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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6 SAN JOSE DIVISION  
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8 M. L. A.,

9 Plaintiff,

10 v.

11 M. JEFFREY MAISELS,

12 Defendant.

Case No. 21-cv-08121-VKD

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

Re: Dkt. No. 10

13  
14 Plaintiff M.L.A., a minor, by and through his guardian ad litem, asserts a single claim for  
15 negligent undertaking against defendant M. Jeffrey Maisels, M.D. Dkt. No. 3. The action was  
16 removed from state court on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a).<sup>1</sup> Dkt.  
17 No. 1.

18 Dr. Maisels moves to dismiss plaintiff's first amended complaint ("FAC") for failure to  
19 state a claim under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 10. The Court heard oral  
20 argument on the motion on December 21, 2021. Dkt. No. 19. Having considered the parties'  
21 submissions and the arguments made at the hearing, the Court grants defendant's motion to  
22 dismiss the FAC with leave to amend.

23 **I. BACKGROUND<sup>2</sup>**

24 M.L.A. was born in December 2017 at the Salinas Valley Hospital Medical Center. Dkt.  
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26 <sup>1</sup> The parties have consented to magistrate judge jurisdiction. Dkt. Nos. 8, 12. The parties do not  
27 otherwise dispute the Court's jurisdiction.

28 <sup>2</sup> Unless otherwise noted, the following factual allegations are taken from the FAC and from  
documents that are incorporated by reference in the FAC or that are the subject of judicial notice.

1 No. 3 ¶¶ 1, 2. While he was still in the hospital, M.L.A. was determined to be at high risk for  
2 developing hyperbilirubinemia, or excessive levels of bilirubin in the blood. *Id.* ¶ 14. If untreated,  
3 hyperbilirubinemia can lead to a condition called kernicterus, a type of brain damage. *Id.* ¶ 16 &  
4 n.1.

5 At some point before M.L.A.’s birth, the American Academy of Pediatrics (“AAP”)  
6 convened a committee to investigate an increase in cases of hyperbilirubinemia and brain injury in  
7 newborns believed to be the result of newborns being discharged from hospitals less than 48 hours  
8 after birth. *Id.* ¶ 4. According to M.L.A., the AAP is a “national organization of pediatricians  
9 whose primary purpose is to advance the educational level for pediatrician members on specific  
10 medical issues and ultimately to improve the quality of medical care for newborn babies in the  
11 U.S.” *Id.* ¶ 5.

12 In July 2004, the AAP Subcommittee on Hyperbilirubinemia prepared and published a  
13 clinical practice guideline called “Management of Hyperbilirubinemia in the Newborn Infant 35 or  
14 more weeks of Gestation” (“the Guideline”). *Id.* ¶ 6. Dr. Maisels chaired the subcommittee and  
15 co-authored the Guideline. *Id.* The Guideline was published in the Journal of Pediatrics, the  
16 official publication of the AAP, and was sent to all pediatrician members of the AAP in the United  
17 States, including California. *Id.* The Guideline included “charts with recommendations for  
18 follow-up care after a bilirubin level was obtained after birth, a chart to determine if phototherapy  
19 was recommended for age-specific bilirubin levels[,] and a chart to determine if exchange blood  
20 transfusion was recommended for age-specific bilirubin level.” *Id.* ¶ 8. According to M.L.A., the  
21 Guideline did not state that “the chart for follow-up of a bilirubin level cannot be used after a baby  
22 has received phototherapy.” *Id.* ¶ 9.

23 In February 2008, Dr. Maisels published a paper titled “Phototherapy for Neonatal  
24 Jaundice” in the New England Journal of Medicine. *Id.* ¶ 11. This paper included the following  
25 statement: “for infants who require phototherapy during their birth hospitalization, a follow-up  
26 bilirubin level should be obtained 24 hours after discharge.” *Id.*

27 In October 2009, the AAP Subcommittee on Hyperbilirubinemia, which was still chaired  
28 by Dr. Maisels, published “Hyperbilirubinemia in the Newborn Infant 35 or more weeks of

1 Gestation: An update with clarifications” in the Journal of Pediatrics. *Id.* ¶ 10. According to  
 2 M.L.A., the 2009 update to the Guideline did not include the recommendation that infants who  
 3 require phototherapy during their birth hospitalization should have a follow-up bilirubin test 24  
 4 hours after discharge, and it also did not “clarify why the Bhutani curve/chart<sup>3</sup> for follow-up based  
 5 on age specific bilirubin levels cannot be used after phototherapy.” *Id.* ¶ 12.

6 At 23 hours after birth, M.L.A. had a bilirubin level of 8.8. *Id.* ¶ 14. His treating  
 7 pediatrician, Dr. Heidi Deyro, treated M.L.A with phototherapy. *Id.* At 36 hours after birth,  
 8 M.L.A. had a bilirubin level of 8.5. *Id.* ¶ 15. According to M.L.A., “the Bhutani curve showed a  
 9 bilirubin of 8.5 to be in the low intermediate zone, and based on that information, Dr. Deyro and  
 10 the nurses, in conformity with the recommendations of the AAP [updated Guideline], ordered that  
 11 M.L.A. be seen in a pediatric clinic for follow-up in 2 days.” *Id.* As it happened, M.L.A. was not  
 12 seen in a pediatric clinic, but was readmitted to the hospital on the third day after discharge with a  
 13 bilirubin level of 41.4. *Id.* ¶ 16. He was subsequently diagnosed with kernicterus. *Id.*

14 In December 2018, M.L.A. filed an action for medical malpractice in state court against the  
 15 Salinas Valley Memorial Hospital and Dr. Deyro, as well as other others. *Id.* ¶¶ 2, 17. In March  
 16 2021, Dr. Maisels testified in a deposition in that action as an expert witness for the defense. *Id.*  
 17 ¶ 7. During his deposition, Dr. Maisels was asked: “[W]ould you disagree with experts who say  
 18 that at 36 hours of age the baby should have either been kept in the hospital for further evaluation,  
 19 observation, and a further bilirubin level or returned to the hospital within 24 hours for a further  
 20 bilirubin level?” *Id.* ¶ 18. According to M.L.A., Dr. Maisels answered as follows:

21 I don’t disagree with any of that. If I was taking care of this baby  
 22 that is almost certainly what I would have done. Dr. Deyro  
 23 misinterpreted, unfortunately, the follow-up issues that were laid out  
 24 in the 2009 guideline, which says that if a baby of this gestation and  
 25 with these kinds of risk factors has a bilirubin level that is in the  
 26 low-intermediate zone, the follow-up recommendation[sic] are  
 return in two days and consider getting a transcutaneous or a serum  
 bilirubin level. . . .

27 <sup>3</sup> According to M.L.A., the Bhutani curve/chart “places the neonate into specific risk categories,  
 28 which then determines follow-up. . . . [It] divides babies into a high risk zone, a high intermediate  
 risk zone, a low intermediate risk zone, and a low risk zone, depending on their bilirubin level at  
 specific hours of age after birth.” *Id.* ¶ 13.

1 Now it is true that those guidelines don't specify that this does not  
2 apply to a baby who has received phototherapy. [Plaintiff's expert]  
3 recognizes that as well and he says that it is not written anywhere,  
4 and he is correct. Nowhere is it written, unfortunately, and I accept  
5 some responsibility for this because I was the author of both of those  
6 guidelines together with other people who wrote it. We should have  
7 specified that any baby who received phototherapy is not part of this  
8 follow-up guideline, that they have to be taken into and considered  
9 in another category. . . .

7 So, unfortunately, and it is not as [Plaintiff's expert] said in his  
8 deposition, common knowledge. It is not common knowledge that  
9 phototherapy doesn't apply. If it was common knowledge, Dr.  
10 Deyro would not have done it. It is not common knowledge. I can  
11 assure you that that is misinterpreted by many pediatricians in this  
12 case. . . .

11 *Id.* ¶¶ 19-21.

12 M.L.A. alleges that Dr. Maisels's failure to "clarify in the [updated AAP Guideline] that  
13 when a baby undergoes phototherapy during their birth hospitalization, [they] should return for a  
14 follow-up bilirubin within 24 hours after discharge, regardless of what risk zone they are in after  
15 phototherapy, led directly to the nurses at Salinas Valley Hospital Medical Center and Dr. Deyro  
16 to fail to have M.L.A. return to the hospital 23 hours after discharge for a follow-up bilirubin." *Id.*  
17 ¶ 22. He alleges that Dr. Maisels negligently undertook to render services to Dr. Deyro and the  
18 hospital's nurses in publishing and failing to clarify the updated Guideline. *Id.* ¶ 24.

## 19 **II. LEGAL STANDARD**

20 A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal  
21 sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).  
22 Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient facts  
23 alleged to support a cognizable legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep't*, 901  
24 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be  
25 taken as true and construed in the light most favorable to the claimant. *Id.*

26 However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere  
27 conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover,  
28 "the court is not required to accept legal conclusions cast in the form of factual allegations if those

1 conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness*  
2 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

3 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that the  
4 pleader is entitled to relief.” This means that the “[f]actual allegations must be enough to raise a  
5 right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555  
6 (2007) (citations omitted). However, only plausible claims for relief will survive a motion to  
7 dismiss. *Iqbal*, 556 U.S. at 679. A claim is plausible if its factual content permits the court to  
8 draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* A plaintiff  
9 does not have to provide detailed facts, but the pleading must include “more than an unadorned,  
10 the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678.

