

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL D. BIRD,  
Plaintiff,

No. C 07-5776 WDB  
ORDER FOLLOWING JANUARY 28,  
2009 HEARING

v.

FOSS MARITIME COMPANY, et  
al.  
Defendants.

On January 28, 2009, the Court heard argument on Plaintiff’s Motion for Reconsideration, filed December 8, 2008, and Defendant’s second Motion to Dismiss, filed December 22, 2008. For reasons elaborated in detail on the record, the Court RULES as follows.

**I. Motion for Reconsideration**

The Court GRANTS plaintiff’s request that the Court reconsider its prior order that granted defendant’s earlier, unopposed motion to dismiss (on grounds of preemption) plaintiff’s claim based on California Labor Code §1102.5.<sup>1</sup> See, Motion to Dismiss, filed November 30, 2007 and Statement of Non-opposition by Plaintiff to

---

<sup>1</sup>Plaintiff’s Motion to Reconsider set forth communications that may constitute confidential settlement communications that should not have been disclosed to the undersigned. The Court’s staff redacted all communications that arguably should not have been disclosed to the Court prior to presenting plaintiff’s Motion to the undersigned. The Court has determined that it does not need to review the redacted communications in order to rule on the Motion to Reconsider. Therefore, the undersigned has not read those communications.

1 Defendant Foss Maritime Company's Motion to Dismiss First Cause of Action  
2 Pursuant to Rule 12(b)(6), filed February 1, 2008.

3 Because plaintiff's former attorney, Mr. Bartley, chose not to oppose  
4 defendant's earlier motion to dismiss, the Court did not previously consider the merits  
5 of defendant's preemption argument.

6 Defendant's November 2007 Motion was predicated in part on *Robinson v.*  
7 *Alter Barge Line, Inc.*, 482 F.Supp.2d 1032 (S.D.Ill. 2007). On appeal, the Seventh  
8 Circuit significantly undermined the district court's conclusions about preemption.  
9 The Seventh Circuit issued its decision in *Robinson v. Alter Barge Line Inc.*, 513 F.3d  
10 668 (7th Cir. 2008), after defendant filed its motion seeking preemption and only  
11 about two weeks before Mr. Bartley filed a statement of non-opposition on plaintiff's  
12 behalf. Because this Court is not bound by rulings from the Seventh Circuit, Mr.  
13 Bartley's apparent failure to become aware of the Seventh Circuit's opinion in  
14 *Robinson* before filing his statement of non-opposition was not wholly unreasonable.  
15 Nonetheless, the Seventh Circuit's opinion provides a persuasive analysis of this  
16 issue, and a diligent attorney would have benefitted his client by bringing it to the  
17 Court's attention.

18 The strong public policy that favors making decisions on the merits weighs in  
19 favor of reconsideration. Although a year has passed since Mr. Bartley first  
20 effectively stipulated to dismissal of plaintiff's claim under California Labor Code  
21 §1102.5, defendant has failed to demonstrate that reconsideration would impose any  
22 material prejudice on Foss' ability to defend this claim.

23  
24 **II. Motion to Dismiss**

25 **A. California Labor Code §1102.5**

26 Plaintiff's First Cause of Action squarely invokes California Labor Code  
27 §1102.5. In relevant part, the California whistleblower's protection act provides,  
28 [a]n employer may not retaliate against an employee for disclosing  
information to a government or law enforcement agency, where the  
employee has reasonable cause to believe that the information discloses a

1 violation of state or federal statute, or a violation or noncompliance with  
2 a state or federal rule or regulation.

3 Cal. Labor Code §1102.5(b).

4 The facts as alleged by plaintiff do not state a claim under §1102.5(b). Before  
5 Mr. Bird filed his amended complaint, the Court explicitly and energetically  
6 admonished him to include in his re-written complaint a detailed recitation of all the  
7 facts on which his causes of action would be based. The Court understands that Mr.  
8 Bird is not a lawyer – and that he might well not know all the legal theories that his  
9 factual contentions implicate. But the Court emphasized that Mr. Bird can and should  
10 know all of the essential facts that he feels played a role in or contributed to the  
11 development of the events about which he is complaining. So he was ordered to  
12 chronicle those facts with special care. When he did that, he alleged (in his amended  
13 complaint) that he reported (to the Coast Guard) the alleged misconduct by defendant  
14 only after defendant allegedly took the adverse employment action against him.

15 The difficulty is that the California statute could support a claim only where the  
16 employer allegedly retaliated against the plaintiff after the plaintiff reported the  
17 misconduct, or, in the words of the statute, only “for disclosing information to a  
18 government . . . agency.” Because Mr. Bird alleges that he did not disclose  
19 information to a government agency until after Mr. Butcher took the actions that  
20 effectively ‘terminated’ plaintiff, Mr. Bird has not stated a claim under §1102.5. And  
21 because he has been given ample and repeated opportunities to set forth the factual  
22 predicates for his claims, the dismissal of this statutory claims is with prejudice.

