UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WAYNE D. SMITH, Plaintiff, v. AZIZ SHARIAT, ET AL., Defendants.	No. 2:13-cv-1830 TLN AC PS ORDER AND FINDINGS & RECOMMENDATIONS

Pending before the court is defendant Lee Vining's May 12, 2014 motion to dismiss, defendant Linda Hilts and Evergreen MGA's May 12, 2014 motion to dismiss, and defendant Aziz Shariat's May 14, 2014 motion to dismiss, all set for hearing on June 18, 2014. The court has determined that these matters shall be submitted upon the record and briefs on file and accordingly, the date for hearing shall be vacated. E.D. Local Rule 230. On review of the motions and the documents filed in support and opposition, THE COURT FINDS AS FOLLOWS:

RELEVANT FACTUAL ALLEGATIONS

Plaintiff's Second Amended Complaint ("SAC") suffers from the same lack of clarity as his previous pleadings. Invoking this Court's jurisdiction pursuant to, inter alia, the First, Fourth and Fifth Amendments of the United States Constitution, the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq., the Racketeering Influenced and Corrupt Organization Act

("RICO"), 18 U.S.C. §§ 1961-1968, and 18 U.S.C. § 201 (which relates to the bribery of public officials and witnesses), plaintiff brings suit against a number defendants for various wrongs that are not entirely clear, even upon multiple readings of the SAC.

Plaintiff's allegations appear to stem from a work contract he entered into on or around October 5, 2011 with Don Bagwell, the then-manager of the Chiquita Family Camp Ground and RV Park ("Camp Chiquita"). On December 2, 2011, plaintiff moved into Camp Chiquita at Space #16, a space he occupied until April 30, 2012. SAC at 7 ¶¶ 9, 9(a). Pursuant to his contract with Bagwell, plaintiff performed work that included "investigations of Camp ground resident[s], Drug dealers and use thereof." SAC at 7 ¶ 9(a). During the course of his work, plaintiff found that electrical meters were being "padd[ed]." Id. at 9 ¶ 16. Plaintiff "reported every discrepancy, discovered At (The Camp), to all Parties, including Illegal, activities, allegations, of (R.I.C.O.), illegal, sales of firearms, Drug sales, and Grow operations, and the various documented violations of State and County Ordinances." Id. at 10 ¶ 17. In exchange for this work, plaintiff was to be paid $1,690.00 per month. Id. at 9 ¶ 16, 18 ¶ 64.

Following Bagwell's death in late-2011, a Camp Chiquita flyer was distributed nullifying all verbal agreements between Bagwell and Camp Chiquita residents. SAC at 11 ¶ 25. Plaintiff claims that he continued to perform work under the contract until his eviction in February 2013, but that he was never paid for his services. Plaintiff claims that this was a breach of implied contract.

Plaintiff also accuses the owner of Camp Chiquita, Aziz Shariat, of conspiring with unnamed individuals to pad the electricity meters for profit and then of retaliating against plaintiff when the latter reported and attempted to correct the padding. SAC at 7 ¶ 10, 10 ¶ 20. On January 10, 2013, Shariat approached Space #17, where plaintiff then resided, and said, "GET OUT, LEAVE THE PARK TODAY, OR I WILL CUT YOUR BALL'S [sic] OFF." Id. at 8 ¶ 11(A). Plaintiff claims he was illegally evicted on February 4, 2013. Id. at 11 ¶ 28.

Per plaintiff, "Defendants, Et, AL" participated in "a system of vicious harassment, discrimination practices, and Bad Faith dealings, and Fraudulent, Promissory estoppel," and "Acted With Deliberate Indifference, and failure to give the Plaintiff procedural Due Process" by

falsifying utility bills and creating false reports that plaintiff was in violation of Camp Chiquita rules. SAC at 9 ¶ 14. Plaintiff claims that he was a law-abiding resident of Camp Chiquita, but that he was targeted by defendants, even though other residents who were participating in illegal activity at the campground were not evicted or arrested. See, e.g., id. at 10 ¶¶ 21-22.

On July 3 (or August 3), 2012, plaintiff's home was burglarized by a former resident of Camp Chiquita. SAC at 11 ¶ 30, 13 ¶ 39. Plaintiff accuses five on-site managers of being aware of an open security gate and of witnessing the burglary. Id. at 11 ¶ 30. He also accuses El Dorado County Sheriff's Deputies Gennai and Funk of responding to this burglary days after the fact, id. at 13 ¶ 40, and of failing to gather information or interview witnesses, id. at 14 ¶ 42. Plaintiff accuses these defendants of violating his Due Process rights.

Following the burglary, plaintiff filed a claim against Camp Chiquita's insurance company. SAC at 14 ¶ 44. He accuses insurance agents Lee Vining and Linda Hilts of acting in bad faith and of discriminating against plaintiff by conspiring to cover up the facts of the burglary. Id. In support of this claim, plaintiff relies solely on these defendants' denial of plaintiff's insurance claims. See id. at 14 ¶ 45.

Plaintiff also asserts that he was discriminated against because of his religion. In support, plaintiff asserts that after "Defendants Et, Al" learned that he is a practicing Christian, they treated him differently. SAC at 7 ¶ 11. Plaintiff accuses Shariat of approaching him on March 16, 2014 during a scheduled church service at Camp Chiquita (after plaintiff's eviction from the campground) and saying, "You are not allowed here, at [The Camp], get Out, or You Will Be Arrested." Id. at 8 ¶ 12. Plaintiff claims this was in violation of his First Amendment rights.

In sum, plaintiff asserts that all defendants acted under color of state law; that all are vicariously liable for Shariat's actions; that all of the defendants' actions constitute a custom, practice and policy of deliberate indifference; that he was discriminated against on account of his disability; and that the defendants deprived plaintiff of his right to practice his religion.

PROCEDURAL BACKGROUND

Plaintiff initiated this action on September 4, 2013. On September 12, 2013, the undersigned granted plaintiff's request to proceed in forma pauperis and screened the complaint,

finding it to be so vague and conclusory that the court was unable to determine whether the action was frivolous or failed to state a claim. The complaint was therefore dismissed and plaintiff was directed to file an amended complaint.

On October 15, 2013, plaintiff filed a First Amended Complaint ("FAC") naming Officers Gennai and Funk; Aziz Shariat, as the owner / operator of Camp Chaquita "aka Yanasa, Inc."; Larry Saunders "aka Georgetown Mini, Storage"; Vining Insurance and Business Consultants dba Frontier Adjusters of Sacramento ("Frontier Adjusters") (erroneously sued as "Lee Vining aka Frontier Adjustments of Sacramento"); and Linda Hilts of Evergreen Insurance Company ("Hilts and Evergreen").

Before the Court could screen the FAC, plaintiff served all defendants by mail. See ECF No. 5. Thereafter, defendants Shariat, Frontier Adjusters, and Hilts and Evergreen filed separate motions to dismiss. ECF Nos. 6, 11, 16. On review of these motions, the Court found plaintiff's pleading to be in violation of Federal Rule of Civil Procedure 8(a)(1) and (2). Thus, the FAC was dismissed with leave to amend.

On April 28, 2014, plaintiff filed the operative SAC. ECF No. 20. Plaintiff again names Officers Gennai and Funk, Shariat, Frontier Adjusters, and Hilts and Evergreen. Pending before the Court are three motions to dismiss filed again by Frontier Adjusters, Hilts and Evergreen, and Shariat. ECF Nos. 21-23. Plaintiff opposes the motions.

LEGAL STANDARDS

The purpose of a motion to dismiss pursuant to this rule is to test the legal sufficiency of the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the plaintiff's claims, even if the plaintiff's allegations are true.

In determining whether a complaint states a claim on which relief may be granted, the

court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989).

The court may consider facts established by exhibits attached to the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987), and matters of public record, including pleadings, orders, and other papers filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986). The court need not accept legal conclusions "cast in the form of factual allegations." Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

DISCUSSION

A. Frontier Adjusters' Motion to Dismiss

Defendant Frontier Adjusters moves to dismiss the SAC on the following grounds: (1) failure to timely serve complaint pursuant to Rule 4(m) of the Federal Rules of Civil Procedure; (2) insufficient service of process pursuant to Rule 12(b)(5); (3) insufficient process pursuant to Rule 12(b)(4); and (4) failure to state a claim pursuant to Rule 12(b)(6).

