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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 JASON COLEMAN, ) Case No. 11-00501 SC  
9 )  
10 Plaintiff, ) ORDER GRANTING DEFENDANTS'  
11 ) MOTION TO DISMISS  
12 v. )  
13 )  
14 SOUTHERN WINE & SPIRITS OF )  
15 CALIFORNIA, INC.; TEAMSTERS LOCAL )  
16 853; and BOB STRELO, )  
17 )  
18 Defendants. )  
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I. INTRODUCTION

Now before the Court is Defendants Teamsters Local 853 ("Union") and Bob Strelo's ("Strelo") (collectively, "Defendants") Motion to Dismiss Plaintiff Jason Coleman's ("Coleman") First Amended Complaint ("FAC"). ECF No. 38 ("Mot."). The Motion is made pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and is fully briefed. ECF Nos. 40 ("Opp'n"), 41 ("Reply"). For the reasons set forth below, the Court GRANTS Defendants' Motion to Dismiss WITHOUT LEAVE TO AMEND.

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1 **II. BACKGROUND**

2 **A. Factual Background**

3 As it must on a Rule 12(b)(6) motion to dismiss, the Court  
4 takes all well pleaded factual allegations as true. Plaintiff, a  
5 resident of Alameda County, California, identifies himself as "an  
6 adult Black male." ECF No. 35 ("FAC") ¶¶ 3-4. Plaintiff alleges  
7 that he entered into an employment contract with Southern Wine &  
8 Spirits of California, Inc. ("Southern") on or about July 21, 2004.  
9 Id. ¶ 14. Plaintiff worked full-time for Southern as a warehouse  
10 worker. Id. Plaintiff alleges that he entered into a second  
11 contract with Union "whereby Union would represent plaintiff in all  
12 matters dealing with his employment while employed by Southern and  
13 Does 1-50." Id. ¶ 15. Plaintiff alleges that, throughout his  
14 employment, Union and Strelo, a Union representative, promised  
15 Plaintiff that they would assist with mediating and/or arbitrating  
16 employment issues between Plaintiff and Southern. Id. ¶¶ 8, 20.  
17 Plaintiff alleges that his Union contract "included but was not  
18 limited to" a Collective Bargaining Agreement ("CBA"). Id. ¶ 15.

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

24 Plaintiff alleges that he was absent from work from November  
25 11 to 17 of 2008. Id. ¶ 21. When he returned to work, he provided  
26 a written medical excuse from his medical provider, Kaiser  
27 Permanente. Id. ¶¶ 22, 25.<sup>1</sup> Plaintiff's supervisor allegedly told

28 <sup>1</sup> Plaintiff attached what he alleges to be the written medical  
excuse to his FAC as Exhibit 3.

1 several of Plaintiff's co-workers that Plaintiff was a "liar" and  
2 that his medical excuse was a ruse. Id. ¶ 26. Further, during  
3 Plaintiff's absence, Southern's human resource director allegedly  
4 told co-workers that he was incarcerated and encouraged them to "go  
5 online" to see for themselves. Id. ¶ 24.

6 Southern suspended Plaintiff from work pending an  
7 "investigation" for a "No Call, No Show" for November 11, 12, and  
8 13, 2008. Id. ¶ 27. After performing this investigation, which  
9 Plaintiff claims violated his privacy rights, Southern denied his  
10 medical excuse on the basis that Plaintiff was merely trying to  
11 cover up an incarceration at the county jail. Id. ¶¶ 29-30.  
12 Plaintiff does not deny that he was incarcerated from November 11  
13 to 13, 2008, but claims that notwithstanding his incarceration, he  
14 was also ill and had been seen by his doctor and had returned to  
15 work with the note required by company policy. Id. ¶ 25. On  
16 November 25, 2008, Plaintiff was terminated for "falsification of  
17 employee records." Id. ¶ 30.

18 Plaintiff initially sought arbitration as provided in the CBA.  
19 Id. ¶¶ 31, 38. Plaintiff alleges that Union and Strelo assisted  
20 Plaintiff with his grievance "in a perfunctory manner," but opted  
21 against pursuing arbitration. Id. ¶ 38. Plaintiff applied for  
22 unemployment benefits, and was denied on the basis that Southern  
23 had reported that Plaintiff had been terminated for an act of  
24 dishonesty under the CBA. Id. ¶¶ 42-43.

25 Plaintiff claims that Southern's justifications for  
26 terminating him were "false and made as a pretext to terminate  
27 plaintiff because of his race." Id. ¶ 34. He alleges that  
28 Southern revised its reason for terminating Plaintiff multiple

1 times, initially suspending him for a "no call no show," then  
2 terminating him for "conspiring with another employee," and  
3 subsequently revising the basis of dismissal to "falsification of  
4 employee records" and later "falsification of time card." Id.  
5 ¶¶ 38, 39. He claims that Southern and Union treated Hispanic  
6 employees differently than Black employees, alleging: "Hispanic  
7 employees . . . have both been convicted of felonies and absence  
8 from a scheduled work shift without suffering any penalty and  
9 certainly not the loss of position at Southern." Id. ¶ 35.  
10 Additionally, Plaintiff alleges that "Defendants told plaintiff  
11 that they used the internet to spy on him" by checking his  
12 "personal files with the County of Alameda" to determine his  
13 whereabouts. Id. ¶ 36.

14 **B. Procedural History**

15 On October 29, 2010, Plaintiff commenced this action in  
16 California Superior Court for the County of Alameda against Union,  
17 Strelo, Southern, and Does 1 through 50. ECF No. 1 ("Not. of  
18 Removal") Ex. A ("Compl."). Union removed this action to federal  
19 court on February 2, 2011, alleging that Plaintiff's claim against  
20 Union and Strelo for breach of the duty of fair representation was  
21 in fact an artfully pleaded claim under the National Labor  
22 Relations Act ("NRLA"), 29 U.S.C. § 151. See Not. of Removal ¶ 2.

23 On April 26, 2011, Southern moved to dismiss the claims in the  
24 Complaint brought against it. ECF No. 16 ("Southern MTD").  
25 Neither Union nor Strelo joined in the motion. Id. The Court  
26 granted Southern's motion to dismiss on August 2, 2011, granting  
27 Plaintiff leave to amend some of his claims against Southern. ECF  
28 No. 32 ("Aug. 2, 2011 Order") at 17. The Court found that the

1 Complaint failed to give Southern fair notice of Plaintiff's claims  
2 against it and that all of Plaintiff's claims concerning racial  
3 discrimination on the part of Southern were barred as they were  
4 subject to binding arbitration. Id. at 10, 15.

5 On September 1, 2011, Plaintiff filed his FAC, asserting ten  
6 claims for relief. About two months later, Plaintiff stipulated to  
7 the dismissal of his claims against Southern. ECF No. 43. Seven  
8 claims remain against Union and/or Strelo: (1) claim one for  
9 violation of Article I, Section 8 of the California Constitution  
10 ("Article I, § 8") against Union and Strelo, (2) claim two for  
11 discrimination based on race against Union and Strelo, (3) claim  
12 three for breach of duty of fair representation against Union and  
13 Strelo, (4) claim four for breach of contract against Union, (5)  
14 claim five for breach of fiduciary obligation against Union, (6)  
15 claim nine for intentional infliction of emotional distress against  
16 Union and Strelo, and (7) claim ten for negligent infliction of  
17 emotional distress against Union. Additionally, in his opposition  
18 brief, Plaintiff asks the Court to read into the FAC a claim under  
19 42 U.S.C. § 1981 ("Section 1981 claim").

20 Now Union and Strelo move to dismiss all claims brought  
21 against them, with the exception of claim three against Union.<sup>2</sup> In  
22 their reply brief, they also urge the Court not to allow Plaintiff  
23 to avoid dismissal based on a Section 1981 claim that was not  
24 specifically pleaded in the FAC.

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28 <sup>2</sup> Defendants have moved to dismiss claim three against Strelo.

1 **III. LEGAL STANDARD**

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

3 When a defendant submits a motion to dismiss under Federal  
4 Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of  
5 establishing the propriety of the court's jurisdiction. See  
6 Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). As a  
7 court of limited jurisdiction, "[a] federal court is presumed to  
8 lack jurisdiction in a particular case unless the contrary  
9 affirmatively appears." Stock West, Inc. v. Confederated Tribes,  
10 873 F.2d 1221, 1225 (9th Cir. 1989). A Rule 12(b)(1)  
11 jurisdictional attack may be facial or factual. White v. Lee, 227  
12 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). In a facial  
13 attack, the defendant challenges the basis of jurisdiction as  
14 alleged in the complaint; however, in a factual attack, the  
15 defendant may submit, and the court may consider, extrinsic  
16 evidence to address factual disputes as necessary to resolve the  
17 issue of jurisdiction, and no presumption of truthfulness attaches  
18 to the plaintiff's jurisdictional claims. Safe Air for Everyone v.  
19 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004); Thornhill Pub. Co. v.  
20 Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

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

22 A motion to dismiss under Federal Rule of Civil Procedure  
23 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
24 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
25 on the lack of a cognizable legal theory or the absence of  
26 sufficient facts alleged under a cognizable legal theory."  
27 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
28 1988). "When there are well-pleaded factual allegations, a court

1 should assume their veracity and then determine whether they  
2 plausibly give rise to an entitlement to relief." Ashcroft v.  
3 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a  
4 court must accept as true all of the allegations contained in a  
5 complaint is inapplicable to legal conclusions. Threadbare  
6 recitals of the elements of a cause of action, supported by mere  
7 conclusory statements, do not suffice." Id. (citing Bell Atl.  
8 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made  
9 in a complaint must be both "sufficiently detailed to give fair  
10 notice to the opposing party of the nature of the claim so that the  
11 party may effectively defend against it" and "sufficiently  
12 plausible" such that "it is not unfair to require the opposing  
13 party to be subjected to the expense of discovery." Starr v. Baca,  
14 633 F.3d 1191, 1204 (9th Cir. 2011).

15  
16 **IV. DISCUSSION**

17 Union and Strelo argue that claim one fails because Article 1,  
18 § 8 does not apply to their conduct; claim two fails because the  
19 Court lacks subject matter jurisdiction; claim three fails as to  
20 Strelo because union officers and employees are not liable for the  
21 duty of fair representation; and claims four, five, nine, and ten  
22 are preempted by federal labor law. Mot. at 7-12. Plaintiff fails  
23 to meaningfully respond to any of these arguments. As Plaintiff  
24 has not spent a great deal of time addressing Defendant's Motion,  
25 neither will the Court.

26 **A. Article 1, § 8 of the California Constitution (Claim One)**

27 In his first claim for relief, Plaintiff alleges that the  
28 Union and Strelo violated Article 1, § 8 by "grant[ing]

1 preferential treatment to Hispanics and non-Blacks in the  
2 management and enforcement of policies and procedures" and by  
3 refusing to aid Plaintiff in arbitration even though "they had  
4 arbitrated more serious issues for many non-Black union members."  
5 FAC ¶¶ 49, 51. Article I, § 8 provides:

6 A person may not be disqualified from entering or  
7 pursuing a business, profession, vocation, or employment  
8 because of sex, race, creed, color, or national or ethnic  
origin.

9 Cal. Const. art. I, § 8. As Defendants argue, this provision only  
10 applies in cases where a plaintiff has been denied entrance into a  
11 profession or has been terminated from the same, but does not apply  
12 to claims of harassment or discriminatory treatment. See Strother  
13 v. Southern Cal. Permanente Medical Group, 79 F.3d 859, 872-873  
14 (9th Cir. 1996). As neither the Union nor Strelo had the authority  
15 to terminate or disqualify Plaintiff from his employment, Plaintiff  
16 cannot state a claim against them under Article I, § 8.  
17 Accordingly, Plaintiff's first claim is DISMISSED as to Union and  
18 Strelo.

19 **B. Discrimination Based on Race (Claim Two)**

20 As to Plaintiff's second claim for discrimination based on  
21 race, Plaintiff alleges that Union and Strelo violated the  
22 California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code  
23 § 12940, by: allowing Southern to impose harsher disciplinary  
24 standards on him; carelessly and perfunctorily processing his  
25 grievance against Southern; imposing harsher standards of  
26 representation on him than similarly situated Hispanics and other  
27 employees; and "causing a predominate Hispanic and other workforce  
28 to persist at Southern." FAC ¶¶ 59, 60, 64.



1 Under FEHA, a plaintiff must exhaust his or her administrative  
2 remedies by filing a complaint with a state investigatory agency  
3 before bringing a civil suit. See Cole v. Antelope Valley Union  
4 High Sch. Dist., 47 Cal. App. 4th 1505, 1509-1510 (Cal. Ct. App.  
5 1996). Where a plaintiff fails to satisfy these procedural  
6 requirements, a court lacks jurisdiction to hear the case. See  
7 Miller v. United Airlines, 174 Cal. App. 3d 878, 890 (Cal. Ct. App.  
8 1985). Defendants argue that the Court lacks jurisdiction over  
9 Plaintiff's FEHA claim because he does not allege that he has  
10 satisfied the administrative exhaustion requirement. Mot. at 8-9.  
11 The Court agrees and DISMISSES Plaintiff's second claim for  
12 discrimination based on race.

13 **C. Duty of Fair Representation (Claim Three)**

14 In his third claim, Plaintiff alleges that Union and Strelo  
15 violated their duty under the CBA to fairly represent Plaintiff  
16 with respect to processing grievances under the CBA. FAC ¶¶ 68-69.  
17 Defendants move to dismiss this claim as to Strelo only. Mot. at  
18 9. As Defendants point out, a number of cases have held that  
19 individual officers, employees, and members of a union cannot be  
20 held liable for breaches of fair representation committed by their  
21 union. See, e.g., Peterson v. Kennedy, 771 F.2d 1244, 1257 (9th  
22 Cir. 1985). In the instant action, Strelo is alleged to be  
23 "employed by and the business representative of [Union]." FAC ¶ 8.  
24 Accordingly, Plaintiff cannot hold Strelo liable for Union's  
25 alleged breach of its duty of fair representation. The Court  
26 DISMISSES claim three as to Strelo. Claim three remains  
27 undisturbed as to Union.

28 ///

1           **D. Preemption (Claims Four, Five, Nine, and Ten)**

2           Defendants argue that claims four (breach of contract), five  
3           (breach of fiduciary duty), nine (negligent infliction of emotional  
4           distress), and ten (intentional infliction of emotional distress)  
5           should be recharacterized under the artful pleading doctrine as  
6           claims for breach of the duty of fair representation and, as such,  
7           are preempted by federal labor law. Mot. at 10.

8           Section 301 of the Labor Management Relations Act ("LMRA")  
9           preempts state-law claims that are "substantially dependent upon  
10          analysis of the terms of an agreement made between the parties in a  
11          labor contract." Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 220  
12          (1985). "More specifically, LMRA § 301 will operate to preempt a  
13          state-law claim whose resolution depends upon the meaning of a  
14          CBA." Adkins v. Mireles, 526 F.3d 531, 539 (9th Cir. 2008). The  
15          federal statutory duty of fair representation also "displaces state  
16          law that would impose duties upon unions by virtue of their status  
17          as the workers' exclusive collective bargaining representative."  
18          Id. "To bring a successful state law action, aggrieved workers  
19          must make a showing of additional duties, if they exist, beyond the  
20          normal incidents of the union-employee relationship." Id.

21          In the instant action, resolution of Plaintiff's fourth and  
22          fifth claims clearly turns on Plaintiff's contractual rights under  
23          the CBA and, consequently, these claims are preempted. Plaintiff's  
24          fourth claim for breach of contract alleges that "Union failed to  
25          proceed with Plaintiff's arbitration against Defendant Southern and  
26          Does 1-50 as mandated in the CBA which is a clear and patent breach  
27          of the CBA." FAC ¶ 74. As to the fifth claim for breach of  
28          fiduciary duty, Plaintiff alleges that "Union has a contractual and

1 fiduciary duty for full and adequate representation of the  
2 Plaintiff as a union member." Id. ¶ 79. Accordingly, the Court  
3 DISMISSES Plaintiff's fourth and fifth claims.

4 Plaintiff's ninth and tenth claims against Union and/or Strelo  
5 for emotional distress are too poorly pleaded to determine if they  
6 are preempted. In his ninth claim for intentional infliction of  
7 emotional distress, Plaintiff lumps Union and Strelo together with  
8 Southern and Does 1-50 and alleges that their acts "were extreme  
9 and outrageous and an abuse of their authority." Id. ¶ 105.

10 Plaintiff makes substantially similar allegations against Union in  
11 his tenth claim for negligent infliction of emotional distress.  
12 See id. ¶¶ 110, 111. It is unclear what acts Plaintiff is  
13 referring to other than Union and Strelo's conduct towards  
14 Plaintiff in their capacity as his union representative. To the  
15 extent that Plaintiff's claims are based on such conduct, they are  
16 preempted. Accordingly the Court DISMISSES Plaintiff's ninth and  
17 tenth claims.<sup>3</sup>

18 **E. Section 1981 Claim**

19 In his opposition brief, Plaintiff contends that federal labor  
20 law would not preempt a claim brought under Section 1981. Opp'n at  
21 5-6. Plaintiff concedes that he has not specifically pled a  
22 Section 1981 claim, but asks the court to read one into the FAC  
23 since it purportedly alleges sufficient facts to state such a

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24 <sup>3</sup> The Court would normally be inclined to grant Plaintiff leave to  
25 amend to cure such poorly pleaded claims. However, the Court  
26 identified similar defects in Plaintiff's claims for emotional  
27 distress in its August 2, 2011 Order on Southern's motion to  
28 dismiss. Aug. 2, 2011 Order at 16. The Court warned that these  
claims were "extremely susceptible to preemption," but granted  
Plaintiff leave to amend to clarify. Id. Although Plaintiff was  
on notice about the weakness of these claims, his FAC provides  
little more clarity than his Complaint.

1 claim. Id. The Court finds that allowing Plaintiff to convert his  
2 claims into a Section 1981 action would deprive Defendant of fair  
3 notice. A Section 1981 claim should be asserted in a complaint,  
4 not an opposition brief. Accordingly, the Court declines to read a  
5 Section 1981 claim into the FAC.

6 Plaintiff also asks that, in the event the Court finds a  
7 Section 1981 claim has not been properly pled, the Court grant  
8 leave to amend so that Plaintiff may specifically allege a Section  
9 1981 claim. Opp'n at 6. The Court finds that granting additional  
10 leave to amend at this stage is inappropriate. Plaintiff has  
11 already been granted leave to amend once and was on notice of the  
12 defects in his Complaint after the Court's August 2, 2011 Order on  
13 Southern's motion to dismiss.

14  
15 **V. CONCLUSION**

16 For the foregoing reasons, the Court GRANTS Defendants  
17 Teamsters Local 853 and Bob Strelo's Motion to Dismiss Plaintiff  
18 Jason Coleman's First Amended Complaint.

- 19 • The Court DISMISSES WITHOUT LEAVE TO AMEND Plaintiff's first  
20 claim for violation of Article I, Section 8 of the California  
21 Constitution as to Teamsters Local 853 and Strelo; second  
22 claim for discrimination based on race as to Teamsters Local  
23 853 and Strelo; third claim for breach of duty of fair  
24 representation as to Strelo; fourth claim for breach of  
25 contract as to Teamsters Local 853; fifth claim for breach of  
26 fiduciary obligation as to Teamsters Local 853; ninth claim  
27 for intentional infliction of emotional distress as to  
28 Teamsters Local 853 and Strelo; and tenth claim for negligent

1 infliction of emotional distress as to Teamsters Local 853.

2 • The third claim for breach of duty of fair representation  
3 against Teamsters Local 853 shall remain undisturbed.

4 • The Court DENIES Plaintiff's request for leave to amend to  
5 allege a claim under 42 U.S.C. § 1981.

6 The hearing scheduled for November 18, 2011 is hereby VACATED. As  
7 set forth in the Court's August 23, 2011 Order, the parties are to  
8 appear before the Court for a case management conference on  
9 December 9, 2011 at 10:00 A.M. in Courtroom 1, 17th Floor at 450  
10 Golden Gate Avenue, San Francisco, California. The parties are to  
11 file with the Court a single joint case management statement at  
12 least seven days prior to that date.

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14 IT IS SO ORDERED.

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16 Dated: November 14, 2011

  
UNITED STATES DISTRICT JUDGE

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