UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 16-0606-DOC (JCGx) Date: February 1, 2017

Title: PAUL MERRITT V. ALEX PADILLA

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Goltz	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING MOTION TO DISMISS SECOND AMENDED COMPLAINT [26]

Before the Court is Defendant's Motion to Dismiss Second Amended Complaint ("Motion") (Dkt. 26). The Court finds this matter appropriate for resolution without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. Having reviewed the moving papers and considered the parties' arguments, the Court hereby GRANTS the Motion.

I. Background

In light of the procedural posture of this case, the Court takes as true the allegations contained in Plaintiff Paul Merritt's ("Plaintiff" or "Merritt") Second Amended Complaint ("SAC") (Dkt. 24).[1]

Merritt was a candidate for United States Senate in California's June 7, 2016 primary election. *See* SAC at 2. Defendant Alex Padilla ("Secretary" or "Defendant") is

[1] The first ten pages of the SAC do not have page numbers. Accordingly, the Court has supplied the page numbers for those pages. The Court uses the page numbers supplied by Plaintiff whenever possible.

the California Secretary of State. As such, it is his responsibility to administer and enforce state law regarding statewide elections. *See* Cal. Gov't Code § 12172.5.

Merritt submitted a candidate statement to Defendant's Office. *See* SAC at 3–4. The top line of the candidate statement Merritt submitted read, in part

> Paul Merritt Registered Independent voter
>
> California make history… elect an independent Senator Merritt.
>
> Elect an independent thinker. Elect the person, not the Party-in-power's . . .

SAC App. 2 at 26.

In early March 2016, Merritt learned that the Secretary intended to list Merritt as having "No Party Preference," rather than including the "Independent Registered voter" label. SAC at 30. Merritt made numerous formal objections to this alteration. *See id.* But when the California Presidential Primary Election, Tuesday June 7, 2016, Official Voter Information Guide ("the Voter Guide") was published, Merritt was listed as "Paul Merritt | No Party Preference." SAC App. 3 at 32. Although Merritt's numerous paragraph breaks were removed in the published version of the statement, the rest of his candidate statement appeared otherwise unedited. *See id.* No candidate included in the voter guide was listed as Independent—numerous candidates where listed as "No Party Preference." *See* Declaration of Gautam Dutta ("Dutta Decl.") (Dkt. 37-1) Ex. 2.

On April 1, 2016, Merritt initiated this lawsuit. Complaint (Dkt. 1). In the operative complaint, the SAC, Merritt brings claims for: (1) violation of his First Amendment Rights; (2) violation of his due process rights; (3) violation of his rights under the Equal Protection Clause; and (4) fraud. SAC at 2, 4.

On July 11, 2016, Defendant filed the instant Motion to Dismiss. Plaintiff opposed on December 23, 2016 (Dkt. 36), and Defendant replied on January 9, 2017 (Dkt. 38).

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the

speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, a court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by* 307 F.3d 1119, 1121 (9th Cir. 2002). A court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

For claims sounding in fraud, a complaint must be dismissed when a plaintiff fails to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009); *see* Fed. R. Civ. P. 9(b). Rule 9(b) requires a plaintiff alleging such claims to "state with particularity the circumstances constituting fraud." *Id.* The "circumstances" required by Rule 9(b) are the "who, what, when, where, and how" of the fraudulent activity. *United States ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). Further, if the plaintiff claims a statement is false or misleading, "[t]he plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *In re Glenfed, Inc. Secs. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)). In other words, the plaintiff "must set forth an explanation as to why the statement or omission complained of was false or misleading." *Cooper v. Pickett*, 137 F.3d 616, 625 (9th Cir. 1997). This heightened pleading standard ensures that "allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). However, "intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

Dismissal with leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made). Dismissal without leave to amend is appropriate only when a court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

III. Discussion

Merritt drafted the SAC himself and filed it as a *pro se* litigant. *See* SAC at 1. Since that time, Merritt has retained counsel. *See* Notice of Appearance or Withdrawal of Counsel (Dkt. 31). However, understandably, Merritt's SAC is somewhat unconventional in its formatting and in places is difficult to follow. Defendant's counsel has clearly done their best to address all of the arguments raised by Plaintiff, and argues for dismissal of the SAC in its entirety. *See generally* Mot. Plaintiff has not opposed all of Defendant's arguments, and argues only that he alleged sufficient facts to state a First Amendment claim, an Equal Protection Claim, and Due Process claim, all based on the alteration of his candidate statement in the Voter Guide. *See* Opp'n at 6–10.

To the extent that Plaintiff does not oppose the Motion to Dismiss as to some of his claims, the Court GRANTS Defendant's Motion to Dismiss those claims, including Plaintiff's claim for fraud.

The Court will now proceed to analyze whether Plaintiff has pleaded adequate facts to support claims for violations of his First Amendment, equal protection, and due process rights based on the alterations of the Voter Guide.

A. First Amendment Claim

Defendant argues that Merritt's First Amendment claim should be dismissed because the heading of the candidate statement is not a form of speech and because even where it a form of speech, the Secretary's actions were reasonable and did not discriminate on the basis of viewpoint. *See* Reply at 3–6.

Plaintiff argues that the Voter Guide is a limited public forum. Opp'n at 6. In a limited public forum, "a lenient reasonableness standard applies to determine the validity of governmental regulations." *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003). Under that test, "the State can restrict access to a limited public forum as long as

(1) the restriction does not discriminate according to the viewpoint of the speaker, and (2) the restriction is reasonable." *Id.*

The Court need not reach whether the heading constitutes speech, because the Court must agree with Defendant that even if it does the Secretary's actions were not a violation of the Plaintiff's First Amendment rights. In *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013), the Ninth Circuit considered a constitutional challenge to a California law that required the Secretary of State to list a candidate as having "No Party Preference" if that candidate did not indicate they were a member of a "qualified party" under California Election Code § 5100. *Id.* at 1113. Thus, a candidate could only list their party preference if their party was a registered "qualified party." *Id.*

The *Chamness* panel held that this regulation was constitutional. at that determination, the circuit court noted that the regulation was "viewpoint neutral." *Id.* at 1118. They reasoned that the requirement to use the term "No Party Preference" did not allow "*any* candidates to term themselves 'Independents' and does allow *all* candidates to put themselves forward." *Id.* at 1118. The panel also found that any slight burden on speech imposed by this designation was amply justified by the state's interest in avoiding any confusion between persons identifying with qualified parties, such as the American Independent Party, and persons who were not associated with a political party. *Id.*

The same logic applies here. No candidate was able to list themselves as an "Independent" in the Voter Guide, but all candidates were able to put forth information about their candidacy. *See* Dutta Decl. Ex. 2. Accordingly, Defendant's actions did not discriminate of the basis of viewpoint. *See Chamness v. Bowen*, 722 F.3d at 1118. Plaintiff's argument that the regulation is not viewpoint neutral is further undermined by the fact that his numerous references to his independent status were left unaltered in his candidate statement. As to reasonableness, the Court considers Defendant's actions to be reasonable to avoid confusion about the party identification of candidates for office. *See id.*

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's First Amendment Claims.

B. Equal Protection Claims

Defendant argues that Plaintiff's equal protection claim should be dismissed as duplicative of his First Amendment claims. Reply at 7. The Court agrees.

Plaintiff's Equal Protection claim appears to be based on the same conduct as his First Amendment claim. *See* Opp'n. As explained by the Ninth Circuit, where a claim for violation of the Equal Protection Clause is based on the violation of First Amendment rights, it is typically unnecessary to do a separate equal protection analysis, as the First Amendment provides the strongest protections of the right to free speech. *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001).

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiff's equal protection Claim.

C. Due Process Claims

Defendant moves to dismiss Plaintiff's due process claims, arguing that the supporting allegations for this claim are "cursory" and that even if properly pleaded, Plaintiff's claim would be meritless. Reply at 8.

In his SAC, Plaintiff alleges that Defendant violated his due process rights because Defendant changed the candidate statement without notice to or a hearing for Plaintiff. SAC at 4. To allege a violation of due process, a plaintiff must allege "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998); *see also* Opp'n at 9.

Merritt has failed to allege a protected liberty or property interest. While Plaintiff provides more context in the Opposition, those allegations are not in his SAC, and thus the Court does not consider them in ruling on the Motion to Dismiss.

Accordingly, the Court DISMISSES Plaintiff's due process claim

IV. Disposition

The Court GRANTS Defendant's Motion to Dismiss. Plaintiff may file an amended complaint elaborating on his due process claims **on or before February 17, 2017.**

The Clerk shall serve this minute order on the parties.