1. Improper Service

As for Frontier Adjusters' ground for dismissal based on insufficiency of process, "service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444-45 (1946). "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987). Accordingly, Rules 12(b)(4) and 12(b)(5) permit a court to dismiss an action for insufficiency of service of process. Fed. R. Civ. P. 12(b)(4)-(5). Rule 12(b)(4) enables the defendant to challenge the substance and form of the summons, and 12(b)(5) allows the defendant to attack the manner in which service was, or was not, attempted. Id. When the validity of service is contested, the burden is on the plaintiff to prove that service was valid under Rule 4. Brockmeyer v. May, 383

F.3d 798, 801 (9th Cir. 2004). If the plaintiff is unable to satisfy this burden, the Court has the discretion to either dismiss the action or retain the action and quash the service of process. Stevens v. Sec. Pac. Nat'l Bank, 538 F.2d 1387, 1389 (9th Cir. 1976).

Rule 4(a)(1) sets forth the requirements for the form of a summons, including that it name the court and the parties, be directed to the defendant, state the name and address of plaintiff, be signed by the clerk, and bear the clerk's seal. Fed. R. Civ. P. 4(a)(1). "Dismissals for defects in the form of summons are generally disfavored." U.S.A. Nutrasource, Inc. v. CNA Ins. Co., 140 F. Supp. 2d 1049, 1052 (N.D. Cal. 2001). "Technical defects in a summons do not justify dismissal unless a party is able to demonstrate actual prejudice." Chan v. Society Expeditions, 39 F.3d 1398, 1404 (9th Cir. 1994). In addition, "[e]ven if the summons fails to name all of the defendants . . . dismissal is generally not justified absent a showing of prejudice." United Food & Commercial Workers Union, Locals 197, et al. v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984) (internal citations omitted) ("Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint.").

Rule 4 also sets forth the requirements for the manner of service. As relevant here, Rule 4(h) provides that a corporation or other unincorporated association may be served either in the manner prescribed for serving an individual, see Rule 4(e)(1), or by delivering a copy of the summons and complaint to an agent authorized to receive service. Fed. R. Civ. P. 4(h). An individual may be served by, inter alia, personally delivering a copy of the summons and a complaint, leaving a copy of each at the individual's usual place of abode, or delivering a copy of each to an agent authorized to receive service. Fed. R. Civ. P. 4(e)(2). Again, once the adequacy of service is challenged, the plaintiff bears the burden of establishing that service was valid. Brockmeyer, 383 F.3d at 801.

In addition to the foregoing, Rule 4 lays out the time frame within which service must be accomplished:

> If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must

extend the time for service for an appropriate period. [. . .]

Fed. R. Civ. P. 4(m). Where service is untimely, Rule 4(m) requires a district court to grant an extension of time for service when the plaintiff shows good cause for the delay in service. Efaw v. Williams, 473 F.3d 1038, 1040 (9th Cir. 2007). In the absence of good cause, the rule permits the district court to grant an extension upon a showing of excusable neglect. Id. See also Lemoge v. United States, 587 F.3d 1188, 1198 (9th Cir. 2009). The plaintiff, of course, bears the burden of showing the existence of good cause or excusable neglect warranting an extension. Habib v. General Motors Corp., 15 F.3d 72, 73 (6th Cir. 1994); McCormack v. City and County of Honolulu, 2011 WL 6934710, at *4 (D. Haw. 2011).

Here, plaintiff commenced this action on September 4, 2013, and first named Frontier Adjusters as a defendant in the FAC filed on October 15, 2013. Therefore, the 120-day period for effecting service of that pleading on this defendant expired on February 12, 2014. Fed. R. Civ. P. 6(a)(1). On December 27, 2013, plaintiff mailed the FAC and accompanying documents purportedly to all defendants, including Lee Vining of Frontier Adjusters. See ECF No. 5. The Summons, though, is almost entirely blank but for the caption of this case, and, in the space provided to list the defendant, includes only the following line: "AZIZ SHARIAT, ET AL.; List of Defendants attach." See id. at 4. Lacking many of the requirements established by Rule 4(a)(1), the Court finds the summons to be defective.

