

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

LAMAR SINGLETON,

CASE NO. 1:10-cv-02019-AWI-SKO

Plaintiff,

**ORDER DISMISSING PLAINTIFF'S
COMPLAINT WITH LEAVE TO AMEND**

v.

ELI LILLY CO.,

Defendant.
_____ /**I. INTRODUCTION AND FACTUAL BACKGROUND**

On October 7, 2010, Plaintiff, LaMar Singleton (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this action against Eli Lilly Co. (“Defendant”). Plaintiff claims that Defendant manufactured, marketed, and sold Zyprexa. Zyprexa is a prescription medication used to treat mental conditions such as schizophrenia and bipolar disorder. *See generally UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 124 (2d Cir. 2010). Plaintiff claims that taking Zyprexa caused him to develop type 2 diabetes, obesity, and permanent nerve damage and pain to both feet and hands. Plaintiff states that his claims arise under the Eighth and Fourteenth Amendments and requests \$13,000,000 in damages.

II. DISCUSSION

A. Screening Requirement

In cases where the plaintiff is a prisoner proceeding in forma pauperis, the Court is required to screen each case and shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue or the action or appeal is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). If the Court determines that the complaint fails to state a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be cured by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

B. Legal Standard

In determining whether a complaint fails to state a claim, the Court uses the same pleading standard used under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “[A] complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, although a court must accept as true all factual allegations contained in a complaint, a court need not accept a plaintiff’s legal conclusions as true. *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (quoting *Twombly*, 550 U.S. at 555).

C. No Cognizable Federal Claim

The only potential federal claims that appear on the face of Plaintiff’s complaint are alleged violations of the Eighth and Fourteenth Amendments. The Eighth Amendment prohibits federal and state governments from imposing cruel and unusual punishments and from imposing excessive fines

1 and bail against individuals convicted of crimes. U.S. Const. amend. VIII. The Fourteenth
2 Amendment encompasses a wide range of rights including citizenship, privileges and immunities,
3 due process, equal protection, apportionment of representation, disqualification of officers, public
4 debt, and enforcement. U.S. Const. amend. XIV.

5 To the extent that Plaintiff is asserting civil rights causes of action pursuant to 42 U.S.C.
6 § 1983,¹ those claims are not viable. Section 1983 provides:

7 Every person who, under color of [state law] . . . subjects, or causes to be subjected,
8 any citizen of the United States . . . to the deprivation of any rights, privileges, or
9 immunities secured by the Constitution . . . shall be liable to the party injured in an
10 action at law, suit in equity, or other proper proceeding for redress. . . .

11 To state a claim pursuant to Section 1983, a plaintiff must plead facts indicating that the
12 defendant acted under color of state law at the time the act complained of was committed and that
13 the defendant deprived the plaintiff of the rights, privileges, or immunities secured by the
14 Constitution or laws of the United States. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir.
15 1986). Generally, private parties are not acting under color of state law, and their conduct does not
16 constitute state action. *See Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991).

17 For the conduct of a private person or entity to constitute state action, there must generally
18 be two elements, including the exercise of a state-created right, privilege, or rule of conduct (state
19 policy), and an actor who is either a state official, one who has acted together with a state official
20 or has obtained significant aid therefrom, or one whose conduct is otherwise chargeable to the state
21 (state actor). *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). Plaintiff has pled no facts
22 indicating that Defendant is a state actor or was acting under the color of state law. Defendant
23 appears to be a private corporation. Therefore, Plaintiff states no cognizable Section 1983 claim.

24 **D. No Cognizable State Law Claim**

25 To the extent that Plaintiff has attempted to set forth a products liability claim pursuant to
26 state law, that claim is insufficient. Plaintiff asserts that he was prescribed Zyprexa, and the drug
27 caused him to suffer nerve damage to both feet and hands. He also asserts that use of Zyprexa

28 ¹ If Plaintiff is not attempting to assert a claim under 42 U.S.C. § 1983, he should identify the federal statute
applicable to his claim(s).

1 caused him to develop diabetes. (Doc. 1, at 3.)

2 A manufacturer of prescription drugs owes to medical professionals the duty of adequate
3 warnings if it knows, or has reason to know, of any dangerous side effects of its drugs. *See Motus*
4 *v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 990 (C.D. Cal. 2001) (citing *Carlin v. Super. Ct.*, 13 Cal. 4th
5 1104, 1112-13 (1996)). California law provides that, in the case of prescription drugs, the duty to
6 warn “runs to the physician, not to the patient.” *Carlin*, 13 Cal. 4th at 1116. Therefore, a
7 prescription drug manufacturer discharges its duty to warn if it provides adequate warnings to the
8 physician about any known or reasonably knowable dangerous side effects, regardless of whether
9 any warning reaches the patient. *Motus*, 196 F. Supp. 2d at 990-91. A plaintiff who asserts a
10 products liability action based on a failure to warn must prove not only that no warning was provided
11 or the warning was inadequate, but also that the inadequacy or the lack of the warning caused
12 plaintiff's injury. *Lummer v. Lederle Labs.*, 819 F.2d 349, 358 (2d Cir. 1987) (applying California
13 law).

14 It is not entirely clear whether Plaintiff intends to set forth a claim based on the failure to
15 warn or some other theory of liability.² There are no facts pled that Defendant failed to adequately
16 warn medical professionals regarding the side effects Plaintiff believes he suffers as a result of taking
17 Zyprexa. Plaintiff also provides no facts regarding who prescribed him Zyprexa, how long he took
18 Zyprexa, or why Plaintiff believes his symptoms are attributable to his use of Zyprexa. Plaintiff
19 must set forth facts indicating how Defendant is liable for the symptoms and medical issues Plaintiff
20 suffers that he believes to be related to his use of Zyprexa. Without additional facts, a state law claim
21 for products liability is not cognizable. *Iqbal*, 129 S. Ct. at 1949 (“[T]he pleading standard Rule 8
22 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned,
23 the-defendant-unlawfully-harmed-me accusation.” (quoting *Bell Atl. Corp.*, 550 U.S. at 555)).

25 ² Stating a products liability claim generally requires a plaintiff to indicate that the product has some particular
26 defect. There are several types of product defects including (1) manufacturing defects, (2) design defects, and (3) failure-
27 to-warn defects. *See Brown v. Super. Ct.*, 44 Cal. 3d 1049, 1057 (1988). Prescription drug manufacturers, however,
28 can generally only be liable for a defect in a drug if it was improperly manufactured or it was distributed without
adequate information regarding the risks and dangers of which the manufacturer knew or should have known. *Id.* at 1069
n.12 (explaining three theories of liability and noting that drug manufacturers could also be liable under general
principles of negligence).

1 **E. Subject Matter Jurisdiction**

2 Due in part to the insufficiency of Plaintiff's claims, the Court cannot ascertain that it has
3 subject matter jurisdiction over this action. The jurisdiction of the federal courts is limited to matters
4 expressly provided in the Constitution or through statute. *Kokkonen v. Guardian Life Ins. Co. of*
5 *Am.*, 511 U.S. 375, 377 (1994). In civil disputes, federal subject matter jurisdiction exists where
6 (1) requirements for diversity are met or (2) the complaint involves a federal question. 28 U.S.C.
7 §§ 1332, 1331. Plaintiff fails to assert diversity, does not properly assert a Section 1983 claim, and
8 fails to plead sufficient facts to implicate a federal question through complete preemption of state
9 law by federal law. As pled, the Court cannot determine that it has subject matter jurisdiction with
10 regard to Plaintiff's complaint.

11 **1. Federal Question**

12 As explained above, Plaintiff has failed to set forth a cognizable claim under the Constitution
13 or federal law such that the Court can exercise federal question subject matter jurisdiction. Plaintiff
14 has not alleged any state action with regard to the asserted constitutional violations. Plaintiff has
15 also failed to identify any federal law that preempts what appears to be a tort claim arising under
16 state law for products liability. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) ("When
17 the federal statute completely preempts the state-law cause of action, a claim which comes within
18 the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal
19 law."). As pled, there are no cognizable claims under federal law. Therefore, the Court has no basis
20 to exercise federal question jurisdiction.

21 **2. Diversity Jurisdiction**

22 Diversity jurisdiction exists in civil disputes between citizens of different states, where the
23 amount in controversy exceeds \$75,000, exclusive of interest and costs. 28 U.S.C. §1332(a)(1).
24 "Individuals are citizens of their state of domicile." *Munoz v. Small Bus. Admin.*, 644 F.2d 1361,
25 1365 (9th Cir. 1981). "A person's domicile is [his/]her permanent home, where [he/]she resides with
26 the intention to remain or to which [he/]she intends to return." *Kanter v. Warner-Lambert Co.*,
27 265 F.3d 853, 857 (9th Cir. 2001). "[A] corporation shall be deemed to be a citizen of any State by
28 which it has been incorporated and of the State where it has its principal place of business"

1 28 U.S.C. §1332(c)(1).

2 While the amount of damages Plaintiff requests satisfies the amount in controversy
3 requirement, Plaintiff has not pled sufficient facts indicating that diversity of citizenship exists.
4 Currently, Plaintiff is incarcerated in Delano, California; however, Plaintiff has not set forth his state
5 of domicile prior to his incarceration.³ Plaintiff has also failed to specify Defendant's state of
6 incorporation, and its principal place of business. Without factual allegations regarding the
7 citizenship of the parties, the Court cannot conclude that subject matter jurisdiction exists on the
8 basis of diversity.⁴

9 **F. Amended Complaint Must Be Complete in Itself Without Reference to Any Prior**
10 **Pleading.**

11 Plaintiff will be given an opportunity to amend the deficiencies of the complaint as outlined
12 above. Plaintiff is advised that Local Rule 220 requires that an amended complaint be complete in
13 itself without reference to any prior pleading. As a general rule, an amended complaint supersedes
14 the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once Plaintiff files an
15 amended complaint, the original pleading no longer serves any function in the case. Therefore, in
16 an amended complaint, as in an original complaint, each claim and the involvement of each
17 defendant must be sufficiently alleged.

18 **III. CONCLUSION**

19 Accordingly, Plaintiff's complaint is DISMISSED WITH LEAVE TO AMEND. Plaintiff
20 SHALL file an amended complaint within thirty (30) days of the date of service of this order. If
21 Plaintiff again fails to file an amended complaint that states a claim and that adequately sets forth
22 facts to support this court's jurisdiction, the Court will recommend that the entire action be dismissed

23 ///

24 ///

25 ///

26 ³ The Court presumes that Plaintiff is a California resident, but Plaintiff should set forth his citizenship in an
27 amended complaint.

28 ⁴ The Court notes that, on Plaintiff's form complaint, he did not complete the portion regarding how the court
has jurisdiction over this action. (Doc. 1, at 1.)

1 for failure to state a claim upon which relief can be granted.

2
3 IT IS SO ORDERED.

4 **Dated: January 28, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE