

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
CALIFORNIA

**Anthony Alexander James v. Matzger Management Company**

James v. Matzger Management Co. · No. 2:23-cv-1174-DAD-SCR · Decided March 6, 2025

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OPINION

(PS) James v. Metzger Mgt. Co.

PER CURIAM.

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8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 ANTHONY ALEXANDER JAMES, No. 2:23-cv-1174-DAD-SCR

12 Plaintiff,

13 v. FINDINGS AND RECOMMENDATIONS

14 MATZGER MANAGEMENT

COMPANY,

15 Defendant. 16

17 18 Plaintiff Anthony Alexander James is proceeding pro se in this action, which was referred  
19 to the undersigned in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).  
Pending 20 before the undersigned is Defendant Matzger Management Company’s motion to  
dismiss the 21 First Amended Complaint (“FAC”) (ECF No. 14). For the reasons stated below, the  
court 22 recommends the motion to dismiss be granted with leave to amend for all causes of  
action except 23 defamation, for which the court recommends the motion be granted without leave  
to amend. 24

BACKGROUND AND PROCEDURAL HISTORY

25 Plaintiff commenced this action on June 21, 2023, by filing a complaint and paying the 26  
applicable filing fee. ECF No. 1. The FAC, filed April 29, 2024, consists of lengthy, 27  
unnumbered paragraphs of loose narration punctuated with citations to various academic sources.  
28 1 It alleges that Defendant blamed Plaintiff for an apartment fire after Plaintiff had filed  
multiple 2 complaints about his unit. ECF No. 14 at 2-3. The fire department reported that the  
fire’s cause 3 was “undetermined[,]” but Plaintiff rejects Defendant’s explanation that the fire had  
started from 4 the stovetop when the electricity had come back on. Id. at 3. 5 The FAC further  
alleges that Defendant failed to adhere to inspection protocols following 6 the fire. Id. at 4. It  
argues that this violates Defendant’s duty of care under California Civil Code 7 § 1714(a). Id. 8  
The FAC separately argues that Defendant falsely told Plaintiff there were no other units 9

available when there were. *Id.* at 5. The FAC alleges discriminatory behavior against Plaintiff based both on this falsehood and on Defendant asserting Plaintiff had started the fire. *Id.* 11 Defendant also failed to produce a written statement regarding the situation, frustrating efforts to 12 determine whether its claims were speculative or grounded in evidence. *Id.* 13 The FAC then alleges that Defendant slandered Plaintiff, falsely accusing him of both 14 starting the fire and owing \$1,180.86. *Id.* at 6. The allegations that Plaintiff started the fire, the 15 FAC argues, both constitute fraud against the insurance company and menace Plaintiff insofar as 16 this could lead him to lose his home. *Id.* at 7. 17 Although the FAC does not specifically identify the causes of action raised, Defendant has 18 construed its allegations into causes of action for (1) negligence, (2) discrimination under the Fair 19 Housing Act (“FHA”), (3) defamation, and (4) “harassment, menacing, and fraud.” See ECF No. 20 15-1 at 8-11. Plaintiff does not dispute this. See generally ECF No. 17. The FAC seeks 21 \$3,000,000 in “awarded pre-judgment” plus unspecified “actual, compensatory, and liquidated 22 damages” and “emotional distress and or declaratory relief[.]” ECF No. 14 at 8.

### 23 LEGAL STANDARD

24 A defendant may move to dismiss a claim under Rule 12(b)(6) if the allegation “fail[s] to 25 state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive, the 26 plaintiff’s complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to 27 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell 28 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). 1 A claim is facially plausible “when the plaintiff pleads factual content that allows the 2 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” 3 *Iqbal*, 556 U.S. at 678. This standard is a “context-specific task that requires the reviewing court 4 to draw on its judicial experience and common sense,” *Id.* at 679, and to “draw all reasonable 5 inferences in favor of the nonmoving party.” *Boquist v. Courtney*, 32 F.4th 764, 773 (9th Cir. 6 2022) (quoting *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 7 (9th Cir. 2014) (internal quotation marks omitted). Stating a claim “requires more than labels and 8 conclusions, and a formulaic recitation of the elements.” *Twombly*, 550 U.S. at 555. A complaint 9 that tenders “naked assertion[s]” is insufficient if “devoid of ‘further factual enhancement.’” 10 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). 11 On a Rule 12(b)(6) motion, the court may consider all materials incorporated into the 12 complaint by reference, as well as evidence properly subject to judicial notice. *Weston Fam. 13 P’ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 617-18 (9th Cir. 2022). “Ultimately, dismissal is 14 proper under Rule 12(b)(6) if it appears beyond doubt that the non-movant can prove no set of 15 facts to support its claims.” *Boquist*, 32 F.4th at 773–74 (internal citation and quotation marks 16 omitted) (cleaned up). 17 The court may dismiss for failure to state a claim when the allegations of the complaint 18 and judicially noticeable materials establish an affirmative defense or other bar to recovery, such 19 as the expiration of the statute of limitations. See *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th

20 Cir. 2013) (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)); see also *Goddard v. Google Inc.*, 21 640 F. Supp. 2d 1193, 1199, n. 5 (N.D. Cal. 2009) (noting that “affirmative defenses routinely 22 serve as a basis for granting Rule 12(b)(6) motions where the defense is apparent from the face of 23 the [c]omplaint”). However, dismissal under Rule 12(b)(6) is improper if the allegations of the 24 complaint and judicially noticeable materials concerning the defense raise disputed issues of fact. 25 *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (citing *Scott v. 26 Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam)). 27 “[A] district court should grant leave to amend even if no request to amend the pleading 28 was made, unless it determines that the pleading could not possibly be cured by the allegation of 1 other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *In re Doe*, 58 F.3d 2 494, 497 (9th Cir. 1995)). A pro se litigant is entitled to notice of the deficiencies in the 3 complaint and an opportunity to amend, unless the complaint’s deficiencies could not be cured by 4 amendment. See *Akhtar v. Mesa*, 698 F.3d 1202, 1213 (9th Cir. 2012).

## 5 ANALYSIS

6 I. Reference to the Original Complaint 7 The FAC alleges that Plaintiff’s “complaint detailed the events and the subsequent cover- 8 up” underlying Plaintiff’s claims. ECF No. 14 at 2. Plaintiff cannot incorporate the Complaint’s 9 allegations into the FAC by reference. As Defendant properly argues, an “‘amended complaint 10 supersedes the original, the latter being treated thereafter as non-existent.’” *Id.* (citing *Lacey v. 11 Maricopa County*, 693 F.3d 896, 925 (9th Cir. 2012)). 12 Local Rule 220 expressly requires that any 12 amended complaint be “complete in itself without reference to the prior or superseded pleading.” 13 A court with a similar rule, in *Diamond v. County of Riverside Sheriff’s Dept.*, rejected a Second 14 Amended Complaint which purported to “incorporate[] all of the allegations, exhibits, and 15 Schedules...of the First–Amended–Complaint that have been submitted in this case.” Case No. 16 14-cv-01922–VBF, 2015 WL 3948833 at \*2-3 (C.D. Cal. 2015). Any incorporation of the 17 original Complaint in this action is void. The FAC will be evaluated solely based on the 18 allegations therein. 19 II. Negligence 20 “In order to prove facts sufficient to support a finding of negligence, a plaintiff must show 21 that the defendant had a duty to use due care, that he breached that duty, and that the breach was 22 the proximate or legal cause of the resulting injury.” *Hayes v. Cnty. of San Diego*, 57 Cal. 4th 23 622, 629 (2013) (alterations omitted). 24 Such a duty of care governs any “injury occasioned to another by his or her want of 25 ordinary care or skill in the management of his or her property or person[.]” Cal. Civil Code § 26 1714(a). The owner of this duty is “‘the person in possession of the land ... because [of the 27 possessor’s] supervisory control over the activities conducted upon, and the condition of, the 28 1 land.’” *Moses v. Roger-McKeever*, 91 Cal. App. 5th 172, 179 (Cal. Ct. App. 2023) (quoting 2 *(Alcaraz v. Vece*, 14 Cal.4th 1149, 1157–1158 (Cal. 1997)). This possessor has a duty to 3 “‘inspect [the premises] or take other proper means to ascertain their condition’” and to either 4 remedy or give adequate warning of any “‘dangerous condition...that would have been 5 discovered by the exercise of reasonable care[.]’” *Moses*, 91 Cal. App. 5th at

179 (quoting *Staats 6 v. Vintner's Golf Club, LLC*, 25 Cal.App.5th 826, 833 (Cal. Ct. App. 2018)).  
7 Defendant concedes that a duty of care exists but argues that Plaintiff has failed to 8 articulate  
how Defendant breached this duty. ECF No. 15-1 at 8-9. Defendant argues that while 9 Plaintiff  
alleges that Defendant failed to inspect an electrical system, he fails to identify which 10 ones. Id.  
at 9. Defendant further argues that Plaintiff does not connect this to any damages 11 caused by the  
fire. Id. 12 Plaintiff responds that Defendant's failure to provide its own theory of causation  
"raises 13 questions" and damages Defendant's credibility. ECF No. 17 at 2. Plaintiff further  
argues that 14 proper maintenance practices are a part of Defendant's duty of care as a landlord,  
and that 15 Defendant breached it by "[n]eglecting essential safety checks such as PG&E  
inspections[.]" Id. 16 at 3. Plaintiff then notes that Defendant, if negligent, is "liable for  
compensating damages arising 17 from both physical injuries sustained during accidents and  
subsequent mental anguish[.]" Id. 18 Defendant replies that Plaintiff conflates damages with  
negligence without explaining how the 19 alleged inspections resulted in the alleged harm. ECF  
No. 19 at 3. 20 The FAC alleges that a fire in the apartment building caused physical damage.  
ECF No. 21 14 at 2. It then asserts that Defendant blamed Plaintiff when the cause was  
undetermined. Id. at 22 3. Defendant has theorized that the fire was ignited when electricity came  
back on in the 23 apartment, an explanation Plaintiff found "scientifically flawed and  
conveniently self-serving." 24 Id. The FAC concludes that circumstantial evidence and this  
"speculative narrative" have 25 "unjustly shifted" the focus of the investigation to Plaintiff. Id.  
When combined with other 26 hazardous conditions in the apartment that Defendant had failed to  
remedy, Plaintiff alleges "a 27 pattern of neglect[.]" Id. Separately, the FAC asserts that  
Defendant's failure to accurately 28 investigate and report the cause of the fire "as required by  
Pacific Gas and Electric (PG&E) 1 standards" is its own act of negligence. Id. at 4. This has  
purportedly resulted in both out-of- 2 pocket expenses and mental anguish for Plaintiff. Id. 3 The  
duty of care owed to a tenant only governs a landlord's "management of his or her 4 property[.]"  
Cal. Civ. Code § 1714(a). While this includes remedying dangerous conditions 5 before they lead  
to injury, no authority suggests that this duty of care extends to properly 6 identifying and  
reporting the causes of an injury after one occurs. See *Moses*, 91 Cal. App. 5th at 7 179. Whether  
Defendant's inspections after the fire were adequate is therefore irrelevant. While 8 Plaintiff now  
argues that safety checks from before the fire were also neglected (ECF No. 17 at 9 3), this  
argument is absent from the FAC. 10 Plaintiff has failed in his FAC to connect any alleged breach  
in its duty as a landlord to 11 any damages Plaintiff suffered. The motion to dismiss the claim for  
negligence should be 12 granted. However, by discussing safety checks from before the fire  
occurred in his opposition to 13 the motion to dismiss, Plaintiff has introduced a possible theory  
under which Defendant's failure 14 to fulfill its duty of care contributed to the apartment fire.  
Granting leave to amend the FAC to 15 include this allegation could remedy the defect in the  
claim for negligence. Leave to amend 16 therefore should be granted. See *Lopez*, 203 F.3d at  
1130. 17 III. Discrimination under the FHA 18 The FHA reflects a policy of "provid[ing], within

constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601. It is therefore unlawful to “refuse to sell or rent...or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3601(a). It is also unlawful to “discriminate against any person in the terms” of such sale or rental and related services, or to represent to them that a dwelling is not available for sale or rental when it is, “because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. §§ 3601(b), (d). Analysis of a claim under the FHA mirrors analysis of a Title VII discrimination claim. *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999). Pleading a prima facie case of disparate treatment thereunder requires alleging that “(1) plaintiff’s rights are protected under the FHA; and (2) as a result of the defendant’s discriminatory conduct, plaintiff has suffered a distinct and palpable injury.” *Id.* This establishes a presumption of discrimination, after which the defendant must “articulate some legitimate, nondiscriminatory reason for the action.” *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Defendant cites *Texas Department of Community Affairs v. Burdine* and *Jauregui v. City of Glendale* to argue that Plaintiff needed to demonstrate that discriminatory intent motivated the Defendant. ECF No. 15-1 at 9 (citing 450 U.S. 248, 256 (1981); 852 F.2d 1128, 1134 (9th Cir. 8 2012)). Both cases show the opposite. In *Texas Department of Community Affairs*, the Court only reached this step after plaintiff “create[d] a presumption that the employer unlawfully discriminated against the employee” through a prima facie case, and the defendant “present[ed] a legitimate reason for the action” in response. 450 U.S. 254-55. In *Jauregui*, the Ninth Circuit held that a plaintiff can use circumstantial evidence to show “‘it is more likely than not’ that the employer’s actions were based on unlawful considerations.” 852 F.2d at 1134 (quoting *Nanty v. Barrows Co.*, 660 F.2d 1327, 1331 (9th Cir.1981)). Only after the plaintiff proved a prima facie case through such circumstantial evidence did the defendant need to argue a non-discriminatory reason that plaintiff was not promoted. *Jauregui*, 852 F.2d at 1135. To survive a motion to dismiss, Plaintiff need only plead sufficient facts to articulate a prima facie case under the FHA. The FAC alleges that Defendant approved an apartment for “a non-African American party” but not for Plaintiff, who presumably is African American. ECF No. 14 at 4-5. It then alleges that by both blaming Plaintiff for the apartment fire and claiming there were no available units, Defendant has engaged in discriminatory behavior. *Id.* at 5. The parties do not dispute that race is among the characteristics the FHA seeks to protect against discrimination. See 42 U.S.C. §§ 3601(a)-(b), (d). Blaming Plaintiff for the apartment fire, however, would not qualify as an act of discrimination thereunder. See 42 U.S.C. § 3601. Defendant argues that allegations of a failure to give Plaintiff a unit given to a non-African American is insufficient to allege discrimination. ECF No. 15-1 at 10. The FAC does not allege when the unit was given to a non-African American, whether Plaintiff needed one at the time, or that Plaintiff was similarly situated to the non-African American who received the unit. *Id.* Plaintiff’s only response is that as an

African American, he is protected by the FHA. ECF

4 No. 17 at 2. This does not address whether he in fact “suffered a distinct and palpable injury” due

5 to discriminatory conduct. See Harris, 183 F.3d at 1051. However, denial of rental housing 6 based on race is a form of discriminatory conduct the FHA prohibits, especially if a landlord lies 7 about units being available in the process. See 42 U.S.C. §§ 3601(a), (d). The FAC does contain 8 at least a coherent theory of discrimination under the FHA. 9 A complaint need not plead all the facts that Defendant requests. For example, Defendant 10 asks whether Plaintiff was similarly situated to the non-African American who rented the unit in 11 question. ECF No. 15-1 at 10. This fact speaks to whether Defendant had a “legitimate, 12 nondiscriminatory reason” for denying Plaintiff’s application for the same unit. See Harris, 183 F.3d at 1051 (citing McDonnell, 411 U.S. at 802). This only becomes relevant after Plaintiff 14 establishes a prima facie case for discrimination, at which point Defendant will bear the burden of 15 proof. See Harris, 183 F.3d at 1051. A FAC does not need to explicitly plead facts sufficient to 16 find that Defendant did not have a nondiscriminatory reason for renting a unit to a non-African 17 American. 18 The pleadings are insufficient, however, because they provide no other details about the 19 discriminatory conduct. Plaintiff does not identify the unit he was purportedly denied, especially 20 as calling the Defendant his “landlord” implies that Plaintiff later rented another unit from 21 Defendant. See ECF No. 14 at 3. He does not specify when this denial occurred, to whom 22 Defendant ultimately leased the desired unit, or any other details that would provide sufficient 23 notice as to what conduct is at issue. The FAC’s threadbare allegation of discrimination lacks the 24 “further factual enhancement” needed to cross “the line between possibility and plausibility[.]” 25 See Twombly, 550 U.S. at 557. 26 What little the FAC does provide, however, suggests that Plaintiff may be able to allege 27 additional facts to support his claim and cure the FAC’s defect. See Lopez, 203 F.3d at 1130. 28 The Court recommends that the motion to dismiss the FAC’s claim under the FHA be 1 GRANTED WITH LEAVE TO AMEND. Upon receiving leave to amend, Plaintiff should be 2 advised that any claim under the FHA must be based on the alleged rental of a unit to a non- 3 African American applicant instead of him. The amended claim must include sufficient details of 4 such rental application to permit the court and Defendant to identify the disputed conduct. 5 IV. Defamation 6 In California, defamation is “(1) a publication that is (2) false, (3) defamatory, (4) 7 unprivileged, and (5) has a natural tendency to injure or causes special damage.” Sanders v. 8 Walsh, 219 Cal. App. 4th 855, 862 (Cal. Ct. App. 2013). Defamation is in the form of either libel 9 or slander. Cal. Civ. Code § 44. 10 Under California law, libel is: 11 a false and unprivileged publication by writing,...or other fixed representation to the eye, which exposes any person to hatred, 12 contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure a person in their 13 occupation. 14 Cal. Civ. Code § 45. Libel “on its face[.]” or per se, involves a falsehood in which the 15 defamatory nature is apparent “without the necessity of explanatory matter[.]” Cal. Civ. Code § 16 45a. This may

include a false allegation that a plaintiff is guilty of a crime. *Fashion 21 v. 17 Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal. App. 4th 1138, 1145, n.7 (Cal. 18 Ct. App. 2004) (citing *Weinberg v. Feisel*, 110 Cal.App.4th 1122, 1135 (Cal. Ct. App. 2003)). If 19 libel is not per se, it is not actionable unless the plaintiff proves he suffered special damages, as 20 defined in section 48a of the California Civil Code, as a proximate result thereof. Cal. Civ. Code 21 § 45a. 22 Slander, in contrast, is “a false and unprivileged oral communication, or uttering certain 23 other derogatory statements regarding a person.” *Bryant v. Lowe’s Home Centers, LLC*, 628 24 F.Supp.3d 1036, 1042 (E.D. Cal. 2022) (quoting *Shively v. Bozanich*, 31 Cal. 4th 1230, 1242 25 (Cal. 2003)). By statute, a slanderous statement is one that: 26 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; 27

2. Imputes in him the present existence of an infectious, contagious,

28 or loathsome disease; 1 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification 2 in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, 3 profession, trade, or business that has a natural tendency to lessen its profits; 4

4. Imputes to him impotence or a want of chastity; or

5

5. Which, by natural consequence, causes actual damage.

6 7 Cal. Civil Code § 46. 8 There are different pleading requirements for libel and slander. Statements alleged to 9 constitute libel “must be specifically identified, if not pleaded verbatim, in the complaint[.]” 10 *Medical Marijuana, Inc. v. ProjectCBD.com*, 46 Cal. App. 5th 869, 893 (Cal. Ct. App. 2020) 11 (cleaned up). Slander, however, involves a situation where “the defendant may have superior 12 knowledge of the precise words that were actually stated[.]” *Medical Marijuana*, 46 Cal. App. 13 5th at 893. A plaintiff pleading slander may need to allege something that ““occurred when he 14 was not present,”” as opposed to defamation, where the statement at issue ““may be seen.”” Id. 15 (quoting *Albertini v. Schaefer* 97 Cal.App.3d 822, 832 (Cal. Ct. App. 1979)). Accordingly, a 16 complaint may plead slander by ““alleging the substance of the defamatory statement[.]”” *Medical 17 Marijuana*, 46 Cal. App. 5th at 893 (quoting *Okun v. Superior Court*, 29 Cal. 3d 442, 458 (Cal. 18 1981)) (emphasis removed). A plaintiff’s retelling of the statement still ““must be sufficiently 19 close to the actual words proved to acquaint a defendant with what he must defend against.”” 20 *Medical Marijuana*, 46 Cal. App. 5th at 894 (quoting *Albertini v. Schaefer* 97 Cal.App.3d 822, 21 832 (Cal. Ct. App. 1979) (emphasis removed). 22 Both forms of defamation require some form of publication. *Haley v. Casa Del Rey 23 Homeowners Assn.*, 153 Cal. App. 4th 863, 877 (Cal. Ct. App. 2007) (quoting *Shively v. 24 Bozanich*, 31 Cal.4th 1230, 1242 (Cal. Ct. App. 2003)). For such purposes, this includes any 25 communication to a “third person” who understands the statement’s ““defamatory meaning as 26 applied to the plaintiff[.]”” *Haley*, 153 Cal. App. 4th at 877 (quoting *Shively*, 31 Cal.4th at 1242). 27 Although the common meaning of the term ‘publication’ requires ““written dissemination,””

this 28 /// 1 is not the case for defamation purposes. *Haley*, 153 Cal. App. 4th at 877 (quoting *Shively*, 31 2 Cal.4th at 1242). 3 The FAC alleges that Defendant defamed Plaintiff by publishing that he owed Defendant 4 \$1,180.96 and that he caused the apartment fire by leaving the stove on. ECF No. 14 at 6. It 5 argues that an allegation that Plaintiff's negligence in leaving the stove on caused the fire is 6 slanderous if false. *Id.* 7 Defendant argues that Plaintiff fails to identify where Defendant published or orally stated 8 that he owed \$1,180.86, in such a way that a listener would understand the statement is about 9 Plaintiff. ECF No. 15-1 at 10-11. In any case, Defendant argues, such a statement would not 10 tend to injure Plaintiff without some explanation for what the fee was or why it was levied. *Id.* at 11 11. Defendant similarly argues that Plaintiff has not provided any facts as to where Defendant 12 published a statement that Plaintiff caused the fire, or what those statements were. *Id.* 13 Plaintiff's opposition does not address the issue of publication directly. See ECF No. 17 14 at 4-5. Plaintiff instead attaches two documents presumably meant to represent the publication of 15 the allegedly defamatory statements. *Id.* at 8-15, 17. As to the amount owed, Plaintiff attaches a 16 "Request for Security Deposit Refund and Forfeiture" from Defendant, showing that Plaintiff 17 owed Defendant \$1,180.80. *Id.* at 17. Plaintiff does not even allege that this form was sent to 18 anyone other than himself, nor would that be expected for such a document. See ECF Nos. 14, 19 17. Plaintiff has failed to sufficiently identify a published statement to a third-person asserting 20 that he owed Defendant money. 21 As to the cause of the fire, Plaintiff attaches the Stockton Fire Department's report on the 22 apartment fire. ECF No. 17 at 8-15. None of the relevant statements therein reflect the 23 Defendant's assertions, to either the fire department or anyone else. The report asserts that two of 24 the firefighters on the scene, Kevin Chase and Nicolas Defazio, "located the fire in the kitchen, 25 specifically involving the stove and the cabinets about the stove." *Id.* at 9, 13, 15. Defazio was 26 the one who told Plaintiff that the fire appeared to start from the stove, despite Plaintiff's protests.

27 *Id.* at 13. At no point was Defendant involved in the conversations reflected in the report.

28 /// 1 Plaintiff has failed to plead that Defendant has orally or verbally published allegations that 2 he either owed Defendant money or started the apartment fire. He has therefore failed to plead 3 sufficient facts to sustain his causes of action for either slander or libel. Nor has Plaintiff made 4 any argument suggesting that he can plead such facts. The court recommends that the cause of 5 action for defamation is DISMISSED WITHOUT LEAVE TO AMEND. 6 V. Harassment, Menacing Behavior, and Fraud 7 The FAC alleges that "individuals who have suffered from harassment, menacing 8 behavior, and fraudulent claims often seek justice through legal channels." ECF No. 14 at 7. 9 Defendant argues that this attempts to turn harassment, menacing behavior, and fraud into a 10 standalone cause of action when there is no authority to do so. ECF No. 15-1 at 11 (citing *Sykes 11 v. Henderson Police Department*, 2022 WL 4227337 at n.3 (D. Nev. Sep. 12, 2022)). Plaintiff 12 asserts in response that there is "growing recognition that emotional distress should be taken 13 seriously within the realm of law." ECF No. 17 at 5. 14 Plaintiff's response does not attempt to tie this argument to any particular cause of action. 15 This

does not mean that doing so would be impossible. The court in Sykes held that there was no 16 common law claim for harassment or federal statute entitling a plaintiff for relief. 2022 WL 17 4227337 at n.3. It also noted, however, that a plaintiff could work this into a cause of action for 18 Intentional (IIED) or Negligent Infliction of Emotions Distress (NIED). Id. 19 Although NIED is actionable, it is a tort of negligence to which all other elements of 20 negligence still apply. Christensen v. Superior Court, 54 Cal. 3d 868, 884 (Cal. 1991). The 21 plaintiff must therefore demonstrate that defendant owes a duty to the plaintiff that defendant then 22 breached. Plotnik v. Meihaus, 208 Cal. App. 4th 1590, 1608 (Cal. Ct. App. 2012). As discussed 23 above, plaintiff has alleged a cause of action for negligence, and leave to amend it should be 24 granted. See supra. Plaintiff cannot list NIED as a separate cause of action. 25 To prevail on a claim for IIED, the plaintiff must show: 26 (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of 27 causing, emotional distress; (2) the plaintiff's suffering severe or 28 extreme emotional distress; and (3) actual and proximate causation 1 of the emotional distress by the defendant's outrageous conduct. 2 Barker v. Fox & Associates, 240 Cal. App. 4th 333, 355 (Cal. Ct. App. 2015) (quoting Hughes v. 3 Pair, 46 Cal.4th 1035, 1050–1051 (Cal. 2009)). Behavior may be “outrageous” if the defendant: 4

(1) abuses a relation or position which gives him power to damage

5 the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or 6 unreasonably with the recognition that the acts are likely to result in illness through mental distress. 7 Clark v. County of Tulare, 755 F.Supp.2d 1075, 1091 (E.D. Cal. 2010) (quoting Molko v. Holy 8 Spirit Assn., 46 Cal.3d 1092, 252 Cal.Rptr. 122, 762 P.2d 46 (1988)). 9 Parts of the FAC suggest the facts needed to plead the elements of IIED. As to damages, 10 for example, it alleges that Defendant's assertion that Plaintiff started the fire has resulted in 11 “emotional distress” and caused Plaintiff's insurance company's “forfeiture” of his claim for 12 damages from the fire. ECF No. 14 at 7. However, Plaintiff has not pleaded facts showing that 13 Defendant's conduct was extreme and outrageous. As in Sykes, the Court therefore recommends 14 that the motion to dismiss the claim for harassment be GRANTED, but with leave to amend the 15 FAC to allege IIED.

## 16 CONCLUSION

17 Accordingly, IT IS HEREBY RECOMMENDED THAT: 18 1. Defendant's motion to dismiss the FAC (ECF No. 15) be GRANTED with leave to 19 amend the causes of action for negligence and violation of the FHA, with leave to 20 amend to add a cause of action for IIED in place of the cause of action for harassment 21 and fraud, and without leave to amend the cause of action for defamation. 22 These findings and recommendations are submitted to the United States District Judge 23 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) 24 days after being served with these findings and recommendations, Plaintiff may file written 25 objections with the court. Such document should be captioned “Objections to Magistrate Judge's 26 Findings and Recommendations.” Local Rule 304(d). Plaintiff is advised

that failure to file 27 //// 28 //// 1 | objections within the specified time may waive the right to  
appeal the District Court's order. 2 || Martinez v. Yist, 951 F.2d 1153 (9th Cir. 1991). 3 || DATED:  
March 6, 2025

SEAN C. RIORDAN

6 UNITED STATES MAGISTRATE JUDGE

7 8 9 10 1] 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 14