Vining received the FAC and accompanying documents by regular U.S. mail on or about January 6, 2014. Decl. of Lee Vining ¶ 3, Ex. 1. Vining did not receive a Summons, he never signed or returned the "Waiver of the Service of Summons," which itself was unsigned and undated, he has never been personally served with any documents, and to date he has not been served with the SAC. Id. ¶¶ 4-6. Thus, service also suffers from insufficiency and untimeliness.

Plaintiff offers no argument in opposition to this defendant's motion to dismiss. See ECF No. 25. Instead, he submits over 150-pages of exhibits, none of which establishes that either Lee Vining or Frontier Adjusters has been properly and/or timely served. See ECF No. 28. In light of plaintiff's failure to meet his burden to show the existence of good cause or excusable neglect in failing to properly and timely serve, the Court will recommend that Frontier Adjusters' Motion to

Dismiss be granted and this action be dismissed against it.

2. Failure to State a Claim

Alternatively, the Court finds the SAC subject to dismissal against this defendant for failure to state a claim. The gravamen of plaintiff's claim is that Frontier Adjusters improperly denied an insurance claim filed by plaintiff for losses incurred following the July (or August) 2012 burglary. The only facts alleged as to this defendant are:

> Defendant Lee Vining, the Independent liability investigator for Evergreen MGA, aka Adjustor, Claim writer and/or administrator, Known as Linda Hilts, operated in Bad Faith and dealing Practices, for their Insured (The Camp), Discriminated against the Plaintiff, by way of Legal cause & Fact, That Defendant Vining in His Person did Conspire to Cover up the Full Faith Facts an [sic] Knowledge availed, to Him in a Conspiracy to Deny the Plaintiff His Claim against their Insured (The Camp).

SAC at 14 ¶ 44. As is evident, the only wrong alleged is this defendant's denial of plaintiff's insurance claim. But plaintiff readily admits that Frontier Adjusters insured Camp Chiquita, not him. Additionally, it is unclear how the mere fact that this defendant denied plaintiff's insurance claim gives rise to a violation of plaintiff's constitutional or federal rights or constitutes a breach of an implied contract or promissory estoppel. Although pro se pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support a cause of action. Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

Given these serious deficiencies in the SAC, and given plaintiff's failure to comply with this Court's instructions for amending his complaint, this Court finds it appropriate to recommend dismissal of the SAC complaint against this defendant with prejudice for failure to comply with Federal Rule of Civil Procedure 8(a) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff has twice amended his complaint, both times with explicit instructions from this Court about complying with Rule 8(a). Though the SAC is in some ways an improvement, it is still far from a clear, intelligible, "short and plain" statement of his claims. Plaintiff failed to follow even relatively straightforward instructions, such as specifying which claims are alleged against which defendants. Instead, plaintiff persists in pleading claims against

"Defendants, Et, AL." Moreover, further amendment would be futile, as improved clarity of pleading regarding the denied insurance claim could not conceivably state a legal claim against Frontier Adjusters under 42 U.S.C § 1983 or RICO. See Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002) (leave to amend need not be granted where amendment would be futile). Accordingly, the Court will recommend that this motion be granted and the claims against Frontier be dismissed with prejudice.

3. Lack of Subject Matter Jurisdiction

Although Frontier Adjusters does not raise the issue of subject matter jurisdiction, this court may raise the issue sua sponte. Snell v. Cleveland, Inc., 316 F.3d 822, 826 (9th Cir. 2002). The "presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). For the reasons explained below in discussion of the other defendants' motions, the complaint does not support subject matter jurisdiction over the claims against Frontier Adjusters. This conclusion further supports dismissal with prejudice.

B. Hilts and Evergreen's Motion to Dismiss

1. Improper Service

In their motion to dismiss, Hilts and Evergreen raise the same arguments as Frontier Adjusters regarding plaintiff's failure to properly and timely serve. Because the facts related to service are identical for these defendants, the undersigned will also recommend that Hilts and Evergreen's motion to dismiss be granted for failure to serve process in accordance with the Federal Rules of Civil Procedure.

2. Failure to State a Claim

Alternatively, the SAC should be dismissed for failure to state a claim. Similar to his claim against Frontier Adjusters, plaintiff accuses Hilts and Evergreen of acting with "Malice and Forethought" in "withhold[ing] Proper Information as revealed by the State of California Dept.; Of Insurance, and dealt with the Plaintiff in Bad Faith, when, acting consistently denying Plaintiff Claims For Losses incurred by their insured (The Camp) . . . ." SAC at 14 ¶ 45. Plaintiff's vague

and conclusory claims against these defendants are subject dismissal with prejudice for the same reasons as discussed on consideration of Frontier Adjusters' motion to dismiss. That is, other than asserting that these defendants denied his insurance claim, plaintiff fails to proffer any facts supporting a claim for a violation of his constitutional or federal rights, breach of an implied contract or promissory estoppel. Because two opportunities to amend the pleadings have not resulted in a cognizable claim, further leave to amend would be an exercise in futility.

3. Lack of Subject Matter Jurisdiction

Lastly, defendants' motion should be granted for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction, and are presumptively without jurisdiction over civil actions. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. Id. Here, although plaintiff lists an array of federal statutes and constitutional provisions, it is unclear how Hilts and Evergreen's denial of plaintiff's insurance claim amounts to, for example, a civil rights violation, 42 U.S.C. § 1983; employment discrimination on the basis of disability, 42 U.S.C. § 12117; employment discrimination for participation in enforcement proceedings, 42 U.S.C. § 2000e-3; or a RICO violation.

C. Shariat's Motion to Dismiss

Defendant Shariat moves to dismiss this action for failure to provide a short and plain statement pursuant to Rule 8(a)(2), failure to establish federal subject matter jurisdiction pursuant to Rule 8(a)(1), and failure to state a claim pursuant to Rule 12(b)(6).

As the Court indicated in recounting plaintiff's factual allegations, the SAC is hardly a model of clarity. This raises problems not only under Rule 8(a), but also under Rule 12(b)(6). In considering motions to dismiss under Rule 12(b)(6), a court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party, although "conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal." Cousins v. Lockyer, 568 F.3d 1063, 1067 (9th Cir. 2009). While "a complaint need not contain detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" Id. "A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see also Bell Atl. Corp v. Twombly, 550 U.S. 544, 556 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than sheer possibility that a defendant acted unlawfully." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). A court may dismiss as frivolous, claims that are clearly baseless, fanciful, fantastic, or delusional. Denton v. Hernandez, 504 U.S. 25, 32-33 (1992).

Additionally, "[f]ederal district courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute. We presume that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." K2 Am. Corp. v. Roland Oil & Gas, LLC, 653 F.3d 1024, 1027 (9th Cir. 2011) (citations and internal marks omitted).

Though plaintiff asserts a slew of federal statutes and constitutional provisions, neither the SAC nor the opposition states a legally cognizable ground for the Court to exercise jurisdiction over plaintiff's allegations. Plaintiff, for example, brings numerous constitutional claims against defendant Shariat for violations of his constitutional rights, including the First Amendment, the Fourth Amendment, and the Fourteenth Amendment. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of law. As the Ninth Circuit has stated, "private parties are not generally acting under color of state law, and . . . '[c]onclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act.'" Price v. State of Hawai'i, 939 F.2d 702, 708 (9th Cir. 1991) (citing Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984) (citation omitted)). Other than a conclusory allegation that Shariat is a state actor, plaintiff has provided no facts supporting this allegation.

In many places, plaintiff fails to plead any factual basis for his claims. In others, the facts he pleads are conclusory or of unclear relevance. For example, though plaintiff alleges that he was discriminated against based on his religion, the complaint contains practically no facts

indicating the basis for this claim. He also brings suit under the ADA and 18 U.S.C. § 201, which as previously noted relates to the bribery of public officials and witnesses, but again he provides only conclusory allegations without a sufficient factual basis for either of these claims. Other allegations are so bizarre as to be entirely implausible.

As for plaintiff's RICO claim, plaintiff does not state directly on which provision(s) of RICO this cause of action is based. In order to state a civil RICO claim, plaintiff must allege facts showing: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property'" ("RICO injury"). Living Designs, Inc. v. E.I. Dupont de Nemours and Co., 431 F.3d 353, 361 (9th Cir. 2005) (quoting Grimmett v. Brown, 75 F.3d 506, 510 (9th Cir. 1996), in turn citing 18 U.S.C. §§ 1964(c), 1962(c)). In order to state a claim for RICO conspiracy, plaintiff must allege that a person conspired to violate section 1962(c), that he suffered RICO injury by reason of overt acts, and that those overt acts constitute predicate acts under the RICO statute, which were in furtherance of the conspiracy. See, e.g., Reddy v. Litton Indus., Inc., 912 F.2d 291, 295 (9th Cir. 1990).