11 A court generally may not consider any material beyond the pleadings when ruling on a  
12 Rule 12(b)(6) motion. Documents appended to the complaint, incorporated by reference in the  
13 complaint, or which properly are the subject of judicial notice may be considered along with the  
14 complaint when deciding a Rule 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 889 F.3d 988,  
15 998 (9th Cir. 2018); *see also Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d  
16 1542, 1555 n.19 (9th Cir. 1990).

### 17 **III. DISCUSSION**

18 Dr. Maisels moves to dismiss M.L.A.’s single claim for negligent undertaking for failure to  
19 state a claim under Rule 12(b)(6). First, Dr. Maisels argues that California Civil Code § 47(b),  
20 informally known as the “witness litigation privilege,” immunizes him from liability. Dkt. No. 10  
21 at 5–7. Second, Dr. Maisels argues that M.L.A. fails to plead facts sufficient to state a claim for  
22 negligent undertaking. *Id.* at 7–9. The Court addresses each argument.

#### 23 **A. Immunity Under California Civil Code § 47(b)**

24 Citing California Civil Code § 47(b), Dr. Maisels argues that he is immune from any  
25 liability because M.L.A.’s claim is based on his privileged deposition testimony. Dkt. No. 10 at  
26 5–7. The “litigation privilege” codified in Civil Code § 47(b) applies to a communication required  
27 or permitted by law in the court of a judicial proceeding to achieve the objects of the litigation.  
28 Cal. Civ. Code § 47(b); *Rusheen v. Cohen*, 37 Cal.4th 1048, 1057 (2006) (citing *Silberg v.*

1 *Anderson*, 50 Cal. 3d 205, 212 (1990)).

2 While statements made by a witness during a deposition are privileged communications,  
 3 *see* Cal. Civ. Code § 47(b)(3); *see also Moore v. Conliffe*, 7 Cal. 4th 634, 640–53 (1994) (medical  
 4 expert’s deposition testimony in connection with private, contractual arbitration proceeding was  
 5 absolutely privileged), Civil Code § 47(b) affords Dr. Maisels no immunity here. M.L.A. does not  
 6 claim that Dr. Maisels was negligent in providing testimony as an expert witness in the state court  
 7 medical malpractice action; rather, the alleged negligent undertaking is Dr. Maisels’s failure to  
 8 provide accurate guidelines for the treatment of hyperbilirubinemia as chair of the AAP  
 9 Subcommittee responsible for formulating and publishing such guidelines. *See* Dkt. No. 13 at 2  
 10 (“[T]he basis of the claim by Plaintiff in this case is not what Dr. Maisels said during his  
 11 deposition, rather the basis of the claim is what [Dr. Maisels] failed to do during the drafting of the  
 12 guidelines, and subsequent revision.”). Dr. Maisels’s deposition testimony may or may not be  
 13 admissible evidence of the alleged negligence, but it is not the basis for M.L.A.’s claim.

14 **B. Failure to State a Claim for Negligent Undertaking**

15 To state a claim for negligent undertaking, M.L.A. must plead the following elements:

16 (1) Dr. Maisels undertook, gratuitously or for consideration, to render services to another;

17 (2) The services rendered were of a kind Dr. Maisels should have recognized as necessary

18 for the protection of M.L.A.;

19 (3) Dr. Maisels failed to exercise reasonable care in the performance of this undertaking;

20 (4) The failure to exercise reasonable care resulted in physical harm to M.L.A.; and

21 (5) Either (a) Dr. Maisels’s failure to exercise reasonable care increased the risk of such

22 harm, or (b) he undertook to perform a duty owed by another to M.L.A., or (c) the harm was

23 suffered because of reliance by another or by M.L.A. upon the undertaking. *See Artiglio v.*

24 *Corning, Inc.*, 18 Cal. 4th 604, 612–13 (1998) (quoting Section 324A of the Restatement (Second)

25 of Torts).

26 Dr. Maisels challenges M.L.A.’s complaint on two grounds.<sup>4</sup> First, he argues that the

27 \_\_\_\_\_  
 28 <sup>4</sup> Dr. Maisels includes additional arguments in his reply brief, including arguments on the merits, some of which rely on quotes from the updated Guideline—a document that is not in the record

1 complaint does not allege that Dr. Maisels undertook to render services to Dr. Deyro, M.L.A.’s  
2 treating physician, and that such an allegation could not plausibly be made based solely on the  
3 publication of the AAP Guideline. Dkt. No. 10 at 8–9. As discussed above, the alleged negligent  
4 undertaking is Dr. Maisels’s failure to provide accurate guidelines for the treatment of  
5 hyperbilirubinemia as chair of the AAP Subcommittee responsible for formulating and publishing  
6 such guidelines. The complaint alleges that the updated Guideline was sent to “all pediatrician  
7 members of the AAP in the U.S.” Dkt. No. 3 ¶ 6. While it may reasonably be inferred from these  
8 allegations that Dr. Maisels and the AAP Subcommittee intended to communicate the treatment  
9 guidelines to all member pediatricians, the complaint does not allege that Dr. Deyro was among  
10 those pediatricians. The complaint does not describe any other manner in which Dr. Maisels  
11 allegedly rendered services to Dr. Deyro. For this reason, the Court agrees that the complaint fails  
12 to plead the first element of a claim for negligent undertaking.

13 The more difficult question is whether formulation and publication of the AAP guidelines  
14 can ever be an actionable undertaking. The complaint describes the AAP’s mission as  
15 “educational,” but does not explain the guidelines’ role in the treatment decisions of pediatricians  
16 like Dr. Deyro. *Id.* ¶ 5. Dr. Maisels cites no authority for his position that the publication of  
17 treatment guidelines by a national organization of pediatricians cannot, as a matter of law,  
18 constitute an undertaking, and that proposition certainly is not self-evident. *See, e.g., Mayall v.*  
19 *USA Water Polo, Inc.*, 909 F.3d 1055, 1067–68 (9th Cir. 2018) (reversing district court’s dismissal  
20 of complaint where plaintiff alleged defendant undertook “specific responsibility to establish and  
21 enforce rules to ensure the safety of athletes in its youth water polo league”); *Deya v. Hiawatha*  
22 *Hosp. Ass’n, Inc.*, No. 10-CV-2263-JAR/GLR, 2011 WL 1698774, at \*2–3 (D. Kan. May 4, 2011)  
23 (permitting amendment to add negligent undertaking claim against hospital administrator  
24 responsible for “reviewing, developing and initiating written policies and protocols for newborn  
25 care”). The question turns, in part, on the nature of the undertaking. *See, e.g., Hardin v. PDX,*  
26 *Inc.*, 227 Cal. App. 4th 159, 169 (2014) (“[I]t is the nature of PDX’s undertaking, not the care with

27  
28 before the Court. The Court will not consider arguments raised for the first time in a reply brief.  
*Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007).



1 which it was carried out, that determines whether it assumed a duty under Restatement section  
 2 324A in the first place.”). Accordingly, because the complaint fails to adequately allege the nature  
 3 of the undertaking at issue, the Court concludes that the complaint fails to plead the first element  
 4 of a claim for negligent undertaking.

5 Second, Dr. Maisels argues that the complaint does not adequately allege causation  
 6 because M.L.A. does not allege that Dr. Deyro relied in any way on the updated Guideline in  
 7 treating M.L.A. Dkt. No. 10 at 9; Dkt. No. 14 at 3. In his opposition brief, M.L.A. responds that  
 8 “[e]ven if Dr. Deyro had [not] read the guideline prior to making her clinical decision, Dr. Deyro’s  
 9 decision was based on the standard of care,” which “in major part, was based on the [updated  
 10 Guideline].” Dkt. No. 13 at 9. However, these allegations are not found anywhere in the  
 11 complaint, which is otherwise silent regarding Dr. Deyro’s knowledge of or reliance on the AAP  
 12 guidelines. For this reason, the Court agrees with Dr. Maisels that the complaint fails to plead the  
 13 fourth element of a claim for negligent undertaking.

14 Accordingly, the Court finds that M.L.A.’s complaint fails to state a claim for negligent  
 15 undertaking against Dr. Maisels.

#### 16 **IV. LEAVE TO AMEND**

17 While leave to amend is generally granted liberally, the Court has discretion to dismiss a  
 18 claim without leave to amend if amendment would be futile. *Manzarek v. St. Paul Fire & Marine*  
 19 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *Rivera v. BAC Home Loans Servicing, L.P.*, 756 F.  
 20 Supp. 2d 1193, 1197 (N.D. Cal. 2010) (citing *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996)).  
 21 Because the Court does not find that amendment would be futile, the Court grants M.L.A. leave to  
 22 amend.

#### 23 **V. CONCLUSION**

24 For the foregoing reasons, the Court grants defendant’s motion to dismiss. Plaintiff may  
 25 file an amended complaint by **January 24, 2022**. The Court continues the initial case  
 26 management conference to **March 1, 2022**.

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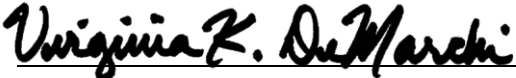


United States District Court  
Northern District of California

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**IT IS SO ORDERED.**

Dated: January 10, 2022

  
VIRGINIA K. DEMARCHI  
United States Magistrate Judge