden of establishing subject matter
21 jurisdiction. *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001).
22 The court presumes a lack of subject matter jurisdiction until the plaintiff proves otherwise. *See*
23 *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S.Ct. 1673, 1675 (1994). The court must also
24 consider whether the motion to dismiss is “facial, confining the inquiry to allegations in the complaint,
25 or factual, permitting the court to look beyond the complaint.” *Savage v. Glendale Union High School*,
26 343 F. 3d 1036, 1039-40 n.2 (9th Cir. 2003); *see also, White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).
27 In the facial attack, a party challenges subject matter jurisdiction by asserting that the allegations in the
28 complaint are insufficient on their face to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*,

1 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual challenge, the truth of the allegations, which would
2 otherwise invoke subject matter jurisdiction, is challenged and this Court “is not restricted to the face
3 of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual
4 disputes concerning the existence of jurisdiction.” *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir. 1988).

5 The government presents a factual challenge. Therefore, “[o]nce the moving party has converted
6 the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought
7 before the court, the party opposing the motion must furnish affidavits or other evidence necessary to
8 satisfy its burden of establishing subject matter jurisdiction.” *Savage*, 343 F.3d at 1039-40 n.2.

9 **Fed. R. Civ. P. 12(b)(6)**

10 The Court considers whether Plaintiffs state a claim pursuant to the standards of review
11 applicable under Fed. R. Civ. P. 12(b)(6). In considering whether Plaintiffs have stated a claim, the
12 Court considers as true the allegations of the complaint, as well as the judicially-noticeable agreements
13 between the government and the State, construes the pleading in the light most favorable to the party
14 opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens*, 546
15 F.3d 580, 588 (9th Cir. 2008). To survive Fed. R. Civ. P. 12(b)(6) scrutiny, “a complaint . . . must
16 contain either direct or inferential allegations respecting all the material elements necessary to sustain
17 recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 52, 127 S. Ct.
18 1955, 1969 (2007).

19 **DISCUSSION**

20 **Jurisdictional Challenge**

21 In his complaint, Mr. Jamarillo asserts jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C.
22 §1334(4). As set forth above, Mr. Jamarillo alleges that he complied with all prerequisites to jurisdiction
23 of this Court as required by 42 U.S.C. §20002 et seq., and exhausted his administrative remedies prior
24 to filing this civil action. To support this allegation, Mr. Jamarillo attached the DFEH right-to-sue letter.

25 Gong argues that this Court lacks jurisdiction over Mr. Jamarillo's claims because Mr. Jamarillo
26 failed to exhaust his administrative remedies by failing to file a timely EEOC claim. Gong contends that
27 Mr. Jamarillo's EEOC claim, filed on April 21, 2010 is untimely, as it was not filed within 180 days.
28 In addition, Gong argues that the DFEH right-to-sue letter is insufficient to allow a Title VII claim.

1 Gong's arguments fail on multiple grounds.

2 First, “[f]ailure to obtain a federal right-to-sue letter does not preclude federal jurisdiction.”
3 *Surrell v. Cal. Water Serv.*, 518 F.3d 1097, 1104 (9th Cir. 2008). Although Mr. Jamarillo is required
4 to exhaust administrative remedies to bring a Title VII claim, “filing a timely charge of discrimination
5 with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a
6 statute of limitations, is subject to waiver, estoppel, and equitable tolling.” *Zipes v. Trans World Airlines,*
7 *Inc.*, 455 U.S. 385, 393 (1982). Gong asserts that it brings this “speaking motion” to present a factual
8 challenge to jurisdiction; however, “Title VII’s timeliness provision is entirely separate from Title VII’s
9 jurisdictional provisions and ‘does not speak in jurisdiction terms or refer in any way to the jurisdiction
10 of the district courts.’” *Surrell*, 518 F.3d at 1104 (quoting *Zipes*, 455 U.S. at 394). Thus, although a
11 plaintiff is required to exhaust administrative remedies, this conditions precedent is a statutory
12 requirement, not jurisdictional.

13 Second, Gong erroneously argues that Mr. Jamarillo’s EEOC claim was required to be filed
14 within 180 days. 42 U.S.C. §2000e-5(e)(1) provides:

15 A charge under this section shall be filed within one hundred and eighty days after the
16 alleged unlawful employment practice occurred ...except that in a case of an unlawful
17 employment practice with respect to which the person aggrieved has initially instituted
18 proceedings with a State or local agency with authority to grant or seek relief from such
19 practice..., such charge shall be filed by or on behalf of the person aggrieved within three
hundred days after the alleged unlawful employment practice occurred, or within thirty
days after receiving notice that the State or local agency has terminated the proceedings
under the State or local law, whichever is earlier, and a copy of such charge shall be filed
by the Commission with the State or local agency.

20 Pursuant to this statute, Title VII requires a plaintiff to file a claim with the EEOC within 300 days of
21 the alleged discriminatory act(s) if the state in which the discriminatory act occurred has a state agency
22 that deal with such matters and the complainant has instituted proceedings with that agency, or within
23 30 days of receiving notice that the state agency has terminated its proceedings, whichever is earlier. *Id.*;
24 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002).

25 The 300-day time period applies in California. Title VII authorizes the EEOC to enter into
26 “worksharing” agreements with state and local fair employment practice agencies to “establish effective
27 and integrated resolution procedures.” 42 U.S.C. §2000e-8(b). The DFEH is a designated agency, and
28 has entered into a worksharing agreement with the EEOC. 29 C.F.R. §1601.74; *Green v. Los Angeles*

1 *County Sup. of Schools*, 883 F.2d 1472, 1476 (9th Cir. 1989). Under this workshare agreement, a charge
2 filed with the DFEH is deemed constructively filed with the EEOC, because the EEOC and DFEH
3 cross-designate the other as its agent for the purpose of receiving charges. *EEOC v. Dinuba Med. Clinic*,
4 222 F.3d 580, 585 (9th Cir. 2000) ("Constructive filing is made possible by 'worksharing agreements,'
5 which designate the EEOC and the state agency each other's agents for the purpose of receiving
6 charges."); *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1175 (9th Cir. 1999) ("[A] charge
7 filed with the state agency before the 300-day filing deadline expires is deemed automatically filed with
8 the EEOC on that same day."); *Green*, 883 F.2d at 1475-76 (holding that, under EEOC-DFEH
9 worksharing agreement, charge filed with DFEH is deemed to have been filed with the EEOC on the
10 same day). Thus, a California plaintiff must file a charge with the EEOC within 300 days of the alleged
11 unlawful practice, not 180 days.

12 Mr. Jamarillo timely filed his EEOC charge. Mr. Jamarillo filed his charge of discrimination
13 with the DFEH and the EEOC on April 21, 2010. By Gong's account, that was 262 days after his
14 alleged wrongful termination on August 3, 2009. Thus, Mr. Jamarillo filed his EEOC charge within 300
15 days of the alleged wrongful conduct. Moreover, Mr. Jamarillo's EEOC claim was timely because it
16 was filed constructively before the 300-day time period had elapsed. "When a charge is initially filed
17 with a state agency...it cannot be considered 'filed' with the EEOC 'before the expiration of sixty days
18 after proceedings have been commenced under the State or local law, unless such proceedings have been
19 earlier terminated. . . ." *Dinuba Med. Clinic*, 222 F.3d at 585, quoting 42 U.S.C. § 2000e-5(c). "In other
20 words, the state agency must be given a 60-day window in which it has the initial and exclusive right
21 to process the charge, 'free from premature federal intervention.'" *Id.* (quoting *EEOC v. Commercial
22 Office Prods. Co.*, 486 U.S. 107, 110 (1988)). As the *Dinuba Med. Clinic* court explained:

23 The net effect of the 60-day deferral provision on the 300-day limitations period is that
24 a charge initially filed with a state agency will be treated as constructively filed with the
25 EEOC upon either the expiration of 60 days or the termination of agency proceedings,
26 whichever occurs first. See 42 U.S.C. 2000e-5(c); *see also* 29 C.F.R. § 1601.13(b)(1).
27 Constructive filing is made possible by "worksharing agreements," which designate the
28 EEOC and the state agency each other's agents for the purpose of receiving charges. *See
Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1175-76 (9th Cir. 1999). In
practical terms, therefore, a charge filed with a state agency within 240 days of the
unlawful employment practice will be guaranteed timely filing with the EEOC. *See id.*
at 1174. If the charge is filed with the state agency after the 240th day, however, it will
be deemed timely filed with the EEOC only if state proceedings are terminated prior to

1 the lapse of the 300th day. *See id.*

2 222 F.3d at 585. On April 22, 2010, DFEH sent Mr. Jamarillo its right-to-sue letter, indicating that the
3 state proceedings were terminated. This was prior to the 300th day. Accordingly, Mr. Jamarillo's EEOC
4 claim was filed in a timely manner.

5 Third, the Court may waive the EEOC exhaustion requirement where, as here, a plaintiff has
6 filed a claim with the DFEH, and received a DFEH right-to-sue letter. "Under Title VII, a plaintiff must
7 exhaust her administrative remedies by filing a timely charge with the EEOC, *or the appropriate state*
8 *agency*, thereby affording the agency an opportunity to investigate the charge." *B.K.B. v. Maui Police*
9 *Dep't.*, 276 F.3d 1091, 1099 (9th Cir. 2002) (emphasis added) (citing 42 U.S.C. §2000e-5). "[W]here,
10 as here, a plaintiff is entitled to receive a right-to-sue letter from the EEOC, a plaintiff may proceed
11 absent such a letter, provided she has received a right-to-sue letter from the appropriate state agency."
12 *Surrell*, 518 F.3d at 1105. Mr. Jamarillo received a right-to-sue letter from the DFEH. Accordingly, the
13 failure to obtain the right-to-sue letter from the EEOC does not bar his claim.

14 For these reasons, this Court DENIES Gong's Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack
15 of subject matter jurisdiction. In addition, this Court considered Gong's motion to dismiss sua sponte
16 under Fed. R. Civ. P. 12(b)(6). Even under these standards, Gong's motion to dismiss the first cause
17 of action is denied.

18 **Challenge to Sufficiency of the Pleadings**

19 In the alternative, Gong moves to dismiss Mr. Jamarillo's fifth, sixth, ninth, and tenth causes of
20 action pursuant to Fed. R. Civ. P. 12(b)(6). Gong argues that Mr. Jamarillo's fifth and sixth causes of
21 action must be dismissed because they exceed the scope of his administrative claim. As to the ninth and
22 tenth causes of action, Gong argues that Mr. Jamarillo has failed to state a claim. The Court considers
23 each challenge to the causes of action individually.

24 **Fifth and Sixth Causes of Action–Retaliation**

25 In his fifth and sixth causes of action, Mr. Jamarillo asserts retaliation claims against Gong.
26 Gong argues that these claims must be dismissed because they exceed the scope of the EEOC charge Mr.

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1 Jamarillo filed. This Court agrees, and dismisses Mr. Jamarillo's fifth and sixth causes of action.¹

2 “[T]he jurisdictional scope of a Title VII claimant's court action depends both on the EEOC
3 charge and the EEOC investigation.” *Green*, 883 F.2d at 1476; *Sosa v. Hiraoka*, 920 F.2d 1452, 1456
4 (9th Cir. 1990). Subject matter jurisdiction extends over all allegations of discrimination that either “fell
5 within the scope of the EEOC's actual investigation or an EEOC investigation which *can reasonably*
6 *be expected to grow out of the charge of discrimination.”* *EEOC v. Farmer Bros.*, 31 F.3d 891, 899 (9th
7 Cir. 1994) (emphasis in original) (quoting *Sosa*, 920 F.2d at 1456). “The administrative charge
8 requirement serves the important purposes of giving the charged party notice of the claim and narrowing
9 the issues for prompt adjudication and decision.” *Id.* (citations and quotations omitted); *see also*
10 *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir. 1985) (“Allowing a complaint to encompass
11 allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory
12 and conciliatory role, as well as deprive the charged party of notice of the charge”).

13 Because there are no allegations of an EEOC investigation, this Court considers the EEOC
14 charge to determine whether this Court has subject matter jurisdiction over Mr. Jamarillo's retaliation
15 claims. In reviewing the jurisdictional question, the Court construes Mr. Jamarillo's EEOC charge “with
16 the utmost liberality.” *Farmer Bros.*, 31 F.3d at 899. “Allegations of discrimination not included in the
17 plaintiff's administrative charge may not be considered by a federal court unless the new claims are ‘like
18 or reasonably related to the allegations contained in the EEOC charge.” *B.K.B.*, 276 F.3d at 1100.

19 In the administrative charge of discrimination, there is a box that allows a claimant to identify
20 the type of discrimination upon which the claim is based. This box allows the claimant to check as many
21 options as are applicable. The choices include race, color, sex, religion, national origin, retaliation, age,
22 disability, genetic information, and other. Mr. Jamarillo marked “disability” in this area. Although
23 “retaliation” was an option, Mr. Jamarillo did not select it.

24 To determine whether Mr. Jamarillo exhausted his administrative remedies as to the retaliation
25 claims that he did not specify in his administrative charge:

26
27 ¹ Although Gong moves to dismiss these claims pursuant to Fed. R. Civ. P. 12(b)(6), the Court notes that unlike the
28 time period for filing the EEOC charge, the scope of Mr. Jamarillo's claims is jurisdictional, *EEOC v. Farmer Bros.* Co., 31
F.3d 891, 899 (9th Cir. 1994), and this Court dismisses the claims for lack of subject matter jurisdiction.

1 it is appropriate to consider such factors as the alleged basis of the discrimination, dates
2 of discriminatory acts specified within the charge, perpetrators of discrimination named
3 in the charge, and any locations at which discrimination is alleged to have occurred. In
4 addition, the court should consider plaintiff's civil claims to be reasonably related to
5 allegations in the charge to the extent that those claims are consistent with the plaintiff's
6 original theory of the case.

7 *B.K.B.*, 276 F.3d at 1100. No complaint is attached to the administrative claim. On the basis of the form
8 alone, no information was given as to dates of discriminatory acts, or Mr. Jamarillo's original theory of
9 the case. The information provided to the EEOC, and to this Court, was that Mr. Jamarillo asserted a
10 claim of disability discrimination against Gong. Although presented with the option, Mr. Jamarillo did
11 not indicate retaliation on the form. Mr. Jamarillo failed to charge the retaliation claims on his EEOC
12 form, and these retaliation claims are not reasonably expected to result from the disability discrimination
13 claim that was generally alleged on the form. Therefore, this Court finds that it lacks subject matter
jurisdiction over Mr. Jamarillo's fifth and sixth causes of action.

14 **Ninth Cause of Action–Cal. Labor Code section 230(b)**

15 Cal. Labor Code section 230(b) provides in relevant part: "An employer may not discharge or
16 in any manner discriminate or retaliate against an employee...for taking time off to appear in court to
17 comply with a subpoena or other court order as a witness in any judicial proceeding." *Id.*

18 Gong faults Mr. Jamarillo's complaint for failure to allege that Mr. Jamarillo: (1) appeared in
19 court to testify as a witness in a judicial proceeding, (2) had to appear in court to comply with a
20 subpoena or other court order; and (3) testified as a witness in a legal proceeding. Gong's first and third
21 assertions are false and redundant. Mr. Jamarillo alleges in paragraph 16 of the complaint as follows:
22 "On approximately four occasions, Plaintiff took time off work to meet with his attorney and *to testify*
23 *in his civil suit.*" (emphasis added). This allegations satisfies the Fed. R. Civ. P. 8 pleading requirement.

24 Although this Court construes a pleading in the light most favorable to the non-movant, this
25 Court finds that the allegations of the complaint are insufficient to state a Cal. Labor Code section 230(b)
26 claim, because no facts give rise to the inference that Mr. Jamarillo appeared in Court pursuant to a
27 subpoena or other court order, as required by the statute. Although Mr. Jamarillo alleges that he missed
28 work to testify in his civil action, there is no indication that the court ordered him to testify.
Accordingly, this Court grants Gong's motion to dismiss this cause of action.

Tenth Cause of Action–Defamation Per Se

2 Mr. Jamarillo's tenth cause of action is for defamation per se. Mr. Jamarillo alleges that
3 defendants "told others, including other agents of [Gong] and subsequent potential employers, expressly
4 or by implication, that Plaintiff was an unreliable employee who did not adhere to Defendant's
5 attendance policy and who deserved to be terminated for poor performance. In fact, Plaintiff was at all
6 times material herein, a reliable employee who did not have poor attendance." Compl. ¶74. Mr.
7 Jamarillo further alleges that the false and defamatory statements violated "Cal. Civil Code §§45 and
8 46(3)(5)" because the speech had either the meaning or substance that Mr. Jamarillo "violated policies;
9 that he was deserving of disciplinary actions against him; and that he was terminated for poor
10 performance." Comp., ¶75.

11 Gong moves to dismiss Mr. Jamarillo’s defamation cause of action, arguing that the allegations
12 fails to state a claim for defamation per se. Moreover, Gong argues, because the allegations fail to state
13 a claim for defamation per se, Mr. Jamarillo was required to plead special damages, which he failed to
14 do. For these reasons, Gong argues that this Court must dismiss Mr. Jamarillo’s tenth cause of action.

15 Mr. Jamarillo alleges defamation pursuant to Cal. Civil Code sections 45 and 46(3) and (5).
16 California Civil Code section 45 defines libel as “a false and unprivileged publication by writing,
17 printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred,
18 contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency
19 to injury him in his occupation.” California Civil Code section 45(a) explains:

20 A libel which is defamatory of the plaintiff without the necessity of explanatory matter,
21 such as an inducement, innuendo or other extrinsic fact, is said to be libel on its face.
Defamatory language not libelous on its face is not actionable unless the plaintiff and
proves that he has suffered special damage as a proximate result thereof.

23 California Civil Code section 46 defines slander, in relevant part, as an unprivileged communication that
24 either injured Mr. Jamarillo, directly or indirectly, with respect to his office, profession, trade, or
25 business or if its publication, or by natural consequence, caused him actual damage. Cal. Civ. Code §46.
26 Thus, defamation includes a publication that is false, defamatory, unprivileged, and has a natural
27 tendency to injure or causes special damage. *Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007).

28 Mr. Jamarillo's allegations do not amount to defamation per se. Statements about Mr.

1 Jamarillo's job performance qualify as "opinion" and do not assert a fact. *Gould v. Maryland Sound*
2 *Industrs., Inc.*, 331 Cal. App. 4th 1137 (1995). In *Gould*, for example, also a wrongful termination
3 action, the plaintiff asserted a defamation claim based on statements by his supervisor that the plaintiff
4 performed his job poorly. The court found that this "was clearly a statement of opinion. It did not
5 suggest any lack of honesty, integrity, or competency on plaintiff's part, nor did it impute any
6 reprehensible personal characteristic." *Id.* Therefore, the court concluded that the statement was not
7 defamatory. *Id.*

8 Even if the statements are not opinion, Mr. Jamarillo's allegations support a claim for defamation
9 per quod, not defamation per se. *See, e.g., The Nethercutt Collection v. Regalia*, 172 Cal. App. 4th 361
10 (2009) (statement that president of museum demanded a commission or a finder's fee was defamation
11 per quod, not defamation per se that it negatively affected his profession). To state a defamation per
12 quod claim, Mr. Jamarillo must plead special damages. *Id.*; California Civil Code section 45(a). Mr.
13 Jamarillo has failed to plead special damages in his complaint. Accordingly, Mr. Jamarillo's defamation
14 cause of action fails.

15 **ORDER**

16 For the foregoing reasons, this Court:

- 17 1. DENIES in part Gong's motion to dismiss Mr. Jamarillo's first cause of action;
- 18 2. GRANTS in part Gong's motion to dismiss, and DISMISSES Mr. Jamarillo's fifth, sixth,
19 ninth, and tenth causes of action;
- 20 3. GRANTS Mr. Jamarillo leave to amend the complaint. Mr. Jamarillo's amended
21 complaint is due no later than October 5, 2010; and
- 22 4. VACATES the September 23, 2010 hearing on this motion.

23 IT IS SO ORDERED.

24 Dated: September 14, 2010

25 /s/ Lawrence J. O'Neill
26 UNITED STATES DISTRICT JUDGE

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