

1
2
3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 DOUGLAS FLAUGHER,

8 Plaintiff,

9 v.

10 SAN FRANCISCO HOUSING,

11 Defendant.

Case No. [17-cv-00727-DMR](#)

**ORDER DISMISSING ACTION
WITHOUT PREJUDICE**

Re: Dkt. No. 12

12 Plaintiff Douglas Flaugher filed this suit along with an application to proceed *in forma*
13 *pauperis* (“IFP”) and a motion to appoint counsel. [Docket Nos. 1, 2, 4]. The court granted
14 Plaintiff’s IFP application, dismissed the complaint with leave to amend, and denied the motion to
15 appoint counsel. [Docket No. 6]. On April 17, 2017, the court construed Plaintiff’s “Motion for
16 Discovery” as a first amended complaint and dismissed the case once again, but granted leave to
17 file a second amended complaint by May 5, 2017. [Docket No. 11]. On May 3, 2017, Plaintiff
18 filed a motion for leave to file an amended complaint. [Docket No. 12]. Since Plaintiff did not
19 file any other document by May 5, 2017, the court construes Plaintiff’s motion for leave as his
20 second amended complaint (“SAC”). The court now dismisses the action without prejudice.

21 **I. DISCUSSION**

22 The SAC is very sparse. In order to fully understand Plaintiff’s case, the court will
23 consider the allegations in the original complaint to provide context for the allegations in the SAC.

24 In his original complaint, Plaintiff brought Eighth Amendment claims against various
25 defendants arising out of their denial of his applications for affordable housing. Plaintiff alleged
26 that he is a mentally disabled individual who is and/or was homeless. *See* Compl. at 6. Plaintiff
27 named Community Housing Partnership as a defendant. It is an organization that provides
28 affordable housing to homeless individuals and is based in San Francisco, California. Plaintiff

1 also named four DOE defendants whom Plaintiff describes as individuals who either worked at the
2 Community Housing Partnership, or are “leaders or representatives” of unnamed organizations
3 that provide affordable housing to homeless and/or mentally disabled individuals in San Francisco.
4 *See* Compl. at 4-5. Plaintiff alleged that the Doe Defendants abandoned and denied his
5 applications for affordable housing for prejudicial and discriminatory reasons, and that the Doe
6 Defendants kept him homeless by approving drug addicts, alcoholics, and undocumented
7 immigrants for affordable housing instead of Plaintiff. *See* Compl. at 4-5.

8 The court dismissed the Eighth Amendment claims in the original complaint with
9 prejudice, but gave Plaintiff an opportunity to amend his complaint to plead allegations showing
10 that the defendants were state actors under 42 U.S.C. § 1983, and that he was subjected to
11 discriminatory conduct in violation of the Fourteenth Amendment and the Fair Housing Act. *See*
12 Docket No. 6.

13 In the SAC, Plaintiff requests that this court “recognize” his claims against the Doe
14 Defendants and alleges that the Doe Defendants (1) abandoned his housing applications with
15 deceit, lies and contempt; and (2) approved affordable housing applications for drug addicts,
16 alcoholics, and illegal immigrants with taxpayer money. Given Plaintiff’s prior pleadings, the
17 court assumes that the Doe Defendants described in the second amended complaint are the same
18 Doe Defendants described in the original complaint.

19 The allegations in the SAC are essentially the same as those raised in the original
20 complaint, with the exception of new allegations asserting deceit, lies and contempt. *Compare*
21 Compl. at 4-5 [Docket No. 1] (alleging that the Doe Defendants kept Plaintiff homeless by
22 approving drug addicts, alcoholics, and undocumented immigrants for affordable housing instead
23 of Plaintiff) *with* SAC at 1 (Doe Defendants “abandoned applications for housing opportunities
24 with “deceit, lies [and] contempt,” and instead provided housing for addicts and alcoholics using
25 taxpayer dollars).

26 The SAC continues to fail to state a claim for the reasons that the court has previously
27 provided. As explained in the court’s March 13, 2017 order dismissing his original complaint,
28 private individuals are generally not liable under 42 U.S.C. § 1983 for “merely private conduct.”

1 *I.H. by & through Hunter v. Oakland Sch. for the Arts*, No. 16-CV-05500-SI, 2017 WL 565069, at
2 *3 (N.D. Cal. Feb. 13, 2017) (explaining that “[g]enerally, private individuals and entities cannot
3 be held liable under section 1983, because this section ‘excludes from its reach merely private
4 conduct, no matter how discriminatory or wrongful’”) (quoting *Am. Mfrs. Mut. Ins. Co. v.*
5 *Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks and citation omitted)). Thus, the Doe
6 Defendants are not liable under section 1983 simply for denying Plaintiff’s affordable housing
7 applications. However, private individuals can “be liable under section 1983 if [they] conspired or
8 entered joint action with a state actor.” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). Here,
9 Plaintiff has not provided any facts showing that the Doe Defendants either conspired or entered
10 into joint action with a state actor. Nor can the court glean the existence of any such facts even
11 considering Plaintiff’s prior documents. Therefore, the court dismisses Plaintiff’s second
12 amended complaint for failure to state a claim.

13 Despite having been given two opportunities to amend his complaint to plead a federal
14 claim, *see* Docket Nos. 6 and 11, it does not appear that Plaintiff can plead a federal claim
15 establishing this court’s subject matter jurisdiction, even liberally construing Plaintiff’s
16 allegations. *See Clarkes v. Hughes*, No. 17-CV-00961 (JMA)(AYS), 2017 WL 1843108, at *3
17 (E.D.N.Y. May 5, 2017) (“Although courts hold pro se complaints to less stringent standards than
18 formal pleadings drafted by lawyers . . . pro se litigants must establish subject matter
19 jurisdiction.”) (citation and internal quotation marks omitted). Therefore, the court dismisses
20 Plaintiff’s action without prejudice. *See* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any
21 time that it lacks subject-matter jurisdiction, the court must dismiss the action.”); *see also*
22 *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (explaining a district court
23 may deny leave to amend if “the plaintiff had several opportunities to amend its complaint and
24 repeatedly failed to cure deficiencies”).

25 The court issues no opinion on whether Plaintiff could bring a state law claim for fraud in
26 state superior court based on the new allegations of deceit, lies, and contempt in the SAC. *See,*
27 *e.g., Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 990, 102 P.3d 268, 274 (2004)
28 (setting forth the elements of fraud claim under California law as “(1) a misrepresentation (false

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage”).

II. CONCLUSION

In sum, the court dismisses Plaintiff’s action without prejudice. The clerk is directed to close the case.

IT IS SO ORDERED.

Dated: May 31, 2017

