

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH LAWRENCE LENK,
Plaintiff,
v.
MONOLITHIC POWER SYSTEMS,
INC.,
Defendant.

Case No.15-cv-01148-NC

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AS TO
LENK'S STATE LAW CLAIMS**

Re: Dkt. No. 59

Plaintiff Kenneth Lenk sues his former employer, Monolithic Power Systems, for wrongful "constructive" termination. Lenk was employed by MPS for about one year before he left. During that year, Lenk alleges that MPS did not pay him a 25% bonus that he was owed, and forced Lenk to end his employment using a variety of unlawful tactics. The Court previously dismissed Lenk's federal causes of action without leave to amend, and now considers Lenk's nine state law causes of action.

Because the Court finds that Lenk's employment agreement states that he was an at will employee and not entitled to a bonus, the Court finds that Lenk's breach of contract claims fail as a matter of law. In addition, Lenk has not provided sufficient facts to demonstrate that his resignation was a constructive discharge. In total, Lenk's second amended complaint provides few facts, and many of his causes of action appear to be unrelated to the facts of his case.

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Case No. 15-cv-01148-NC

1 The Court DISMISSES all claims in the complaint. The Court grants Lenk leave to
2 amend on two claims: California Labor Code § 970, and constructive termination in
3 violation of public policy, California Labor Code § 2802.

4 **I. BACKGROUND**

5 **A. Judicial Notice**

6 Generally, the Court considers only the facts presented in the complaint at issue to
7 determine the sufficiency of the claims. *United States v. Corinthian Colleges*, 655 F.3d
8 984, 998-99 (9th Cir. 2011). Here, MPS has requested judicial notice of two documents
9 Lenk quotes in the complaint, but does not provide: Lenk’s offer letter with MPS and the
10 MPS handbook. The Court may also consider unattached evidence on which the complaint
11 “necessarily relies” if: (1) the complaint refers to the document; (2) the document is central
12 to the plaintiff’s claim; and (3) no party questions the authenticity of the document. *Id.*
13 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)). The Court finds that the
14 complaint necessarily relies on these documents; therefore, the request for judicial notice is
15 GRANTED.

16 Additionally, Lenk includes a number of factual assertions in his opposition to the
17 motion to dismiss which are not contained in the complaint, and not provided for in a
18 sworn declaration. Dkt. No. 64. Lenk includes further exhibits “to clarify” his position
19 with the opposition, but these are not documents relied on in the complaint. Dkt. No. 65.
20 The Court DENIES Lenk’s request for judicial notice as to these documents. However, the
21 Court will consider the assertions made in the opposition and included as part of Lenk’s
22 request for judicial notice to be proffered facts that could be included in a future complaint,
23 should the Court grant leave to amend.

24 **B. Facts**

25 On January 31, 2012, plaintiff Kenneth Lenk was contacted by an employment
26 agent, Charly Barr, for possible employment at defendant Monolithic Power Systems, Inc.
27 (“MPS”). Second Amended Complaint (“SAC”) ¶ 6. On March 12, 2012, MPS offered
28 Lenk employment as the Director of Marketing of Automotive and Industrial Products, in

1 an offer letter signed by MPS’s President and CEO. Dkt. No. 60, Exh. A. According to
2 the offer letter, Lenk was to be paid an \$175,000 annual salary, with a signing bonus of
3 \$20,000 to be repaid if Lenk left before completing two years of employment. *Id.* In
4 addition, Lenk was offered 8,000 restricted stock units, which vest over a period of four
5 years, and he was eligible to participate in the company’s semi-annual bonus program. *Id.*
6 Lenk accepted the offer and began working for MPS on March 30, 2012. SAC ¶ 8.
7 Sometime in March 2013, Lenk left MPS. SAC ¶ 13.

8 Lenk alleges that his departure from MPS was a “constructive discharge” because
9 MPS did not pay him a bonus, did not reimburse work-related expenses, engaged in
10 harassment, reduced his job function and role, and inhibited his success. SAC ¶ 10. Lenk
11 alleges that he was not told that a bonus would be subject to the manager’s discretion.
12 SAC ¶ 35. Lenk alleges that Barr represented that a 25% bonus would be part of his
13 compensation package, and that Barr acted as a representative of MPS. SAC ¶ 50. Lenk
14 also alleges that MPS “falsely represented the permanent work location” because they
15 moved to a new location one month after Lenk’s start date. SAC ¶ 52.

16 In 2012, Lenk became a participant in the Automotive Electronics Council (AEC),
17 an industry committee that addresses quality, protocol, and policy issues. SAC ¶¶ 112-
18 116. Lenk alleges: “On January 12, 2013 Plaintiff’s Manager Sciammas, in violation of
19 AEC standards, overrode Plaintiff’s decision to notify customer of a non-standard product
20 (Plaintiff requested a customer signed waiver to ship per industry and AEC protocol
21 standards). Manager Sciammas also requested to stop documentation on this (to avoid
22 paper trails and liability).” SAC ¶ 118. Lenk alleges that after this event, he was subject
23 to adverse employment actions including denial of bonus payments, denial of expense
24 payments, reduction of job function, and unfair performance goal scoring. SAC ¶ 121.

25 Additionally, Lenk alleges that Sciammas, a manager at MPS “discriminated
26 against Plaintiff during the time of his disability. The discrimination reduced Plaintiff’s
27 performance score, which ultimately lead to non-payment of the company bonus and is a
28 reduction of employee compensation.” SAC ¶¶ 131-32.

1 **C. Procedural History**

2 Lenk appears pro se in this action and sued MPS on March 11, 2015, for wrongful
3 constructive termination of his employment, seeking damages including for an alleged
4 unpaid bonus. Dkt. No. 1. MPS moved to dismiss the complaint on June 15, 2015. Dkt.
5 No. 25. On the same day, MPS filed a counterclaim, alleging that Lenk must repay the
6 \$20,000 advance signing bonus because he did not stay with MPS for the requisite two
7 years of employment. Dkt. No. 28. On June 29, Lenk amended his complaint and moved
8 to dismiss the counterclaim. Dkt. Nos. 35, 36. The Court denied Lenk’s motion to
9 dismiss. Dkt. No. 51. MPS moved to dismiss Lenk’s first amended complaint, and the
10 Court granted Lenk a short stay to obtain counsel and file an opposition to the motion.
11 Dkt. Nos. 44, 51. The parties then stipulated to allow Lenk to file a second amended
12 complaint, which he filed on August 11, 2015. Dkt. No. 54. Now, MPS moves to dismiss
13 the second amended complaint. Dkt. No. 59. The Court held a hearing on the motion on
14 September 30, 2015. Dkt. No. 68.

15 Lenk’s second amended complaint contains eleven causes of action. Dkt. No. 54.
16 On October 20, 2015, the Court dismissed the two federal claims without leave to amend.
17 Dkt. No. 70. Because it was unclear whether diversity jurisdiction existed over the
18 remaining state law claims, the Court ordered the parties to further brief the question of the
19 Court’s jurisdiction. Dkt. No. 70. The parties agreed that Lenk was a citizen of Arizona at
20 the time the complaint was filed, while MPS was a citizen of Delaware and California, and
21 the amount in controversy exceeds \$75,000. The Court agreed and found that jurisdiction
22 is proper. Dkt. No. 77. The Court now considers the state law claims in Lenk’s second
23 amended complaint.

24 **II. LEGAL STANDARD**

25 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
26 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
27 motion to dismiss, all allegations of material fact are taken as true and construed in the
28 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-

1 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are
2 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
3 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need
4 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as
5 true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
6 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw
7 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
8 *v. Iqbal*, 556 U.S. 662, 678 (2009).

9 Generally, a Court must grant leave to amend freely. Fed. R. Civ. P. 15(a).
10 However, in granting leave to amend, the Court considers: (1) undue delay; (2) bad faith;
11 (3) prejudice to the opponent; and/or (4) futility of the proposed amendment. *Loehr v.*
12 *Ventura County Community College District*, 743 F.2d 1310, 1319 (9th Cir. 1984) (citing
13 *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In *Lockheed Martin Corp. v. Network*
14 *Solutions, Inc.*, the Ninth Circuit determined that the district court properly denied leave to
15 amend because the plaintiff’s “legal basis for a cause of action is tenuous, [so] futility
16 supports the refusal to grant leave to amend.” 194 F.3d 980, 986 (9th Cir. 1999)(citing
17 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)).

18 In addition, a court may also consider whether the plaintiff has previously amended
19 his complaint. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 n.3 (9th Cir.1987).
20 “Where a court has already provided the plaintiff one or more opportunities to amend her
21 complaint, its discretion over further amendments is particularly broad.” *Dauth v.*
22 *Convenience Retailers, LLC*, 13-cv-047 MEJ, 2013 WL 4225587, at *2 (N.D. Cal. July 31,
23 2013).

24 **III. DISCUSSION**

25 Lenk’s remaining state law claims are: (A) Covenant of Good Faith and Fair
26 Dealing, Breach of Contract; (B) California Labor Code § 970; (C) California Labor Code
27 § 976; (D) California Labor Code § 2751; (E) Wrongful Constructive Termination in
28 Breach of Contract; (F) Wrongful Constructive Termination in Violation of Public Policy

1 and California Labor Code § 132A; (G) California Labor Code § 223; (H) California Labor
2 Code § 1102.5; (I) California Labor Code § 2802(a). The Court addresses each of these
3 claims in turn.

4 Preliminarily, the Court concludes that although Lenk is no longer domiciled in
5 California, he may avail himself of California state law as to the claims in this complaint.
6 “It is well-settled that in diversity cases federal courts must apply the choice-of-law rules
7 of the forum state.” *Estate of Darulis v. Garate*, 401 F.3d 1060, 1062 (9th Cir. 2005).
8 Under California’s choice-of-law rule, California law applies unless a party objects.
9 *Hurtado v. Superior Court*, 11 Cal. 3d 574, 581 (1974); *PlasPro GMBH v. Gens*, No. 09-
10 cv-04302 PSG, 2011 WL 1000755, at *3 (N.D. Cal. Mar. 21, 2011). Additionally, the law
11 of the place of contracting determines the enforcement and validity of the contract.
12 Restatement (First) of Conflict of Laws § 332 (1934). The complaint asserts that the
13 transactions at issue took place in substantial part in California. Additionally, no party
14 objects to the application of California law.

15 **A. Violation of Covenant of Good Faith and Fair Dealing, and Breach of**
16 **Contract**

17 In his first cause of action, Lenk alleges a “violation of the covenant of good faith
18 and fair dealing, breach of contract.” While this is proposed as a single cause of action, it
19 must be analyzed as several components. The Court will first address the breach of
20 contract as an independent claim. Because the covenant of good faith and fair dealing is
21 not alone a cause of action, the Court will address it separately. *See Waller v. Truck Ins.*
22 *Exchange, Inc.*, 11 Cal.4th 1, 36 (1995) (the covenant of good faith and fair dealing cannot
23 “be endowed with an existence independent of its contractual underpinnings”).

24 **1. Breach of Contract**

25 Under California law, a breach of contract claim requires plaintiff to prove “the
26 existence of contract, plaintiff’s performance of that contract or excuse for failure to
27 perform, defendant’s breach, and damage to plaintiff resulting therefrom.” *McKell v.*
28 *Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006) (citing 4 Witkin, Cal.

1 Procedure (4th ed. 1997) Pleading, § 476 at 570). Here, Lenk points to two interactions
2 with MPS that formed a contract: his communication with the hiring agent, Barr; and
3 Lenk’s offer letter from MPS, which became his employment agreement once signed.

4 **a. Interaction with Barr**

5 Lenk alleges that his interactions with Barr constituted a contract on behalf of MPS
6 that Lenk would receive a 25% annual bonus, in addition to his salary and stock options.
7 MPS argues that Barr was not an agent of MPS, so had no authority to make legally
8 binding representations of Lenk’s terms of employment with MPS. Because the Court
9 takes the facts in the complaint as true, the Court assumes for the purposes of a motion to
10 dismiss that Barr was an agent of MPS. Here, Lenk’s contract claim is premised on an
11 email exchange with Barr that occurred before Lenk signed his employment agreement or
12 accepted employment with MPS. SAC ¶ 6.

13 The first element of breach of contract requires the existence of a contract. “A
14 contract is an agreement to do or not to do a certain thing.” Cal. Civ. Code § 1549.
15 Generally, advertisements are not treated as an offer to enter into a contract, but merely an
16 invitation to bargain, and thus cannot be construed as a contract if accepted. *Harris v.*
17 *Time, Inc.*, 191 Cal. App. 3d 449, 455 (1987), *as modified* (May 21, 1987). Additionally,
18 “a manifestation of willingness to enter into a bargain is not an offer” but rather an
19 invitation to negotiate a contract. Restatement (Second) of Contracts § 26. Finally, when
20 the parties reduce an agreement to a writing, which in view of its completeness and
21 specificity reasonably appears to be a complete agreement, it is considered an integrated
22 agreement. Restatement (Second) of Contracts § 209. “A binding integrated agreement
23 discharges prior agreements to the extent that it is inconsistent with them.” Restatement
24 (Second) of Contracts § 213.

25 Here, Lenk alleges that Barr is an agent for MPS and approached him about a job
26 with MPS. SAC ¶ 7. Barr discussed compensation with Lenk, and set up two interviews
27 with MPS. SAC ¶ 7. First, the Court finds that Barr’s conversations with Lenk are
28 invitations to bargains, or manifestations of willingness of MPS to enter into an

1 employment negotiation with Lenk, so do not constitute a contract. Second, Lenk’s
2 employment agreement is an offer by the President and CEO of MPS, and has all of the
3 terms of employment included within it, such as his compensation, job title, and bonus
4 information. Dkt. No. 65 at Exh. A (offer letter/employment agreement). Lenk signed and
5 accepted this offer on March 12, 2012. *Id.* From the facts alleged, the Court concludes
6 that the employment agreement is an integrated agreement, and it discharges any prior
7 agreements that Lenk may have had with Barr. Therefore, the Court finds that any breach
8 of contract premised on Lenk’s interaction with Barr must be denied as a matter of law, as
9 these interactions do not constitute a contract that can be breached.

10 In his opposition to the motion to dismiss, Lenk has provided the emails exchanged
11 between himself and Barr. The Court considers these as proffered facts that could be
12 included in an third amended complaint. However, the Court concludes that the emails
13 between Lenk and Barr would not cure the legal deficiency with this claim, as outlined
14 above. This claim is DISMISSED without leave to amend, in as much as a contract is
15 premised on Barr’s interactions with Lenk.

16 **b. Employment Agreement**

17 In contrast, Lenk’s employment contract is a contract that can give rise to a breach
18 claim. Lenk alleges that the contract was breached because (1) he was not given the bonus
19 he was led to believe he would be paid, and (2) his early “termination” is a breach of the
20 contract. The Court will address Lenk’s constructive termination argument in section F
21 below, but for the purposes of this analysis, the Court will assume that Lenk can establish a
22 constructive termination.

23 First, Lenk alleges that MPS led him to believe that he would receive a significant
24 bonus, based on the company’s profits. He argues that his employment agreement was
25 breached because MPS paid him a bonus that was less than he expected. However, the
26 agreement states, “In addition, you will be eligible to participate in the Company’s semi-
27 annual bonus program, when applicable. Bonuses may be paid based on the Company’s
28 financial performance and your performance; provided, however, that there is no guarantee

1 that any such bonus will be paid and if paid, that the amount is subject to your Manager(s)
2 discretion.” Dkt. No. 65 at Exh. A. Because no term in the contract requires MPS to
3 provide Lenk with a bonus, or to make bonuses available in a particular manner, this
4 cannot be a term that is breached by the non-payment of a bonus. Therefore, there is no
5 basis for a breach of contract based on the non-payment of a bonus.

