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

BRIAN EUGENE JEFFERSON,
Plaintiff,

CASE NO. 1:16-cv-01298-LJO-SKO

v.

**FINDINGS AND
RECOMMENDATIONS THAT
PLAINTIFF’S COMPLAINT BE
DISMISSED WITH PREJUDICE**

CITY OF FRESNO; FRESNO POLICE
DEPARTMENT; and FRESNO CITY
COUNTY SPCA,

(Doc. 1)

Defendants.

OBJECTIONS DUE: 14 DAYS

I. INTRODUCTION

On September 1, 2016, Plaintiff Brian Eugene Jefferson (“Plaintiff”), proceeding *pro se*, filed this action against Defendants City of Fresno, Fresno Police Department, and “Fresno City County SPCA” (“Defendants”).¹ (Doc. 1.) For the reasons set forth below, the Court RECOMMENDS that Plaintiff’s complaint be DISMISSED with prejudice and without leave to amend.

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¹ Along with his complaint, Plaintiff filed an application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915, and a “Motion to Release.” (Docs. 2, 3.)

1 *Twombly*, 550 U.S. at 555).

2 Finally, pro se pleadings are liberally construed. *See Haines v. Kerner*, 404 U.S. 519,
3 520-21 (1972); *Balistreri*, 901 F.2d at 699. Unless it is clear that no amendment can cure the
4 defects of a complaint, a pro se plaintiff proceeding *in forma pauperis* is entitled to notice and
5 an opportunity to amend before dismissal. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.
6 1987). If the Court determines that the complaint fails to state a claim, leave to amend may be
7 granted to the extent that the deficiencies of the complaint are capable of being cured by
8 amendment. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

9 IV. DISCUSSION

10 A. Plaintiff Has Not Pleaded Any Viable Federal Claim.

11 Federal courts have no power to consider claims for which they lack subject-matter
12 jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *see also Vacek*
13 *v. United States Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006) (citing *Kokkonen v. Guardian*
14 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Subject matter jurisdiction is determined and
15 must exist at the time the complaint is filed. *See Morongo Band of Mission Indians v. Cal. State*
16 *Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) (looking to original complaint, and not
17 amended complaint, for subject matter jurisdiction).

18 This Court has an independent duty to consider its own subject-matter jurisdiction,
19 whether or not the issue is raised by the parties, (*id.*) and must dismiss an action over which it
20 lacks jurisdiction. Fed. R. Civ. P. 12(h)(3); *see also Cal. Diversified Promotions, Inc. v.*
21 *Musick*, 505 F.2d 278, 280 (9th Cir. 1974) (“It has long been held that a judge can dismiss *sua*
22 *sponte* for lack of jurisdiction.”). The burden is on the federal plaintiff to allege facts
23 establishing that jurisdiction exists to hear his claims.

24 Plaintiff alleges the following bases for federal question jurisdiction: “ADA and Code of
25 Federal Regulations § 36.202,” 28 U.S.C. § 1331, and 28 U.S.C. § 1332. (Doc. 1, p. 4.) At the
26 outset, 28 U.S.C. sections 1331 (federal question) and 1332 (diversity) are purely jurisdictional
27 statutes that do not, on their own, create a private right of action. *See Montana-Dakota Util. Co.*
28 *v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) (“The Judicial Code, in vesting

1 jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction
2 to adjudicate those arising from other sources which satisfy its limiting provisions.”). *See also*
3 *White v. Paulsen*, 997 F. Supp. 1380, 1382-83 (E.D. Wash. 1998) (citing *In re Estate of*
4 *Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1474-75 (9th Cir. 1994)).

5 Plaintiff’s remaining basis for federal question jurisdiction is the “ADA and Code of
6 Regulations § 36.202.” Title 28 C.F.R. section 36.202 mirrors the language of Title III of the
7 Americans with Disabilities Act (“ADA”), 42 U.S.C. section 12182(b)(1)(A), which, although
8 unclear, is the presumably the section of the ADA that Plaintiff alleges is at issue. Title III of
9 the ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment of
10 the goods, services, facilities, privileges, advantages, or accommodations of any place of public
11 accommodation by any person who owns, leases (or leases to), or operates a place of public
12 accommodation.” 42 U.S.C. § 12182(a). *See also Ariz. ex rel. Goddard v. Harkins Amusement*
13 *Enters.*, 603 F.3d 666, 670 (9th Cir. 2010). Title 28 C.F.R. section 36.202 similarly prohibits
14 discrimination on the basis of a disability or disabilities by a “public accommodation.” 28
15 C.F.R. § 36.202.

16 Liberally construed, Plaintiff’s complaint does not plead any discrimination on the basis
17 of disability by a public accommodation; instead, Plaintiff claims that Defendants, who are all
18 public entities, improperly removed his service dogs from his private property. (Doc. 1, p. 5.)
19 At best, this is a state law claim for conversion. Plaintiff fails to state a claim under Title III² of
20 the ADA and 28 C.F.R. § 36.202, thereby depriving the Court of federal question jurisdiction
21 under 28 U.S.C. § 1331. Because Plaintiff has not articulated any cognizable federal claim over
22 which this Court may assert jurisdiction, dismissal is recommended. *Bender*, 475 U.S. at 541;
23 *Kokkonen*, 511 U.S. at 377; *Vacek*, 447 F.3d at 1250; *Cal Diversified*, 505 F.2d at 1380.

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27 ² To the extent that Plaintiff’s complaint against Defendants is construed to assert a claim under Title II
28 of the ADA, which prohibits discrimination by a public entity, such claim fails because Plaintiff does not
plead that he is a qualifying individual who was subjected to discrimination on the basis of a disability
by a public entity. *See* 42 U.S.C. § 12132.

1 **B. The Court Lacks Diversity Jurisdiction over Plaintiff’s Claim(s).**

2 Plaintiff also alleges diversity jurisdiction over his claim(s). (Doc. 1, p. 3.) Pursuant to
3 28 U.S.C. § 1332, federal district courts have original jurisdiction over all civil actions where
4 the matter in controversy exceeds \$75,000 and is between “citizens of a State and citizens or
5 subjects of a foreign state.” In other words, the plaintiff and the defendant must be citizens of
6 different states to satisfy the complete diversity requirement of section 1332. *Strawbridge v.*
7 *Curtiss*, 3 Cranch 267, 7 U.S. 267, 2 L.Ed. 435 (1806) (no plaintiff can be a citizen of the same
8 state as any of the defendants). Here, although Plaintiff alleges he is a citizen of the State of
9 “ONE UNDER GOD” (Doc. 1, p. 4), elsewhere in his complaint Plaintiff indicates that he is a
10 citizen of California.³ (Doc. 1, p. 1.) The allegations in the complaint and the civil cover sheet
11 indicate that Defendants are also all citizens of California.⁴ (Docs. 1, 1-1.) Because it appears
12 that Plaintiff and Defendants are all citizens of California, complete diversity is lacking.
13 *Garcia-Cardenas v. Immigration Legal Servs.*, APC, No. 1:13-CV-01065-AWI, 2013 WL
14 4542223, at *2 (E.D. Cal. Aug. 27, 2013) (citing *Strawbridge*, 7 U.S. at 267). Because there is
15 no diversity jurisdiction, this Court must dismiss Plaintiff’s complaint for lack of jurisdiction,
16 with prejudice. *See Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir.
17 2001) (“[I]f the court dismisses for lack of subject matter jurisdiction, it has no discretion and
18 must dismiss all claims.”).

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22 ³ In addition, Plaintiff’s exhibit submitted in support of his “Motion for Release” states that he is a
23 resident of California (Doc. 3, p. 4). *See Thompson v. U.S. Postal Serv.*, No. C 12-0301 PJH, 2012 WL
24 3583134, at *1 (N.D. Cal. Aug. 20, 2012) (“In determining whether it has subject matter jurisdiction, a
25 court is not limited to the allegations of the complaint, but may consider facts outside the pleadings.”
26 (citing *Wyatt v. Terhune*, 315 F.3d 1108, 1119–20 (9th Cir. 2003)).

27 ⁴ Plaintiff’s caption also names “Lean Management,” “FizzoLean Ent,” and “Coast 2 Coast Detail &
28 Polishing.” (Doc. 1, p. 1.) Plaintiff is advised, however, that corporate entities “may appear in the
federal courts only through licensed counsel.” *Rowland v. California Men’s Colony*, 506 U.S. 194, 202
(1993); *United States v. High Country Broadcasting Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir.1993); *see also*
Osborn v. President of Bank of United States, 9 Wheat. 738, 829, 6 L.Ed. 204 (1824); *Turner v.*
American Bar Ass’n, 407 F.Supp. 451, 476 (N.D. Tex. 1975) (citing the “long line of cases” from 1824
to the present holding that a corporation may only be represented by licensed counsel). All artificial
entities must appear in federal court through counsel. *Rowland*, 506 U.S. at 202. Additionally, this
Court’s Local Rule 183(a) provides: “A corporation or other entity may appear only by an attorney.”

1 **B. Amendment Would Be Futile**

2 The complaint has not set forth any viable federal claim, and there is not complete
3 diversity between the parties. Because Plaintiff has failed to plead facts invoking the Court’s
4 jurisdiction, the complaint should be dismissed. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th
5 Cir. 1996) (“A party invoking the federal court’s jurisdiction has the burden of proving the
6 actual existence of subject matter jurisdiction.”). Moreover, amendment would be futile
7 because there is no set of facts Plaintiff could allege in an amended complaint to establish
8 jurisdiction over his claims. Accordingly, the action should be dismissed with prejudice and
9 without leave to amend.

10 **V. CONCLUSION AND RECOMMENDATION**

11 IT IS HEREBY RECOMMENDED that Plaintiff’s complaint be DISMISSED with
12 prejudice and without leave to amend.

13 These findings and recommendations are submitted to the district judge assigned to this
14 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within **fourteen**
15 **(14) days** of service of this recommendation, any party may file written objections to these
16 findings and recommendations with the Court and serve a copy on all parties. The document
17 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The
18 district judge will review the magistrate judge’s findings and recommendations pursuant to 28
19 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified
20 time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th
21 Cir. 2014).

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23 IT IS SO ORDERED.

24 Dated: November 4, 2016

/s/ Sheila K. Oberto
25 UNITED STATES MAGISTRATE JUDGE
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