

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

MACK A. MCCALLUM,  
Plaintiff,  
v.  
STATE OF CALIFORNIA  
Defendant.

Case No. 1:15-cv-00356-WBS-SAB

**FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THAT PLAINTIFF'S  
COMPLAINT BE DISMISSED, WITHOUT  
LEAVE TO AMEND**

**ECF NO. 1**

**OBJECTIONS DUE WITHIN THIRTY (30)  
DAYS**

Plaintiff Mack A. McCallum (“Plaintiff”) filed the complaint in this action on March 6, 2015. For the reasons set forth below, the Court finds that Plaintiff’s complaint fails to state any cognizable claims and should be dismissed without leave to amend.

## I.

District courts may dismiss a claim *sua sponte* under Federal Rule of Civil Procedure 12(b)(6) if the Court gives notice of its intention to dismiss and afford plaintiffs an opportunity to at least submit a written memorandum in opposition to such motion.<sup>1</sup> Lee v. City of Los Angeles, 250 F.3d 668, 683 n.7 (9th Cir. 2001) (quoting *Omar v. Sea-Land Serv., Inc.*, 813 F.2d

<sup>1</sup> Through these Findings and Recommendations, the Court gives Plaintiff notice of its intention to dismiss. Plaintiff has an opportunity to submit a written memorandum in opposition by filing objections to these Findings and Recommendations.

1 986, 991 (9th Cir. 1987); Wong v. Bell, 642 F.2d 359, 362 (9th Cir. 1981)). Under Rule 8(a), a  
2 complaint must contain “a short and plain statement of the claim showing that the pleader is  
3 entitled to relief.” Fed. R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not  
4 require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-  
5 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell  
6 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). “[A] complaint must contain sufficient  
7 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id.  
8 (quoting Twombly, 550 U.S. at 570). “[A] complaint [that] pleads facts that are ‘merely  
9 consistent with’ a defendant’s liability . . . ‘stops short of the line between possibility and  
10 plausibility of entitlement to relief.’” Id. (quoting Twombly, 550 U.S. at 557). Further, although  
11 a court must accept as true all factual allegations contained in a complaint, a court need not  
12 accept a plaintiff’s legal conclusions as true. Id. “Threadbare recitals of the elements of a cause  
13 of action, supported by mere conclusory statements, do not suffice.” Id. (quoting Twombly, 550  
14 U.S. at 555).

15 **II.**

16 **PLAINTIFF’S COMPLAINT**

17 Plaintiff names the State of California as defendant in this action. Plaintiff contends that  
18 California’s Megan’s law violates his constitutional rights because it is an Ex Post Facto law.  
19 Plaintiff contends that he should no longer be subjected to the negative impact associated with  
20 his registration as a sex offender because his conviction was expunged pursuant to California  
21 Penal Code § 1203.4.

22 **III.**

23 **DISCUSSION**

24 **A. Res Judicata**

25 As an initial matter, the Court notes that Plaintiff’s claim in this action is identical to the  
26 claim Plaintiff raised in Mack A. McCallum v. State of California, Case No. 1:14-cv-00284-  
27 LJO-SAB (“2014 Action”). Plaintiff filed the complaint in the 2014 Action on February 26,  
28 2014 and the Court dismissed those claims for failure to state a claim on March 28, 2014.

1       “‘The doctrine of res judicata provides that a final judgment on the merits bars further  
2 claims by parties or their privies based on the same cause of action,’ and ‘is central to the  
3 purpose for which civil courts have been established, the conclusive resolution of disputes within  
4 their jurisdiction.’” Headwaters Inc. v. U.S. Forest Service, 399 F.3d 1047, 1051-52 (9th Cir.  
5 2005) (quoting In re Schimmeis, 127 F.3d 875, 881 (9th Cir. 1997)). “The elements necessary to  
6 establish res judicata are: ‘(1) an identity of claims, (2) a final judgment on the merits, and (3)  
7 privity between parties.’” Id. at 1052 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l  
8 Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003)).

9       Here, this action presents identical claims involving the same parties as Plaintiff’s 2014  
10 Action. See Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-1202 (9th Cir. 1982)  
11 (discussing factors court considers in determining identity of claims). There was a final  
12 judgment on the merits in the 2014 Action. See Stewart v. U.S. Bancorp., 297 F.3d 953, 957  
13 (9th Cir. 2002) (dismissal for failure to state a claim is a “judgment on the merits” to which res  
14 judicata applies). There was privity between the parties, as the parties in both actions are  
15 identical. Accordingly, the doctrine of res judicata bars Plaintiff from re-litigating the claims  
16 dismissed in the 2014 Action.

17       **B. Ex Post Facto Claims**

18       Even if the doctrine of res judicata did not apply, the Court finds that Plaintiff fails to  
19 state any cognizable claims in this action. Plaintiff claims that California’s Megan’s law violates  
20 the ex post facto clause of the United States Constitution. “The States are prohibited from  
21 enacting an ex post facto law.” Garner v. Jones, 529 U.S. 244, 249 (2000) (citing U.S. Const.,  
22 Art I, § 10, cl. 1). The Ex Post Facto Clause bars enactments which, by retroactive operation,  
23 increase the punishment for a crime after its commission. Id. (citing Collins v. Youngblood, 497  
24 U.S. 37, 42 (1990)). “[T]wo critical elements must be present for a criminal or penal law to be  
25 ex post facto: it must be retrospective, that is, it must apply to events occurring before its  
26 enactment, and it must disadvantage the offender affected by it.” Weaver v. Graham, 450 U.S.  
27 24, 29 (1981) (citing Lindsey v. Washington, 301 U.S. 397, 401 (1937)).

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1        As a general proposition, sex offender registration laws do not violate the Ex Post Facto  
2 Clause. See Smith v. Doe, 438 U.S. 84, 105-106 (2003) (holding that Alaska's sex offender  
3 registration laws do not violate the Ex Post Facto Clause); Hatton v. Bonner, 356 F.3d 955, 967  
4 (9th Cir. 2003) (California's sex offender registration scheme does not violate Ex Post Facto  
5 Clause). Plaintiff's complaint fails to allege any facts that raise a new or different challenge to  
6 California's sex offender registration scheme that has not already been rejected by the United  
7 States Supreme Court or the Ninth Circuit. Accordingly, his claim is not cognizable.

8        Plaintiff cites California Penal Code § 1203.4 in his complaint, which provides for a  
9 process to expunge criminal convictions. Although unclear, presumably Plaintiff is attempting to  
10 raise an ex post facto challenge to subsequent amendments which require sex offenders to  
11 register irrespective of whether their conviction has been expunged pursuant to Section 1203.4.  
12 See Cal. Penal Code § 290.007 ("Any person required to registered ... shall register ... regardless  
13 of whether the person's conviction has been dismissed pursuant to Section 1203.4...."). These  
14 changes to California's sex offender registration scheme do not violate the Ex Post Facto Clause.  
15 See U.S. v. Hardeman, 704 F.3d 1266, 1268 (9th Cir. 2013) ("...those laws, standing alone, do  
16 not violate ex post facto principles [because] registration itself is not considered punitive."); see  
17 also People v. Acuna, 77 Cal. App. 4th 1056, 1060 (2000) (amendments to Section 1203.4  
18 prohibiting expungement of sex offense did not constitute ex post facto law).

19        Based upon the foregoing, the Court finds that Plaintiff fails to state any cognizable  
20 claims.

21        **C. Dismissal Without Leave to Amend**

22        Normally, leave to amend should be granted upon dismissal of a complaint with "extreme  
23 liberality." Moss v. U.S. Secret Service, 572 F.3d 962, 972 (9th Cir. 2009). Dismissal without  
24 leave to amend is improper unless it is clear, upon de novo review, that the complaint could not  
25 be saved by any amendment. Id.

26        The Court finds that it is clear that Plaintiff's complaint cannot be saved by any  
27 amendment. Plaintiff's ex post facto challenges to California's sex offender registration scheme  
28 are not cognizable by clearly established law. Therefore, the Court recommends that Plaintiff's

1 claim be dismissed without leave to amend.

2 **IV.**

3 **CONCLUSION AND RECOMMENDATION**

4 For the reasons set forth above, the Court finds that Plaintiff's claims are barred by the  
5 doctrine of res judicata. The Court further finds that Plaintiff's complaint fails to state any  
6 cognizable claims. The Court finds that Plaintiff's complaint cannot be saved by any  
7 amendment.

8 Accordingly, it is HEREBY RECOMMENDED that Plaintiff's complaint be  
9 DISMISSED, without leave to amend.

10 These findings and recommendations are submitted to the district judge assigned to this  
11 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within thirty (30)  
12 days of service of this recommendation, any party may file written objections to these findings  
13 and recommendations with the Court and serve a copy on all parties. Such a document should be  
14 captioned "Objections to Magistrate Judge's Findings and Recommendations." The district  
15 judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. §  
16 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may  
17 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)  
18 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

19  
20 IT IS SO ORDERED.

21 Dated: March 11, 2015



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UNITED STATES MAGISTRATE JUDGE