"Racketeering activity" is defined to encompass a variety of criminal acts identified in 18 U.S.C. § 1961(1). Sanford v. MemberWorks, Inc., 625 F.3d 550, 557 (9th Cir. 2010). To satisfy the "pattern" requirement, there must be at least two acts of racketeering activity within a ten-year time period. 18 U.S.C. § 1961(5). As an alternative to demonstrating a pattern of racketeering activity, a plaintiff may rely on proof of the collection of an unlawful debt. See 18 U.S.C. § 1962(a)–(c). RICO defines "unlawful debt" as a debt resulting from illegal "gambling activity" or one that is unenforceable because it is "usurious." 18 U.S.C. § 1961(6); Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 665-66 (9th Cir. 1988).

Where a plaintiff alleges "a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim[,] . . . the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of [Federal Rule of Civil Procedure] 9(b)." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003). To be alleged with particularity, a plaintiff must allege "the

who, what, when, where, and how" of the alleged fraudulent conduct, Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997), and "set forth an explanation as to why [a] statement or omission complained of was false and misleading," In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc). In other words, "the circumstances constituting the alleged fraud [must] be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." Vess, 317 F.3d at 1106 (first alteration supplied; internal quotation and citations omitted). "Rule 9(b)'s requirement that '[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity' applies to civil RICO fraud claims." Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir. 2004) (internal citation omitted); Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 541 (9th Cir. 1989).

In this case, plaintiff asserts that Shariat conspired with unnamed individuals to pad the electricity meters at Camp Chiquita for profit. Even taken as true, plaintiff has insufficiently pled facts to permit the Court to draw a reasonable inference that this defendant's conduct involved a pattern of racketeering activity, as defined by statute, and has further failed to allege the "who, what, when, where and how" of this claim. Moreover, the injury claimed is nonsensical: the "loss of Business, known as 'The Spoken Word R&D' 008-TW1, a congressional program and Work rehabilitative program, Plaintiff, (Maximus), Now Known as (Bass) (The Act of Congress 1999)." SAC at 21 ¶ 86.

To the extent plaintiff grounds his claims on breach of implied contract and promissory estoppel, he fails to establish the basis of this Court's subject matter jurisdiction. See 18 U.S.C. §§ 1331-1332. Even assuming jurisdiction could be established, plaintiff fails to state a claim. To establish breach of implied contract, California law recognizes two varieties of implied contract: contracts are implied in law where "the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice" Hedging Concepts, Inc. v. First Alliance Mortgage Co., 41 Cal. App. 4th 1410, 1419 (1996)); and, contracts are implied in fact where the parties' actions evince an intention to create a binding contract. See Weitzenkorn v. Lesser, 40 Cal. 2d 778, 794 (1953) ("The only distinction between an implied-in-fact contract and

an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct"). Unlike quasi-contracts or contracts implied in law, contracts implied in fact reflect the parties' actual intentions. Id.; see generally Gunther-Wahl Productions, Inc. v. Mattel, Inc., 104 Cal. App. 4th 27, 36-42 (2002) (collecting early cases); see also Montz v. Pilgrim Films & Television, Inc., 649 F.3d 975 (9th Cir. 2011). To establish promissory estoppel, plaintiff must allege (1) a promise that is clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance. See Boon Rawd Trading Int'l Co., Ltd. v. Paleewong Trading Co., Inc. 688 F. Supp. 940, 953 (2010).

Plaintiff contends that he entered into a contract with Dan Bagwell in October 2011 that was rescinded by Camp Chiquita management in late-2011 following Bagwell's death. Plaintiff claims that he continued to perform under the contract for over one year after Bagwell's death, but that defendants breached the *implied* contract by failing to pay him the amount promised ($1,690.00 per month). Plaintiff, however, also asserts that he entered into a *signed* contract with Bagwell. See SAC at 20 ¶ 75. These contradictory allegations do not give defendants fair notice of the basis of plaintiff's claim and are insufficient to establish the elements of either a breach of an implied contract or promissory estoppel claim. See Fed. R. Civ. P. 8(a)(2); Wyshak v. City Nat'l Bank., 607 F.2d 824, 827 (9th Cir. 1979).

Defendant Shariat's motion to dismiss the SAC for failure to comply with the requirements of Rule 8(a) and for failure to state a claim should therefore be granted.

D. Screening of SAC as to Deputies Gennai and Funk

Also pending before the Court is plaintiff's June 2, 2014 motion for service of the complaint on defendants El Dorado County Sheriff's Deputies Gennai and Funk. Before ruling on that motion, the undersigned will screen the SAC pursuant to the federal in forma pauperis statute, which authorizes federal courts to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

In evaluating plaintiff's SAC, this Court must construe it in the light most favorable to the

plaintiff and accept as true the factual allegations of the complaint. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). This rule does not apply to "'a legal conclusion couched as a factual allegation,'" Papasan v. Allain, 478 U.S. 265, 286 (1986) (quoted in Twombly, 550 U.S. at 555), nor to "allegations that contradict matters properly subject to judicial notice" or to material attached to or incorporated by reference into the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988-89 (9th Cir. 2001).

In this case, plaintiff accuses Deputies Gennai and Funk of responding to the burglary of plaintiff's residence thirteen days after the fact and of failing to gather information or interview witnesses. The Court gleans additional facts from a copy of a report prepared by El Dorado County Sheriff's Deputies Gennai and Funk on August 14, 2012 following their investigation of the burglary.[1] See ECF No. 28-2 at 13-15. Per this report, the burglary of plaintiff's residence occurred at some time between August 3 and August 9, 2012, while plaintiff was in Reno, Nevada. On August 9, 2012, plaintiff received a phone call from Camp Chiquita management informing him that his residence had been broken into. On August 13, 2012, plaintiff returned home to find that it had indeed been burglarized. That evening, at approximately 11:10 p.m., Deputies Gennai and Funk were dispatched to plaintiff's residence. When they arrived, they spoke to plaintiff and learned that prescription medication and thousands of dollars in cash had been stolen. Plaintiff suspected Donna Carpenter of the burglary, but the deputies did not attempt to make contact with her both because of the time of night and because of plaintiff's uncertainty about the suspect's whereabouts.

Examination of this report leads the Court to conclude that plaintiff's claim against these deputies is subject to dismissal. This is because the report establishes that Deputies Gennai and

[1] This report was submitted by plaintiff in opposition to the pending motions to dismiss. Because the SAC depends, in part, upon consideration of this report, it may be considered. See Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008) (When adjudicating a motion to dismiss, a court "need not accept as true allegations contradicting documents that are referenced in the complaint"); Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (Consideration of materials incorporated by reference in the complaint is permitted when "plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document."). Here, because the report was submitted by plaintiff himself, there can be no dispute concerning its authenticity or its contents.

Funk responded to the burglary on the evening of August 13 or the early morning of August 14, 2014, immediately (or at least very soon) after plaintiff contacted the El Dorado County Sheriff's Department and not, as plaintiff alleges in the SAC, days after receiving notice. Moreover, even assuming Deputies Gennai and Funk failed to gather information or interview witnesses, this does not amount to a constitutional violation. See Gomez v. Whitney, 757 F.2d 1005, 1006 (9th Cir. 2007) ("[W]e can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved."). Because plaintiff has failed to state facts that constitute the infringement of another recognized constitutional right, his claims against these defendants must be dismissed. As this is plaintiff's third unsuccessful attempt to state a claim against these defendants, the Court will recommend that this dismissal be without leave to amend.

Based on the foregoing, IT IS HEREBY ORDERED that:

1. The June 18, 2014 hearing on defendants' motions to dismiss (ECF Nos. 21-23) is vacated;
2. Plaintiff's June 2, 2014 motion for service of complaint (ECF No. 27) is denied; and

IT IS HEREBY RECOMMENDED that:

1. Frontier Adjusters' May 12, 2014 motion to dismiss (ECF No. 21) be granted;
2. Hilts and Evergreen's May 12, 2014 motion to dismiss (ECF No. 22) be granted;
3. Shariat's May 14, 2014 motion to dismiss (ECF No. 23) be granted; and
4. This action be dismissed with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v.

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Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

DATED: June 17, 2014

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE