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APPENDIX 1

**NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**MADHURI TRIVEDI, Plaintiff-Appellant,
v.**

**U.S. DEPARTMENT OF HOMELAND
SECURITY; et al.,
Defendants-Appellees.**

[STAMP: FILED OCT 3, 2017

**MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS]**

No. 17-15217

D.C. No. 3:16-cv-01122-JD

MEMORANDUM*

**Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding
Submitted September 26, 2017****

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Trivedi's request for oral argument, set forth in the opening and reply briefs, is denied.

Before: SILVERMAN, TALLMAN, and N.R. SMITH,
Circuit Judges.

Madhuri Trivedi appeals pro se from the district court's judgment dismissing her action alleging federal and state law claims arising from the denial of her I-140 immigrant visa petitions. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(c), *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999), and under Federal Rule of Civil Procedure 12(h)(3) for lack of subject-matter jurisdiction, *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014). We may affirm on any basis supported by the record. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008). We affirm.

Dismissal of Trivedi's claims under (1) 8 U.S.C. § 1324b (unfair immigration-related employment practices), (2) the Health Insurance Portability & Accountability Act, (3) the Patient Safety and Quality Improvement Act, 42 U.S.C. § 299b-22, (4) the Civil Rights Act of 1991, 42 U.S.C. § 2000e-3a, (5) 18 U.S.C. §§ 1512, 1513 & 1621, and (6) for intentional infliction of emotional distress, was proper because Trivedi failed to allege facts sufficient to state plausible claims for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (citation and internal quotation marks omitted)); *Fajardo*, 179 F.3d at 699 ("A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law.").

The district court properly dismissed Trivedi's False Claims Act cause of action because none of the defendants is alleged to be a government contractor or to otherwise have presented false claims to the government. See 31 U.S.C. § 3729(a)(1)(A) (prohibiting knowingly presenting to the government a "false or fraudulent claim for payment or approval").

The district court did not abuse its discretion by dismissing Trivedi's claim under the Administrative Procedure Act, 5 U.S.C. § 704, for review of defendant United States Citizenship and Immigration Service's ("USCIS") denials of Trivedi's I-140 visa petitions, because the complaint failed to comply with Federal Rule of Civil Procedure 8(a)'s requirement of a short and plain statement of the claim. See Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ."); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981) (complaint that is "verbose, confusing and almost entirely conclusory" violates Rule 8); see also *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996) ("We review dismissal of a complaint with prejudice for failure to comply with a court's order to amend the complaint to comply with Rule 8 for abuse of discretion.").

We reject as without merit Trivedi's contention that the district court was required to hold a hearing or oral argument before ruling on defendants' motions to dismiss, and Trivedi's contentions regarding alleged judicial bias.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

The court's July 27, 2017 order denying Trivedi's emergency motions for injunctive relief and sanctions (Docket Entry No. 56) stated that no motions for reconsideration, clarification, or modification of these denials would be filed or entertained. Accordingly, we do not consider Trivedi's motions for rehearing en banc and for "initial hearing en banc" of the July 27, 2017 order (Docket EntryNos. 58, 59, 63).

Trivedi's motion to accept electronically filed briefs (Docket Entry No. 62) is denied as moot.

Trivedi's motion to expedite oral argument and decision in this matter (Docket Entry No. 63) is denied as moot.

All other pending requests are denied.

AFFIRMED.

APPENDIX 2
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MADHURI TRIVEDI, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	Case No. 16-cv-01122- JD JUDGMENT
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On November 21, 2016, the Court dismissed the complaint in this case under Federal

Rules of Civil Procedure 12(c) and 12(h)(3). Dkt. No. 47. Plaintiff Trivedi was given until December 30, 2016 to file an amended complaint, but has not done so. Consequently, pursuant to Federal Rule of Civil Procedure 58, the Court enters judgment against plaintiff Madhuri Trivedi. IT IS SO ORDERED. Dated: January 31, 2017

/s/

JAMES DONATO
United States District Judge

APPENDIX 3
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MADHURI TRIVEDI, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	Case No. 16-cv-01122- JD ORDER DISMISSING COMPLAINT WITH LIMITED LEAVE TO AMEND Re: Dkt. No. 18
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Plaintiff Madhuri Trivedi is proceeding pro se in this immigration action. Trivedi is a citizen of India who currently resides in Alameda County, California. Dkt. No. 1. Trivedi states that she has been residing in the United States since 2003. *Id.* She names as defendants two federal governmental agencies (U.S. Department of Homeland Security and U.S. Citizenship and Immigration Services) and six individual government employees in their official capacities (Jeh Johnson, Secretary of Homeland Security; Leon Rodriguez, Director of USICS; Donald Neufeld, Director of USCIS service centers; Gregory Richardson, Director of Texas service center; Mark Hazuda, Director of Nebraska service center; John Roth, OIG at DHS; and Maria Odom, DHS). *Id.* ¶¶ 20-26. The complaint centers on the USCIS's denial

of her I-140 immigration petition. *See, e.g., id.* ¶¶ 5, 11, 19.

Defendants have collectively moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. No. 18. This was a misstep because defendants filed the 12(b) motion after filing an answer. Dkt. No. 12. The proper procedure is to move under Rule 12(c), and the Court treats the 12(b)(6) portion of defendants' motion as a motion for judgment on the pleadings made under Rule 12(c). *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004). The Court finds that the 12(b)(1) portion of defendants' motion is properly before the Court "as a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction." *Augustine v. U.S.*, 704 F.2d 1074, 1075 (9th Cir. 1983). Dismissal is granted.

DISCUSSION

The complaint paints with a broad brush, and the gist of Trivedi's legal claims is difficult to discern. Pro se filing are to be liberally construed, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotations omitted). But the Court may not construe a pro se complaint so liberally as to supply essential elements of claims that were not pled. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). In addition, irrespective of a litigant's pro se status, federal courts are courts of limited jurisdiction, and the Court must dismiss an action if it finds at any time that it lacks subject matter jurisdiction over a case. Fed. R. Civ. P. 12(h)(3).

For the most part, none of the many laws referenced by Trivedi in the complaint provide a basis for proceeding with this case because she cannot state a

claim against these defendants under them. Here are the main deficiencies:

1. Unfair immigration-related employment practices, 8 U.S.C. § 1324b (Dkt. No. 1 ¶ 34): This statute prohibits discrimination based on national origin or citizenship status in the employment context. Trivedi does not allege that any of the defendants were her employers or that they otherwise discriminated against her on the basis of national origin or citizenship status “with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment.” 18 U.S.C. § 1324b(a)(1). Trivedi’s other factual allegations make clear that this is a deficiency she cannot save by amendment -- she did not have an employment relationship with any of them. The complaint also does not contain any material, non-conclusory and plausible factual allegations that Trivedi was discriminated against by any employer because of her national origin or citizenship status. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The complaint makes clear that Trivedi is instead alleging that she was retaliated against as a whistleblower, because she “rais[ed]/report[ed] issues related to GE who knowingly and illegally releas[ed] defective medical devices.” Dkt. No. 1 ¶ 27. Even putting to one side for now Trivedi’s failures to satisfy the procedural preconditions to asserting a private right of action under 8 U.S.C. § 1324b, the types of factual allegations made by Trivedi in her complaint simply do not map onto that statute. Trivedi’s claims against defendants under 8 U.S.C. § 1324b are consequently dismissed with prejudice.

2. Health Insurance Portability & Accountability Act (Dkt. No. 1 ¶¶ 48-49): Trivedi suggests that defendants have violated HIPAA by improperly retaliating against her. Dkt. No. 1 ¶ 49 (citing 45 C.F.R. § 164.530(g)). But as that regulation makes clear on its face, any prohibition on intimidation or retaliation it imposes applies only to “a covered entity.” See 45 C.F.R. § 164.530(g) (“A covered entity or business associate may not threaten, intimidate, coerce, harass, discriminate against, or take any other retaliatory action . . .”). Under 45 C.F.R. § 160.103, “[c]overed entity means: (1) A health plan; (2) A health care clearinghouse; [or] (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” None of those definitions applies to defendants, who are either federal governmental entities or employees of such entities, and nothing in Trivedi’s complaint suggests otherwise. Claims under this regulation, too, are dismissed with prejudice.

3. False Claims Act, 31 U.S.C. §§ 3729, 3802 (Dkt. No. 1 ¶¶ 50-53): Trivedi alleges that the False Claims Act “applies to the actions of all government contractors,” that “General Electric is a government contractor,” and that GE “fail[ed] to disclose product defects.” Dkt. No. 1 ¶ 51. None of defendants are alleged to have been government contractors, or to otherwise have presented false claims or committed a violation falling under the False Claims Act. These claims are dismissed with prejudice.

