

1 **I. SCREENING REQUIREMENT**

2 Under 28 U.S.C. § 1915(e)(2), the Court must conduct a review of an *in forma pauperis*
3 complaint to determine whether it “state[s] a claim on which relief may be granted,” is “frivolous
4 or malicious,” or “seek[s] monetary relief against a defendant who is immune from such relief.” If
5 the Court determines that the complaint fails to state a claim, it must be dismissed. *Id.* An action
6 is frivolous if it is “of little weight or importance: having no basis in law or fact” and malicious if
7 it was filed with the “intention or desire to harm another.” *Andrews v. King*, 398 F.3d 1113, 1121
8 (9th Cir. 2005). Leave to amend may be granted to the extent that the deficiencies of the
9 complaint can be cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

10 A complaint must contain “a short and plain statement of the claim showing that the
11 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
12 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
14 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
15 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
16 at 663 (quoting *Twombly*, 550 U.S. at 555). While factual allegations are accepted as true, legal
17 conclusions are not. *Id.* at 678.

18 In determining whether a complaint states an actionable claim, the Court must accept the
19 allegations in the complaint as true, *Hosp. Bldg. Co. v. Trs. of Rex Hospital*, 425 U.S. 738, 740
20 (1976), construe *pro se* pleadings liberally in the light most favorable to the Plaintiff, *Resnick v.*
21 *Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s favor. *Jenkins*
22 *v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of *pro se* plaintiffs “must be held to less
23 stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342
24 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally construed after
25 *Iqbal*).

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1 **II. SUMMARY OF PLAINTIFF’S FIRST AMENDED COMPLAINT**

2 Plaintiff’s allegations appear to be derived from occurrences during Plaintiff’s time spent
3 filming an episode of “Homemade Millionaire,” a reality show produced by Defendant. Plaintiff
4 alleges the following, (ECF No. 7):

5 Plaintiff was tortured by Defendant while filming “Homemade Millionaire,” Plaintiff
6 experienced “traumatic, indelible injuries, inflicted upon [Plaintiff’s] person, identity and
7 character, at the ‘orders’ of [Defendant] Kelly Ripa” by way of “repeated, calculated, malicious
8 actions of torment . . . specifically intended to induce psychological duress.” Defendant had
9 producers of the show “continually wake [Plaintiff] up throughout the night, intentionally
10 depriving [her] of sleep, night after night.” Defendant would then “viciously bully and publicly
11 humiliate [Plaintiff] fifteen hours a day on set.” Plaintiff’s public abuse was so severe that
12 strangers approached her offering condolences.

13 Plaintiff has been defamed by Defendant. Plaintiff has repeatedly requested that
14 Defendant cease airing the episode on “Homemade Millionaire,” but Defendant refuses to do so.
15 As a result of airing the episode, Plaintiff has been unable to find employment. Additionally, the
16 episode presents Plaintiff in a “completely false and negative manner.”

17 Plaintiff had a contract with Defendant that Plaintiff would be paid “\$40 per diem.”
18 However, Defendant would only pay Plaintiff and the other reality show participants \$10 per day.
19 Defendant therefore breached her contract with Plaintiff.

20 Plaintiff was “emotionally unstable and severely unwell” while filming “Homemade
21 Millionaire.” Plaintiff also suffers from bipolar disorder. These conditions “seemed to fuel Kelly
22 Ripa’s abuse and degr[a]dation,” in violation of the Welfare and Institution Code.

23 **III. DISCUSSION¹**

24 **A. Torture**

25 Plaintiff alleges a claim of torture pursuant to a criminal statute, California Penal Code
26 § 206, which provides:

27 ¹ While it appears that the relevant event(s) took place in New York, Plaintiff specifically cites to California
28 laws in her FAC. The Court will therefore analyze Plaintiff’s FAC under the cited California law. However, even if
New York law were to be applied, the Court’s analysis would be the same.

1 Every person who, with the intent to cause cruel or extreme pain
2 and suffering for the purpose of revenge, extortion, persuasion, or
3 for any sadistic purpose, inflicts great bodily injury as defined in
4 Section 12022.7 upon the person of another, is guilty of torture.

5 The crime of torture does not require any proof that the victim
6 suffered pain.

7 In turn, Section 12022.7 defines “great bodily injury” as a significant or substantial physical
8 injury. Cal. Penal Code Ann. § 12022.7(f). The crime of torture is punishable by imprisonment in
9 the state prison for a term of life. Cal. Penal Code Ann. § 206.1.

10 Plaintiff fails to set forth sufficient factual allegations that Defendant inflicted any bodily
11 injury upon her person. Instead, Plaintiff alleges that she “experienced ‘traumatic, indelible
12 injuries, inflicted upon [her] person, identity and character’” by means of “‘repeated, calculated,
13 malicious actions of torment . . . specifically intended to induce psychological duress.’” Plaintiff
14 further alleges that the “‘repeated, calculated, malicious actions of torment’” involved “having
15 producers ‘continually wake [her] up throughout the night, intentionally depriving [her] of
16 sleep.’” These allegations of psychological duress from sleep deprivation fail to state a claim of
17 torture under California Penal Code § 206.

18 In any event, Plaintiff’s claim of torture—a criminal cause of action—is not a cognizable
19 claim in this civil action. A plaintiff may bring a civil action against a defendant based on an
20 alleged violation of criminal statute in the following three circumstances:

21 First, and perhaps most commonly, violation of a criminal statute
22 can be used to establish a breach of the standard of care or other
23 element of an ordinary tort cause of action. Second . . . a criminal
24 statute can expressly or impliedly give rise to a private right of
25 action for its violation. Third, under some circumstances, a
26 governmental or quasi-governmental agency can sue to enjoin
27 further breaches of the statute on a public nuisance or related
28 theory.

29 *Animal Legal Defense Fund v. Mendes*, 72 Cal. Rptr. 3d 553, 555-56 (Ct. App. 2008) (citations
30 omitted). Whether a plaintiff can bring a private action against a defendant for an alleged
31 violation of criminal law is ultimately an issue of legislative intent; “[i]f the Legislature intended
32 there be no private right of action, that usually ends the inquiry.” *Id.* at 556. Further, if it is
33 determined that “the Legislature expressed no intent on the matter either way, directly or
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1 impliedly, there is no private right of action, with the possible exception that compelling reasons
2 of public policy might require judicial recognition of such a right.” *Id.* (citing *Moradi-Shalal v.*
3 *Fireman’s Fund Ins. Cos.*, 758 P.2d 58, 69 (Cal. 1988), *Katzenberg v. Regents of Univ. of Cal.*, 58
4 P.3d 339, 349-50 (Cal. 2002)).

5 Plaintiff’s claim of torture does not fall within any of the three categories. Plaintiff does
6 not allege a tort claim for which a criminal statute can be used to establish a breach of a standard
7 of care. Plaintiff is not a governmental or quasi-governmental agency, and is not suing to enjoin
8 further breaches of the torture criminal statute on a public nuisance theory. And, most
9 importantly, it is evident from the face of the criminal statute that the state legislature expressed
10 no intent to provide for a private right of action for its violation. The language of the criminal
11 statute does not— either expressly nor impliedly—contemplate a private right of action; in fact, it
12 expressly anticipates punishment for its violation only by means of imprisonment. *See* Cal. Penal
13 Code Ann. § 206.1. Furthermore, the Court finds no compelling reasons of public policy to
14 recognize a private right of action for torture in this action because, as aforementioned, Plaintiff’s
15 allegations of psychological duress from sleep deprivation fail to state a claim of torture pursuant
16 to the criminal statute.

17 To the extent Plaintiff is attempting to initiate criminal proceedings against Defendant,
18 Plaintiff does not have a constitutional right to prosecute another person or to petition a federal
19 court to compel criminal prosecution of another person. *Linda R.S. v. Richard D.*, 410 U.S. 614,
20 619 (1973) (“[I]n American jurisprudence... a private citizen lacks a judicially cognizable interest
21 in the prosecution or nonprosecution of another.”); *Diamond v. Charles*, 476 U.S. 54, 64-65
22 (1986); *see also Maine v. Taylor*, 477 U.S. 131, 137 (1986) (citations omitted) (“private parties...
23 have no legally cognizable interest in the prosecutorial decisions of the Federal Government”);
24 *Leeke v. Timmerman*, 454 U.S. 83, 86-87 (1981) (“the decision to prosecute is solely within the
25 discretion of the prosecutor”).

26 Accordingly, Plaintiff fails to state a claim for torture.

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1 **B. Defamation²**

2 Under California Civil Code § 44, defamation is defined as either libel or slander. Section
3 45, in turn, defines libel as:

4 [A] false and unprivileged publication by writing, printing, picture,
5 effigy, or other fixed representation to the eye, which exposes any
6 person to hatred, contempt, ridicule, or obloquy, or which causes
 him to be shunned or avoided, or which has a tendency to injure
 him in his occupation.

7 Cal. Civ. Code § 45. Additionally, § 46 defines slander, in relevant part, as:

8 [A] false and unprivileged publication, orally uttered, and also
9 communications by radio or any mechanical or other means
10 which... [t]ends directly to injure [a person] in respect to his office,
11 profession, trade or business, either by imputing to him general
12 disqualification in those respects which the office or other
 occupation peculiarly requires, or by imputing something with
 reference to his office, profession, trade, or business that has a
 natural tendency to lessen its profits

13 *Id.* at § 46. Finally, § 47 defines privileged publication as one made:

14 (a) In the proper discharge of an official duty.

15 (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in
16 any other official proceeding authorized by law, or (4) in the
17 initiation or course of any other proceeding authorized by law and
 reviewable pursuant to Chapter 2 (commencing with Section 1084
 of Title 1 of Part 3 of the Code of Civil Procedure . . .

18 (c) In a communication, without malice, to a person interested
19 therein, (1) by one who is also interested, or (2) by one who stands
20 in such a relation to the person interested as to afford a reasonable
21 ground for supposing the motive for the communication to be
 innocent, or (3) who is requested by the person interested to give
 the information. This subdivision applies to and includes a
 communication concerning the job performance or qualifications of
 an applicant for employment . . .

22 (d) (1) By a fair and true report in, or a communication to, a public
23 journal, of (A) a judicial, (B) legislative, or (C) other public official
24 proceeding, or (D) of anything said in the course thereof, or (E) of a
 verified charge or complaint made by any person to a public
 official, upon which complaint a warrant has been issued . . .

25 (e) By a fair and true report of (1) the proceedings of a public
26 meeting, if the meeting was lawfully convened for a lawful purpose
27 and open to the public, or (2) the publication of the matter
 complained of was for the public benefit.

28 ² Plaintiff alleges a claim of defamation by citing 28 U.S.C. § 4101; however, that code section pertains to foreign judgments and is therefore not relevant to this matter.

1 *Id.* at § 47.

2 To state a cause of action for defamation, Plaintiff must allege that Defendant
3 intentionally (1) published a statement of fact (2) which is false, (3) unprivileged, and (4) has a
4 natural tendency to injure or which causes special damage. *Price v. Stossel*, 620 F.3d 992, 998
5 (9th Cir. 2010) (citing *Gilbert v. Sykes*, 53 Cal.Rptr.3d 752, 764 (Ct. App. 2007)). A private
6 figure plaintiff must also allege that a defendant failed to use reasonable care to determine the
7 truth or falsity of the allegedly defamatory statements. *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711,
8 749 (1989).

9 Plaintiff alleges that Defendant continues to air an episode of *Homemade Millionaire* that
10 presents Plaintiff in a false and negative manner, and the airing of the episode has prevented her
11 from gaining employment. These allegations fail to state a cognizable claim for defamation.
12 Plaintiff fails to allege that Defendant made any false statement and published any such statement
13 by means of the television episode. Plaintiff merely states that the television episode in which she
14 appeared presents her in a “completely false and negative manner.” Accordingly, Plaintiff has
15 failed to state a claim of defamation.

16 **C. Breach of Contract**

17 Under California law, the elements of a breach of contract claim are: 1) existence of a
18 valid contract; 2) performance by the plaintiff or excuse for nonperformance; 3) breach by the
19 defendant; and 4) damages. *First Commercial Mortgage Co. v. Reece*, 89 Cal. App. 4th 731, 745
20 (2001). To state a cause of action for breach of contract, the plaintiff must plead the terms of the
21 contract either verbatim or according to its legal effect. *Langan v. United Servs. Auto. Ass’n*, 69
22 F.Supp.3d 965, 979 (N.D. Cal. 2014) (quoting *Twaite v. Allstate Ins. Co.*, 216 Cal.App.3d 239,
23 252 (1989)).

24 Accepting Plaintiff’s allegations as true and construing them in the light most favorable to
25 her, Plaintiff has stated a viable breach of contract cause of action. Although Plaintiff does not
26 plead the terms of the contract verbatim, she alleges that she and Defendant had a contract
27 whereby Defendant would pay Plaintiff \$40 per day as compensation for Plaintiff’s participation
28 in the episode of “*Homemade Millionaire*.” Plaintiff further alleges that she filmed the episode of

1 Homemade Millionaire, and Defendant breached the contract by only paying Plaintiff \$10 per day
2 instead of \$40 per day. Plaintiff also appears to allege that she has suffered damages in the form
3 of receiving less money than she is owed. Accordingly, Plaintiff has alleged sufficient facts to
4 state a cognizable breach of contract claim.

5 **D. Welfare and Institution Code Violation**

6 Plaintiff alleges that Defendant violated the Welfare and Institution Code because
7 Defendant's "abuse and degr[a]dation" were "fueled" by Plaintiff being "emotionally unstable
8 and severely unwell". Plaintiff, however, does not cite to a specific section of the Welfare and
9 Institutions Code. Upon examination of the California Welfare and Institutions Code, the Court
10 cannot locate any provision granting a private right of action against a private citizen for abusing
11 and degrading an individual suffering a mental impairment. Accordingly, Plaintiff has failed to
12 adequately plead a cause of action under the California Welfare and Institution Code.

13 **IV. CONCLUSION AND RECOMMENDATIONS**

14 The Court recommends that Plaintiff be allowed to proceed only on her claim for breach
15 of contract against Defendant and that all other claims be dismissed with prejudice.

16 The Court does not recommend granting further leave to amend because Plaintiff filed her
17 First Amended Complaint after receiving ample legal guidance from the Court, and it appears that
18 the deficiencies of the First Amended Complaint cannot be cured by further leave to amend.

19 These findings and recommendations are submitted to the district judge assigned to the
20 case, pursuant to 28 U.S.C. § 636(b)(1). Within **twenty-one (21) days** after being served with
21 these findings and recommendations, Plaintiff may file written objections with the court. Such a
22 document should be captioned "Objections to Magistrate Judge's Findings and
23 Recommendations."

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Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: July 16, 2018

/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE