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3 **UNITED STATES DISTRICT COURT**

4 EASTERN DISTRICT OF CALIFORNIA

5
6 JACK BORDERS and RACHEL WHIPPLE,
7 Plaintiffs,

CASE NO. 1:16-cv-1818-DAD-SKO

**ORDER DISMISSING COMPLAINT
WITH 30 DAYS LEAVE TO AMEND**

8 v.

(Doc. 1.)

9
10 CITY OF TULARE; OFFICER ERIC
11 TREVINO; OFFICER JULIA FRANCO;
12 TULARE POLICE CHIEF JERRY
13 BRECKERIDGE; CAPTAIN BROOKSHER;
14 LT. LORI CANABA VILLASENOR;
15 TULARE CITY MANAGER DON
BOORMAN; BRAZIL LITIGATION; and
16 MARIAN CORREIA,
17 Defendants.

18 **I. INTRODUCTION**

19 On December 2, 2016, Plaintiff Jack Borders, proceeding pro se, filed a complaint against
20 City of Tulare, Officer Eric Trevino, Officer Julia Franco, Tulare Police Chief Jerry Breckeridge,
21 Captain Brooksher, Lt. Lori Canaba Villasenor, Tulare City Manager Don Boorman, “Brazil
22 Litigation,” and Marian Correia (collectively “Defendants”).¹ Plaintiff also filed an application to
23 proceed *in forma pauperis* (IFP). (Doc. 2.)

24 For the reasons set forth below, Plaintiff’s complaint is DISMISSED with leave to amend.

25 **II. PLAINTIFF’S COMPLAINT**

26 Plaintiff’s complaint is not a model of clarity. However, the gist of the allegations is that
27 Defendants violated Plaintiff’s rights by depriving him of the “property” that is his children, who

28 ¹ The complaint’s caption also names Rachel Whipple as a purported plaintiff, but the complaint does not appear to
allege any causes of action on her behalf. (See Doc. 1.)

1 apparently are not currently in his custody. (*See* Doc. 1.) Plaintiff alleges that Defendants have
2 refused to return his “non-contraband property” after he “warned Defendants on [May 18, 2015] to
3 return Plaintiff’s property.” (*Id.* ¶ 10.)

4 Plaintiff brings two claims: “trespass” and “breach of contract.” (Doc. 1 at 4–8.)
5 Plaintiff’s trespass claim alleges that Defendants
6 arbitrarily and capriciously deprived Plaintiff [Jack Borders] of property [kids] . .
7 . under ‘color of law’ without provision for a judicial trial by jury by reason of
8 federal law exceeding Congressional authority under the federal constitution. See
9 the prohibition against “Bills of Attainder” in Article 1, Section 9, Clause 3 of the
United States Constitution; U.S. v. Min.. Public Intrest [sic] Research Group, 468
U.S. 841, 491 (1965); U.S. Const. Article 3 § 2, 3; Amendment 6.

10 (Doc. 1 ¶ 9.)

11 Plaintiff’s breach of contract claim alleges that Plaintiff “has one valid consensual contract
12 with each of the above named state officials” under the “sixth article of the constitution of the
13 United States[, which] requires ‘all executive and Judicial Officers both of the United States and
14 of the Several States, shall be bound Oath or Affirmation, to support this Constitution.’” (*Id.* ¶
15 11.) Plaintiff alleges further that

16 [t]hese officials have failed to perform their office under oath, specifically
17 denying multiple constitutional rights or specifically acting against or in excess of
18 their office under a color of law: specifically depriving Plaintiff of due process
19 under the fifth [sic] Amendment and depriving Plaintiff of property under the
color of a law which is a form ‘pains and penalties’ forbidden by the ‘Bills of
Attainder’ prohibition in the ninth section of the First Article of the federal
constitution.

20 (*Id.* ¶ 12.)

21 III. DISCUSSION

22 A. Screening Standard

23 District courts “may authorize the commencement . . . of any suit, action or proceeding,
24 civil or criminal . . . without prepayment of fees or security therefor, by a person who submits an
25 affidavit that includes a statement of all assets such [person] possesses that the person is unable to
26 pay such fees or give security therefor.” 28 U.S.C. § 1915(a)(1). A district court “shall dismiss
27 the case at any time if the court determines” that the action is “frivolous or malicious,” or “fails to
28 state a claim on which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B); *O’Neal v. Price*, 531

1 F.3d 1146, 1153 (9th Cir. 2008). An action is “frivolous” if it has no arguable basis in fact or law;
2 the term embraces both inarguable legal conclusions and fanciful factual allegations. *Neitzke v.*
3 *Williams*, 490 U.S. 319, 325 (1989); *DeRock v. Sprint-Nextel*, 584 Fed. Appx. 737 (9th Cir. 2014);
4 *see also Tripati v. First Nat’l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987).

5 A complaint must contain “a short and plain statement of the claim showing that the
6 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
7 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
8 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
9 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as
10 true, courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*,
11 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

12 While persons proceeding pro se are still entitled to have their pleadings liberally
13 construed and to have any doubt resolved in their favor, to survive screening Plaintiff’s claims
14 must be facially plausible, which requires sufficient factual detail to allow the Court to reasonably
15 infer that each named defendant is liable for the misconduct alleged, *Iqbal*, 556 U.S. at 678
16 (quotation marks omitted); *Moss v. United States Secret Service*, 572 F.3d 962, 969 (9th Cir.
17 2009). The sheer possibility that a defendant acted unlawfully is not sufficient, and mere
18 consistency with liability falls short of satisfying the plausibility standard. *Iqbal*, 556 U.S. at 678
19 (quotation marks omitted); *Moss*, 572 F.3d at 969.

20 **B. Plaintiff’s Complaint is Dismissed with Leave to Amend**

21 **1. Plaintiff’s Complaint Fails to Comply with Rule 8**

22 Finally, Plaintiff’s complaint does not contain a “short and plain statement of the claim
23 showing that he is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Pursuant to Rule 8(a) of the Federal
24 Rules of Civil Procedure, a complaint must contain a “short and plain statement of the claim
25 showing that the pleader is entitled to relief.” Although the Federal Rules adopt a flexible
26 pleading policy, a complaint must “give fair notice and state the elements of the claim plainly and
27 succinctly.” *Jones v. Community Redev. Agency of the City of Los Angeles*, 733 F.2d 646, 649
28 (9th Cir. 1984) (citation omitted). While detailed allegations are not required, a plaintiff must set

1 forth “the grounds of his entitlement to relief[,]” which “requires more than labels and
2 conclusions, and a formulaic recitation of the elements of a cause of action” *Twombly*, 550
3 U.S. at 555 (internal quotations and citations omitted).

4 Plaintiff’s complaint is neither short nor plain. The complaint itself is eight pages, but
5 attaches over 60 pages of exhibits of documents from state and federal court proceedings,
6 correspondence with various state agencies, copies of certified mail receipts, and handwritten
7 documents titled “Victim Impact Statement,” “Complaint,” “Final Notice and Request to Return
8 Confiscated Property,” and “Demand Letter,” among others. (*See* Doc. 1.) Plaintiff’s eight-page
9 complaint lacks important factual details regarding what happened and who was involved. For
10 example, there are nine defendants who are named in Plaintiff’s complaint. However, Plaintiff
11 does not specifically identify what each defendant allegedly did that was improper and caused him
12 harm. It is not sufficient for Plaintiff to use the term “defendant” without any further identifying
13 information. When multiple defendants are named, the plaintiff must allege the basis of his claims
14 as to each defendant; it is improper to simply lump defendants together. *See Sebastian Brown*
15 *Prods., LLC v. Muzooka, Inc.*, 143 F. Supp. 3d 1026, 1040 (N.D. Cal. 2015); *Flores v. EMC*
16 *Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014). In other words, Plaintiff must identify
17 the specific wrongful acts that each defendant performed and how each defendant either caused
18 Plaintiff harm or is responsible for Plaintiff’s harm. *See id.* With respect to Plaintiff’s exhibits,
19 while permissible if incorporated by reference, Fed. R. Civ. P. 10(c), they are not necessary in the
20 federal system of notice pleading, Fed. R. Civ. P. 8(a). “Each allegation must be simple, concise,
21 and direct.” Fed. R. Civ. P. 8(d)(1). The function of the complaint is not to list every single fact
22 or attach every document relating to Plaintiff’s claims.

23 Plaintiff’s complaint is not in compliance with Rule 8(a). If Plaintiff elects to amend his
24 complaint, he must meet the requirements of Rule 8. For each claim, Plaintiff shall clearly and
25 succinctly set forth the facts that Plaintiff believes give rise to that claim, including the identity of
26 the defendant(s) involved.

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1 **2. Plaintiff Has Not Pled Any Cognizable Federal Claim.**

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

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

15 Here, Plaintiff’s claims for trespass and breach of contract sound in state law and therefore
16 cannot provide a basis for federal question jurisdiction. *See Scott v. Fox*, No. 2:16-cv-1927 KJN
17 P, 2017 WL 999463, at *4 (E.D. Cal. Mar. 15, 2017) (“[S]tate law . . . breach of contract claims
18 do not confer federal subject matter jurisdiction.”); *Hill v. Cullum*, No. 2:12-cv-1314 GEB GGH
19 PS, 2012 WL 12883190, at *2 (E.D. Cal. Aug. 27, 2012), report and recommendation adopted,
20 No. 2:12-cv-1314 GEB GGH PS, 2012 WL 12883191 (E.D. Cal. Sept. 21, 2012) (dismissing
21 action with prejudice for lack of subject matter jurisdiction where the non-diverse plaintiff
22 “raise[d] only state law claims,” including trespass.). To the extent that Plaintiff is attempting to
23 allege a civil rights claim under federal law, however, the Civil Rights Act provides as follows:

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

27 42 U.S.C. § 1983. The statute plainly requires there be an actual nexus or link between the actions
28 of the defendants and the deprivation alleged to have been suffered by Plaintiff. *See Rizzo v.*

1 *Goode*, 423 U.S. 362, 371 (1976).

2 A person ‘subjects’ another to the deprivation of a constitutional right, within the
3 meaning of section 1983, if he does an affirmative act, participates in another’s
4 affirmative acts, or omits to perform an act which he is legally required to do that
causes the deprivation of which complaint is made.

5 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

6 As set forth above, Plaintiff fails to specifically link any defendant in this action to his
7 claims. In Plaintiff elects to amend his complaint to plead a claim under 42 U.S.C. § 1983, he
8 must allege what each defendant did or did not do that resulted in the violation of his
9 constitutional rights.²

10 **3. The Court Lacks Diversity Jurisdiction over Plaintiff’s State Law Claims.**

11 Pursuant to 28 U.S.C. § 1332(a), federal district courts have original jurisdiction over civil
12 actions in diversity cases “where the matter in controversy exceeds the sum or value of \$75,000”
13 and where the matter is between “citizens of different States.”

14 Plaintiff has not alleged the parties’ citizenship is completely diverse. Plaintiff’s complaint
15 alleges that Plaintiff and Defendants are all California residents (Doc. 1 at ¶¶4–5), which destroys
16 the requisite complete diversity in this case. *See Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d
17 718, 722 (9th Cir. 2008) (citing *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (stating that
18 diversity jurisdiction requires “complete diversity of citizenship”). Accordingly, this Court lacks
19 diversity jurisdiction.

20 **4. Plaintiff May File An Amended Complaint.**

21 In sum, Plaintiff’s complaint fails to comport with Rule 8 and does not plead a cognizable
22 federal claim. At this time, the Court will not grant Plaintiff’s motion to proceed *in forma*
23 *pauperis*. Instead, the Court will permit Plaintiff to file an amended complaint that follows the
24 directives of this order. *Cf. Rodriguez v. Steck*, 795 F.3d 1187, 1188 (9th Cir. 2015) (“denial of

25 ² It appears that some of the defendants identified in Plaintiff’s complaint are private actors. Plaintiff is advised that,
26 where defendants are private actors engaged in private conduct, there is no state action. *See American Mfrs. Mut. Ins.*
27 *Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (“ . . . § 1983 excludes from its reach merely private conduct, no matter how
28 discriminatory or wrong.”); *Lim v. Central Du Page Hosp.*, 871 F.2d 644, 645 (7th Cir. 1989) (holding that conduct of
a private hospital and private physicians was not “state action.”); *cf. West*, 487 U.S. at 49 (“The traditional definition
of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by
virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”).

1 leave to proceed *in forma pauperis* is an abuse of discretion unless the district court first provides
2 a plaintiff leave to amend the complaint or finds that amendment would be futile”).

3 An amended complaint must be legible, must identify what causes of action are being
4 pursued, identify the improper actions or basis for liability of each defendant, and the factual
5 allegations must demonstrate plausible claims. Plaintiff may not change the nature of this suit by
6 adding new, unrelated claims in his amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th
7 Cir. 2007). If Plaintiff files an amended complaint, it will be reviewed and a determination
8 regarding *in forma pauperis* status will be made.

9 If Plaintiff does not timely file an amended complaint or fails to cure the deficiencies
10 identified above, Court will recommend that *in forma pauperis* status be denied and the complaint
11 be dismissed with prejudice.

12 **ORDER**

13 Accordingly, IT IS HEREBY ORDERED that;

- 14 1. Plaintiff’s complaint (Doc. 1) is DISMISSED WITHOUT PREJUDICE and WITH
15 LEAVE TO AMEND;
- 16 2. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file a first
17 amended complaint; and
- 18 3. If Plaintiff fails to file a first amended complaint in compliance with this order, the Court
19 will recommend that *in forma pauperis* status be denied and the complaint be dismissed
20 with prejudice.

21
22 IT IS SO ORDERED.

23 Dated: March 23, 2017

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