



1 claim is frivolous “when the facts alleged arise to the level of the irrational or the wholly incredible,  
2 whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*,  
3 504 U.S. 25, 32-33 (1992). The Court must screen the First Amended Complaint because an amended  
4 complaint supersedes the previously filed complaint. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467,  
5 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

## 6 **II. Pleading Standards**

7 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A  
8 pleading stating a claim for relief must include a statement affirming the court’s jurisdiction, “a short  
9 and plain statement of the claim showing the pleader is entitled to relief; and . . . a demand for the  
10 relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P.  
11 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se* pleadings are held to “less  
12 stringent standards” than pleadings by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

13 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and  
14 succinct manner. *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Further, a  
15 plaintiff must identify the grounds upon which the complaint stands. *Swierkiewicz v. Sorema N.A.*, 534  
16 U.S. 506, 512 (2002). The Supreme Court noted,

17 Rule 8 does not require detailed factual allegations, but it demands more than an  
18 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers  
19 labels and conclusions or a formulaic recitation of the elements of a cause of action will  
not do. Nor does a complaint suffice if it tenders naked assertions devoid of further  
factual enhancement.

20 *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (internal quotation marks and citations omitted).

21 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d  
22 266, 268 (9th Cir. 1982). The Court clarified further,

23 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim  
24 to relief that is plausible on its face.” [Citation]. A claim has facial plausibility when  
25 the plaintiff pleads factual content that allows the court to draw the reasonable  
26 inference that the defendant is liable for the misconduct alleged. [Citation]. The  
27 plausibility standard is not akin to a “probability requirement,” but it asks for more than  
a sheer possibility that a defendant has acted unlawfully. [Citation]. Where a complaint  
pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of  
the line between possibility and plausibility of ‘entitlement to relief.’”

28 *Iqbal*, 556 U.S. at 678 (citations omitted). When factual allegations are well-pled, a court should

1 assume their truth and determine whether the facts would make the plaintiff entitled to relief; legal  
2 conclusions in the pleading are not entitled to the same assumption of truth. *Id.*

3 The Court has a duty to dismiss a case at any time it determines an action fails to state a claim,  
4 “notwithstanding any filing fee that may have been paid.” 28 U.S.C. § 1915e(2). Accordingly, a court  
5 “may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a  
6 claim.” *See Wong v. Bell*, 642 F.2d 359, 361 (9th Cir. 1981) (citing 5 C. Wright & A. Miller, *Federal*  
7 *Practice and Procedure*, § 1357 at 593 (1963)). However, leave to amend a complaint may be granted  
8 to the extent deficiencies of the complaint can be cured by an amendment. *Lopez v. Smith*, 203 F.3d  
9 1122, 1127-28 (9th Cir. 2000) (en banc).

### 10 **III. Jurisdiction**

11 The district court is a court of limited jurisdiction, and is empowered only to hear disputes  
12 “authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,  
13 377 (1994); *Exxon Mobil Corp v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). The federal courts  
14 are “presumed to lack jurisdiction in a particular case, unless the contrary affirmatively appears.” *A-Z*  
15 *Intll. v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003).

16 A federal court “ha[s] an independent obligation to address sua sponte whether [it] has subject-  
17 matter jurisdiction.” *Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). It is the obligation of  
18 the district court “to be alert to jurisdictional requirements.” *Grupo Dataflux v. Atlas Global Group,*  
19 *L.P.*, 541 U.S. 567, 593 (2004). Without jurisdiction, the district court cannot decide the merits of a  
20 case or order any relief. *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d  
21 1376, 1380 (9th Cir. 1988). The burden of establishing jurisdiction rests upon plaintiff as the party  
22 asserting jurisdiction. *Kokkonen*, 511 U.S. at 377; *see also Hagans v. Lavine*, 415 U.S. 528, 543 (1974)  
23 (acknowledging a claim may be dismissed for lack of jurisdiction if it is “so insubstantial, implausible,  
24 ... or otherwise completely devoid of merit as not to involve a federal controversy within the  
25 jurisdiction of the District Court”).

### 26 **IV. Factual Allegations and Background**

27 Previously, Plaintiff asserted that Victor Vevea “is a paralegal who works out of the office of  
28 Anthony Bryant Law Offices.” (Doc. 1 at 5) Plaintiff reported he “hired Mr. Vevea for the purpose of

1 investigation services,” for which Mr. Vevea “asked for \$4,500.00 up front.” (*Id.*) Plaintiff now  
2 alleges that the money was paid “to process and file, a petition for a writ of Habeas Corpus.” (Doc. 5 at  
3 2) Plaintiff alleges that on September 16, 2014, he and Mr. Veva “entered into a contractual  
4 agreement,” and the required payment was made from his account by the Bureau of Prisons. (*Id.* at 4)  
5 According to Plaintiff, “Mr. Veva cashed the check and never provided any services at all.” (Doc. 1 at  
6 5)

7 Based upon these facts, Plaintiff “prays that this Court proceed with [the] federal law suit for  
8 breach of contractual agreement, and award \$15,000 for damages.” (Doc. 5 at 6)

9 **V. Discussion and Analysis**

10 **A. Subject matter jurisdiction**

11 The determination of subject matter jurisdiction “is governed by the ‘well-pleaded complaint  
12 rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the  
13 face of the plaintiff’s properly pleaded complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392  
14 (1987). Therefore, the complaint must establish “either that [1] federal law creates the cause of action  
15 or that [2] the plaintiff’s right to relief necessarily depends on resolution of a substantial question of  
16 federal law.” *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold &*  
17 *Easement*, 524 F.3d 1090, 1100 (9th Cir. 2008) (quoting *Franchise Tax Bd. v. Constr. Laborers*  
18 *Vacation Trust*, 463 U.S. 1, 27-28 (1983)).

19 Significantly, it the only claim upon which Plaintiff seeks to proceed in this action is for a  
20 breach of contract. (*See* Doc. 5 at 3, 6) A claim for breach of contract will not provide the basis for  
21 federal court jurisdiction. *See Kokkonen*, 511 U.S. at 378. Rather, a breach of contract claim arises  
22 under state law. *See Hall v. North American Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007). Thus,  
23 Plaintiff has not raised a claim that invokes federal subject matter jurisdiction.

24 **B. Diversity jurisdiction**

25 Pursuant to 28 U.S.C. § 1332, the Court has jurisdiction over a matter where the parties have  
26 diverse citizenship and the amount in controversy exceeds \$75,000. *Id.*; *see also Bautista v. Pan*  
27 *American World Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987).

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1                    1.        Citizenship of the parties

2                    The parties to the litigation must have diverse citizenships, not diverse residences. A person’s  
3 citizenship is determined first by whether he is a citizen of the United States, and second by the state  
4 where he is domiciled. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). To be  
5 domiciled in a state, the person must have a physical presence—such as having a residence or having a  
6 location where his belongings are kept—in the state, coupled with the intent to permanently reside  
7 there. *Id.* A person’s domicile for purposes of diversity is determined as of the time the action is filed.  
8 *Hill v. Roller*, 615 F.2d 886, 889 (9th Cir. 1980).

9                    Previously, Plaintiff alleged that he is a citizen of Arizona and Defendant is a citizen of  
10 California. (Doc. 1 at 4) However, Plaintiff is currently in custody and housed in Arizona. The Ninth  
11 Circuit has “not decide[d] whether a prisoner can establish domicile in his place of incarceration for  
12 purposes of federal diversity jurisdiction.” *U.S. v. Arango*, 670 F.3d 988, 997 n.7 (9th Cir. 2012).  
13 Thus, “courts typically presume a prisoner to be a resident of the state he or she formerly resided in  
14 prior to the incarceration.” *Hardaway v. Nooth*, 2011 WL 7276958, n.2 (D. Or. Oct. 6, 2011), *adopted*  
15 *by* 2012 U.S. Dist. LEXIS 16875 (D. Or. Feb. 10, 2012). Indeed, the Ninth Circuit indicated that  
16 “[o]ne does not change his residence to the prison by virtue of being incarcerated there.” *Cohen v.*  
17 *United States*, 297 F.2d 760, 774 (9th Cir. 1962). Because Plaintiff has not alleged where he resided  
18 prior to his incarceration, it is unclear whether the state of Arizona is, in fact, his domicile for purposes  
19 of 28 U.S.C. § 1332.<sup>2</sup>

20                    2.        Amount in controversy

21                    Plaintiff asserts the amount in controversy is \$4,500.00, plus interest. (Doc. 1 at 5, 6; Doc. 5 at  
22 3) He also seeks an unidentified amount of punitive damages, which Plaintiff appears to indicate is  
23 sufficient to meet the minimum amount of \$75,000.00 required by 28 U.S.C. § 1332.

24                    Significantly, “[i]t is well established that punitive damages are part of the amount in  
25 controversy in a civil action.” *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001) (citing *Bell*

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27                    <sup>2</sup> Notably, the Court previously indicated the facts were insufficient to support a determination of Plaintiff’s  
28 citizenship for purposes of this action. However, Plaintiff has not alleged any further facts to aid the Court in its analysis.  
Regardless, as explained below, the amount in controversy requirement is not satisfied.

1 *v. Preferred Life Assur. Society*, 320 U.S. 238, 240 (1943)). However, the Court must be able to  
2 determine that a preponderance of evidence demonstrates that the punitive damages award could  
3 adequately increase the amount in controversy to meet the jurisdictional minimum. *See Gaus v. Miles,*  
4 *Inc.*, 980 F.2d 564, 566-67 (9th Cir. 2002)

5 When a federal court has diversity jurisdiction, it applies state substantive law and federal  
6 procedural law. *In re Larry’s Apartment, LLC*, 249 F.3d 832, 837 (9th Cir. 2001). Although it is  
7 unclear whether California or Arizona law applies to this claim for breach of contract—given the lack  
8 of facts regarding where and when the parties entered into the agreement—the states’ laws regarding  
9 punitive damages for contract actions are the same. Neither California nor Arizona permits punitive  
10 damages to be recovered for breach of contract, unless the breach also involves a tort. *Lerner v.*  
11 *Brettschneider*, 123 Ariz. 152, 156 (1979) (explaining that in Arizona, punitive damages cannot be  
12 recovered for breach of contract unless the breach constitutes a tort); *See In re Marriage of Benge*, 151  
13 Ariz. 219, 224 (1986) (explaining that “punitive damages may not ordinarily be assessed in contract  
14 actions” but that they “may be recoverable where the breach of contract constitutes a tort”); *Walker v.*  
15 *Signal Companies, Inc.*, 84 Cal.App.3d 982, 996 (Ct. App. 1978) (“[p]unitive damages are not  
16 recoverable in an action for breach of contract no matter how willful, malicious or fraudulent the  
17 breach”); *see also* Cal. Civ. Code § 3294.

18 Because Plaintiff’s allegations for a breach of contract show the monetary amount in dispute is  
19 \$4,500 (Doc. 5 at 3), the allegations are insufficient to demonstrate that the monetary requirement of 28  
20 U.S.C. § 1332 is satisfied.

21 **VI. Findings and Recommendations**

22 Plaintiff has failed to provide sufficient facts sufficient to support a determination that the  
23 Court has jurisdiction over the matter. Because Plaintiff was previously advised of the jurisdictional  
24 issues and failed to allege facts supporting a conclusion that the Court has either subject matter  
25 jurisdiction or diversity jurisdiction, it appears further leave to amend the pleadings would be futile.  
26 *See Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987); *see also Lopez*, 203 F.3d at 1128  
27 (dismissal of a *pro se* complaint without leave to amend for failure to state a claim is proper only  
28 where it is obvious that an opportunity to amend would be futile).

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Based upon the foregoing, the Court **RECOMMENDS**:

1. Plaintiff's First Amended Complaint be **DISMISSED** without prejudice for lack of jurisdiction; and
2. The Clerk of Court be directed to close this action.

These Findings and Recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within fourteen days of the date of service of these Findings and Recommendations, any party may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991); *Wilkerson v. Wheeler*, 772 F.3d 834, 834 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: November 22, 2016

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE