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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOSHUA BANKO,

No. 13-02977 RS

Plaintiff,

**ORDER DENYING IN PART AND
GRANTING IN PART MOTION TO
DISMISS**

v.

APPLE, INC., and DOES 1-50,

Defendants.

I. INTRODUCTION

Plaintiff Joshua Banko, a former employee of defendant Apple, Inc., filed this action in June 2013. He asserts five claims for relief, each stemming from the allegation that Apple wrongfully terminated his employment. Apple moves to dismiss the first, second, third, and fifth claims alleged in Banko’s first amended complaint (FAC). For the following reasons, the motion is denied in part and granted in part. While Banko’s second, fourth, and fifth claims can proceed, his first and third claims are dismissed with prejudice.

II. BACKGROUND¹

Banko began working as an engineer for Apple in 2000. Over the following twelve years, he earned numerous promotions, positive performance reviews, and discretionary bonuses for his work on Apple products. In January 2012, Banko began to notice irregularities in expense reports

¹ The factual background is based on the averments in the FAC, which must be taken as true for purposes of a motion to dismiss.

1 submitted by Employee Roe, a subordinate engineer.² Banko directed Roe to remove the allegedly
2 fraudulent charges from her reports. Later that year, he noticed further irregularities in Roe's
3 reported expenses. Banko once more raised the issue with Roe, who again failed to remedy the
4 errors.

5 Banko came to believe that Roe's actions violated both the law and Apple company policy.
6 Operating under the belief that he was obligated to report his subordinates' wrongful behavior,
7 Banko informed his supervisors that Roe had repeatedly filed inaccurate expense reports. His
8 supervisors instructed Banko not to report Roe formally to the company. Banko, believing he was
9 effectively being asked to cover up employee embezzlement, refused their request and lodged a
10 formal complaint with Apple about Roe. As a result, the company conducted an internal audit that
11 revealed over forty instances of misrepresentations on Roe's expense reports. Based on these
12 results, Banko recommended that Roe be terminated.

13 Despite Banko's recommendation, Apple chose to retain Roe. Banko's superiors informed
14 him that he should cease pursuing Roe's termination, stating that she was a valuable employee.
15 Banko, however, continued to believe he had a legal obligation to stop Roe. He then informed
16 Victor Cousins, a member of Apple's Human Resources department, of Roe's alleged wrongdoings.
17 After investigating the matter, Cousins wrote a report recommending Roe's termination. She was
18 ultimately terminated on December 31, 2012.

19 In early January 2013, after returning from a company-wide holiday break, Banko received a
20 significant discretionary bonus for his recent work on an important Apple project. On January 9,
21 2013, Banko was called into a meeting with his supervisor and another human resources employee.
22 He was asked to stay home for the rest of the week – a request Banko understood to indicate that his
23 termination was imminent. When he returned to work the following Monday, January 14, 2013,
24 Banko was terminated.

25 Banko filed suit in June 2013, alleging five claims for relief: (1) violation of the Dodd-Frank
26 Act, (2) wrongful termination in violation of public policy, (3) retaliation in violation of the
27 Sarbanes-Oxley Act, the Dodd-Frank Act, and California Labor Code § 1102.5, (4) breach of

28 ² Employee Roe's name has been changed to protect her privacy.

1 employment contract, and (5) breach of the implied covenant of good faith and fair dealing. Apple
2 moved to dismiss the complaint in its entirety. The motion was denied in part and granted in part
3 with leave to amend. (Docket No. 29). The first claim was dismissed on the grounds that Banko
4 does not qualify as a “whistleblower” under the Dodd-Frank Act because he did not report Roe’s
5 alleged embezzlement to the Securities and Exchange Commission. Similarly, because Banko did
6 not demonstrate that he can avail himself of federal whistleblower protection, the dismissal order
7 further found that Banko’s third claim for retaliation is not cognizable under Sarbanes-Oxley or
8 Dodd-Frank. That order permitted the third claim to proceed, however, under the theory that Apple
9 violated the California Labor Code. Banko’s fifth claim for breach of the implied covenant of good
10 faith and fair dealing was dismissed for failure to allege that Apple frustrated his ability to perform
11 his contractual obligations. The motion was denied with respect to the second and fourth claims.
12 Banko proceeded to file the pending FAC. Apple now moves to dismiss the FAC’s first, second,
13 third, and fifth claims for relief.

14 III. LEGAL STANDARD

15 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges a
16 court’s subject matter jurisdiction over the plaintiff’s claims. A challenge to subject matter
17 jurisdiction “can be either facial, confining the inquiry to allegations in the complaint, or factual,
18 permitting the court to look beyond the complaint.” *Savage v. Glendale Union High Sch.*, 343 F.3d
19 1036, 1039 n. 2 (9th Cir. 2003). A complaint may also be dismissed pursuant to Federal Rule of
20 Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. A Rule
21 12(b)(6) motion may be based on either the lack of a cognizable legal theory or the absence of
22 sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901
23 F.2d 696, 699 (9th Cir. 1990).

24 A complaint must present factual allegations sufficient “to raise a right to relief above the
25 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Specifically, the factual
26 allegations must suffice to state a claim that is “plausible on its face,” that is, “plausibly suggesting
27 (not merely consistent with)” a right to relief. *Id.* at 557, 570. While the factual allegations of the
28 complaint are taken as true and all reasonable inferences are drawn in favor of the plaintiff,

1 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
2 do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Twombly*, 550 U.S. at 555.
3 Accordingly, “a court discounts conclusory statements, which are not entitled to the presumption of
4 truth, before determining whether a claim is plausible.” *Chavez v. United States*, 683 F.3d 1102,
5 1108 (9th Cir. 2012).

6 IV. DISCUSSION

7 A. Banko’s Procedural Objections

8 Banko asserts that the bulk of Apple’s motion is procedurally improper. In particular, he
9 contends that because the court denied Apple’s prior attempt to dismiss the second and third claims,
10 Rule 12(g) bars Apple from challenging those claims again. That rule provides, in pertinent part:

11 If a party makes a motion under this rule but omits therefrom any defense or
12 objection then available to the party which this rule permits to be raised by motion,
13 the party shall not thereafter make a motion based on the defense or objection so
14 omitted, except a motion as provided in subdivision (h)(2) hereof on any of the
15 grounds there stated.

16 Fed. R. Civ. P. 12(g). Rule 12(h)(2), in turn, allows a party to raise a defense of failure to state a
17 claim: “(A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c);
18 or (C) at trial.” Fed. R. Civ. P. 12(h)(2).

19 Apple’s motion proceeds on two bases. First, Apple contends the court lacks subject matter
20 jurisdiction over the third claim. Federal courts have a continuing obligation to dismiss claims over
21 which they lack subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). Accordingly, it is entirely
22 proper for the court to address whether it has subject matter jurisdiction over Banko’s third claim.

23 Second, Apple argues that several of Banko’s claims must be dismissed for failure to state a claim
24 upon which relief can be granted. Unlike motions under Rules 12(b)(2)-(5), a motion to dismiss
25 under Rule 12(b)(6) is not mandatorily barred when omitted from a prior Rule 12 motion. *See* Fed.
26 R. Civ. P. 12(h)(1). Although Rule 12(g) “technically prohibits successive motions to dismiss that
27 raise arguments that could have been made in a prior motion . . . courts faced with a successive
28 motion often exercise their discretion to consider the new arguments in the interests of judicial
economy.” *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, 2011 WL 2690437, *2 n. 1 (N.D.

1 Cal. 2011). In this case, it is reasonable for the court to consider more fully how its prior holding
2 impacts the viability of Banko’s remaining claims.

3 B. First Claim: Violation of Dodd-Frank Act

4 The Dodd-Frank Act prohibits employers from taking adverse employment actions against
5 “whistleblower” employees for making disclosures that are required or protected under the
6 Sarbanes-Oxley Act. 15 U.S.C. § 78u-6(h)(1)(A). Banko claims that Apple violated Dodd-Frank,
7 contending his termination was motivated by his disclosures, which he asserts are protected by
8 Sarbanes-Oxley.