23 Dismissal of the claim that purported to be based on §1102.5 does not end our  
24 inquiry. Plaintiff appears *pro se*, and the Court is required to read his pleading  
25 liberally. California courts appear to recognize a common law tort claim for wrongful  
26 termination in violation of public policy. In appropriate circumstances a plaintiff  
27 might state a claim under this doctrine if plaintiff alleges that his employer terminated  
28 him because he reported to his employer violations by his employer (or its agents) of  
laws or regulations that implicate important public interests.

1 Plaintiff did not clearly invoke this common law tort theory as the source of the  
2 rights that he seeks to vindicate under the First Cause of Action. Nonetheless, the  
3 facts as alleged by plaintiff appear to state a claim under this doctrine. The Court,  
4 therefore, RULES that plaintiff's Amended Complaint alleges a claim for wrongful  
5 termination in violation of public policy under California's common law.

6 During oral argument, defense counsel informed the Court that Foss Maritime  
7 contends that 46 U.S.C. section 2114 also preempts any such common law tort claim.  
8 Having anticipated that contention, and having considered the circuit court's rejection  
9 of a somewhat similar argument in Robinson, we declined to conclude that federal law  
10 preempts this common law cause of action.

11 The relevant question before us is whether there is a "conflict" between the  
12 state and federal provisions. In the context of preemption analysis, a "conflict" is  
13 deemed to exist only when (1) it is impossible to comply with both the state and  
14 federal requirements or (2) the "state law stands as an obstacle to the accomplishment  
15 and execution of the full purposes of and objectives of Congress." *Young v. Coloma-*  
16 *Agaran*, 340 F.3d 1053, 1055 (9th Cir. 2003). No preempting conflict exists simply  
17 because there is a shortfall in parallelism or symmetry between the relevant state and  
18 federal laws.

19 The Ninth Circuit directs us to be circumspect about the reach of preemption.  
20 *Chevron USA, Inc., v. Hammond*, 726 F.2d 483, 486 (9th Cir. 1984); *Pacific Merchant*  
21 *Shipping Assn. v. Aubry*, 918 F.2d 1409 (9th Cir. 1990). Although not bound by  
22 rulings from the Seventh Circuit, this Court finds persuasive much of Judge Posner's  
23 reasoning in *Robinson*. We see nothing in the federal statute or legislative history  
24 indicating that Congress intended to preempt state laws protecting seamen from  
25 retaliatory discharge. Moreover, the state law in issue here appears to advance the  
26 same interests that Congress sought to advance in section 2114; the California  
27 common law tort certainly does not present an obstacle to achieving the purposes of  
28 section 2114. Because we can see no "conflict" between the state and federal laws,  
and because there appears to be no other ground to support a finding of preemption,

1 we conclude that plaintiff is free to pursue his claim for relief under the California  
2 common law tort theory.

3  
4 **B. Coast Guard Whistle Blower's Protection Act**

5 Plaintiff's Amended Complaint as clarified on the record at the January 28,  
6 2009, hearing states a claim under 46 U.S.C. §2114. Mr. Bird alleges that a  
7 substantial factor in Capt. Butcher's decision to take adverse employment action  
8 against him was Capt. Butcher's apprehension that Mr. Bird was likely to report  
9 alleged safety violations by Foss to a federal agency.

10 In defendant's view, Mr. Bird cannot make this allegation in compliance with  
11 Federal Rule of Civil Procedure 11. See, Transcript of January 28, 2009, hearing. If  
12 defendant files a motion for sanctions under Rule 11, plaintiff is responsible for  
13 fulfilling his obligations under that Rule and the Local Rules of this Court. If plaintiff  
14 does not satisfy his obligations under the rules he exposes himself to potentially  
15 significant monetary sanctions.

16  
17 **C. California Business & Professions Code §17200**

18 Plaintiff claims that Foss violated California Business and Professions Code  
19 §17200 when it (allegedly) terminated his employment in retaliation for his  
20 complaints to Foss about its unlawful practices. In addition to disputing plaintiff's  
21 underlying factual contentions, Foss asserts that Mr. Bird cannot state a claim under  
22 this California statute because he cannot show that he is entitled to any of the forms of  
23 relief this statute could authorize. Those forms of relief, defendant contends, are only  
24 equitable – and, according to defendant, Mr. Bird's factual allegations, even if true,  
25 could not entitle him to any equitable remedy.

26 This is a line of argument on which the Court is not prepared to rule.  
27 Accordingly, **by February 11, 2009**, defendant must file with the Court and serve on  
28 Mr. Bird its motion seeking dismissal of plaintiff's claim under California Business &  
Professions Code §17200 on the ground that plaintiff has not alleged an injury that

1 may be redressed in equity. The Court will determine whether Mr. Bird needs to file  
2 an opposition to that motion.

3  
4 **D. RICO claims**

5 The Court GRANTS defendant's motion to dismiss plaintiff's fourth and fifth  
6 causes of action for violations under RICO. These claims are dismissed without leave  
7 to amend.

8 The Court never intended to give Mr. Bird permission to so radically expand  
9 this litigation at so late a date. Mr. Bird was represented by counsel for many months  
10 – but neither he nor his lawyer ever even intimated that he might assert claims under  
11 these complex federal statutes. To expand the case in this way at this juncture would  
12 be fundamentally unfair to Foss – in part because it would require Foss to re-do and/or  
13 extend discovery, motion, and mediation work already invested, and in part because  
14 so much time has passed that the Court cannot be confident that Foss would still be  
15 able to develop all the evidence it would have pursued if it had known, from the  
16 outset, that it faced claims under these statutes. The latter concern (about  
17 compromised access to evidence) is especially potent when the statutes plaintiff  
18 belatedly seeks to add would expose Foss, for the first time, to triple damages.

19 Another consideration that supports the Court's rejection of these claims is that  
20 in presenting them in his amended complaint plaintiff has violated Federal Rules of  
21 Civil Procedure 8 and 9. He fails to plead, in these causes of action, the facts that he  
22 alleges support his entitlements under the RICO statutes. He fails even more  
23 dramatically to plead with the particularity required by Rule 9.

24 These failings are important – because they conceal what appear to be legally  
25 fatal flaws in these claims. To have a viable claim under the RICO statutes, a plaintiff  
26 must prove, among many other things, that the defendant committed multiple (at least  
27 two) criminal acts that are connected in some common scheme or undertaking. As far  
28 as we can tell, plaintiff has not alleged that Foss engaged in any criminal acts; plaintiff

1 certainly has not identified any criminal statutes that the acts he attributes to Foss  
2 would violate.

3 In addition, plaintiff has failed to plead facts which, if proved, would show that  
4 he suffered compensable damages as a result of multiple criminal acts by Foss. The  
5 Court rejects Mr. Bird's contention that his termination (which presumably would  
6 cause him to suffer damages) was a criminal offense – in part because, under the facts  
7 as he alleges them to have unfolded, he was terminated before he reported anything  
8 about Foss to any governmental authority. Moreover, he was terminated (if at all),  
9 only once. One termination could not constitute a “pattern” of racketeering activity.

10 In his fifth claim, Mr. Bird alleges that Foss “conspired” to violate his rights  
11 under the RICO statues. He fails to assert, however, that the alleged conspiracy  
12 included any other person or entity. A party cannot engage by itself in a conspiracy.

13 The way Mr. Bird ‘threw in’ the expansive and threatening RICO claims makes  
14 the Court worry about how Mr. Bird intends to litigate this case and what is driving  
15 some of his litigation decisions. He presented his RICO claims in the most conclusory  
16 of forms – with no apparent attention to their specific requirements and no apparent  
17 concern about the effect that adding such claims would have on the character, scope,  
18 expense, and time consumption of this litigation, or about whether Foss could fairly  
19 defend such claims at this juncture.

20 Mr. Bird seems to take pride in being “oppositional” – to quote him. He says  
21 he has devoted considerable time and energy (unrelated to this case) to trying to  
22 uncover dirt about political or other public figures. These announcements, in  
23 combination with the way Mr. Bird tried to add the RICO claims to this litigation,  
24 cause the Court to worry that there is some part of Mr. Bird that is approaching this  
25 case as a game – as (in part) some kind of extra-curricular adventure whose objectives  
26 reach well beyond seeking fair redress and reasonable relief for significant wrongs  
27 genuinely suffered and that promises satisfying collateral emotional rewards along the  
28 way. Mr. Bird may not be conscious of any such animating considerations – and they

1 may not exist. The Court certainly makes no findings about such matters here. But it  
2 would be irresponsible for the Court not to share these concerns with Mr. Bird.

3  
4 **E. Miscellaneous**

5 The Court strikes the references to “DOES 1-100 inclusive” included in  
6 plaintiff’s Amended Complaint, filed December 10, 2008.

7  
8 **III. Case Management Order**

9 **By March 6, 2009**, Foss must file with the Court and serve on Mr. Bird its  
10 Motion for Summary Judgment.

11 If, after reading defendant’s Motion for Summary Judgment, Mr. Bird  
12 determines that he cannot fairly respond to the motion without conducting limited and  
13 focused discovery, then **by March 13, 2009**, Mr. Bird must file with the Court and  
14 serve on defense counsel a writing that (1) identifies with specificity the information  
15 Mr. Bird believes he needs in order to fairly respond to the motion and (2) sets forth  
16 his proposed method(s) and time-frame for obtaining that information.

17 If, after reading defendant’s Motion for Summary Judgment, Mr. Bird  
18 concludes that he can fairly respond to the motion without conducting additional  
19 discovery, then **by March 20, 2009**, Mr. Bird must file with the Court and serve on  
20 defendant’s counsel his opposition to defendant’s motion for summary judgment. If  
21 Mr. Bird wants the Court to consider any evidence in support of his opposition he  
22 must file and serve copies of that evidence along with his opposition. Mr. Bird is  
23 responsible for determining the requirements for opposing a motion for summary  
24 judgment and for conducting discovery.

25 //  
26 //  
27 //  
28 //  
//

1           The Court will determine the schedule for the hearing on defendant's motion  
2 for summary judgment following receipt of Mr. Bird's submission.

3 **IT IS SO ORDERED.**

4 Dated: January 29, 2009

  
\_\_\_\_\_  
WAYNE D. BRAZIL  
United States Magistrate Judge

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28