



1 122.

2 In considering a motion to dismiss, the Court must accept all allegations of  
3 material fact in the complaint as true. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). The  
4 Court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer  
5 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S.  
6 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All  
7 ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen,  
8 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual  
9 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009).  
10 In addition, pro se pleadings are held to a less stringent standard than those drafted by lawyers.  
11 See Haines v. Kerner, 404 U.S. 519, 520 (1972).

12 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement  
13 of the claim showing that the pleader is entitled to relief” in order to “give the defendant fair  
14 notice of what the . . . claim is and the grounds upon which it rests.” Bell Atl. Corp v. Twombly,  
15 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order  
16 to survive dismissal for failure to state a claim under Rule 12(b)(6), a complaint must contain  
17 more than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
18 allegations sufficient “to raise a right to relief above the speculative level.” Id. at 555-56. The  
19 complaint must contain “enough facts to state a claim to relief that is plausible on its face.” Id. at  
20 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
21 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
22 Iqbal, 129 S. Ct. at 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but  
23 it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting  
24 Twombly, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a  
25 defendant’s liability, it ‘stops short of the line between possibility and plausibility for entitlement  
26 to relief.’” Id. (quoting Twombly, 550 U.S. at 557).

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1 In deciding a Rule 12(b)(6) motion, the Court generally may not consider materials  
2 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);  
3 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The Court may, however, consider: (1)  
4 documents whose contents are alleged in or attached to the complaint and whose authenticity no  
5 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,  
6 and upon which the complaint necessarily relies, but which are not attached to the complaint, see  
7 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials  
8 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.  
9 1994).

10 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no  
11 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per  
12 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

## 13 I. BACKGROUND

### 14 A. Procedural History

15 This matter was previously before the undersigned when Plaintiff was proceeding  
16 pro se. At that time, the action proceeded on Plaintiff’s pro se second amended complaint, filed  
17 on June 29, 2020. See ECF No. 61. In that pleading, Plaintiff alleged eight claims for relief as  
18 follows:  
19

20 First Claim	Wrongful termination in violation of public policy, California Labor Code § 232.5.
21 Second Claim	Wrongful termination in violation of public policy, California Labor Code § 1102.5.
22 Third Claim	Breach of contract and implied covenant of good faith and fair dealing.
23 Fourth Claim	Breach of contract and implied covenant of good faith and fair dealing.
24 Fifth Claim	Breach of contract and implied covenant of good faith and fair dealing.
25 Sixth Claim	Unfair business practices, California Business & Professions Code § 17200, et seq.

1                   Seventh Claim        Defamation.

2                   Eighth Claim         Slander.

3                   See id. at 23-48.

4                   On August 3, 2020, Defendant filed a motion to dismiss the second amended  
5 complaint. See ECF No. 62. Defendant argued that particular portions of the second amended  
6 complaint should be dismissed. See id. at 12-21. Specifically, Defendant contended: (1)  
7 Plaintiff's third claim should be dismissed because it is preempted and time-barred; (2) Plaintiff's  
8 fourth and fifth claims should be dismissed because Plaintiff has not alleged contractual  
9 obligations separate from his third claim, which is preempted and time-barred; (3) Plaintiff's  
10 seventh and eighth claims should be dismissed because they are time-barred and the alleged  
11 defamatory statements are privileged, not defamatory, or substantially true. See id. Defendant  
12 did not challenge the sufficiency of Plaintiff's first, second, or sixth claims.

13                   Following completion of briefing, the undersigned issued findings and  
14 recommendations on February 23, 2021, recommending that Defendant's motion to dismiss be  
15 granted. See ECF No. 75. Specifically, the Court concluded: (1) Plaintiff's third, fourth, and  
16 fifth claims should be dismissed with prejudice as preempted and time-barred; (2) Plaintiff's  
17 seventh claim based on statements made to Plaintiff's union representative, statements made to  
18 the California Employment Development Department, and statements made to the California  
19 health and Human Services Agency should be dismissed with prejudice; (3) Plaintiff's seventh  
20 claim based on statements made to Cal Fire should be dismissed with leave to amend; and (4)  
21 Plaintiff's eighth claim should be dismissed with prejudice as duplicative. See id. at 28-29. The  
22 findings and recommendations were adopted in full by the then-assigned District Judge on May  
23 24, 2022. See ECF No. 96.

24                   While the findings and recommendations addressing Defendant's motion to  
25 dismiss the second amended complaint were pending, retained counsel substituted in for Plaintiff  
26 pro se on May 20, 2021. See ECF No. 87. After the February 23, 2021, findings and  
27 recommendations were adopted on May 24, 2022, Plaintiff, through retained counsel, filed the  
28 operative verified third amended complaint on September 26, 2022. See ECF No. 108.



1 At the outset, the Court agrees with Defendant's argument that the majority of  
2 Plaintiff's defamation claim, based on statements other than those allegedly made to Cal Fire,  
3 have been dismissed with prejudice. Defendant's motion to dismiss should be granted insofar as  
4 Plaintiff's fourth claim is based on such statements. As explained in the Court's prior findings  
5 and recommendations and order, Plaintiff was granted leave to amend his defamation claim only  
6 as to statements allegedly made to Cal Fire. The Court will focus the remainder of its analysis on  
7 Plaintiff's claim in the context of such alleged statements.

8 As to statements allegedly made to Cal Fire, Plaintiff alleges as follows in the third  
9 amended complaint:

10 197. EMC's agent(s) or Representative(s) Ms. Carol Linscheid,  
11 and Mr. B. Kiuttu and cc'd to Marty Marshal exchanged an email  
regarding the events surrounding two separate events:

- 12 a. When Bailey came into the hospital wearing his  
13 fireman dress blues after responding to an auto  
14 accident that happened two days prior in front of his  
home where he held the neck of an elderly woman  
about to be transported to EMC.
- 15 b. When BAILEY and a confidant, Al Peterson, tried  
16 to see Radiology department manager Phillip  
17 Pooley and EMC's CEO Mike Wiltermood to  
continue via his unwavering focus to alert a  
significant patient safety concern.

18 198 Bailey did present in his fireman's dress uniform and  
19 carrying [sic] a small lighthouse as a reminder of a presentation made by  
20 Carol Linscheid exactly one year to the day describing an infamous  
incident between US Naval battle groups and Spanish Lighthouse.

21 199. These two events have been used to malign and defame  
22 BAILEY by mixing the two events passed down by various witnesses and  
blowing completely out of context what took place.

23 200. It is common knowledge that when rumors get spread from  
24 one person to another and another the story changes and becomes  
something entirely different from the original event and that is what  
happened regarding both incidents involving fireman's garb.

25 201. This led to the SEIU Union attorneys declining to move  
26 BAILEY's grievance forward because ". . .the Union learned from the  
27 employer about [-- redacted] **fraudulently donning a firefighter's  
uniform, and unauthorized entry into the hospital. . . ."** (See **EXHIBIT  
03, @ Pg. 3, Defendants Bates No. D001580-1582).**

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1                   202. The event where BAILEY entered the hospital in dress  
2 uniform (later learned to be a Cal Fire policy) was NOT an illegal act, and  
3 BAILEY had called ahead trying to seek the audience of EMC's CEO  
4 Mike Wiltermood regarding the significant patient safety concerns.

5                   203. At the same event and time, he was accompanied by his  
6 trusted confidant as a witness; thus, it cannot have been a celestine attempt  
7 to sneak passed [sic] hospital security. A truly innocent action was  
8 deliberately villainized by Ms. Linscheid, painting pictures to Mr. Marcus  
9 Hatcher and others.

10 ECF No. 108, pgs. 29-30 (emphasis in original).

11 Defendant argues:

12                   The SAC alleged that some unknown employee, agent, or  
13 representative of ENLOE accused BAILEY of "fraudulently donning of  
14 the firefighter's uniform and unauthorized entry into the hospital" in an  
15 unknown oral or written communication (by speech, email, fax or some  
16 unknown means) to some unknown person at the local community fire  
17 department some unknown point in time. ECF Dkt. 61, ¶¶ 308-309, 315-  
18 316. The Court has already ruled that these allegations failed to state a  
19 plausible claim for relief. ECF Dkt. 75, 24:18-26:23; ECF Dkt. 96; ECF  
20 Dkt. 100. Specifically, the Court found that BAILEY's allegations are too  
21 vague and conclusory because he doesn't factually allege who published  
22 and/or received the alleged defamatory statement, in what form the alleged  
23 publication was made, when the publication was made, and/or when  
24 BAILEY learned that he was discharged from his position as a volunteer  
25 firefighter. ECF Dkt. 75, 26:15-23; ECF 96; ECF Dkt. 100.

26                   In his TAC, BAILEY fails to add any factual allegations  
27 regarding the purported communication(s) to Cal Fire. Instead, the TAC  
28 again alleges that some unknown employee, agent, or representative of  
ENLOE accused BAILEY of "fraudulently donning" a "firefighter's  
uniform" and "unauthorized entry" into ENLOE's hospital in an unknown  
oral or written communication (by speech, email, fax or some unknown  
means) to some unknown person at the local community fire department  
some unknown point in time. ECF Dkt. 108, ¶¶ 227-228. Accordingly, the  
TAC's vague, conclusory allegations again fail to state a plausible claim  
for relief. *See* ECF Dkt. 75, 26:15-23; ECF 96; ECF Dkt. 100. . . .

ECF No. 114-1, pgs. 9-10.

Given that Defendant's argument is premised on the notion that Plaintiff's third  
amended complaint does not add to Plaintiff's previous allegations, found to be too vague, it  
bears noting Plaintiff's allegations in the second amended complaint related to statements  
allegedly made to Cal Fire. As to statements allegedly made to Cal Fire, the Court stated as  
follows:

In his seventh claim, Plaintiff alleges that Defendants made

1 various false statements to Cal Fire through its agents and that such  
2 statements resulted in the loss of his job as a volunteer firefighter. See  
3 ECF No. 61, pgs. 44-47. According to Plaintiff, Defendant or its agents  
4 “representatives intentionally and maliciously published (by speech,  
5 email, fax or some unknown means) caused PLAINTIFF to lose his  
6 position as a volunteer Firefighter for Butte County with Cal Fire.  
7 PLAINTIFF.” *Id.* at 44. Plaintiff adds: “PLAINTIFF is informed,  
8 believes and thereon alleges that DEFENDANT and/or it’s [sic] agents or  
9 representatives falsely accused PLAINTIFF of “*fraudulent[ly] donning of  
10 the firefighter’s uniform, and unauthorized entry into the hospital*”;  
11 without any factual basis to imply the uniform was “fraudulent[ly]”  
12 obtained.” *Id.* (italics in original). Plaintiff also states: “DEFENDANT  
13 and/or its agents or representatives published in oral and written  
14 communication to the local community fire department that ultimately  
15 lead to dismissal from his career as a volunteer firefighter” and “[f]urther,  
16 DEFENDANT and its agents or representatives published in oral,  
17 telephonic, email, fax, or yet to be disclosed communication that  
18 PLAINTIFF ‘unauthorized entry’ into EMC by ‘*fraudulently donning*’ a  
19 firefighters uniform”” *Id.* at 45 (italics in original).

20 \* \* \*

21 . . . Defendant contends Plaintiff’s allegations are too vague  
22 and conclusory to state a claim for relief. The Court agrees. As  
23 Defendant notes, Plaintiff alleges that some unknown form of  
24 communication was published to an unknown person or persons at an  
25 unknown point in time. . . .

26 ECF No. 75, pgs. 25-26.

27 Under California law, the tort of defamation involves (1) an intentional publication  
28 that (2) is false and (3) unprivileged and (4) has a natural tendency to injure or causes special  
damages. See Smith v. Maldonado, 72 Cal. App. 4th 637, 645 (1999); see also Seelig v. Infinity  
Broadcasting Corp., 97 Cal. App. 4th 798, 809 (2002). The truth of the statements at issue is an  
absolute defense against a defamation claim. See Smith, 72 Cal. App. 4th at 646-47.

The Court does not agree with Defendant that the defamation claim as alleged in  
the third amended complaint remains deficient. Assuming the allegations are true, the Court finds  
that Plaintiff has pleaded sufficient facts to state a claim. First, Plaintiff has alleged intentional  
publication of a statement – that Plaintiff “fraudulently” donned his firefighter’s uniform – via  
email. Second, adding to the allegations in the second amended complaint, Plaintiff now alleges  
in the third amended complaint that these statements were made by Ms. Linscheid. Third,  
Plaintiff alleges the statement is untrue. More specifically, Plaintiff asserts that, while he was in



1 fact wearing his firefighter’s uniform at the time in question, he was not doing so “fraudulently”  
2 because it is Cal Fire policy to wear the uniform. Fourth, the statement that Plaintiff  
3 “fraudulently” wore his uniform is one that has a natural tendency to injure, and Plaintiff alleges  
4 as much by claiming that, as a result of the statement, he lost his position with Cal Fire. And  
5 finally, while Plaintiff admits that he was wearing the uniform, he denies that he did so  
6 “fraudulently” and, thus, does not admit the truth of the statement.

7  
8 **III. CONCLUSION**

9 As a final matter, the Court is in receipt of a February 3, 2024, letter sent by  
10 Plaintiff’s counsel, Ronda Baldwin-Kennedy, Esq. In this letter, Ms. Baldwin-Kennedy informs  
11 that Court that she has been suspended from the practice of law for 90 days by the State Bar of  
12 California, effective February 4, 2024. This suspension will end on or about May 4, 2024. The  
13 Court, therefore, will set a due date for objections after this date.

14 Based on the foregoing, the undersigned recommends that Defendant’s motion to  
15 dismiss, ECF No. 114, be DENIED and that Defendant be required to file an answer to Plaintiff’s  
16 third amended complaint.

17 These findings and recommendations are submitted to the United States District  
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). On or before May  
19 10, 2024, any party may file written objections with the Court. Responses to objections shall be  
20 filed within 14 days after service of objections. Failure to file objections within the specified time  
21 may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22  
23 Dated: March 12, 2024

24   
25 DENNIS M. COTA  
26 UNITED STATES MAGISTRATE JUDGE  
27  
28