4. Patient Safety & Quality Improvement Act of 2005, 42 U.S.C. § 299 (Dkt. No. 1 ¶¶ 54-55): As Trivedi acknowledges, this act is directed toward

“health care professionals and entities.” Dkt. No. 1 ¶ 54. Section 299b-22(e) provides that “[a] provider may not take an adverse employment action . . . against an individual based upon the fact that the individual in good faith reported information (A) to the provider with the intention of having the information reported to a patient safety organization; or (B) directly to a patient safety organization.” 42 U.S.C. § 299b-22(e). None of the named defendants are health care providers or are alleged to have acted as

Trivedi’s employer. Any claims against defendants under this statute are dismissed with prejudice.

5. Civil Rights Act of 1991, 42 U.S.C. § 2000e-3a (Dkt. No. 1 ¶ 57): The Civil Rights Act prohibits employers from discriminating against employees or applicants for employment on certain specified grounds. 42 U.S.C. § 2000e-3(a). Trivedi makes no allegation that she has ever applied for employment with or been employed by any of the defendants, and her complaint as a whole makes clear that is not the nature of her grievance against defendants. Claims under this act are dismissed with prejudice.

6. Tampering with / retaliation against a witness and perjury, 18 U.S.C. §§ 1512, 1513, 1621 (Dkt. No. 1 ¶¶ 62, 72, 73): The facts alleged by Trivedi do not fit these statutes. She was not, for example, a witness in an official proceeding. And these are criminal statutes for which there is no private right of action. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Trivedi’s claims under these statutes are dismissed with prejudice.

7. Intentional infliction of emotional distress (Dkt. No. 1 ¶¶ 63-69): Trivedi alleges that defendants USCIS and DHS intentionally inflicted emotional distress on her. Dkt. No. 1 ¶ 64. This claim, too, is fatally flawed. To the extent Trivedi seeks monetary damages for this alleged tort, dismissal is warranted because Trivedi did not first seek an administrative resolution of her claim as required by the Federal Tort Claims Act, 28 U.S.C. § 2675(a). Trivedi neither presented a claim to the USCIS and DHS, nor had a claim been “finally denied” by either agency. See *McNeil v. U.S.*, 508 U.S. 106, 111 (1993). Trivedi “believes that exhaustion of Federal Tort Claims Act claims with administrative remedy with such LAWLESS agenc[ies] is NOT required.” Dkt. No. 24 at 6 (emphases in original). But that is decidedly not the law. Our circuit has “repeatedly held that this ‘claim requirement of section 2675 is jurisdictional in nature and may not be waived.’” *Jerves v. U.S.*, 966 F.2d 517, 519 (9th Cir. 1992) (citations omitted). The Supreme Court, too, has emphasized that this “straightforward statutory command” must be adhered to, even in cases filed by pro se litigants, stating, “we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.” *McNeil*, 508 U.S. at 113. To the extent Trivedi seeks injunctive relief for her intentional infliction of emotional distress claim (in the form of an order “restraining DHS/USCIS from further acts” causing her “emotional distress,” Dkt. No. 1 ¶ 133), the claim is barred on a different ground: Trivedi lacks Article III standing. Under *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), Trivedi has failed to allege, and her allegations show that she cannot sufficiently

plead, a “sufficient likelihood that [s]he will again be wronged in a similar way.” Trivedi’s intentional infliction of emotional distress claims are dismissed with prejudice.

8. Request for review of denial of I-140 petition: Defendants “admit” that the Court would have jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 704, to review the USCIS’s denial of Trivedi’s I-140 petition for classification as an alien of “extraordinary ability” under 8 U.S.C. § 1153(b)(1). Dkt. No. 18 at 17-18. But the Court finds that the current version of Trivedi’s complaint does not squarely present a request for the Court to perform such a review. Because such a request likely can properly be made to this Court, *see, e.g., Sodipo v. Rosenberg*, 77 F. Supp. 3d 997, 1001-02 (N.D. Cal. 2015), the Court grants Trivedi leave to amend her complaint to present that request, if she wishes to do so, in a more direct and focused manner.

CONCLUSION

The complaint is dismissed with prejudice with the limited exception of the claim seeking review of the USCIS’s denial of the I-140 petition. The amended complaint must be filed by **December 30, 2016**. Trivedi may not add any new claims or defendants without seeking leave of the Court first. Trivedi is advised that failure to follow this order will result in summary dismissal of the amended complaint.

This order terminates docket number 18, and Trivedi’s other pending motions, Dkt. Nos. 37, 39, 41, 45, are terminated as moot.

IT IS SO ORDERED.

Dated: November 21, 2016

/s/

JAMES DONATO

United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**