UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

TADEUSZ WYRZYKOWSKI,

Plaintiff,

v.

COUNTY OF MARIN, et al.,

Defendants.

_____/

No. 3:14-cv-03825-LB

ORDER GRANTING THE DEFENDANTS' MOTION TO DISMISS THE PLAINTIFF'S SECOND AMENDED COMPLAINT

[Re: ECF No. 45]

INTRODUCTION

Plaintiff Tadeusz Wyrzykowski, who is proceeding *pro se*, sued ten defendants in his Second Amended Complaint: (1) the County of Marin; (2) the County of Marin Board of Supervisors; (3) County Supervisors; (4) former District 1 Supervisor Susan Adams; (5) current District 5 Supervisor Judy Arnold; (6) current District 4 Supervisor Steven Kinsey; (7) current District 2 Supervisor Katie Rice; (8) current District 3 Supervisor Kathrin Sears; (9) Roy Given; and (10) Liz Clark. (Second Amended Complaint, ECF No. 44.[1]) The court previously dismissed the County Supervisors because it is duplicative of the County of Marin Board of Supervisors; nine defendants remain. (5/12/2015

[1] Record citations are to documents in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the tops of the documents.

Order, ECF No. 52 at 2.) The gist of his allegations is that the defendants improperly seek taxes from him with respect to a property he owns. The defendants move to dismiss his Second Amended Complaint. (Motion to Dismiss, ECF No. 45.) Pursuant to Civil Local Rule 7-1(b), the court finds this matter suitable for determination without oral argument. (6/4/2015 Clerk's Notice, ECF No. 65.) Upon consideration of the papers submitted and the applicable legal authority, the court grants the defendants' motion.

STATEMENT

I. PLAINTIFF'S ALLEGATIONS

The complaint's allegations contain the following. The plaintiff is the owner of several properties; he labeled four as "Property #01," "Property #06," "Property #21," and "Property #28." (*See* Second Amended Complaint ¶¶ 24-25, 34, 53.) The claims in this action, however, are in relation to Property #01. (*See id.* ¶¶ 24-25, 36.) At a high level, he alleges that the defendants improperly labeled the properties as "delinquent" at various times since 2002 even though he paid the taxes owed on them, deprived him of due process of law and equal protection under the law, violated his civil rights, engaged in racketeering and fraud, and intentionally inflicted emotional distress. (*See generally id.*)

The plaintiff alleges that the defendants' unlawful conduct began on April 1, 2002, "upon [his] asking the tax office clerk[, who was] under [defendant Roy] Given's direct supervision, to[] please check some facts/figures re[:] town folks' properties." (*Id.* ¶ 30.) He believed that "the taxman was auctioning on false 'delinquency,' rendering people homeless." (*Id.*) Defendants then "discriminated [against], insulted, labeled for retaliation . . . for daring to, asking in the name of the greater public good. . . ." (*Id.* ¶ 31 (ellipses in original).) Four days later, on April 4, 2002, the "county clerks [in] room 202, under [Mr.] Given's direct supervision[,] embezzled [the plaintiff's] tax payments." (*Id.* ¶ 32.) "A month later[, the] room 202 clerks . . . under [Mr.] Given's orders, demanded money for" Property #28. (*Id.*) The plaintiff "informed [them and] sent proof that [he] just paid tax on" Property #28. (*Id.*) Soon thereafter, Property #28 "was fraudulently labeled 'delinquent' and set up for auction." (*Id.* ¶ 33.)

From 2004 to 2007, as a part of "[Mr.] Given's RICO Racket scam, they stole more payments

on" Property #06, Property #21, and Property #28. (*Id.* ¶ 34; *see also id.* ¶¶ 34-38, 48.) The plaintiff alleges that multiple persons in the County Clerk's office "admitted" that he made the payments but they had not been "applied" or "posted" to his accounts correctly. (*Id.* ¶¶ 35, 38.) The plaintiff also alleged that on June 22, 2007, "[Mr.] Given conned [non-party Michael] Smith and [defendant Liz] Clark to help him induce me [i]nto a 'contract.'" (*Id.* ¶¶ 40; *see also id.* ¶ 6(h).) Pursuant to this contract, the plaintiff was forced "to pay again on a paid bill." (*Id.* ¶ 60.) Mr. Given also "shook [the plaintiff] down [for his] $179 pocket cash [and] with it as he fraudulently fooled/robbed the County treasury." (*Id.* ¶¶ 40; *see also id.* ¶¶ 46-47.) On July 10, 2007, the plaintiff "asked the [B]oard of Supervisors fo[r] help, [but] they sheltered[and] accomplised the abusers." (*Id.* ¶ 60.) Then, in August 2007, Mr. Given "duped the County Recorder, Richard Arrow[, when Mr. Given] laundered [his] stolen funds through the County treasury, using willing, [and] duped into perjury[,] co-actress [Ms.] Clark." (*Id.* ¶ 42; *see also id.* ¶ 49.)

Over three years after that, on December 20, 2010, non-party Michael Smith and defendant Mr. Given "assaulted [the plaintiff] for filing [an] Adm. Claim against their violations." (*Id.* ¶ 60.) Three days later, on December 23, 2010, the plaintiff "sought help from the Supes[, but i]nstead [of getting] help, [he] got battered, at the Board chamber." (*Id.*)

In 2010, Property #01 comes into the picture. On April 12, 2010, the plaintiff "timely paid tax $2984[.]51 on [P]rop[erty] #01 (and on other props.)." (*Id.* ¶ 62.) On December 10, 2010, he "timely paid tax $1650[.]14 on [P]rop[erty] #01 (and on other props.)." (*Id.*) And on April 8, 2011, he "timely paid tax $2451[.]35 on [P]rop[erty] #01 (and on other props.)." (*Id.*) But defendants Mr. Given and Ms. Clark and others "maliciously ma[d]e sure [that the plaintiff's] misery d[id] not end." (*Id.* ¶ 63.) "[D]espite taxes timely PAID, they fraudulently label[ed] [P]rop[erty] #1 'delinquent,' [and] as before, with [P]rop[erty] #28, they point[ed] it to [] auction." (*Id.*; *see also id.* ¶ 6(e).)

From 2011 to 2013, the defendants "repeatedly demand[ed] payments, penalties, interests, [and fees]" on Property #01. (*Id.* ¶ 65.) In the spring 2011, "while in Nevada [the plaintiff] was threatened by" Mr. Given and Ms. Clark "with dire repercussions if [he did] not pay more money on the fraudulent 'contract.'" (*Id.* ¶ 54.) "They pursued [the plaintiff] through [the] US Mail, through Fax, [and t]hrough Phone." (*Id.* ¶ 55.) The plaintiff "objected," as he "wanted to pay only due and

true taxes," but he "did NOT get ANY answer." (*Id.* ¶¶ 54, 56.) "Cornered, threatened by [Mr.] Given, [Ms.] Clark[, and the] abuse of power, [the plaintiff] sent money orders to Marin County." (*Id.* ¶ 56.)

Later, on August 14, 2013, "under more threats of further punishment, [the plaintiff] sent by Mail, to [defendant Mr.] Given [an] undue/untrue demanded, fraudulent payment on a bill [for Property] #01 that [had] already been paid." (*Id.* ¶ 13; *see also id.* ¶ 71.) Later, in the fall of 2013, "under more threats and further punishment, [the plaintiff] sent to [defendant Mr.] Given the undue, fraudulently demanded [payment] on a bill [for Property #01] that ha[d] already [been] PAID on" August 14, 2013. (*Id.* ¶ 19.) The plaintiff "went to the County Board of Supervisors chamber[s] to complain again. NO ONE would hear [him], again." (*Id.* ¶ 20.) Instead, the secretary or clerk gave him a complaint form. (*Id.*)

On February 12, 2014, the plaintiff filed a government administrative claim, but "[t]he stone-walled County/Counsel emblematically set a trap" and "fraudulently, deceitfully showed no interest in [it], nor its content, charges, format, in-sufficiency, et al." and instead "awaited a suit, which they can trash on [and] claim 'insufficiency.'" (*Id.* ¶ 14; *see also id.* ¶¶ 21, 72-73.) On the claim form, when asked to provide the "date of injury, damage or loss," the plaintiff wrote that the injury occurred on September 3, 2013 and is continuing. (Request for Judicial Notice ("RJN"), Ex. B, ECF No. 20.[2]) When asked to provide a "general description of injury, damage or loss and circumstance

[2] The defendants previously asked the court to take judicial notice of the following documents: (1) the plaintiff's August 22, 2014 application to proceed *in forma pauperis* in this case; (2) the claim form that the plaintiff submitted to the County of Marin on February 12, 2014; (3) the claim form that the plaintiff submitted to the County of Marin on November 30, 2010; (4) a "Notice of Return of Claim without Action/Rejection of Claim" form dated February 24, 2014; (5) the complaint that the plaintiff filed in the United States District Court for the Northern District of California on June 30, 2011 in *Wyrzykowski v. County of Marin, et al.*, No. C 11-03239 SI; (6) the District Court's January 8, 2012 order dismissing the plaintiff's action in *Wyrzykowski v. County of Marin, et al.*, No. C 11-03239 SI; (7) the Ninth Circuit Court of Appeal's March 12, 2012 order dismissing the plaintiff's appeal of the District Court's January 8, 2012 order; (8) the United States Supreme Court's October 7, 2013 notice that the plaintiff's petition for writ of certiorari is denied; (9) the third amended complaint that the plaintiff filed in Marin County Superior Court on October 9, 2012 in *Wyrzykowski v. County of Marin, et al.*, No. CIV-110-3274; (10) the Marin County Superior Court's July 11, 2014 order on the defendants' motion for judgment on the pleadings; (11)

which gave rise to the claim," the plaintiff wrote: "ethnic discrim., retaliatory discrim., equal protection, oppression, deprivation of rights – color of law, abuse of power, embezzlement, extortion of public property – tax funds, mail/wire fraud, RICO, systemic public corruption, malfeasance, negligent supervision, culture – customs, forger of documents, consortium, IIED, threats to life et al." (*Id.*) When asked why the County of Marin is responsible for the alleged injury, damage or loss, the plaintiff wrote: "The Board–County is allowing, permitting, sheltering, abetting, accomplicing fraud, extortion, corruption, et al. Roy Given is County Tax Collector, Treasurer, Finance Dir., Public Administrator." (*Id.*) And when asked the name or names of the County of Marin employee or employees who caused the alleged injury, damage or loss, the plaintiff wrote, "Roy Given." (*Id.*) The plaintiff did not provide any factual allegations on the claim form. (*See id.*)

On February 22, 2014, the Office of the County Counsel rejected the plaintiff's claim. (Second Amended Complaint ¶¶ 14, 21, 73; RJN, Ex. D, ECF No. 20.)

II. PLAINTIFF'S PRIOR ACTIONS

According to the documents submitted by the defendants for judicial notice, the plaintiff filed prior actions regarding the taxes owed on his properties since 2002.

On June 30, 2011, the plaintiff filed a complaint in this district against the County of Marin, Michael Smith, Mr. Given, and Ms. Clark in which he made allegations nearly identical to those made here. (RJN, Ex. E, ECF No. 20.) That action primarily concerned his failure to file property taxes on Property #28. (*See id.* at ¶ 56, ECF No. 20-2 at 22.) Judge Illston dismissed his action without prejudice and without leave to amend on January 8, 2012. (RJN, Ex. F, ECF No. 20.) The

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the petition for a writ of mandate that the plaintiff filed with the California Court of Appeal on August 28, 2014; (12) the California Court of Appeal's September 5, 2014 and December 10, 2014 orders denying the plaintiff's petition for a writ of mandate; (13) the Marin County Superior Court's notice that trial will begin on January 9, 2015; (14) plaintiff Keiki Fujita's July 8, 2014 application to proceed *in forma pauperis* in *Fujita v. County of Marin Board of Supervisors, et al.*, No. C14-03093 NC; and (15) Keiki Fujita's October 10, 2014 notice of voluntary dismissal in *Fujita v. County of Marin Board of Supervisors, et al.*, No. C14-03093 NC; and (16) the Marin County Superior Court's January 30, 2015 order granting judgment in favor of the defendants in *Wyrzykowski v. County of Marin, et al.*, No. CIV-110-3274. (*See* RJN, Exs. A-O, ECF No. 20; Second RJN, ECF No. 39, Ex. P, ECF No. 39.) The court did so. (3/23/2015 Order, ECF No. 43 at 3 n.3.)

plaintiff unsuccessfully appealed to the Ninth Circuit and the U.S. Supreme Court. (RJN, Exs. G, H, ECF No. 20.)

Also on June 30, 2011, the plaintiff filed a complaint in Marin County Superior Court (the "Superior Court Action") against the County of Marin, the Board of Supervisors, Michael Smith, Mr. Given, Ms. Clark, Susan Adams, Judy Arnold, Steve Kinsey, Sandy Laird, Chris Sciocchetti, Katherine Haley, and Dolores Reinhardt. That action, too, primarily concerned his failure to file property taxes on Property #28. (*See* RJN, Ex. I, ECF No. 20.) He brought the following 32 claims: (1) assault; (2) battery; (3) intentional infliction of emotional distress; (4) free speech retaliation; (5) ethnic discrimination; (6) violation of his right to association; (7) unconstitutional policy, customs, and procedures; (8) violation of his personal rights; (9) retaliatory discrimination; (10) conspiracy against rights; (11) deprivation of rights under color of law; (12) abuse of power; (13) honest services; (14) fraudulent contract; (15) mail and wire fraud; (16) civil RICO; (17) [none]; (18) fraud; (19) perjury; (20) systematic public corruption; (21) malfeasance in office; (22) official misconduct; (23) negligent supervision; (24) unconstitutional taking; (25) forgery of documents; (26) extortion and embezzlement of funds; (27) violation of the revenue and taxation code; (28) fraudulent concealment; (29) violation of due process; (30) defamation, libel, and slander; (31) violation of equal protection; (32) oppression; and (33) threats and threats to life.[3] (*See id.*)

The defendants thereafter moved for judgment on the pleadings as to all of the plaintiff's claims except for his 4th and 31st claims. (*See* RJN, Ex. J, ECF No. 20.) On July 11, 2014, the Marin County Superior Court granted the defendants' motion, dismissed without prejudice the plaintiff's 14th claim, and dismissed with prejudice the rest. (*Id.*) The plaintiff did not re-allege his 14th claim. (*See* Second RJN, Ex. P, ECF No. 39.)

On January 9, 2015, the case proceeded to a bench trial on the plaintiff's 4th claim (free speech retaliation) and 31st claim (violation of equal protection). (*See* RJN, Ex. M, ECF No. 20; Second RJN, Ex. P, ECF No. 39.) The plaintiff made an opening statement, but declined to call witnesses,

[3] The plaintiff brought only 32 claims, but he numbered them as claims 1 through 33. As the court noted above, he failed to bring a 17th claim. The court keeps the plaintiff's numbering, though, because the Marin County Superior Court referred to his claims by his numbers.

introduce any evidence, or make further statements to the court. (*See* Second RJN, Ex. P, ECF No. 39.) At the close of the plaintiff's case in chief, the defendants moved for judgment under California Code of Civil Procedure 631.8 on the basis that the plaintiff had failed to establish any evidence to support his claims. (*See id.*) In light of the plaintiff's decision not to introduce evidence, on January 30, 2015, the court found that the plaintiff had not established the required elements of his claims and granted the defendants' motion and entered judgment in their favor. (*Id.*)

III. PROCEDURAL HISTORY

The plaintiff filed his original Complaint in this action on August 22, 2014. (Complaint, ECF No. 1.) After dismissing the plaintiff's subsequently filed First Amended Complaint upon the defendants' motion, the plaintiff filed the operative Second Amended Complaint. (Second Amended Complaint, ECF No. 44.) In it, the plaintiff brings the following eleven claims: (1) violation of his Fourteenth Amendment procedural due process rights (against all defendants except the County of Marin); (2) violation of his Fourteenth Amendment right to equal protection under the law (against the County of Marin and the Board of Supervisors); (3) municipal liability under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) and *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (against the County of Marin and the Board of Supervisors); (4) supervisory liability under *Monell* (against Ms. Adams, Arnold, Kinsey, Rice, and Sears and Mr. Given); (5) violation of California's Bane Act, Cal. Civ. Code § 52.1 (against all defendants except the County of Marin); (6) "theft of honest services, abuse of power, and color of law" (against all defendants except the County of Marin); (7) fraud (against all defendants); (8) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964, based on predicate crimes of mail and wire fraud (against all defendants); (9) violation of RICO, based on predicate crimes of embezzlement and extortion (against all defendants except the County of Marin); (10) intentional infliction of emotional distress (against all defendants except the County of Marin); and (11) loss of consortium (against all defendants except the County of Marin). (*Id.* ¶¶ 97-230.)

On April 27, 2015, the defendants filed a motion to dismiss the Second Amended Complaint. (Motion to Dismiss, ECF No. 45.) The plaintiff filed an opposition on May 26, 2015, and the defendants filed a reply on May 29, 2015. (Opposition, ECF No. 59; Reply, ECF No. 60.)

ANALYSIS

I. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must therefore provide a defendant with "fair notice" of the claims against it and the grounds for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation and citation omitted).

A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does not contain enough facts to state a claim to relief that is plausible on its face. *See Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 557). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted).

In considering a motion to dismiss, a court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *See id*. at 550; *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007).

If the court dismisses the complaint, it should grant leave to amend even if no request to amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)). But when a party repeatedly fails to cure deficiencies, the court may order dismissal without leave to amend. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (affirming dismissal with prejudice where district court had

instructed *pro se* plaintiff regarding deficiencies in prior order dismissing claim with leave to amend).

II. DISCUSSION

A. Mr. Burroughs and Mr. Walsh Are Not Served Defendants

As an initial matter, the court notes that the plaintiff listed former County of Marin finance directors Greg Burroughs and Mark Walsh as defendants to his supervisory liability claim. (Second Amended Complaint, ECF No. 4 at 29.) The plaintiff, however, did not list Mr. Burroughs and Mr. Walsh as defendants in the caption of the Second Amended Complaint. (*Id.* at 1.) Moreover, the plaintiff mentions Mr. Burroughs and Mr. Walsh in the Second Amended Complaint only to allege that Mr. Given engaged in his conduct "behind their backs." (*Id.* ¶¶ 53, 144.) For this reason, the court did not direct the defendants' counsel to decide whether to accept service on their behalf, and the defendants' counsel thus did not do so. (*See* 5/12/2015 Order, ECF No. 52; 5/18/2015 Statement, ECF No. 53.) This means that Mr. Burroughs and Mr. Walsh have not been served with the Second Amended Complaint and thus are not "parties" to this action at this time. *Cf. Ornelas v. De Frantz*, C 00-1067 JCS, 2000 WL 973684, at *2 n.2 (N.D. Cal. June 29, 2000) (unserved defendants are not "parties" for consent purposes) (citing *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995)).

B. The Defendants Have Not Shown that the Plaintiff's Claims Are Barred by California's Claim Preclusion Doctrine

A defendant may raise the affirmative defense of res judicata by way of a motion to dismiss under Rule 12(b)(6). *See Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). Under 28 U.S.C. § 1738, federal courts are required to give full faith and credit to state court judgments. *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 336 (2005); *Brodheim v. Cry*, 584 F.3d 1262, 1268 (9th Cir. 2009). To determine the preclusive effect of a state court judgment, federal courts look to state law. *Heinrichs v. Valley View Dev.*, 474 F.3d 609, 615 (9th Cir. 2007).

While the United States Supreme Court uses the term "res judicata" to refer collectively to claim preclusion and issue preclusion, *see, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), the California Supreme Court generally uses the term "res judicata" to refer to claim preclusion, and the term "collateral estoppel" to refer to issue preclusion, *see Boeken v. Philip Morris USA, Inc.*, 48 Cal.

4th 788, 797 (Cal. 2010) (distinguishing between the two "aspects" that compose California law's preclusion doctrine). The California Supreme Court has explained it thusly:

> "As generally understood, '[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.' [Citation.] The doctrine 'has a double aspect.' [Citation.] 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' [Citation.] 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment . . . "operates"' in 'a second suit . . . based on a different cause of action . . . "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." [Citation.]' [Citation.] 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]'" (*People v. Barragan* (2004) 32 Cal. 4th 236, 252–253, 9 Cal. Rptr. 3d 76, 83 P.3d 480.)

Boeken, 48 Cal. 4th at 797.

Here, the defendants argue that California's claim-preclusion doctrine bars all of the plaintiff's claims except his claim for loss of consortium. (Motion to Dismiss, ECF No. 45 at 12-15.) Two of the three prerequisite elements are met: Mr. Kinney (the party against whom the claim preclusion doctrine is being asserted) was a party to the Superior Court Action, and the Superior Court Action resulted in a final judgment on the merits. Thus, the inquiry now focuses on whether the claims raised in this action (with the exception of the plaintiff's claim for loss of consortium) are identical to the claims litigated in the Superior Court Action.

"To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.'" *Id.* (quoting *Slater v. Blackwood*, 15 Cal.3d 791, 795 (Cal. 1975)). The California Supreme Court has explained this theory as follows:

> Under this theory, "[a] cause of action . . . arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. 'Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term . . . .'" (*McKee v. Dodd* (1908) 152 Cal. 637, 641, 93 P. 854.)
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> "In California the phrase 'cause of action' is often used indiscriminately . . . to mean counts which state [according to different legal theories] the same cause of action . . . ." (*Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 Cal. 2d

> 845, 847, 13 Cal. Rptr. 194, 361 P.2d 914.) But for purposes of applying the doctrine of res judicata, the phrase "cause of action" has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. (*See Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal. 4th 854, 860, 21 Cal. Rptr.2d 691, 855 P.2d 1263.) As we explained in *Slater v. Blackwood, supra*, 15 Cal. 3d at page 795, 126 Cal. Rptr. 225, 543 P.2d 593: "[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief.' [Citations.]" Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. (*Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 954, 160 Cal. Rptr. 141, 603 P.2d 58.)

Id. at 797-98.

In their motion, the defendants argue that the plaintiff seeks in this action "compensation for the same harm" that was the basis for the Superior Court Action. (Motion to Dismiss, ECF No. 45 at 14.) The court disagrees. As the plaintiff made clear in the Second Amended Complaint, this action concerns the defendants' actions with respect to Property #01. Those actions occurred since 2010. The Superior Court Action, which was filed in 2011, concerned the defendants' actions with respect to Property #28. Most of those actions occurred between 2002 and 2011. Even though the legal claims that the plaintiff brings in this action are the same legal claims that he brought in the Superior Court Action, he brings them with respect to different properties entirely.

Recognizing this, the defendants say that the plaintiff cannot simply "re-brand his claims as also occurring" with respect to Property #01, but they cite no authority for this argument, and the court has found none, either. (*See id.*) Although many of the facts the plaintiff alleged in his Second Amended Complaint do concern the defendants' conduct with respect to Property #28, those allegations are for context and do not form the basis for his legal claims. (*See* Second Amended Complaint ¶ 25 (alleging, for example, that the defendants' past conduct with respect to Property #28 shows a pattern of racketeering activity).) And while it is true that California's claim preclusion doctrine bars "not only claims actually litigated in a prior proceeding, but also claims that could have been litigated," *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993) (citing *Busick v. Workmen's Comp. Appeals Bd.*, 7 Cal. 3d 967, 975 (Cal. 1972)),

that rule assumes that the same harm is at issue. Here it is not. As stated above, in this context and based on the authority cited above, the alleged harm to Property #01, which has not been litigated, is distinct from the alleged harm to Property #28, which has. Accordingly, the plaintiff's claims are not barred by California's claim-preclusion doctrine.

C. The Plaintiff Has Not Sufficiently Pleaded His Claims

1. Fourteenth Amendment Procedural Due Process

The plaintiff brings his first claim under 28 U.S.C. § 1983 for violation of his Fourteenth Amendment right to procedural due process. (Second Amended Complaint ¶¶ 97-105.) Essentially, the plaintiff alleges in this claim that he paid the property taxes for Property #01 by money order and that Mr. Given and Ms. Clark cashed those money orders, embezzled the money, and then labeled Property #01 as "delinquent." (*Id.* ¶ 99(c)-(f).) He also alleges that he tried to resolve the matter "dozens of times at all possible levels" and even filed an administrative claim, which the County of Marin denied using "boilerplate" language. (*Id.* ¶¶ 21, 99(o).)

"A section 1983 claim based upon procedural due process . . . has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). As the defendants point out, the plaintiff has not shown what process he was due and how he was deprived of it. He alleges that he filed an administrative claim and that the County of Marin denied the claim, but he does not allege why the claim process was deficient. Simply alleging that the County of Marin denied his claim using "boilerplate" language is not enough to state a claim to relief that is plausible on its face. Accordingly, the court dismisses without prejudice the plaintiff's first claim for violation of procedural due process.

2. Fourteenth Amendment Equal Protection

The plaintiff brings his second claim under 28 U.S.C. § 1983 for violation of his Fourteenth Amendment right to equal protection of the laws. (Second Amended Complaint ¶¶ 106-116.) The plaintiff alleges that he "was repeatedly single[d] out[and] treated differently [from] the citizenry" by Mr. Given and Ms. Clark. (*Id.* ¶ 109; *see also id.* ¶ 99(g); *but see id.* ¶ 99(g) (alleging that both "[his] and others' so situated funds[and] property were repeatedly differently treated").) "[R]ather

than treating [the plaintiff], [his] funds, interests and property equally as the main body of the Public, [Mr. Given, Ms. Clark and their team] repeatedly with hostility and violence abused [him], injured [him], ruined [his] health, love, [and] life [when they] repeatedly embezzled [his] property/funds[,] and extorted under their RICO Racket." (*Id.* ¶ 110.)

From these allegations, it appears that the plaintiff bring a so-called "class of one" equal-protection claim. "The Supreme Court has recognized that 'an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called "class of one."'" *Gerhart v. Lake County, Montana*, 637 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008)). "To succeed on [a] 'class of one' claim, [a plaintiff] must demonstrate that the [defendant]: (1) intentionally (2) treated [the plaintiff] differently than other similarly situated [individuals], (3) without a rational basis." *Id.* at 1022 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008)). A plaintiff, however, need not show that the defendant was motivated by subjective ill will. *Id.* (citing *Willowbrook*, 528 U.S. at 565).

The defendants correctly point out that the plaintiff has not alleged a sufficient factual basis regarding how he was denied equal protection, how he was intentionally treated differently than others similarly situated, or why the defendants' actions were not rational. (Motion to Dismiss, ECF No. 45 at 17.) He says he was "singled out," but to the extent he is challenging the County of Marin's tax collection processes, he does not allege how the County of Marin's attempts to tax his real property and to assess penalties and interest for delinquent taxes are different than how it treats others. To the extent that he contends he was treated differently because Mr. Given and Ms. Clark do not embezzle and extort money from other citizens, his allegations are not enough to state a claim to relief that is plausible on its face. Simply put, his allegations about Mr. Given's and Ms. Clark's embezzlement and extortion are confusing. He alleges that they cashed his money orders but there are no allegations that they used the money for personal use or did not deposit the money into the account for his property taxes. Accordingly, the court dismisses without prejudice the plaintiff's second claim for violation of his Fourteenth Amendment right to equal protection of the laws.

3. Municipal Liability

The plaintiff brings his third claim under 28 U.S.C. § 1983 for municipal liability under *Monell* and based on a failure-to-train theory under *City of Canton*. (Second Amended Complaint ¶¶ 117-126.)

Local governments are "persons" subject to liability under 42 U.S.C. § 1983 where official policy or custom causes a constitutional tort. *See Monell*, 436 U.S. at 690. Nonetheless, a city or county may not be held vicariously liable for the unconstitutional acts of its employees under the theory of *respondeat superior*. *See Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 691; *Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir. 1995). To impose municipal liability under § 1983 for a violation of constitutional rights, a plaintiff must show: (1) that the plaintiff possessed a constitutional right of which he or she was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional rights; and (4) that the policy is the moving force behind the constitutional violation. *See Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

Liability based on a municipal policy may be satisfied in one of three ways: (1) by alleging and showing that a city or county employee committed the alleged constitutional violation under a formal governmental policy or longstanding practice or custom that is the customary operating procedure of the local government entity; (2) by establishing that the individual who committed the constitutional tort was an official with final policymaking authority, and that the challenged action itself was an act of official governmental policy which was the result of a deliberate choice made from among various alternatives; or (3) by proving that an official with final policymaking authority either delegated policymaking authority to a subordinate or ratified a subordinate's unconstitutional decision or action and the basis for it. *See Fuller*, 47 F.3d at 1534; *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992).

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011); *see also City of Canton*, 489 U.S. at 388-92. "A municipality's culpability for a deprivation of rights is at its most

tenuous where a claim turns on a failure to train." *Id.* (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 822–823 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training'" is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell* ")). "To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (quoting *City of Canton*, 489 U.S. at 388). Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *City of Canton*, 489 U.S. at 389; *see Connick*, 131 S.Ct. at 1359-60.

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410 (1997). "Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Connick*, 131 S.Ct. at 1360 (citing *Bryan Cnty.*, 520 U.S. at 407). "The city's 'policy of inaction' in light of notice that its program will cause constitutional violations 'is the functional equivalent of a decision by the city itself to violate the Constitution.'" *Id.* (quoting *City of Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part)). "A less stringent standard of fault for a failure-to-train claim 'would result in *de facto respondeat superior* liability on municipalities . . . .'" *Id.* (quoting *City of Canton*, 489 U.S. at 392); *see also Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (opinion of Brennan, J.) ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials . . . ."). Thus, "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick*, 131 S.Ct. at 1360 (quoting *Bryan County*, 520 U.S. at 409). "Policymakers' 'continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the deliberate indifference—necessary to trigger municipal liability.'" *Id.* (quoting *Bryan Cnty.*, 520 U.S. at 407) (internal quotation marks omitted). "Without notice that a

course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id.*

The plaintiff's claim fails. First, it fails because he has not shown that he possessed a constitutional right and that he was deprived of that right. As explained above, the plaintiff has not alleged plausible procedural due process or equal protection claims, and those are the alleged constitutional violations underlying his municipal liability claim. Second, the plaintiff does not allege facts regarding the County of Marin's failure to train its employees. While previous Ninth Circuit authority "require[d] plaintiffs in civil rights actions against local governments to set forth no more than a bare allegation that government officials' conduct conformed to some unidentified government policy or custom," the Ninth Circuit explicitly found that authority to be overruled post-*Iqbal*. *See AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637 (2012) (citations omitted). Indeed, the new standard, which applies to all claims, including ones under *Monell*, is this:

> "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation."

Id. (quoting *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011). Using this new standard, the Ninth Circuit in *County of Tulare* found the plaintiff's allegations "that Defendants 'maintained or permitted an official policy, custom or practice of knowingly permitting the occurrence of the type of wrongs' that [the plaintiff] elsewhere alleged" because the plaintiff "did not put forth additional facts regarding the specific nature of this alleged 'policy, custom or practice,' other than to state that it related to 'the custody, care and protection of dependent minors. . . ." *Id.* (footnote omitted). The plaintiff's *Monell*-related allegations are similarly deficient. They are mere recitations of the basic elements of a *Monell* claim, and they do not provide sufficient detail to suggest a plausible claim for relief. Accordingly, the court dismisses without prejudice the plaintiff's third claim for municipal liability under *Monell* and *City of Canton*.

4. Supervisory Liability

The plaintiff brings his fourth claim under 28 U.S.C. § 1983 for supervisory liability. (SAC ¶¶

129-144.) "A defendant may be held liable as a supervisor under § 1983 if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (internal quotation marks and citation omitted). "A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." *Id*. at 1208 (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998)). To adequately plead such a claim, "allegations in a complaint . . . may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Id*. at 1216. These factual allegations "must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id*.

The plaintiff's claim fails because he has not shown an underlying constitutional violation. As explained above, the plaintiff has not alleged plausible procedural due process or equal protection claim, and those are the constitutional violations underlying his municipal liability claim. To the extent that he alleges a different underlying constitutional violation, *see* Second Amended Complaint ¶¶ 133 (alleging that the defendants "deprived the citizenry of their Constitutional Rights" generally), his claim is insufficient. Accordingly, the court dismisses without prejudice the plaintiff's fourth claim for supervisory liability.

5. California Civil Code § 52.1

The plaintiff's fifth claim is for violation of California's Bane Act, Cal. Civ. Code. § 52.1. (*Id.* ¶¶ 145-157.) The Bane Act prohibits interference or attempted interference with a person's rights under federal or California law by "threats, intimidation, or coercion." Cal. Civ. Code § 52.1(a). The Bane Act authorizes a claim for relief "against anyone who interferes, or tries to do so, by threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured by federal or state law." *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 331 (Cal. 1998). To obtain relief under this statute, a plaintiff must prove that a defendant tried to, or did, prevent the plaintiff from doing

something that he had the right to do under the law, or to force plaintiff to do something that he was not required to do under the law. *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal. App. 4th 860, 883 (Cal. Ct. App. 2007) (citing *Jones*, 17 Cal. 4th at 334).

It appears that the plaintiff's Bane Act allegations are based on the defendants' alleged fraudulent extortion and embezzlement of his tax payments and their singling of him out for different treatment.[4] As explained above, the plaintiff's allegations about Mr. Givens's and Ms. Clark's embezzlement and extortion do not raise a plausible claim for relief, and the court has dismissed as insufficient the plaintiff's procedural due process equal protection claims. His Bane Act claim is premised on the same insufficient allegations. Accordingly, the court dismisses without prejudice the plaintiff's fifth claim for violation of the Bane Act.

The defendants argue that the court should dismiss this claim with prejudice. They point out that, to bring a Bane Act claim, the plaintiff must have first filed an administrative claim adequately alleging the wrongs he alleges here. As one federal district court has explained:

> As a prerequisite for money damages litigation against a public entity, the California Tort Claims Act requires presentation of the claim to that entity. *See* Cal. Gov. Code § 945.4; *State of California v. Superior Court*, 32 Cal. 4th 1234, 1240-44, 13 Cal. Rptr.3d 534, 90 P.3d 116 (2004) ("*Bodde*"). Compliance with the Tort Claims Act is an element of a cause of action against a public entity. *Willis v. Reddin*, 418 F.2d 702, 704 (9th Cir. 1969); *Bodde*, 32 Cal. 4th at 1240, 13 Cal. Rptr.3d 534, 90 P.3d 116. As such, "compliance with the claims statute is mandatory and failure to file a claim is fatal to the cause of action." *Hacienda La Puente Unified School Dist.*

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[4] Federal district courts applying the Bane Act have reached different conclusions about the conduct necessary to support a claim. One line of cases has held that the coercive conduct must be separate from the alleged constitutional violation. *See Rodriguez v. City of Fresno*, 819 F. Supp. 2d 937, 953 (E.D. Cal. 2011) (holding that "in order to maintain a claim under the Bane Act, the coercive force applied against a plaintiff must result in an interference with a separate constitutional or statutory right. It is not sufficient that the right interfered with is the right to be free of the force or threat of force that was applied."). Other courts have concluded that a Bane Act claim may be based on the same coercive conduct as a constitutional claim. *See Bass v. City of Fremont*, No. C12-4943 THE, 2013 WL 891090, at *5-6 (N.D. Cal. Mar. 8, 2013) (holding that the Bane Act applies where the underlying statutory or constitutional violation involved threats, intimidation, or coercion, without a separate showing of coercion). In the absence of binding authority, the court finds persuasive the line of cases permitting Bane Act claims based on the same conduct as an underlying constitutional violation. As discussed in *Bass*, this reading comports with the legislative history and the relatively broad statutory interpretation advanced in *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 823, 842 (2004). *See Bass*, 2013 WL 891090, at *5.

> *v. Honig*, 976 F.2d 487, 494 (9th Cir. 1992); *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 455, 115 Cal. Rptr. 797, 525 P.2d 701 (1974); *see also Bodde*, 32 Cal. 4th at 1240, 13 Cal. Rptr.3d 534, 90 P.3d 116. In federal court, the failure to allege facts that either demonstrate or excuse compliance with the California Tort Claims Act will subject a state law claim to dismissal. *See Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470, 1477 (9th Cir. 1995); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 (9th Cir. 1988); *cf. Bodde*, 32 Cal.4th at 1239, 13 Cal. Rptr. 3d 534, 90 P.3d 116.

Young v. City of Visalia, 687 F. Supp. 2d 1141, 1152 (N.D. Cal. 2009).

The defendants argue that the plaintiff's administrative claim did not include the factual basis for his Bane Act claim, namely, that Mr. Given and Ms. Clark defrauded him by forcing him to enter into a fraudulent contract and thereafter extorting and embezzling money from him. The court disagrees. The plaintiff did mention extortion and embezzlement in his claim, and although he did not specifically mention that some acts in furtherance of the extortion and embezzlement occurred while he was in Nevada, that is good enough.

The defendants also argue that they are immune from liability under California Government Code § 860.2. That section provides immunity to public entities and public employees for injuries caused by "[i]nstituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax" or "[a]n act or omission in the interpretation or application of any law relating to a tax." The problem with addressing this now is that the plaintiff's allegations are still in flux. If the plaintiff can sufficiently allege a claim based on, say, extortion and embezzlement, then those acts would not be incidental to the assessment or collection of a tax. For now, though, the plaintiff simply has not alleged a plausible claim; the court thus defers ruling on this argument at this time. The defendants may raise it again in a subsequent motion to dismiss.

6. Theft of Honest Services, Abuse of Power, and Color of Law

The plaintiff's sixth claim is for "theft of honest services, abuse of power, and color of law." (Second Amended Complaint ¶¶ 158-166.) As the defendants note, there is no basis for these claims. The plaintiff's reference to "honest services" may be a reference to the federal criminal law's prohibition of using the mails and wires in furtherance of fraudulent deprivations of "the intangible right of honest services," *see* 18 U.S.C. §§ 1341, 1343, 1346, but a civil plaintiff has no right to bring a claim under this criminal statute. If one assumes that the plaintiff intends to assert it as a

predicate for a civil RICO claim, as discussed below, that claim fails too. And the plaintiff cites no basis for his "abuse of power" or "color of law" claims either. Accordingly, the court dismisses with prejudice the plaintiff's sixth claim for "theft of honest services, abuse of power, and color of law."

7. Fraud

The plaintiff's seventh claim is for fraud. (Second Amended Complaint ¶¶ 167-180.) It is based on the "fraudulent contract" that Mr. Given and Ms. Clark "induced" him to enter into under threats and duress. (*Id.* ¶ 167.) The plaintiff alleges that he entered into this contract on June 22, 2007. (*Id.*)

The defendants argue that, to bring this claim, the plaintiff needed to have filed an administrative claim without six months of the accrual of the claim. This is true. As one court in this district has explained:

> California Government Code Section 945.4 provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with . . . Section 910 . . . until a written claim therefore has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board. . . ." Section 910, in turn, requires that the claim state the "date, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and provide "[a] general description of the . . . injury, damage or loss incurred so far as it may be known at the time of presentation of the claim." A claimant has six months from the date of claim denial to file a lawsuit. Cal. Gov't Code § 945.6(a)(1); *see Castro v. Sacramento County. Fire Prot. Dist.*, 47 Cal. App. 4th 927, 929 (1996) (affirming trial court's dismissal of case filed 19 days after the 6–month limitations period, despite attorney error being the cause).

Chan-Sosa v. Cal. Highway Patrol, No. 15-cv-00008-SI, 2015 WL 2173720, at *2 (N.D. Cal. May 8, 2015). Here, the defendants say that the plaintiff's "fraudulent contract" claim accrued on the day he entered into it—June 22, 2007. This means that he must have presented an administrative claim to the County of Marin within six months later, but there is no indication that he did so. Accordingly, the court dismisses with prejudice the plaintiff's seventh claim for fraud.

8. Civil RICO

The plaintiff's eighth and ninth claims are for violation of the civil RICO statute, 18 U.S.C. § 1964(c). (Second Amended Complaint ¶¶ 181-200.) The elements of a civil RICO claim are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (internal quotation marks omitted); *see also* 18

U.S.C. §§ 1962(c), 1964(c).

Although the defendants make several argument, their argument that the plaintiff cannot allege a "pattern" of racketeering activity is persuasive and sufficient on its own to warrant dismissal of the plaintiff's claim.

> To establish a pattern of racketeering activity, a plaintiff's allegations must show that the predicate acts are related ("relatedness requirement"), "and that they amount to or pose a threat of continued criminal activity" ("continuity requirement"). *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (emphasis in original).
>
> A plaintiff may satisfy the continuity requirement by alleging either "closed-ended" or "open-ended" continuity. Closed-ended continuity involves "a series of related predicates extending over a substantial period of time." *H.J.*, 492 U.S. at 242; *see also Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992). Open-ended continuity involves "a specific threat of repetition extending indefinitely into the future," or predicate acts that "are part of an ongoing entity's regular way of doing business." *H.J.*, 492 U.S. at 242; *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447, 450 (9th Cir. 1991).
>
> Where the predicate acts were designed to bring about a single event or injury to a single plaintiff, continuity is not sufficiently plead. *See, e.g., Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1364 (9th Cir. 1987) (two predicate acts aimed at fraudulent inducement to enter a contract); *Religious Technology Center*, 971 F.2d at 366 (only goal of defendants was successful prosecution of their state lawsuit); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992) (defendants' acts served single purpose of impoverishing plaintiff).
>
> In *Sever*, a single plaintiff brought suit against his former employers alleging that they had fired him, blacklisted him, and induced a subsequent employer to fire him after he wrote articles criticizing the defendant former employers and testified before Congress to their economic detriment. The plaintiff's RICO claim alleged that the defendants engaged in a pattern of racketeering activity that damaged his ability to obtain employment. The lower court dismissed the plaintiff's fourth amended complaint for failure to state a RICO claim, in part because he had failed to allege a pattern of racketeering. *Id.* at 1533. The Ninth Circuit affirmed, holding, among other things, that the allegations did not satisfy the continuity requirement set out in *H.J.*, noting that there was no suggestion that the defendants would have harmed any other Congressional witnesses or that the alleged practices had become a regular way of conducting business. *Id.* In addition, the Court noted that "there was but a single victim involved." *Id.* at 1535.

Fotinos v. Fotinos, No. C 12–953 CW, 2013 WL 1195644, at *7 (N.D. Cal. Mar. 22, 2013). There is but a single victim involved here, too—the plaintiff. All of his allegations are that the defendants have engaged in illegal activities to harm him and him alone. Indeed, this is why he brings an equal protection claim. And as the only victim, the plaintiff as a matter of law cannot show that the defendants engaged in a pattern of racketeering activity. Simply put, this is not a civil RICO case.

Accordingly, the court dismisses with prejudice the plaintiff's eighth and ninth claims for violation of the civil RICO statute.

9. Intentional Infliction of Emotional Distress

The plaintiff's tenth claim is for intentional infliction of emotional distress. (Second Amended Complaint ¶¶ 201-220.) In California, "[a] cause of action for intentional infliction of emotional distress exists when there is (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Kelley v. Conco Companies*, 196 Cal. App. 4th 191, 215 (2011). "A defendant's conduct is outrageous when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Id.* (internal quotation marks omitted).

The plaintiff's claim fails. First, his claim is based on the conduct supporting his other claims, but the court has dismissed those claims because his allegations do not support plausible claims for relief. Second, even accepting his allegations to be true, the plaintiff cites nothing to show that the conduct rises to the necessary level of outrageousness. In his opposition, the plaintiff points to his allegations regarding the severity of his injuries, but this misses the point. The point is that he does not provide authority showing that the defendants' conduct was extreme and outrageous. Accordingly, the court dismisses with prejudice the plaintiff's tenth claim for intentional infliction of emotional distress.

10. Loss of Consortium

The plaintiff's eleventh claim is for loss of consortium. (Second Amended Complaint ¶¶ 221-230.) A loss of consortium claim seeks "to compensate for the loss of [ ] companionship, affection and sexual enjoyment of one's spouse, and it is clear that these can be lost as a result of psychological or emotional injury as well as from actual physical harm." *Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 932 (1980). To state a claim for loss of consortium, a "marital spouse must allege that their partner suffered an injury that is 'sufficiently serious and disabling to raise the inference that the conjugal relationship is more than superficially or temporarily impaired.'" *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1039 (9th Cir. 2008) (quoting

Molien, 27 Cal.3d at 932-33). While a physical injury may be more obvious, "a marital relationship can be grievously injured when one spouse suffers a traumatically induced neurosis, psychosis, chronic depression, or phobia." *Anderson v. Northrop Corp.*, 203 Cal. App. 3d 772, 780 (Cal. Ct. App. 1988) (quoting *Molien*, 27 Cal. 3d at 933). A claim for loss of consortium does not stand on its own, but is recognized as a "derivative of other injuries [ ] not an injury in and of itself." *Thomsen v. Sacramento Metro. Fire Dist.*, No. 2:09-CV-01108 FCD, 2009 WL 8741960, at *13 (E.D. Cal. Oct. 20, 2009) (internal citation and quotations omitted).

The plaintiff's claim fails because he alleges that he is the injured party and he also is the party bringing the claim. He is not the marital spouse whose partner suffered an injury. His wife is the marital spouse, and he is the partner who suffered an injury. Accordingly, the court dismisses with prejudice the plaintiff's eleventh claim for loss of consortium.

CONCLUSION

Accordingly, the court grants the defendant's motion. The plaintiff's first, second, third, fourth, and fifth claims are dismissed without prejudice, and his sixth, seventh, eighth, ninth, tenth, and eleventh claims are dismissed with prejudice. In light of the plaintiff's notice of unavailability, the plaintiff may file a third amended complaint by August 7, 2015.

This order resolves ECF No. 45.

IT IS SO ORDERED.

Dated: June 9, 2015

LAUREL BEELER
United States Magistrate Judge