

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON COLEMAN,)	Case No. 11-501 SC
)	
Plaintiff,)	ORDER RE: SOUTHERN'S
)	<u>MOTION TO DISMISS</u>
v.)	
)	
SOUTHERN WINE & SPIRITS OF)	
CALIFORNIA, INC.; TEAMSTERS LOCAL)	
853; and BOB STRELLO,)	
)	
Defendants.)	
)	

I. INTRODUCTION

On October 29, 2010, Plaintiff Jason Coleman ("Plaintiff") commenced this action in California Superior Court for the County of Alameda against his former employer, Defendant Southern Wine & Spirits of California, Inc. ("Southern"); his labor union, Defendant Teamsters Local 853 ("Union"); and Union's business representative, Defendant Bob Strello ("Strello") (collectively, "Defendants"). ECF No. 1 ("Notice of Removal") Ex. A ("Compl."). Union removed this action to federal court on February 2, 2011, alleging that Plaintiff's fifth cause of action against Union and Strello for breach of the duty of fair representation was in fact an artfully pleaded claim under the National Labor Relations Act ("NRLA"), 29 U.S.C. § 151. See Notice of Removal ¶ 3.¹ Now

¹ Southern joined in the removal. Id.

1 Southern moves to dismiss the action under Rules 12(b)(1) and (6)
2 of the Federal Rules of Civil Procedure; neither Union nor Strello
3 have joined Southern's Motion. ECF No. 16 ("Mot."). This Motion
4 is fully briefed. ECF Nos. 23 ("Opp'n"), 25 ("Reply"). For the
5 following reasons, the Court GRANTS Southern's Motion to Dismiss.
6

7 **II. BACKGROUND**

8 Plaintiff, a resident of Alameda County, California,
9 identifies himself as "an adult Black male." Compl. ¶ 3.
10 Plaintiff alleges that he entered into an employment contract with
11 Southern on or about July 21, 2004. Id. ¶ 14. Plaintiff worked
12 full-time for Southern as a warehouse worker. Id. ¶ 14. Plaintiff
13 also alleges that he entered into a second contract with Union
14 "whereby Union would represent plaintiff in all matters dealing
15 with his employment while employed by Southern and Does 1-50." Id.
16 ¶ 15. Plaintiff alleges that this contract "included but was not
17 limited to" a Collective Bargaining Agreement ("CBA").² Id.

18 The CBA contains specific provisions that protect Union
19 employees from wrongful termination and that require "just cause"
20 for termination by Southern. CBA § 18.2.1. While Southern
21 generally may not terminate a Union employee absent both just cause
22 and a prior warning notice, it may discharge a Union employee for
23 an act of dishonesty without a prior warning notice. Id.

24 _____
25 ² Southern attached to its Motion the declaration of Tom Passantino
26 ("Passantino"), who identifies himself as the Director of Human
27 Resources for Southern. Id. ¶ 1. Passantino attaches to his
28 declaration an exhibit which he declares is the CBA. A court may
generally consider a document outside the complaint when deciding a
motion to dismiss if the complaint specifically refers to the
document and if its authenticity is not questioned. Townsend v.
Columbia Ops., 667 F.2d 844, 848-49 (9th Cir. 1982). Plaintiff does
not challenge the authenticity of the CBA, and the Court considers
it in ruling upon this Motion.

1 The CBA contains a non-discrimination clause:

2 The Employer and the Union agree to comply with
3 applicable Federal and/or State laws to prevent
4 discrimination against any employee or
5 applicant for employment or union membership on
6 the basis of race, color, creed, sex, sexual
orientation, marital status, age, disability,
pregnancy, national origin, work-related
injuries, [or] Veteran status, as such are
defined by applicable State or Federal Law.

7 Id. § 2.3.1. It also provides an optional mediation process, id. §
8 19.2, and a mandatory arbitration process, id. §§ 19.3-8. It
9 provides for final binding arbitration of "disputes and grievances
10 arising hereunder involving interpretation or application of the
11 terms of this Agreement, including any statutory or common law
12 claims of sex, race, age, disability or other prohibited
13 discrimination." Id. § 19.1.1. It states: "Should a dispute arise
14 with respect to such issues and should the parties fail to reach
15 agreement, such dispute shall be submitted to final and binding
16 arbitration to determine an appropriate remedy under applicable law
17 and this Agreement." Id. § 19.4.4. It also provides: "No employee
18 or group of employees covered herein shall be subject to an
19 individual agreement separate and apart from this Agreement." Id.
20 § 1.2.1.

21 Plaintiff alleges that one of Southern's work rules required
22 an employee to notify Southern at least one hour before the
23 scheduled start time if he or she was unable to report for work.
24 Compl. ¶ 18. If an employee was unable to work due to an illness,
25 he or she was required to provide a doctor's note. Id.

26 Plaintiff alleges that he was absent from work from November
27 11 to 17 of 2008. Id. ¶ 21. When he returned to work, he provided
28 a written medical excuse from his medical provider, Kaiser

1 Permanente. Id. ¶ 22.³ However, Southern suspended Plaintiff from
2 work pending an "investigation" for a "No Call, No Show" for
3 November 11, 12, and 13, 2008. Id. ¶ 24. After performing this
4 investigation, which Plaintiff claims violated his privacy rights,
5 Southern denied his medical excuse on the basis that Plaintiff was
6 merely trying to cover up an incarceration at the county jail. Id.
7 ¶ 30. Plaintiff does not deny that he was incarcerated from
8 November 11 to 13, 2008, but claims that notwithstanding his
9 incarceration, he was also ill and had been seen by his doctor and
10 had returned to work with the note required by company policy. Id.
11 ¶ 32. On November 25, 2008, Plaintiff was terminated for
12 "falsification of employee records." Id. ¶ 27.

13 Plaintiff pursued arbitration of his wrongful termination
14 claim as provided in the CBA. Id. ¶ 29. Plaintiff alleges that
15 Union and Strello assisted Plaintiff with his grievance "in a
16 perfunctory manner," but opted against pursuing arbitration of his
17 wrongful termination claim. Id. ¶ 40. Plaintiff applied for
18 unemployment benefits, and was denied on the basis that Southern
19 had reported that Plaintiff had been terminated for an act of
20 dishonesty under the CBA. Id. ¶¶ 44, 45.

21 Plaintiff claims that Southern's justifications for
22 terminating him were "false and made as a pretext to terminate
23 plaintiff because of his race." Id. ¶ 34. He alleges that
24 Southern revised its reason for terminating Plaintiff multiple
25 times, initially suspending him for a "no call no show," then
26 terminating him for "conspiring with another employee," and
27 subsequently revising the basis of dismissal to "falsification of

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³ Plaintiff attached what he alleges to be the written medical
excuse to his Complaint as Exhibit 3.

1 employee records" and later "falsification of time card." Id.
2 ¶¶ 41, 42. He claims that Southern and Union treated Hispanic
3 employees differently than Black employees, alleging: "Defendants
4 have allowed plaintiff's supervisors to speak to plaintiff's
5 colleagues in a different language other than English, so that
6 plaintiff and other Black employees could not follow their
7 conversations." Id. ¶ 26. Plaintiff alleges that this "had the
8 effect of alienating and ostracizing plaintiff and the other Black
9 employees," and that "[w]rong acts and other behavior of Hispanic
10 employees were kept hidden or instantly corrected since Spanish was
11 not spoken by the Black employees." Id. Additionally, Plaintiff
12 alleges that "Defendants told plaintiff that they used the internet
13 to spy on him" by checking his "personal files with the County of
14 Alameda" to determine his whereabouts. Id. ¶¶ 38, 29.

15 Plaintiff brings fourteen causes of action. First, against
16 Southern, he alleges discrimination based on race. Id. ¶¶ 51-59.
17 Second, against all Defendants, he alleges violation of article I,
18 section 8 of the California Constitution⁴, alleging Defendants
19 "willfully and intentionally preferred a predominant Hispanic and
20 other non-Black workforce," and "granted preferential treatment to
21 Hispanics and other non-Blacks in the hiring, management and
22 enforcement of policies and procedures." Id. ¶¶ 52- 66. Third,
23 against Union and Strello, he alleges discrimination based on race.
24 Id. ¶¶ 67-77. Fourth, against Southern, he alleges retaliation.
25 Id. ¶¶ 78-80. Fifth, against Union and Strello, he alleges breach
26 of the duty of fair representation, alleging that Union and Strello

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28 ⁴ Article I, section 8 of the California Constitution provides: "A
person may not be disqualified from entering or pursuing a
business, profession, vocation, or employment because of sex, race,
creed, color, or national or ethnic origin."

1 had failed to honor "an obligation under the CBA to fairly
2 represent plaintiff with respect to process any grievances under
3 the CBA." Id. ¶¶ 81-86. Sixth, against Union, he alleges breach
4 of contract, claiming Union failed to pursue arbitration on behalf
5 of Plaintiff as provided in the CBA. Seventh, against Union, he
6 alleges breach of fiduciary obligation, alleging Union owed
7 Plaintiff "a contractual and fiduciary duty for full and adequate
8 representation," and that Union breached that duty by failing to
9 "pursue and/or represent Plaintiff in his wrongful termination
10 claim." Id. ¶¶ 93, 94. Eighth, against Southern and Union, he
11 alleges "fraud/misrepresentation," claiming they "made
12 representations, promises, material omissions and conducted
13 themselves in a deceptive manner" and "misrepresent[ed] the true
14 reason of Defendants termination of Plaintiff." Id. ¶¶ 98, 99.
15 Ninth, against Southern, Plaintiff alleges wrongful termination "in
16 violation of well-established public policies, as set forth in
17 various statutes and Constitutional provisions including, but not
18 limited to, [California] Government Code § 12940, § 12948, [and] §
19 12926." Id. ¶ 103. Tenth, against all Defendants, Plaintiff
20 brings a claim for intentional infliction of emotional distress
21 ("IIED"). Id. ¶¶ 107-12. Eleventh, against all Defendants,
22 Plaintiff brings a claim for negligent infliction of emotional
23 distress ("NIED"). Id. ¶ 113-17. Twelfth, against all Defendants,
24 Plaintiff brings a defamation claim, alleging that "Defendants made
25 public false and unprivileged oral and written statements of and
26 concerning plaintiff" that damaged Plaintiff. Id. ¶¶ 118-23.
27 Thirteenth, against all Defendants, Plaintiff alleges invasion of
28 privacy, claiming Defendants made "public, false and unprivileged

1 oral and/or written statements that directly injured and continues
2 to injure plaintiff in respect to his profession by imputing him
3 general disqualifications and characteristics that employment
4 requires." Id. ¶ 126. Plaintiff identifies Southern's statement
5 that he falsified employment and time records as such a statement.
6 Id. Finally, against Southern, Plaintiff brings a claim for
7 "invasion of privacy -- false light," alleging that Southern
8 published information about Plaintiff which was "without merit and
9 false in its context," which "led to the recipients of the
10 information to assume false conclusions about plaintiff." Id. ¶
11 133.

12 Southern moves to dismiss all of Plaintiff's claims as
13 preempted by section 301 of the Labor Management Relations Act
14 ("LMRA") or, alternatively, as insufficiently pleaded under Twombly
15 and Iqbal. See Mot.

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17 **III. LEGAL STANDARD**

18 **A. Rule 12(b)(1)**

19 When a defendant submits a motion to dismiss under Federal
20 Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of
21 establishing the propriety of the court's jurisdiction. See
22 Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). As a
23 court of limited jurisdiction, "[a] federal court is presumed to
24 lack jurisdiction in a particular case unless the contrary
25 affirmatively appears." Stock West, Inc. v. Confederated Tribes,
26 873 F.2d 1221, 1225 (9th Cir. 1989). A Rule 12(b)(1)
27 jurisdictional attack may be facial or factual. White v. Lee, 227
28 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). In a facial

1 attack, the defendant challenges the basis of jurisdiction as
2 alleged in the complaint; however, in a factual attack, the
3 defendant may submit, and the court may consider, extrinsic
4 evidence to address factual disputes as necessary to resolve the
5 issue of jurisdiction, and no presumption of truthfulness attaches
6 to the plaintiff's jurisdictional claims. Safe Air for Everyone v.
7 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004); Thornhill Pub. Co. v.
8 Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

9 **B. Rule 12(b)(6)**

10 A motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
12 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
13 on the lack of a cognizable legal theory or the absence of
14 sufficient facts alleged under a cognizable legal theory.
15 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
16 1990). "When there are well-pleaded factual allegations, a court
17 should assume their veracity and then determine whether they
18 plausibly give rise to an entitlement to relief." Ashcroft v.
19 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
20 court must accept as true all of the allegations contained in a
21 complaint is inapplicable to legal conclusions. Threadbare
22 recitals of the elements of a cause of action, supported by mere
23 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950
24 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The
25 allegations made in a complaint must be both "sufficiently detailed
26 to give fair notice to the opposing part of the nature of the claim
27 so that the party may effectively defend against it" and
28 sufficiently plausible such that "it is not unfair to require the

1 opposing party to be subjected to the expense of discovery." Starr
2 v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011).

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4 **IV. DISCUSSION**

5 Of the fourteen causes of action pleaded in the Complaint, ten
6 are brought against Southern: discrimination based on race;
7 violation of article I, section 8 of the California Constitution;
8 retaliation; fraud/misrepresentation; wrongful termination; IIED;
9 NIED; defamation; invasion of privacy; and invasion of privacy --
10 false light. See Compl. Southern argues that all should be
11 dismissed with prejudice as preempted by section 301 of the LMRA
12 or, alternatively, dismissed as insufficiently pleaded under
13 Twombly and Iqbal.

14 **A. Failure to State a Claim**

15 Southern argues that none of Plaintiff's claims are pleaded
16 with the specificity required by Twombly and Iqbal. With the
17 possible exception of Plaintiff's discrimination and wrongful
18 termination claims, the Court agrees. In pleading a claim for
19 retaliation, Plaintiff does not identify the protected activity he
20 engaged in that caused Southern to retaliate.⁵ Instead, he strings
21 together a series of legal conclusions: he claims that he suffered
22 injury "[a]s a direct and proximate result of the retaliation and
23 discrimination perpetrated against plaintiff by defendants," and
24 claims that punitive damages are appropriate because "Defendants

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26 ⁵ The elements of the claim for retaliation are "(1) the employee's
27 engagement in a protected activity, that is, opposing any practices
28 forbidden under the statute; (2) retaliatory animus on the part of
the employer; (3) an adverse action by the employer; (4) a causal
link between the retaliatory animus and the adverse action; (5)
damages; and (6) causation." Mamou v. Trendwest Resorts, Inc., 165
Cal. App. 4th 686, 713 (Ct. App. 2008).

1 acted fraudulently, maliciously, and oppressively with the intent
2 to injure plaintiff." Compl. ¶¶ 78- 80. Plaintiff's claim for
3 "fraud/misrepresentation" is devoid of facts that would support a
4 plausible claim against Southern; furthermore, as a claim sounding
5 in fraud, this claim is subject to -- and fails to satisfy -- the
6 heightened pleading standard of Federal Rule of Civil Procedure
7 9(b). Plaintiff states: "Defendants made representations,
8 promises, material omissions and conducted themselves in a
9 deceptive manner," but fails to identify who made these statements
10 or omissions, what made them false, or when they were made. In
11 bringing IIED and NIED claims, Plaintiff states Southern's actions
12 in terminating his employment were "extreme and outrageous" without
13 providing facts to support this legal conclusion. In pleading his
14 defamation and two invasion-of privacy claims, Plaintiff states,
15 "Defendants made public false and unprivileged oral and written
16 statements of and concerning plaintiff," but does not identify
17 these allegedly damaging statements, the individuals who made them,
18 or the parties to whom they were communicated.

19 Plaintiff's Complaint must give Southern fair notice of the
20 nature of the claim so that Southern can effectively defend against
21 it. Starr, 633 F.3d at 1204. It fails to do this. Because
22 improper pleading generally only justifies dismissal with leave to
23 amend and preemption under section 301 of the LMRA is a basis for
24 dismissal with prejudice, the Court continues its analysis below.

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1 **B. Preemption**

2 Southern argues that Plaintiff's claims are preempted by
3 section 301 of the LMRA.⁶ Mot. at 4. While the LMRA does not
4 include an express statutory preemption provision, the Supreme
5 Court has long held that section 301(a) preempts state law to
6 ensure Congress's goal of creating a uniform doctrine of federal
7 labor law. Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962).
8 This preemptive effect "extend[s] beyond suits alleging contract
9 violations." Allis-Chalmers Corp. v Lueck, 471 U.S. 202, 210
10 (1985). This ensures that the LMRA "will be frustrated neither by
11 state laws purporting to determine questions relating to what the
12 parties to a labor agreement agreed nor by parties' efforts
13 to renege on their arbitration promises by relabeling as tort suits
14 actions simply alleging breaches of duties assumed in collective-
15 bargaining agreements." Livadas v. Bradshaw, 512 U.S. 107, 122-23,
16 (1994) (internal quotation marks and citation omitted).

17 To determine if a claim is preempted under section 301, a
18 court must first determine whether the cause of action involves a
19 right conferred upon an employee by virtue of a CBA. See Burnside
20 v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007).⁷

21 "[S]tate-law rights and obligations that do not exist independently
22

23 ⁶ Southern argues that this supports dismissal under Rule 12(b)(1)
24 for lack of subject matter jurisdiction. The Court finds this
25 argument perplexing; Southern cites no law supporting its argument
26 that federal preemption is a jurisdictional matter. As such, the
Court evaluates Southern's argument under Rule 12(b)(6), and
determines whether, in light of federal preemption, Plaintiff has
failed to state a claim upon which relief can be granted.

27 ⁷ The Ninth Circuit in Burnside characterized this as a "two-step"
28 analysis. Id. As the Court will discuss, in 14 Penn Plaza LLC v.
Pyett, 129 S. Ct. 1456 (2009), the Supreme Court subsequently
abrogated Allis-Chalmers Corp. v Lueck, 471 U.S. 202 (1985),
effectively adding an intermediary step between these two steps.

1 of private agreements, and that as a result can be waived or
2 altered by agreement of private parties, are pre-empted." Allis-
3 Chalmers, 471 U.S. at 213. If a right is not conferred by the CBA,
4 the court must determine whether the CBA identifies the claim and
5 contains a provision that clearly and unmistakably requires its
6 binding arbitration. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456,
7 1474 (2009). If so, absent an effective waiver of the arbitration
8 right, the Court lacks jurisdiction to hear the claim. Id. If the
9 right is neither conferred by the CBA nor subject to binding
10 arbitration, the court must determine whether the cause of action
11 is "substantially dependent on analysis of a collective-bargaining
12 agreement." Burnside, 491 F.3d at 1059 (quoting Caterpillar, Inc.
13 v. Williams, 482 U.S. 386, 394 (1987)). If the claim requires the
14 court to "interpret," rather than merely "look to," the CBA, then
15 the claim is substantially dependent on the CBA and is preempted by
16 section 301(a). See id. at 1060.

17 1. Claims Involving a Right Conferred by the CBA

18 Because of the pleading deficiencies in Plaintiff's Complaint,
19 it is difficult for the Court to determine, at this juncture,
20 whether Plaintiff's claims involve rights conferred by the CBA. To
21 the extent that Plaintiff alleges that he was denied the benefits
22 of the CBA -- such as by alleging that Southern terminated him
23 absent just cause or without regard for the procedure provided for
24 in the CBA -- Plaintiff's claims are preempted. It appears,
25 however, that none of Plaintiff's claims involve rights conferred
26 upon Plaintiff by the CBA -- his racial discrimination,
27 retaliation, fraud, defamation, and invasion of privacy claims
28 could possibly be raised even if no CBA existed. As such, the

1 Court tentatively finds that, as currently pleaded, none of
2 Plaintiff's claims involve a right conferred by the CBA.

3 2. Claims Subject to Binding Arbitration

4 Southern argues that Plaintiff's retaliation, wrongful
5 termination, and two discrimination claims should be dismissed
6 because the CBA contains a provision requiring arbitration of such
7 claims, citing Pyett. Mot. at 6. In Pyett, the Supreme Court held
8 that "a collective-bargaining agreement that clearly and
9 unmistakably requires union members to arbitrate ADEA claims is
10 enforceable as a matter of federal law." 129 S. Ct. at 1474. It
11 noted that the Second Circuit had wrongly interpreted its opinion
12 in Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 (1974) to
13 forbid the enforcement of CBAs requiring arbitration of statutory
14 rights related to equal employment opportunities. Id. at 1466-67.

15 Here, the CBA provides:

16 It is the desire of both parties to this
17 Agreement that disputes and grievances arising
18 hereunder involving interpretation or
19 application of the terms of this Agreement,
20 including any statutory or common law claims of
sex, race, age, disability or other prohibited
discrimination, shall be settled amicably or if
necessary, by final and binding arbitration as
set forth herein.

21 Id. § 19.1.1 (emphasis added). The Court finds that this language
22 clearly and unmistakably requires arbitration of Plaintiff's claims
23 premised on racial discrimination. As such, Plaintiff's racial
24 discrimination claim and claim under article I, section 8 of the
25 California Constitution are preempted. To the extent that
26 Plaintiff's retaliation and wrongful termination claims are
27 premised on Southern's alleged discrimination on the basis of race,
28 these claims are also preempted.

1 Plaintiff makes four arguments that Pyett should not apply:
2 (1) Plaintiff is no longer an employee of Southern; (2) Plaintiff
3 sought arbitration and Union refused to represent him in
4 arbitration proceedings; (3) Pyett concerned a violation of ADEA
5 rather than state law claims of race discrimination; and (4)
6 Plaintiff was "intentionally prevented from exercising and
7 protecting his rights." Opp'n at 7.

8 As to Plaintiff's first argument, Plaintiff cites no law that
9 suggests his termination from employment with Southern frees him
10 from his obligations under the CBA. Plaintiff's second argument --
11 that he sought arbitration and was refused -- is considered and
12 rejected in Pyett. The Court acknowledged "the union's exclusive
13 control over the manner and extent to which an individual grievance
14 is presented" and the possibility that "a union may subordinate the
15 interests of an individual employee to the collective interests of
16 all employees in the bargaining unit." 129 S. Ct. at 1472 (citing
17 Gardner-Denver, 415 U.S. at 58, n.19). The Court determined that
18 this potential conflict of interest did not render arbitration
19 provisions unenforceable, and noted a union's decision to not
20 pursue a grievance on behalf of one of its members for
21 discriminatory reasons could give rise to an action under the NLRA
22 by the employee against the union. Id. at 1473.

23 Third, Plaintiff's argument that Pyett is inapposite because
24 it concerns an ADEA claim lacks merit. While Pyett concerns a
25 claim of age discrimination rather than racial discrimination, it
26 clearly and unequivocally limited the Court's earlier decision in
27 Gardner-Denver forbidding enforcement of provisions requiring the
28 arbitration of an employee's statutory claims under the Civil

1 Rights Act. Id. The Court distinguished its holding from the
2 holding of Gardner-Denver on the grounds that the CBA in that
3 action did not "expressly reference" the statutory claim at issue,
4 whereas the CBA in Pyett "clearly and unmistakably" provided for
5 arbitration of ADEA claims. Id. at 1468. The Court wrote of
6 Gardner-Denver and its progeny: "Since the employees there had not
7 agreed to arbitrate their statutory claims, and the labor
8 arbitrators were not authorized to resolve such claims, the
9 arbitration in those cases understandably was held not to preclude
10 subsequent statutory actions." Id. (citing Gilmer v.
11 Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991)).

12 Finally, Plaintiff cites no law -- and makes no colorable
13 argument -- that Pyett is inapposite due to his allegation that
14 Southern and Union "intentionally prevented [him] from exercising
15 and protecting his rights."

16 For these reasons, the Court finds that all of Plaintiff's
17 claims concerning racial discrimination on the part of Southern are
18 subject to binding arbitration. As such, the Court DISMISSES WITH
19 PREJUDICE Plaintiff's first claim for discrimination based on race;
20 second claim for violation of Article I, section 8 of the
21 California Constitution; fourth claim for retaliation; and ninth
22 claim for wrongful termination in violation of public policy.

23 3. Claims Requiring Interpretation of the CBA

24 Southern argues that all of Plaintiff's claims are preempted
25 "because they are based on Southern's investigation and termination
26 of Plaintiff," and thus "depend wholly upon an interpretation of
27 what investigatory and disciplinary actions Defendant was
28 authorized to take under the CBA." Mot. at 4.

1 As stated supra, the Plaintiff's claims are too poorly pleaded
2 to determine if interpretation of the CBA is required. However,
3 the Court determines that the bulk of Plaintiff's claims are
4 extremely susceptible to preemption on this ground. To the extent
5 that Plaintiff's claims are premised on Southern's actions in
6 investigating Plaintiff's absence and terminating his employment,
7 they require interpretation of the CBA and are preempted. See
8 Newberry v. Pac. Racing Ass'n, 854 F.2d 1142, 1149-50 (9th Cir.
9 1988) (preempting plaintiff's emotional distress claim arising out
10 of her discharge and employer's conduct in the investigation
11 leading up to it). Many of Plaintiff's claims appear to be
12 premised on Southern's investigation and subsequent termination of
13 Plaintiff. For example, if Plaintiff alleges that Southern invaded
14 his privacy by investigating his absence, such a claim would be
15 preempted. If Plaintiff's defamation claim concerns statements
16 made in accordance with the investigation and termination, his
17 claim is likely preempted. See Tellex v. Pac. Gas & Elec. Co., 817
18 F.2d 536, 538-39 (9th Cir. 1987).

19 As such, the Court DISMISSES, WITHOUT PREJUDICE, the remaining
20 claims against Southern. Plaintiff is granted thirty (30) days
21 leave to amend his complaint. Should Plaintiff fail to amend his
22 complaint within this time frame, the Court will dismiss all claims
23 against Southern WITH PREJUDICE and dismiss Southern from this
24 action. This Order leaves untouched Plaintiff's claims against
25 Union and Strello.

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V. CONCLUSION

For the above reasons, the Court GRANTS Defendant Southern Wine & Spirits of California, Inc.'s Motion to Dismiss, DISMISSING Plaintiff Jason Coleman's claims against Southern as follows:

- Plaintiff's first claim for discrimination based on race; second claim for violation of Article I, section 8 of the California Constitution; fourth claim for retaliation; and ninth claim for wrongful termination in violation of public policy are DISMISSED WITH PREJUDICE.
- Plaintiff's remaining claims against Southern are DISMISSED WITH LEAVE TO AMEND.

IT IS SO ORDERED.

Dated: August 2, 2011


UNITED STATES DISTRICT JUDGE