

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALEX GEORGE PEROS,

CASE NO. 1:10-cv-2376-OWW-MJS

Plaintiff,

ORDER DISMISSING PLAINTIFF'S  
COMPLAINT WITHOUT PREJUDICE FOR  
LACK OF JURISDICTION

v.

NUTRIBIOTIC, INC., et al.,

(ECF No. 2)

Defendants.

PLAINTIFF'S AMENDED COMPLAINT, IF  
ANY, DUE NOT LATER THAN FEBRUARY  
/ 10, 2011

Plaintiff Alex George Peros initiated this action by filing a Complaint on December 21, 2010 accompanied by a request to proceed in forma pauperis. (ECF Nos. 2 & 3.) Plaintiff's original Complaint is before the Court for screening.

**I. SCREENING REQUIREMENT**

The in forma pauperis statute provides that "the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). 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). Detailed factual allegations are not required, but "[t]hreadbare

1 recitals of the elements of a cause of action, supported by mere conclusory statements,  
2 do not suffice,” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v.  
3 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and courts “are not required to  
4 indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th  
5 Cir. 2009) (internal quotation marks and citation omitted). While factual allegations are  
6 accepted as true, legal conclusion are not. Iqbal, 129 S.Ct. at 1949.

## 8 **II. PLAINTIFF’S CLAIMS**

9 Plaintiff brings claims for negligence, willful and wanton misconduct, strict liability  
10 in tort, and breach of implied warranty arising out of Defendants’ sale of Calcium Ascorbate  
11 Crystalline Powder. Plaintiff contends that he consumed Defendants’ product and became  
12 ill. Plaintiff seeks \$47,481,355.00 in monetary damages plus special damages to cover  
13 future medical expenses for himself and his wife.

## 15 **III. ANALYSIS**

16 In his Complaint, Plaintiff alleges subject matter jurisdiction based on diversity of  
17 citizenship. (Compl. ¶ 3.)

18 Federal courts are courts of limited jurisdiction, having subject matter jurisdiction  
19 only over matters authorized by the Constitution and Congress. See Kokkonen v.  
20 Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); Coury v. Prot, 85 F.3d 244, 248 (5th Cir.  
21 1996) (“It is axiomatic that the federal courts have limited subject matter jurisdiction and  
22 cannot entertain cases unless authorized by the Constitution and legislation.”) Article III,  
23 § 2 of the Constitution and the federal diversity statute, 28 U.S.C. § 1332(a), give federal  
24 district courts jurisdiction “over cases between ‘citizens of different States,’ and ‘over cases  
25 between citizens of a State’ and ‘citizens or subjects of a foreign state.’” Cresswell v.  
26  
27

1 Sullivan & Cromwell, 922 F.2d 60, 68 (2d Cir. 1990); Coury, 85 F.3d at 248. “The diversity  
2 jurisdiction statute, as construed for nearly 200 years, requires that to bring a diversity case  
3 in federal court . . . each plaintiff must be diverse from each defendant.” Lee v. Am. Nat’l  
4 Ins. Co., 260 F.3d 997, 1004 (9th Cir. 2001). Failure to meet the requirements of the  
5 diversity statute for each defendant destroys “complete diversity,” “rendering the entire  
6 case beyond the federal court’s power to decide.” Id. at 1005 (citing Newman-Green, Inc.  
7 v. Alfonzo-Larrain, 490 U.S. 826, 829 (1989)); see also Coury, 85 F.3d at 248 (noting that  
8 “there is a presumption against subject matter jurisdiction that must be rebutted by the  
9 party bringing an action to federal court”).

10  
11 Plaintiff’s Complaint states that he is a citizen of the state of California. (Compl. ¶  
12 1.) Plaintiff also states that Defendant Nutribiotic, Inc. is a “corporation organized under  
13 the laws of the State of California, with its principal place of business located in Lakeport,  
14 California.” (Id. ¶ 2.) Because Plaintiff and at least one Defendant are citizens of  
15 California, there is not complete diversity in this case. See Lee, 260 F.3d at 1004. Thus,  
16 the Court cannot have subject matter jurisdiction over Plaintiff’s claims under the diversity  
17 statute.  
18

19  
20 Federal courts also have original jurisdiction over “all civil actions arising under the  
21 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. This is commonly  
22 referred to as “federal question” jurisdiction. Plaintiff’s Complaint contains references to  
23 regulations set forth by the Food and Drug Administration (“FDA”). (Compl. ¶¶ 25-28.) The  
24 Court expresses no opinion as to whether Plaintiff can bring a private cause of action  
25 against Defendants for violating FDA regulations. However, because it appears that  
26 Plaintiff may be able to amend his Complaint to establish federal question jurisdiction, the  
27

1 Court will allow him to do so. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)  
2 (courts should give pro se litigants the opportunity to amend their claims unless  
3 amendment would be futile).

4 If Plaintiff desires to file an amended complaint in this action,<sup>1</sup> he needs to allege  
5 facts sufficient to state a claim under a federal law, a treaty, or the United States  
6 Constitution. If Plaintiff can establish a federal question jurisdiction, he is free to reallege  
7 the state law claims asserted in this initial Complaint, and the Court may exercise  
8 supplemental jurisdiction over those claims. See 28 U.S.C. § 1367(a). The key is that  
9 Plaintiff must first establish subject matter jurisdiction by alleging facts sufficient to state  
10 a claim under federal law, a treaty, or the United States Constitution.  
11

#### 12 **IV. CONCLUSION**

13 For the reasons stated above, Plaintiff's Complaint is DISMISSED without prejudice  
14 for lack of subject matter jurisdiction. The Court will give Plaintiff leave to amend his  
15 Complaint to attempt to establish federal question jurisdiction.  
16

17 Plaintiff is hereby on notice that an amended complaint supercedes the original  
18 complaint, Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh,  
19 814 F.2d 565, 567 (9th Cir. 1987), and must be "complete in itself without reference to the  
20 prior or superceded pleading," Local Rule 220. Therefore, "[a]ll causes of action alleged  
21 in an original complaint which are not alleged in an amended complaint are waived." King,  
22 814 F.2d at 567 (citing London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981));  
23 accord Forsyth, 114 F.3d at 1474.  
24

25 Based on the foregoing, it is HEREBY ORDERED that:  
26

27  

---

<sup>1</sup> Alternatively, Plaintiff could choose to pursue these claims in state court.

1           1.     Plaintiff's Complaint, filed December 21, 2010, is dismissed for lack of subject  
2 matter jurisdiction;

3           2.     Not later than **February 10, 2011**, Plaintiff shall file an amended complaint;  
4 and  
5

6           3.     If Plaintiff fails to file an amended complaint in compliance with this order, this  
7 action will be dismissed.

8  
9  
10  
11 IT IS SO ORDERED.

12  
13 Dated: January 7, 2011

*/s/ Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27