9 This claim was dismissed in the court’s prior order. (Docket No. 29). Banko, who has not
10 amended this claim, intends to appeal the court’s conclusion that he cannot avail himself of Dodd-
11 Frank’s whistleblower protections. The first claim is therefore dismissed without leave to amend.

12 C. Second Claim: Wrongful Termination in Violation of Public Policy

13 In California, an employer may be subject to tort liability if it terminates an employee in
14 violation of a fundamental public policy. *Steffens v. Regus Grp., PLC*, 485 F. App'x 187, 188 (9th
15 Cir. 2012) (citing *Gould v. Md. Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1147 (1995)). To sustain
16 a claim for wrongful termination, the underlying public policy must be (1) supported by either
17 constitutional or statutory provisions; (2) “public” in the sense that it “inures to the benefit of the
18 public” rather than merely serving the interests of individuals; (3) well-established at the time of
19 plaintiff’s discharge; and (4) “fundamental” and “substantial.” *Stevenson v. Super. Ct.*, 941 P.2d
20 1157, 1161 (Cal. 1997).

21 Claims for wrongful termination “typically arise when an employer retaliates against an
22 employee for refusing to violate a statute, performing a statutory obligation, exercising a statutory
23 right, or reporting an alleged violation of a statute of public importance.” *Gould*, 31 Cal. App. 4th at
24 1147. When an employee claims he was terminated for reporting an alleged violation of a statute of
25 public importance, he “is not required to report the violation to a government or law enforcement
26 agency; internal reporting is sufficient.” *Steffens*, 485 F. App'x at 188 (citing *Gould*, 31 Cal. App.
27 4th at 1150). Nor, for purposes of surviving a motion to dismiss, must the employee specify the
28 particular statutory provision(s) supporting his claim. *See Vargas v. BP Am., Inc.*, 2011 WL

1 1601588 (E.D. Cal. 2011) (stating that while failure to identify a specific statutory or constitutional
2 policy would doom a wrongful termination claim in state court, federal notice pleading requires
3 less); *see also Stoval v. Basin St. Properties*, 2013 WL 6002758, *3 (N.D. Cal. 2013) (denying
4 employer’s motion for summary judgment on wrongful termination claim where employee failed to
5 specify which statutory provision was implicated by his allegation).

6 The FAC alleges that Roe’s embezzlement of a publicly-traded corporation’s funds harmed
7 the general public by “impacting the millions of Apple shareholders[] and . . . creating tax
8 irregularities[.]” FAC ¶ 64. Banko contends that by ordering him to cease pursuing Roe’s
9 termination, and for eventually firing him because he was unwilling to ignore Roe’s embezzlement,
10 Apple punished him for reporting illegal activity in the workplace. Banko maintains he was simply
11 seeking to enforce laws and policies that discourage employee financial misconduct, thereby
12 benefitting Apple and the general public alike.

13 Apple argues that Banko’s wrongful termination claim fails for several reasons. First,
14 seizing upon the prior order’s conclusion that Banko is not a “whistleblower” for purposes of
15 Sarbanes-Oxley or Dodd-Frank, Apple argues that because Banko cannot prevail on that federal
16 claim for relief, neither can he predicate his wrongful termination claim on the theory that Apple
17 violated public policies set forth in either federal statute. Several courts in this district have held,
18 however, that even where a plaintiff is unable to state a claim for relief under a particular statute, he
19 can nevertheless prevail on a claim that he was wrongfully terminated in violation of that statute’s
20 policy.³

21 In *Weingand v. Harland Fin. Solutions, Inc.*, the plaintiff sued his former employer, alleging
22 he was fired for notifying supervisors that the company may have been violating California wage-

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24 ³ At oral argument, Apple purported not to dispute that a wrongful termination claim can be
25 premised on a public policy set forth in a statute under which the wrongful termination plaintiff
26 cannot recover. Apple maintains, however, that the policies underlying federal and California
27 retaliation statutes do not protect employees who, like Banko, fail to report co-worker wrongdoing
28 to outside authorities. This argument rings hollow at least with respect to the California Labor
Code, which expressly protects employees who “refus[e] to participate in an activity that would
result in a violation of state or federal statute, or a violation or noncompliance with a state or federal
rule or regulation.” Cal. Lab. Code § 1102.5(c). An employee need not report to authorities in
order to seek protection under this subsection.

1 and-hour laws. 2012 WL 3537035 (N.D. Cal. 2012). The court dismissed plaintiff’s retaliation
2 claim under California Labor Code § 1102.5, reasoning that he failed to meet the statutory
3 requirement of reporting the alleged wrongdoing to authorities.⁴ *Id.* at *4. His wrongful
4 termination claim, on the other hand, survived the employer’s motion to dismiss. The employer
5 argued that because the plaintiff’s actions were not protected under the retaliation statute, his claim
6 for wrongful termination could not be predicated upon the allegation that he was fired in violation of
7 California Labor Code policy. The court disagreed, finding that “other cases with similar facts . . .
8 have looked to the public policy evinced by the *purpose* of various statutes as opposed to a
9 mechanical application of the statutory causes of action on an element-by-element basis.” *Id.* at *8.
10 (emphasis in original); *see also Gould*, 31 Cal. App. 4th at 1148 (“[I]f MSI discharged Gould in
11 retaliation for his reporting violations of the overtime wage law to MSI management, it violated a
12 fundamental public policy of the state.”)).

13 Similarly, in *Stoval v. Bain Street Properties*, the plaintiff’s wrongful termination claim was
14 cognizable based on the public policy reflected in § 1102.5 even though the plaintiff was likely
15 precluded from stating a claim under the statute. 2013 WL 6002758 (N.D. Cal. 2013). In *Stoval*,
16 the plaintiff was employed as a facilities manager for a company that owned several apartment
17 buildings. The plaintiff was terminated after informing his employer that a co-worker illegally
18 connected a cable television service to an apartment unit inside one of the employer’s properties.
19 The court denied the employer’s summary judgment motion on the plaintiff’s wrongful termination
20 claim, reasoning that § 1102.5 “evinces a strong public interest in encouraging employee reports of
21 illegal activity in the workplace.” *Id.* *3 (quoting *Collier v. Super. Ct.*, 228 Cal. App. 3d 1117, 1123
22 (1991) (alterations and quotation marks omitted). The court acknowledged that the plaintiff, who
23 did not specify he was terminated in violation of § 1102.5’s policy, and who had not pled a claim
24 under the statute, would likely be precluded from protection under § 1102.5 due to his failure to
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28 ⁴ Nor could the plaintiff in *Weingand* establish that he had refused to participate in illegal activity.
See § 1102.5(c).

1 report the alleged wrongdoing to authorities.⁵ *Id.* Nonetheless, the court held that because the
2 California Labor Code’s retaliation statute reflects a strong public policy encouraging employees to
3 report illegal workplace activity, the plaintiff’s claim could proceed on the basis that he was
4 terminated for reporting his co-worker’s alleged cable theft. *Id.*

5 *Weingand* and *Stoval* demonstrate that Banko’s failure to state a claim under a particular
6 statute (*e.g.*, Dodd-Frank) does not preclude him from relying on that statute’s policies for purposes
7 of his wrongful termination claim. As an initial matter, the Dodd-Frank and California Labor Code
8 retaliation provisions both appear to reflect a strong public interest in encouraging employees to
9 report illegal activity in the workplace. However, there is little case law exploring the extent to
10 which a wrongful termination tort can be premised on the policies set forth in Dodd-Frank. For
11 purposes of resolving this motion, it is sufficient to conclude that Banko’s claim can proceed on the
12 theory that he was terminated in violation of the “strong public interest,” reflected in California
13 Labor Code § 1102.5, “in encouraging employee reports of illegal activity in the workplace.”
14 *Collier*, 228 Cal. App. 3d at 1123; *see also Stoval*, 2013 WL 6002758 at *4.

15 Apple further contends that Banko’s claim must fail because it cannot be tethered to any
16 “fundamental” public policy. *See Remus v. Fios, Inc.*, 2012 WL 707477 at *10 (N.D. Cal. 2012).
17 According to Apple, it is well-settled that internal company complaints about employee
18 embezzlement do not implicate a fundamental public policy for purposes of the wrongful
19 termination tort. It relies primarily on *American Computer Corp. v. Superior Court*, wherein the
20 California Court of Appeal held that the plaintiff’s internal reporting of co-worker embezzlement
21 was insufficient to sustain a wrongful termination claim. *See* 213 Cal. App. 3d 664 (1989). The
22 court reasoned that “the most that can connect [plaintiff’s] conduct with the public interest is the
23 argument that by reporting his suspicions to his superiors he took action which might eventually
24 prevent or uncover commission of a felony and thereby serve[] the laudable goal of preventing
25 crime.” *Id.* at 668.

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28 ⁵ The court in *Stoval* did not address § 1102.5(c), presumably because the plaintiff did not “refus[e]
to participate in an activity that would result in a violation of state or federal statute, or a violation or
noncompliance with a state or federal rule or regulation.” Cal. Lab. Code § 1102.5(c).

1 The court in *Stoval* rejected an argument similar to the one Apple makes here. Examining
2 California cases decided since *American Computer*, the court concluded that “[u]nder California
3 law, it implicates a public policy to terminate an employee’s employment as a result of his or her
4 reporting a criminal activity.” 2013 WL 6002758, *4. In *Collier*, decided two years after *American*
5 *Computer*, the California Court of Appeal recognized that there is a compelling and “fundamental
6 public interest in a workplace free from crime.” 228 Cal. App. 3d at 1127. Further, in *Haney v.*
7 *Aramark Unif. Servs., Inc.*, the California Court of Appeal found that where a policy underlying a
8 wrongful termination claim is reflected in a provision of the Penal Code, “the policy is deemed
9 fundamental or substantial, and inures to the benefit of the public rather than merely serving the
10 interests of individuals.” *Stoval* at *4 (summarizing *Haney*, 121 Cal. App. 4th 623 (2004)). Banko
11 reported embezzlement, a crime enumerated in the state Penal Code. See Cal. Penal Code § 503.
12 Apple is therefore incorrect to contend that, as a matter of law, Banko’s internal complaint about
13 Roe’s alleged criminal activity cannot implicate a fundamental public policy. See *Stoval* at *3
14 (because cable theft is proscribed in the Penal Code, wrongful termination claim could proceed
15 where employee was allegedly fired for reporting co-worker’s cable theft).

16 Against the backdrop of *Haney* and *Collier*, both of which acknowledge that reporting
17 criminal activity in the workplace implicates a public policy, Apple’s other authorities are less
18 compelling. Apple relies on *Rivera v. Nat’l R.R. Passenger Corp.*, wherein the Ninth Circuit held
19 that “reporting ongoing criminal conduct to an employer’s management does not necessarily
20 implicate a public interest.” 331 F.3d 1074, 1080 (9th Cir.) (emphasis added). In *Rivera*, the
21 plaintiff alleged he was wrongfully terminated for reporting unsafe and illegal activities in the
22 workplace. The district court granted the defendant’s motion for summary judgment, and the Ninth
23 Circuit affirmed, reasoning that there was insufficient evidence that the plaintiff actually reported
24 the criminal activity to his employer. Then, in apparent dicta, the court stated that “[i]f Rivera had
25 reported the illegal activities of his co-workers, Rivera may have achieved the ‘laudable goal’ of
26 preventing crime, but this is not enough to fit within the narrow confines of wrongful termination in
27 violation of public policy.” *Id.* at 1080 (quoting *American Computer*, 213 Cal. App. 3d at 668).
28 The court’s conclusion apparently was premised exclusively on *American Computer*, a case the

1 California Court of Appeal has since found to be inconsistent with subsequent California cases. *See*
2 *Collier*, 228 Cal. App. 3d at 1125. Moreover, *Rivera* was decided before *Haney*, in which the Court
3 of Appeal held that a wrongful discharge claim implicates fundamental public policy when the
4 plaintiff alleges he was fired for reporting and refusing to engage in fraudulent billing practices. *See*
5 121 Cal. App. 4th at 643.⁶ In sum, because Banko alleges sufficient facts to support a plausible
6 claim that he was terminated for reporting co-worker embezzlement in the workplace, Apple’s
7 motion is denied with respect to his second claim.

8 D. Third Claim: Retaliation

9 Banko alleges that Apple retaliated against him in violation of Dodd-Frank, Sarbanes-Oxley,
10 and California Labor Code § 1102.5. As discussed in the court’s prior order, Banko’s third claim
11 cannot proceed under either federal law. (Docket No. 29). Apple contends state law similarly
12 provides no remedy. Like Dodd-Frank and Sarbanes-Oxley, the state statute seeks to protect
13 whistleblowers by prohibiting employers from retaliating against employees for engaging in certain
14 categories of protected activity. Cal. Lab. Code § 1102.5. While § 1102.5(a) and (b) provide
15 protections for employees who report wrongdoing to government authorities, (c) prohibits
16 employers from retaliating against employees “for refusing to participate in an activity that would
17 result in a violation of state or federal statute, or a violation or noncompliance with a state or federal
18 rule or regulation.” *Id.* § 1102.5(c).

19 Apple contends that the court lacks subject matter jurisdiction over this claim, arguing that
20 Banko was required to exhaust his administrative remedies with the California Labor Commissioner
21 before coming to federal court. Although § 1102.5 is silent on administrative exhaustion
22 requirements, § 98.7 sets out the complaint process for an employee alleging a violation of the
23 California Labor Code. *See Dowell v. Contra Costa Cnty.*, 928 F. Supp. 2d 1137, 1152 (N.D. Cal.
24 2013). That statute provides, in pertinent part: “Any person who believes that he or she has been
25 discharged or otherwise discriminated against in violation of any law under the jurisdiction of the

26 ⁶ Apple also invokes *Van Hulten v. Us. Sec. Assocs.*, 2010 U.S. Dist. LEXIS 57979 (E.D. Cal.
27 2010), *Lewis v. Electronic Data Systems Corp.*, 2004 Cal. App. Unpub. LEXIS 8987 (2004), and
28 *Giknyo v. Alticor, Inc.*, 2010 Cal. App. Unpub. LEXIS 3303 (2010). All three cases rely primarily
on *American Computer* for the notion that reporting co-worker wrongdoing does not implicate a
fundamental public policy.

1 Labor Commissioner *may* file a complaint with the division within six months after the occurrence
2 of the violation.” Cal. Lab. Code § 98.7(a) (emphasis added). Noting the permissive language of
3 the statute, some courts in this district have held that § 98.7(a) does not require a plaintiff to exhaust
4 administrative remedies before bringing a § 1102.5 claim in federal court. *See, e.g., Dowell*, 928 F.
5 Supp. 2d at 1153; *Turner v. City & County of San Francisco*, 892 F. Supp. 2d 1188, 1201–02 (N.D.
6 Cal. 2012). The majority of courts addressing the issue, however, have held that a plaintiff must file
7 a complaint with the Labor Commissioner before bringing a § 1102.5 claim in federal court. *See,*
8 *e.g., Miller v. Sw. Airlines, Co.*, 923 F. Supp. 2d 1206, 1210 (N.D. Cal. 2013); *Wright v. Kaiser*
9 *Found. Hospitals*, 2012 WL 4097738 (N.D. Cal. 2012); *Ferretti v. Pfizer Inc.*, 855 F. Supp. 2d
10 1017, 1023 (N.D. Cal. 2012); *Morrow v. City of Oakland*, 2012 WL 2133755 (N.D. Cal. 2012);
11 *Reynolds v. City & Cnty. of San Francisco*, 2011 WL 4808423 (N.D. Cal. 2011). These cases rely
12 on *Campbell v. Regents of University of California*, in which the California Supreme Court held that
13 even though § 1102.5 is silent on the issue, “the past 60 years of California law on administrative
14 remedies” nevertheless compels the conclusion that a plaintiff bringing a claim under the statute is
15 subject to the exhaustion requirement. 106 P.3d 976, 988 (2005).

16 Banko pleads no facts indicating that he filed an administrative complaint with the Labor
17 Commissioner. Accordingly, he fails to demonstrate that the court has subject matter jurisdiction
18 over his § 1102.5 claim. At oral argument, counsel for Banko acknowledged that the administrative
19 exhaustion requirements have not been satisfied. Accordingly, because amendment apparently
20 would be futile, the third claim for retaliation is dismissed with prejudice. *See AmerisourceBergen*
21 *Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006).

22 E. Fifth Claim: Breach of Implied Covenant of Good Faith and Fair Dealing

23 Every contract contains an implied-in-law covenant of good faith and fair dealing that
24 “neither party will do anything which will injure the right of the other to receive the benefits of the
25 agreement.” *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1, 8 (2000) (quotations and
26 citations omitted). The implied covenant “imposes upon each party the obligation to do everything
27 that the contract presupposes they will do to accomplish its purpose.” *Careau & Co. v. Sec. Pac.*
28 *Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 398 (Ct. App. 1990) (citations and quotations omitted). Thus,

1 it “protects only the parties' right to receive the benefit of their agreement.” *Foley v. Interactive*
2 *Data Corp.*, 765 P.2d 373, 400 n. 39 (1988). “A claim for breach of the implied covenant of good
3 faith and fair dealing is not duplicative of a breach of contract claim when a plaintiff alleges that the
4 defendant acted in bad faith to frustrate the benefits of the alleged contract.” *Davis v. Capitol*
5 *Records, LLC*, 2013 WL 1701746 (N.D. Cal. 2013).

6 Unlike his initial complaint, Banko’s amended complaint plausibly suggests he is entitled to
7 relief for this claim. *See Twombly*, 550 U.S. at 570. Banko reported Roe’s activities to his
8 supervisors due to his belief that he was obligated by law and company policy to do so. Banko
9 avers that when he was told to cease pursuing Roe’s termination, Apple presented him with an
10 untenable dilemma: either disobey his superiors’ instructions or adopt a course of conduct Banko
11 believed would violate Apply policy and the law. According to Banko, his employer’s actions made
12 it impossible for him to do his job pursuant to his purported employment contract, thereby breaching
13 Apple’s obligation to abide by the implied covenant of good faith and fair dealing.⁷ When viewing
14 these allegations in a light most favorable to Banko, the FAC raises his right to relief “above the
15 speculative level” for breach of the implied covenant of good faith and fair dealing. *Id.* at 555.
16 Accordingly, Apple’s motion is denied with respect to Banko’s fifth claim.

17 V. CONCLUSION

18 For the foregoing reasons, Apple’s motion is GRANTED with respect to Banko’s first and
19 third claims for relief. It is DENIED with respect to his second and fifth claims.

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21 ⁷ The FAC further avers that Apple breached the implied covenant by terminating Banko in order to
22 avoid paying him a separate bonus he allegedly earned as a result of his work on an important Apple
23 invention. Apple rejects this allegation, arguing that Banko’s implied covenant claim is duplicative
24 of his breach of contract claim. *See Celador Int’l Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846, 852
25 (C.D. Cal. 2004) (“A breach of the implied covenant of good faith and fair dealing involves
26 something more than breach of the contractual duty itself.”) (citing *Careau & Co. v. Security Pacific*
27 *Business Credit, Inc.*, 272 Cal. Rptr. 387, 398 (Ct. App. 1990)). Banko avers the existence of an
28 implied contract whereby Apple could terminate him only for cause. Taking Banko’s allegations as
true, Apple had a duty to execute the contract's purposes in good faith. *See Daly v. United*
Healthcare Ins. Co., 2010 WL 4510911 (N.D. Cal. 2010). If Apple fired Banko in bad faith to
deprive him of the bonus he would have otherwise received absent his sudden and unexpected
termination, it may have breached the implied covenant of good faith and fair dealing. Because
Banko’s other averments are sufficient to survive Apple’s 12(b)(6) motion on this claim, the
invention bonus allegations are, if anything, an additional grounds warranting the denial of Apple’s
motion as to this claim.

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IT IS SO ORDERED.

Dated: 12/16/13



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE