

1 IN THE UNITED STATES DISTRICT COURT
2
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA

4 No. C 10-04653 CW
5 RAYMOND E. HORNE,
6 Plaintiff,
7 v.
8 DISTRICT COUNCIL 16 INTERNATIONAL
9 UNION OF PAINTERS AND ALLIED TRADES
10 and DOUGLAS CHRISTOPHER,
11 Defendants.

ORDER DENYING
PLAINTIFF'S MOTION
TO REMAND (Docket
No. 8) AND GRANTING
DEFENDANTS' MOTION
TO DISMISS
(Docket No. 5)

11 Plaintiff Raymond E. Horne alleges that Defendants District
12 Council 16 International Union of Painters and Allied Trades
13 (District Council 16) and Douglas Christopher violated California's
14 Fair Employment and Housing Act (FEHA) by discriminating against
15 him on the basis of race and retaliating against him for
16 complaining about race discrimination. Plaintiff moves to remand
17 his action to Alameda County Superior Court and requests attorneys'
18 fees for improper removal. Defendants oppose Plaintiff's motion
19 and move to dismiss his action or, in the alternative, for a more
20 definite statement. Plaintiff opposes Defendants' motion. The
21 motions were heard on December 23, 2010. Having considered oral
22 argument and the papers submitted by the parties, the Court DENIES
23 Plaintiff's motion to remand and GRANTS Defendants' motion to
24 dismiss. Plaintiff is granted leave to amend his complaint.

25 BACKGROUND

26 The following allegations are contained in Plaintiff's
27 complaint.
28

1 Plaintiff is an African-American male and resides in
2 California. District Council 16, which is headquartered in
3 Livermore, California, is comprised of sixteen local unions of
4 drywall finishers, glaziers, painters and floor coverers.

5 Plaintiff is a member of Glaziers Local Union No. 718, which
6 is a part of District Council 16. In 2004, Plaintiff joined the
7 union's executive board. Since 2006, Plaintiff has been the
8 union's recording secretary.

9 In February, 2009, Plaintiff applied for an organizer position
10 with District Council 16, which is a full-time position with
11 benefits. A few weeks later, he interviewed with John Sherak, the
12 union's director of organizing. On or about April 1, 2009,
13 Plaintiff was notified that another applicant had been chosen for
14 the position. The successful candidate was Mark Shelly, a white
15 male who had not actively participated in the union before he was
16 selected to be an organizer.

17 On February 19, 2010, Plaintiff again applied for an organizer
18 position with District Council 16. On or about July 6, 2010,
19 Plaintiff was informed that he was not selected for the position.
20 The successful candidate was Mike Dufford, a white male "who had an
21 insignificant history of service with Glaziers Local Union #718"
22 Compl. ¶ 14. Plaintiff believes that Defendant Douglas
23 Christopher, the business manager and secretary-treasurer of
24 District Council 16, made the decision to select Dufford.

25 On July 7, 2010, Plaintiff filed internal union charges
26 against Christopher. Plaintiff alleged that Christopher violated
27 section 2 of the Constitution of the International Union of
28 Painters and Allied Trades (IUPAT). In relevant part, section 2

1 states that an object of IUPAT is to "unite into one labor
2 organization all workers eligible for membership, regardless of
3 religion, race, creed, color, national origin, age, or sex."
4 Compl. ¶ 15. Plaintiff also charged Christopher with violating the
5 District Council 16 Bylaws, which provide that "any member who
6 discriminates against a member shall have charges preferred against
7 them." Compl. ¶ 15.¹ On July 29, 2010, District Council 16 held a
8 trial on Plaintiff's charges. On July 30, 2010, Christopher was
9 found not guilty on both counts. Plaintiff has appealed this
10 decision.

11 On or about August 5, 2010, Christopher filed an internal
12 union charge against Plaintiff, claiming that Plaintiff had
13 violated section 298 of the IUPAT Constitution. Section 298
14 provides that a union member violates the IUPAT Constitution by
15 preferring charges against another member that are "unsupported by
16 substantial evidence and motivated by bad faith or malice." Compl.
17 ¶ 17. District Council 16 held a trial on this charge on August
18 30, 2010.

19 Based on these allegations, Plaintiff filed a complaint in
20 Alameda County Superior Court on September 2, 2010. He pleads FEHA
21 claims against both Defendants for race discrimination based on the
22 July, 2010 decision not to hire him as an organizer. He also
23 brings FEHA claims for retaliation against both Defendants. In
24 particular, Plaintiff alleges that Christopher filed his August 5,
25

26 ¹ In his complaint, Plaintiff alleges that he brought charges
27 against Christopher under ¶ 18.4 of the Bylaws. Plaintiff appears
28 to have intended to plead that he brought claims under ¶ 18.3 of
the Bylaws. See Manansala Decl. in Support of Defs.' Opp'n to
Remand, Ex. B ¶ 18.3.

1 2010 charge in retaliation for Plaintiff's July 7, 2010 charges
2 concerning race discrimination. Plaintiff appears to allege that
3 District Council 16 retaliated against him by scheduling "a trial
4 of this matter." Compl. ¶ 32.

5 With respect to exhaustion of his administrative remedies,
6 Plaintiff pleads only that he "timely filed a charge of
7 discrimination" before the DFEH. Compl. ¶ 8. At the hearing on
8 the parties' motions, Plaintiff clarified that his FEHA claims do
9 not rest on District Council 16's alleged decision not to hire him
10 in April, 2009, but rather on its alleged decision not to do so in
11 July, 2010. Defendants conceded that Plaintiff has exhausted his
12 administrative remedies with respect to District Council 16's non-
13 selection decision in July, 2010.

14 Defendants removed Plaintiff's action to federal court on
15 October 15, 2010. They assert that the Court has federal question
16 jurisdiction based on Plaintiff's retaliation claims, which they
17 contend are preempted by section 301 of the Labor Management
18 Relations Act (LMRA) of 1947, 29 U.S.C. § 185. Defendants ask the
19 Court to exercise supplemental jurisdiction over Plaintiff's
20 discrimination claim under FEHA.

21 DISCUSSION

22 I. Plaintiff's Motion to Remand

23 At any time before judgment, if it appears that the district
24 court lacks subject matter jurisdiction over a case previously
25 removed from state court, the case must be remanded. 28 U.S.C.
26 § 1447(c). On a motion to remand, the scope of the removal statute
27 must be strictly construed. See Gaus v. Miles, Inc., 980 F.2d 564,
28 566 (9th Cir. 1992). "The 'strong presumption' against removal

1 jurisdiction means that the defendant always has the burden of
2 establishing that removal is proper." Id. (internal citation
3 omitted). Courts should resolve doubts as to removability in favor
4 of remanding the case to state court. Id.

5 Generally, "the well-pleaded complaint rule provides that
6 federal jurisdiction exists only when a federal question is
7 presented on the face of the plaintiff's properly pleaded
8 complaint." Hunter v. Philip Morris USA, 582 F.3d 1039, 1042 (9th
9 Cir. 2009) (citation and internal quotation marks omitted). An
10 exception to this rule is the "complete preemption" doctrine.
11 Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1107
12 (9th Cir. 2000). This "doctrine is actually a doctrine of
13 jurisdiction and is not to be confused with ordinary preemption
14 doctrine (although it is related to preemption law)." Id. Under
15 the complete preemption doctrine, the "preemptive force" of certain
16 statutes is recognized as being "so strong that they 'completely
17 preempt' an area of state law" such that "any claim purportedly
18 based on that preempted state law is considered, from its
19 inception, a federal claim" Id.

20 Section 301, which has been deemed to have such an effect,
21 provides:

22 Suits for violation of contracts between an employer and
23 a labor organization representing employees in an
24 industry affecting commerce as defined in this chapter,
25 or between any such labor organizations, may be brought
26 in any district court of the United States having
jurisdiction of the parties, without respect to the
amount in controversy or without regard to the
citizenship of the parties.

27 29 U.S.C. § 185(a). "Union constitutions are an important form of
28 contract between labor organizations" and fall within the scope of

1 section 301. Woodell v. Int'l Bhd. of Elec. Workers, 502 U.S. 93,
2 101 (1991); see also Fox v. Bakery, Confectionary, Tobacco Workers
3 & Grain Millers Int'l Union, 2010 WL 682458, at *8 (N.D. Cal.). To
4 fulfill the LMRA's purposes, "§ 301 'complete preemption' must be
5 construed to cover 'most state-law actions that require
6 interpretation of labor agreements.'" Balcorta, 208 F.3d at 1108.

7 "A state law claim is completely preempted by the LMRA when it
8 'necessarily requires the court to interpret an existing provision
9 of a [labor agreement] that can reasonably be said to be relevant
10 to the resolution of the dispute.'" Dahl v. Rosenfeld, 316 F.3d
11 1074, 1077 (9th Cir. 2003) (quoting Cramer v. Consol. Freightways
12 Inc., 255 F.3d 683, 693 (9th Cir. 2001)). Courts must narrowly
13 construe the term "interpret." Balcorta, 208 F.3d at 1108. "A
14 'reference to or consideration of terms of a [labor] agreement is
15 not the equivalent of interpreting the meaning of the terms.'" Detabali v. St. Luke's Hosp., 482 F.3d 1199, 1203 (9th Cir. 2007)
16 (quoting Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 749
17 (9th Cir. 1993)).

18
19 As noted above, Defendants argue that Plaintiff's retaliation
20 claims are preempted by section 301. Defendants maintain that they
21 have legitimate, non-retaliatory reasons for their challenged
22 conduct and that these reasons will require an interpretation of
23 the IUPAT Constitution and the District Council 16 Bylaws.² In
24 particular, Christopher asserts that his charge was based on
25 Plaintiff's violation of the IUPAT Constitution. For its part,

26
27 ² Retaliation claims under FEHA are subject to the familiar
28 burden-shifting framework established by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005).

1 District Council 16 states that it was following its Bylaws and
2 procedures when it scheduled a hearing on Christopher's charge and
3 that it did not act based on a retaliatory motive.

4 An evaluation of these defenses would necessarily entail an
5 interpretation of the IUPAT Constitution and District Council 16's
6 Bylaws. With regard to Christopher, the Court would likely be
7 required to construe the terms "substantial evidence," "bad faith"
8 and "malice" to determine whether Christopher's reason for bringing
9 a charge was legitimate and non-retaliatory. And, as explained
10 further below, interpretation of these terms would also be
11 necessary to evaluate whether Christopher's legitimate reason was a
12 pretext for retaliation. As for District Council 16, whether it
13 was required to schedule proceedings on Christopher's charge would
14 entail an analysis of its Bylaws and the IUPAT Constitution.

15 Plaintiff argues that his retaliation claim requires
16 determining Defendants' intent and that this inquiry does not
17 require resort to the Bylaws or the IUPAT Constitution. This is
18 not necessarily true. For example, if Christopher asserts that he
19 filed his charge with the intent to discipline Plaintiff for his
20 alleged violation of the IUPAT Constitution, the Court must
21 interpret the terms of that document to determine whether
22 Christopher's claim was colorable. If it were not, Christopher's
23 proffered reason could be deemed illegitimate, permitting a
24 presumption of retaliatory motive. Alternatively, Christopher's
25 reason could be deemed to be pretext for retaliation, particularly
26 if Plaintiff can show that others similarly situated have not been
27 charged under section 298; the evaluation of comparable
28 circumstances would also entail an interpretation of the IUPAT

1 Constitution.

2 Plaintiff next argues that neither the Bylaws nor the IUPAT
3 Constitution defines or describes the terms "discriminates," "bad
4 faith" or "malice." Pl.'s Reply in Support of Mot. to Remand 3.
5 However, this argument strengthens the case against remand. If
6 these terms were explained, interpretation of these documents might
7 not be required; mere reference to them could be sufficient.
8 However, because these terms are not defined, the Court must
9 interpret them, thereby triggering jurisdiction under section 301.

10 Finally, Plaintiff cites Guidry v. Marine Engineers'
11 Beneficial Association, 2007 WL 707511 (N.D. Cal.), for the
12 proposition that section 301 does not preempt retaliation claims
13 against unions. Guidry is distinguishable. There, the plaintiff
14 alleged that his union retaliated against him by failing to
15 represent him at a meeting at which he was discharged and by
16 refusing to file a grievance on his behalf. Id. at *5. The court
17 opined that whether interpretation of a labor contract was required
18 was a close case. Id. at *5. The court ultimately held that no
19 analysis was required, noting that the defendant had failed to
20 identify "any contractual provision whose meaning is disputed."
21 Id. at *6. Here, Defendants have identified provisions that
22 require interpretation.

23 Accordingly, because Defendants raise defenses that would
24 require interpretation of the Bylaws and the IUPAT Constitution,
25 the Court has federal question jurisdiction over Plaintiff's
26 action. Thus, this case was properly removed from state court, and
27 Plaintiff's motion to remand must be denied.

28

1 II. Defendants' Motion to Dismiss or for a More Definite Statement

2 A complaint must contain a "short and plain statement of the
3 claim showing that the pleader is entitled to relief." Fed. R.
4 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
5 claim is appropriate only when the complaint does not give the
6 defendant fair notice of a legally cognizable claim and the grounds
7 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
8 (2007). In considering whether the complaint is sufficient to
9 state a claim, the court will take all material allegations as true
10 and construe them in the light most favorable to the plaintiff. NL
11 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

12 However, this principle is inapplicable to legal conclusions;
13 "threadbare recitals of the elements of a cause of action,
14 supported by mere conclusory statements," are not taken as true.
15 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
16 (citing Twombly, 550 U.S. at 555).

17 When granting a motion to dismiss, the court is generally
18 required to grant the plaintiff leave to amend, even if no request
19 to amend the pleading was made, unless amendment would be futile.
20 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
21 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
22 would be futile, the court examines whether the complaint could be
23 amended to cure the defect requiring dismissal "without
24 contradicting any of the allegations of [the] original complaint."
25 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
26 Leave to amend should be liberally granted, but an amended
27 complaint cannot allege facts inconsistent with the challenged
28 pleading. Id. at 296-97.

1 Pursuant to Federal Rule of Civil Procedure 12(e), a party may
2 move for a more definite statement when a pleading to which a
3 responsive pleading is permitted is "so vague or ambiguous that a
4 party cannot reasonably be required to frame a responsive
5 pleading." Where a pleading "fails to specify the allegations in a
6 manner that provides sufficient notice, a defendant can move for a
7 more definite statement under Rule 12(e)." Swierkiewicz v. Sorema
8 N.A., 534 U.S. 506, 514 (2002). A Rule 12(e) motion is proper
9 "where the complaint is so general that ambiguity arises in
10 determining the nature of the claim or the parties against whom it
11 is being made." Sagan v. Apple Computer, Inc., 874 F. Supp. 1072,
12 1077 (C.D. Cal. 1994). A Rule 12(e) motion is also appropriate
13 where it is not clear from the complaint what the legal nature of
14 the claim is or if an employee is asserting a common law or
15 statutory claim. McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir.
16 1996).

17 A. FEHA Claims Against Christopher

18 Defendants argue that Plaintiff's claims against Christopher
19 must be dismissed on three grounds: (1) he cannot be sued
20 individually under FEHA; (2) the filing of his internal union
21 charge against Plaintiff was privileged; and (3) Plaintiff does not
22 plead facts in support of his claim. Because the first reason is
23 dispositive, the remaining two are not addressed.

24 Plaintiff brings his discrimination claim against Christopher
25 under section 12940(b). Compl. ¶ 24. That section proscribes
26 conduct by a "labor organization," Cal. Gov't Code § 12940(b),
27 which is defined to be "any organization that exists and is
28 constituted for the purpose, in whole or in part, of collective

1 bargaining or of dealing with employers concerning grievances,
2 terms or conditions of employment, or of other mutual aid or
3 protection," id. § 12926. Christopher does not meet this
4 definition and is therefore not subject to section 12940(b).

5 Plaintiff's retaliation claim is brought under section
6 12940(h), which concerns conduct by "any employer, labor
7 organization, employment agency, or person." Even though the
8 statute uses the word "person," in Jones v. Lodge at Torrey Pines
9 Partnership, the California Supreme Court held that employees must
10 bring retaliation claims against their employers; "nonemployer
11 individuals are not personally liable for their role in that
12 retaliation." 42 Cal. 4th 1158, 1173 (2008). California courts,
13 however, have not addressed whether union officials can be held
14 personally liable for retaliation. Thus, the Court must predict
15 how the California Supreme Court would resolve this question.
16 Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir.
17 2007).

18 Although Jones addressed retaliation in the employment
19 context, its reasoning could be applied with equal force to
20 retaliation by union officials who are acting on their
21 organization's behalf. Jones relied on reasoning from Reno v.
22 Baird, in which the California Supreme Court held that nonemployer
23 individuals cannot be held liable for unlawful discrimination in
24 employment, 18 Cal. 4th 640 (1998). The Jones court explained,

25 All of the[] reasons for not imposing individual
26 liability for discrimination -- supervisors can avoid
27 harassment but cannot avoid personnel decisions, it is
28 incongruous to exempt small employers but to hold
individual nonemployers liable, sound policy favors
avoiding conflicts of interest and the chilling of
effective management, corporate employment decisions are

1 often collective, and it is bad policy to subject
2 supervisors to the threat of a lawsuit every time they
3 make a personnel decision -- apply equally to
4 retaliation. Indeed, some may apply even more forcefully
5 to retaliation claims. If an employee gains a reputation
6 as a complainer, supervisors might be particularly afraid
7 to impose discipline on that employee or make other
8 lawful personnel decisions out of fear the employee might
9 claim the action was retaliation for the complaining.

10 Id. at 1167. Many of these policy considerations can be applied to
11 individuals acting in their capacities as union officials and on
12 behalf of the union.

13 Here, Plaintiff has not alleged the capacity in which
14 Christopher retaliated against him. Plaintiff's opposition
15 suggests that Christopher acted in his capacity as a union official
16 and on behalf of the union. In responding to Defendants' argument
17 on the effect of Jones and Reno on this case, Plaintiff refers to
18 Christopher as a union official. Plaintiff also argues that
19 Christopher could be regarded to have aided and abetted District
20 Council 16's alleged misconduct. These arguments suggest that
21 Christopher acted in his capacity as a union official, on behalf of
22 District Council 16. If this is so, Jones and Reno preclude
23 Plaintiff from seeking liability against Christopher for
24 retaliation.³

25 Plaintiff's alternative theory is that Christopher could be
26 held liable under section 12940(i), which deems it unlawful for
27 "any person to aid, abet, incite, compel, or coerce the doing of
28 any of the acts forbidden under this part, or to attempt to do so."

³ Because Plaintiff's arguments do not suggest that
Christopher acted in a strictly personal capacity, the Court does
not decide whether section 12940(h) supports liability against an
individual who was not a union official and not acting on the
union's behalf.

1 However, this argument is also foreclosed by Reno, which
2 interpreted subsection (i) to pertain to third parties who are not
3 a part of an entity defendant. 18 Cal. 4th at 655-56 (citing
4 Janken v. GM Hughes Elecs., 46 Cal. App. 4th 55 (1996)). Here,
5 Christopher was apparently a union official and, therefore, a part
6 of the union.

7 Accordingly, Plaintiff's claims against Christopher are
8 dismissed. Because amendment of his discrimination claim against
9 Christopher would be futile, this claim is dismissed with
10 prejudice. Plaintiff's retaliation claim against Christopher, to
11 the extent it is based on Christopher's role as a union official or
12 actions he undertook on behalf of the union, is dismissed without
13 leave to amend. Plaintiff is granted leave to amend his
14 retaliation claim only if he intends to allege that Christopher
15 acted in an individual capacity and is prepared to provide legal
16 authority for the proposition that such a claim can be raised under
17 FEHA.

18 B. Sufficiency of Pleadings Supporting Retaliation Claim
19 Against District Council 16

20 Defendants argue that Plaintiff's retaliation claim against
21 District Council 16 must be dismissed because his allegations fail
22 to state a claim. Defendants do not challenge the sufficiency of
23 the allegations supporting Plaintiff's discrimination claim against
24 District Council 16.

25 FEHA provides that it is unlawful for any "labor organization
26 . . . to discharge, expel, or otherwise discriminate against any
27 person because the person has opposed any practices forbidden under
28 this part or because the person has filed a complaint, testified,

1 or assisted in any proceeding under this part." Cal. Gov't Code
2 § 12940(h). FEHA's provisions must be "construed liberally for the
3 accomplishment of the purposes of" that law. Id. § 12993(a); see
4 also Yanowitz, 36 Cal. 4th at 1054 n.14.

5 As noted above, Plaintiff alleges in his complaint that
6 District Council 16 retaliated against him by scheduling a trial on
7 Christopher's August 5, 2010 internal union charge. At the hearing
8 on the parties' motions, Plaintiff conceded that this does not
9 constitute actionable retaliation by District Council 16. However,
10 Plaintiff represented that, since District Council held the trial
11 on Christopher's charge, the union has suspended Plaintiff's
12 membership. Based on this representation, Plaintiff's retaliation
13 claim appears to arise under the "otherwise discriminate" prong of
14 section 12940(h); he does not allege or represent that Defendants
15 discharged or expelled him.

16 In their opening brief, Defendants argue that Plaintiff's
17 retaliation claim must be dismissed because he fails to allege that
18 District Council 16 was his employer and that it took an adverse
19 employment action against him.⁴ In his opposition, Plaintiff
20 points out that he is suing District Council 16 in its capacity as
21 a labor organization, not as his employer.

22 By its plain terms, FEHA prohibits District Council 16 from
23 retaliating against Plaintiff for engaging in protected activity.
24 Defendants argue that Plaintiff must allege that they retaliated
25

26 ⁴ Defendants do not challenge Plaintiff's race discrimination
27 claim on the same grounds. FEHA prohibits "a labor organization"
28 from discriminating against any person based on race "in the
selection of the labor organization's staff." Cal. Gov't Code
§ 12940(b).

1 against him "in his capacity as a union member." Reply 3 (citing
2 Yerndon v. Teamsters Local 1149, 886 F. Supp. 226 (N.D.N.Y. 1995))
3 (emphasis in original).⁵ Plaintiff's representation that District
4 Council 16 suspended his membership could satisfy this standard.
5 However, because Plaintiff does not allege this in his complaint
6 and because he concedes that the conduct he has plead does not
7 state a claim, his retaliation claim against District Council 16
8 must be dismissed. Plaintiff is granted leave to amend to plead
9 that District Council 16 suspended his membership in retaliation
10 for protected activity.

11 C. Exhaustion of Administrative Remedies

12 FEHA requires plaintiffs to exhaust their administrative
13 remedies prior to bringing suit. This involves filing a complaint
14 with the California Department of Fair Employment and Housing
15 (DFEH) and receiving a right-to-sue letter. Martin v. Lockheed
16 Missiles & Space Co., 29 Cal. App. 4th 1718, 1724 (1994).

17 Defendants complain that Plaintiff does not plead sufficient
18 facts to support his allegation that he timely exhausted his
19 administrative remedies. Neither Plaintiff nor Defendants have
20 lodged any documents related to Plaintiff's actions before the
21 DFEH.

22 As noted above, at the hearing on the parties' motions,
23 Plaintiff stated that he rests his claims on District Council 16's
24 decision not to hire him in July, 2010, and Defendants conceded
25

26 ⁵ Because Plaintiff's assertion that he was suspended appears
27 to satisfy the standard set forth in Yerndon, the Court need not
28 reach whether a labor union might "otherwise discriminate" by
taking actions that do not affect members in their capacities as
union members.

1 that Plaintiff exhausted his administrative remedies with respect
2 to this decision. This decision, however, apparently pertains only
3 to Plaintiff's discrimination claim against District Council 16.
4 Plaintiff did not represent whether he exhausted his administrative
5 remedies with respect to his retaliation claims against either
6 Christopher or District Council 16, which are based on different
7 conduct.

8 Accordingly, the Court denies Defendants' motion to dismiss
9 based on Plaintiff's failure to exhaust administrative remedies, to
10 the extent it is directed at his discrimination claim against
11 District Council 16. However, Plaintiff's retaliation claims
12 against Christopher and District Council 16 are dismissed for the
13 additional reason that he has not alleged that he has exhausted
14 them with the DFEH. In any amended complaint, Plaintiff must
15 allege that he has exhausted his administrative remedies with
16 respect to his retaliation claims.

17 CONCLUSION

18 For the foregoing reasons, the Court DENIES Plaintiff's motion
19 to remand (Docket No. 8) and GRANTS Defendants' motion to dismiss
20 (Docket No. 5). Plaintiff's discrimination claim against
21 Christopher is dismissed with prejudice. His retaliation claim
22 against Christopher, to the extent that it is based on
23 Christopher's role as a union official or actions undertaken on
24 behalf of the union, is dismissed without leave to amend.
25 Plaintiff is granted leave to amend his retaliation claim only if
26 he intends to allege that Christopher acted in an individual
27 capacity and is prepared to offer legal authority to support such a
28 claim. His retaliation claim against District Council 16 is

1 dismissed with leave to amend to plead that it suspended his union
2 membership because he engaged in protected activity. Plaintiff's
3 retaliation claims against Christopher and District Council 16 are
4 dismissed for the additional reason that he has not plead that he
5 has exhausted his administrative remedies with respect to them; he
6 must cure this deficiency in any amended complaint. Plaintiff's
7 discrimination claim against District Council 16 is sufficiently
8 plead.

9 Plaintiff may file an amended pleading within seven days of
10 the date of this Order. If Plaintiff does so, Defendants shall
11 answer or move to dismiss fourteen days after Plaintiff files his
12 amended complaint. If Defendants move to dismiss, Plaintiff shall
13 file his opposition fourteen days after the motion is filed.
14 Defendants' reply, if necessary, shall be due seven days after
15 that. The motion will be taken under submission on the papers.

16 If Plaintiff does not file an amended complaint, his
17 retaliation claims will be dismissed without prejudice, and his
18 discrimination claim against the union will be remanded to Alameda
19 County Superior Court.

20 The case management conference, currently set for January 25,
21 2011, is continued to March 15, 2011 at 2:00 p.m.

22

23 IT IS SO ORDERED.

24

25 Dated: 1/19/2011



CLAUDIA WILKEN
United States District Judge

26

27

28