6 Second, as to Lenk’s termination, under California law, “[a]n employment, having
7 no specified term, may be terminated at the will of either party on notice to the other.”
8 Cal. Lab. Code § 2922. Thus, an employment contract cannot be breached when an
9 employer terminates an employee unless one of the terms of the contract establishes the
10 reasons or method for termination. Lenk argues that his employment was not at will
11 because (1) the employment agreement provided for a 4 year vesting of stock options, and
12 (2) the job description and requirements of the job take several years to fulfill. Dkt. No. 64
13 at 3. However, the employment agreement states unambiguously, “Your employment with
14 MPS is ‘at will’ in that it can be terminated with or without cause, and with or without
15 notice, at any time at the option of MPS or yourself except as otherwise provided by law.”
16 Dkt. No. 65 at Exh. A. Even if MPS terminated Lenk, this would not be a violation of the
17 employment agreement, as Lenk was an at will employee. Therefore, the Court finds that
18 no breach of contract claim can be premised on the non-payment of a bonus or on Lenk’s
19 termination, as these actions do not violate the terms of Lenk’s employment agreement.
20 This claim is DISMISSED without leave to amend.

21 **2. Implied Covenant of Good Faith and Fair Dealing**

22 Lenk alleges that MPS violated the implied terms of the contract because MPS
23 violated the covenant of good faith and fair dealing. Lenk argues: “Defendant’s trickery of
24 attempting to withdraw from the obligation promised by their agent is a violation of the
25 covenant of good faith. Defendant allows their agent Barr to promise items that are not
26 delivered at a later time and then attempts to hide under questionable clauses to support
27 their misrepresentation.” Dkt. No. 64 at 5.

28 “The covenant of good faith and fair dealing, implied by law in every contract,

1 exists merely to prevent one contracting party from unfairly frustrating the other party's
2 right to receive the *benefit of the agreement actually made.*" *Guz v. Betchel National, Inc.*,
3 24 Cal.4th 317, 349 (2000) (emphasis in original). As a result, the covenant of good faith
4 and fair dealing "cannot impose substantive duties or limits on the contracting parties
5 beyond those incorporated in the specific terms of their agreement." *Id.* The California
6 Supreme Court has emphasized that "breach of the implied covenant cannot logically be
7 based on a claim that [the] discharge [of an at-will employee] was made without good
8 cause." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 698 n.39 (1988).

9 In *Guz*, the California Supreme Court considered arguments identical to Lenk's and
10 reasoned that the covenant of good faith and fair dealing cannot be the basis for a claim
11 "where an employee argues that even if his employment was at will, his arbitrary dismissal
12 frustrated his contract benefits and thus violated the implied covenant of good faith and
13 fair dealing. Precisely because employment at will *allows* the employer freedom to
14 terminate the relationship as it chooses, the employer does not frustrate the employee's
15 contractual rights merely by doing so. In such a case, the employee cannot complain about
16 a deprivation of the benefits of continued employment, for the agreement never provided
17 for a continuation of its benefits in the first instance." *Guz*, 24 Cal.4th at 350 (emphasis in
18 original).

19 Thus, Lenk's claim for breach of contract in violation of the covenant of good faith
20 and fair dealing is also barred as a matter of law. Here, no contract term provided for Lenk
21 to receive a bonus at MPS, or protected Lenk from termination at any time. Both the
22 underlying breach of contract claim and the implied covenant of good faith and fair dealing
23 claim fails are improper. This claim is DISMISSED without leave to amend.

24 **B. California Labor Code § 970, Violation of Covenant of Good Faith and Fair**
25 **Dealing, Breach of Contract**

26 For the following causes of action where Lenk has alleged a violation of the
27 covenant of good faith and fair dealing, and a breach of contract, the Court will not
28 separately consider these claims. The above reasoning applies throughout, so only the

1 California Labor Code portion of the claim will be addressed.

2 California Labor Code § 970 provides that “No person, or agent or officer thereof,
3 directly or indirectly, shall influence, persuade, or engage any person to change from one
4 place to another in this State or from any place outside to any place within the State, or
5 from any place within the State to any place outside, for the purpose of working in any
6 branch of labor, through or by means of knowingly false representations, whether spoken,
7 written, or advertised in printed form, concerning either:

8 (a) The kind, character, or existence of such work;

9 (b) The length of time such work will last, or the compensation therefor;

10 (c) The sanitary or housing conditions relating to or surrounding the work;

11 (d) The existence or nonexistence of any strike, lockout, or other labor dispute

12 affecting it and pending between the proposed employer and the persons then or last
13 engaged in the performance of the labor for which the employee is sought.”

14 This section “requires the employee to demonstrate that his or her employer made
15 ‘knowingly false representations’ concerning the nature, duration or conditions of
16 employment.” *Eisenberg v. Alameda Newspapers*, 74 Cal. App. 4th 1359, 1392 (1999).

17 “Moreover, under the statute an employee must establish that the employer induced him or
18 her to relocate or change addresses.” *Id.* Allegations of fraud or misrepresentation require
19 a heightened pleading standard. Fed. R. Civ. P. 9(b). “The complaint must specify such
20 facts as the times, dates, places, benefits received, and other details of the alleged
21 fraudulent activity.” *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (citations
22 omitted).

23 Lenk alleges that MPS knowingly mislead him to believe his payment of a bonus
24 would be greater, that his job responsibilities were not fully disclosed, and MPS did not
25 inform him of their new permanent location. In his opposition, Lenk proffers, “Defendant
26 knew that the extra distance to the new work location would discourage candidates in the
27 opposite direction (Plaintiff) and failed to disclose this important fact.” Dkt. No. 64 at 8.

28 The second amended complaint does not meet the heightened pleading standard.

1 However, from the proffers of fact that Lenk has made in his opposition and the facts
2 contained in the first amended complaint, the Court concludes that Lenk has additional
3 facts at his disposal. Thus, amendment is not futile, and the Court will permit Lenk to
4 amend this claim. This claim is DISMISSED WITH LEAVE TO AMEND.

5 **C. California Labor Code § 976**

6 California Labor Code § 976 provides, “No person shall publish or cause to be
7 published any advertisement, solicitation or communication in any newspaper, poster or
8 letter, offering employment as a salesman, broker or agent, whether as an employee or
9 independent contractor, which advertisement, solicitation or communication (a) is willfully
10 designed to mislead any person as to compensation or commissions which may be earned;
11 or (b) falsely represents the compensation or commissions which may be earned.”

12 Lenk alleges no facts implicating this section of the Labor Code, as it appears Lenk
13 learned about the MPS position from Barr, and spoke directly with MPS employees about
14 the compensation and commissions earned. Therefore, Lenk has not alleged that MPS
15 falsely published information about Lenk’s position. California Labor Code § 976 is
16 inapplicable to Lenk’s factual scenario, and no facts have been proffered to suggest that
17 amendment would be productive. Thus, the Court DISMISSES this claim without leave to
18 amend.

19 **D. California Labor Code § 2751**

20 California Labor Code § 2751 provides, “(a) Whenever an employer enters into a
21 contract of employment with an employee for services to be rendered within this state and
22 the contemplated method of payment of the employee involves commissions, the contract
23 shall be in writing and shall set forth the method by which the commissions shall be
24 computed and paid.” Subsection (c) defines “commission” and states that the term does
25 not include “bonus and profit-sharing plans, unless there has been an offer by the employer
26 to pay a fixed percentage of sales or profits as compensation for work to be performed.”

27 Here, the employment agreement states that Lenk’s compensation was in the form
28 of a profit-sharing or bonus plan. Thus, this section of the Labor Code is also inapplicable

1 to Lenk’s claims. This claim is DISMISSED without leave to amend.

2 **E. Wrongful Constructive Termination in Breach of Contract**

3 As discussed previously, Lenk’s termination, regardless of whether Lenk was
4 terminated by MPS or whether he ended the employment relationship, cannot be the basis
5 of a breach of contract claim. Thus, this claim is DISMISSED without leave to amend.

6 **F. Wrongful Constructive Termination in Violation of Public Policy and
7 California Labor Code § 132A**

8 This cause of action requires the Court to analyze three separate components: (1)
9 constructive discharge; (2) in violation of public policy; and (3) California Labor Code §
10 132A.

11 **1. Constructive Discharge**

12 “Constructive discharge occurs when the employer’s conduct effectively forces an
13 employee to resign. Although the employee may say, ‘I quit,’ the employment relationship
14 is actually severed involuntarily by the employer’s acts, against the employee’s will. As a
15 result, a constructive discharge is legally regarded as a firing rather than a resignation.”
16 *Turner v. Anheuser-Busch, Inc*, 7 Cal. 4th 1238, 1245-46 (1994). Constructive discharge
17 is not a cause of action, but can be attached to a tort or contract claim, transforming an
18 employee’s resignation into a termination for purposes of that tort or contract claim. *Id.* at
19 1251. To plead constructive termination, an employee must allege that the employer either
20 intentionally created or knowingly permitted working conditions that were so intolerable
21 or aggravated at the time of the employee’s resignation that a reasonable employer would
22 realize that a reasonable person in the employee’s position would be compelled to resign.
23 *Id.*

24 Here, Lenk does not allege the facts that would transform his resignation into a
25 termination in the second amended complaint. However, in his opposition, Lenk provides
26 more detail: “Plaintiff has previously supplied (in his First Amended Complaint)
27 significant dates and actions to support his Constructive Discharge position, including the
28 fact that at least 4 other people (2 designers, a Product Marketer and a Product Engineer)

1 were laid off the same week as Plaintiff’s Constructive Discharge occurred. The layoff of
2 4 people in one group (majority of the group) in one week during good financial
3 performance times (suggesting a lay-off was not necessary) indicates that the company had
4 plans to restructure the group, including Plaintiff’s role.” Dkt. No. 64 at 9. Because the
5 second amended complaint is factually deficient, the Court finds that none of the claims
6 can rest upon Lenk’s theory of constructive discharge as pled in the second amended
7 complaint. However, Lenk appears to have additional facts at his disposal. All of Lenk’s
8 remaining claims rely on his theory of constructive discharge, so the Court will consider
9 Lenk’s factual proffer in determining whether leave to amend is appropriate for each
10 remaining claims.

11 **2. Constructive Discharge in Violation of Public Policy**

12 Although a plaintiff must sufficiently plead constructive discharge to avail himself
13 of the tort of constructive discharge in violation of public policy, the Court will assume
14 that Lenk can allege sufficient facts in an amended complaint to establish constructive
15 discharge. To plead a claim for wrongful discharge in violation of fundamental public
16 policy, a plaintiff must plead that his dismissal violated a policy that is (1) fundamental,
17 (2) beneficial for the public, and (3) embodied in a statute or constitutional provision.
18 *Turner*, 7 Cal.4th at 1256. Fundamental means that the policy is firmly established. *Foley*,
19 47 Cal.3d at 670 n.11. Beneficial to the public means that the interest advanced by the
20 policy must inure to the benefit of the public at large, rather than simply to the individual
21 employer or employee. *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083, 1095-96 (1992). The
22 plaintiff must identify a policy or statute that “would be thwarted by his alleged
23 discharge.” *Turner*, 7 Cal.4th at 1257. Thus, Lenk must demonstrate that his constructive
24 discharge violated a policy embodied in a statute.

25 **3. California Labor Code § 132A**

26 California Labor Code § 132A provides, “Any employer who discharges, or
27 threatens to discharge, or in any manner discriminates against any employee because he or
28 she has filed or made known his or her intention to file a claim for compensation with his

1 or her employer . . . is guilty of a misdemeanor.”

2 Only the Workers’ Compensation Appeals Board, and not any court, “is vested with
3 [the] full power, authority, and jurisdiction to try and determine finally all matters
4 specified in [California Labor Code § 132a] subject only to judicial review.” Cal. Lab.
5 Code § 132(a)(4). This cause of action cannot be used as a basis for wrongful termination
6 in violation of public policy. *Dutra v. Mercy Med. Ctr. Mt. Shasta*, 209 Cal. App. 4th 750,
7 755 (2012). Additionally, Lenk pleads no facts that he filed a complaint against MPS
8 during his employment. This claim is DISMISSED without leave to amend.

9 **G. Wrongful Constructive Termination, California Labor Code § 223**

10 California Labor Code § 223 provides, “Where any statute or contract requires an
11 employer to maintain the designated wage scale, it shall be unlawful to secretly pay a
12 lower wage while purporting to pay the wage designated by statute or by contract.” First,
13 this section does not create a private right of action. *Johnson v. Hewlett-Packard Co.*, 809
14 F. Supp. 2d 1114, 1136 (N.D. Cal. 2011). Second, Lenk pleads no facts to allege MPS has
15 a designated wage scale, and his offer letter demonstrates that the opposite is true. Lenk
16 was given a set salary, along with benefits outlined in the contract. This claim is
17 DISMISSED without leave to amend.

18 **H. Wrongful Constructive Termination, California Labor Code § 1102.5**

19 A prima facie case of employment retaliation under California Labor Code § 1102.5
20 requires plaintiff to demonstrate that he was subjected to adverse employment action after
21 engaging in protected activity, and that there was a causal connection between the two.
22 *Edgerly v. City of Oakland*, 211 Cal. App. 4th 1191, 1199 (2012). An employee engages
23 in protected activity when he “discloses to a governmental agency reasonably based
24 suspicions of *illegal activity*.” *Mokler v. County of Orange*, 157 Cal. App. 4th 121, 138
25 (2007) (emphasis in original). The employee must “reasonably believe . . . he was
26 disclosing a violation of state or federal law.” *Patten v. Grant Joint Union High Sch. Dist.*,
27 134 Cal. App. 4th 1378, 1384 (2005). “To have a reasonably based suspicion of illegal
28 activity, the employee must be able to point to some legal foundation for his suspicion—

1 some statute, rule or regulation which may have been violated by the conduct he
2 disclosed.” *Fitzgerald v. El Dorado Cnty.*, 12-cv-02932 KJN, 2015 WL 966133, at *13
3 (E.D. Cal. Mar. 3, 2015) (citing *Love v. Motion Indus., Inc.*, 209 F. Supp. 2d 1128, 1135
4 (N.D. Cal. 2004)). Lenk points to his disclosure of MPS’s alleged violation of an industry
5 committee’s standards. SAC ¶¶ 112-116. This is not a violation of state or federal law,
6 and thus the claim is DISMISSED without leave to amend.

7 **I. Wrongful Constructive Termination, California Labor Code § 2802(a)**

8 California Labor Code § 2802(a) provides, “An employer shall indemnify his or her
9 employee for all necessary expenditures or losses incurred by the employee in direct
10 consequence of the discharge of his or her duties, or of his or her obedience to the
11 directions of the employer, even though unlawful, unless the employee, at the time of
12 obeying the directions, believed them to be unlawful.” Lenk alleges that he was not
13 reimbursed by MPS for 5 months of work-related expenses. In his opposition, Lenk
14 includes further details about the reimbursements as attachments. Dkt. No. 64. The Court
15 finds that as alleged in the second amended complaint, this claim lacks factual detail.
16 However, Lenk appears to have more specific information available.

17 Lenk has proffered more factual information for the constructive discharge claim
18 and California Labor Code § 2802(a), which the Court finds could cure the deficiencies in
19 the second amended complaint. Thus, the Court dismisses this claim WITH LEAVE TO
20 AMEND. For this claim to proceed, the Court notes that Lenk must sufficiently plead (1)
21 constructive discharge; (2) in violation of California Labor Code § 2802(a); and (3) a
22 causal connection between MPS’s failure to reimburse and Lenk’s termination.

23 **IV. CONCLUSION**

24 In conclusion, the Court has considered each of Lenk’s causes of action, construing
25 his pleadings liberally. The Court has also taken into account Lenk’s factual proffers, from
26 his prior complaints and his opposition, in determining whether amendment is futile. The
27 Court finds that the following claims fail to state a claim, and GRANTS the motion to
28 dismiss without leave to amend: breach of contract, implied covenant of good faith and fair

1 dealing, and the California Labor Code §§ 2751, 123A, 223, 1102.5 claims, as presented in
2 the complaint.

3 The Court GRANTS the motion to dismiss WITH LEAVE TO AMEND as to
4 Lenk's California Labor Code § 970 claim, and his theory of constructive termination in
5 violation of the public policy of California Labor Code § 2802.

6 Lenk may submit an amended complaint within 14 days. The amended complaint is
7 limited to alleging these two causes of action and the relevant facts. The amended
8 complaint may not include additional causes of action or parties.

9
10 **IT IS SO ORDERED.**

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12 Dated: November 23, 2015



NATHANAEL M. COUSINS
United States Magistrate Judge

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