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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARREL L. ESPINOSA,
Plaintiff,
v.
WHITEPAGE, INC., a Delaware
corporation dba whitepages.com,
Defendant.

No. 2:14-cv-2829-MCE-EFB PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff filed a complaint against defendant Whitepages, Inc. on December 4, 2014.¹ Prior to initiating this action, plaintiff was declared a vexatious litigant and subjected to a pre-filing order. *See Espinosa v. Marshall*, 2:06-cv-1192 MCE GGH PS, ECF No. 92 at 2. That order prohibited plaintiff from filing any new actions unless he filed with his complaint a copy of the pre-filing order and a declaration containing, among other things, an explanation for why he believes his claims have merit. *Id.* Plaintiff did not file such a declaration. Neither did he file a copy of the pre-filing order. Consequently, the clerk’s office was unaware of the order and this civil action was mistakenly opened despite plaintiff’s noncompliance.

¹ This case, in which plaintiff is proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). *See* 28 U.S.C. § 636(b)(1).

1 As part of a motion to dismiss, ECF No. 17, defendant informed the court that a vexatious
2 litigant/pre-filing review order had been entered against plaintiff. P&A ISO Def.'s Mot. to Dism.,
3 ECF No. 18; *see Espinosa v. Marshall*, 2:06-cv-1192 MCE GGH PS. As noted, plaintiff did not
4 comply with the requirements that he file a copy of the pre-filing order and a declaration of merit.
5 He also failed to comply with the requirements that he list all previous actions he filed in this or
6 any other court and identify the names of all defendants and all claims made in previous actions.
7 *Espinosa v. Marshall*, 2:06-cv-1192 MCE GGH PS, ECF No. 92 at 2-3. Plaintiff also failed to
8 comply with the requirements that he certify that the defendants named in the proposed action
9 have not previously been sued by plaintiff. *Id.*

10 Once the court learned of the order, it specifically instructed plaintiff to comply with it
11 and to file the required documents. ECF No. 24. Plaintiff was informed that "the court will
12 review the declaration plaintiff submits and determine whether this action may proceed." *Id.*
13 Although plaintiff has since filed his declaration, he has disregarded the court's statement that
14 after the declaration was submitted, it would be reviewed to determine whether the action should
15 proceed. Instead, plaintiff has besieged the docket with numerous unnecessary filings. He filed a
16 motion to amend, a notice of withdrawal of his motion for leave to file a second amended
17 complaint--which indicated that the parties had stipulated to the filing of the proposed second
18 amended complaint,² ECF No. 25, and a motion for leave to file a third amended complaint,
19 which he noticed for hearing on March 25, 2015. ECF No. 26. On March 11, 2015, he filed yet
20 another motion for leave to file an amended complaint. ECF No. 33.³ Then, on July 16, he filed

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23 ² Since plaintiff had already amended his complaint as a matter of course, he could not
24 further amend his complaint without written consent from defendant or leave of court. *See* Fed.
25 R. Civ. P. 15(a). Plaintiff's pleading indicates that the parties stipulated to plaintiff filing his
26 proposed second amended complaint (ECF No. 25), and defendant filed a written statement of
27 non-opposition to plaintiff's request to file the proposed second amended complaint. ECF No.
28 16. Accordingly, the operative complaint is the proposed amended complaint filed on January 23,
2015. ECF No. 8

³ As the court had yet to review plaintiff's declaration as to whether the action would
proceed, the hearings on plaintiff's motions were vacated. ECF No. 36.

1 a motion for default judgment and a request for entry of defendant’s default. ECF No. 39.⁴ The
2 clerk declined plaintiff’s request for entry of default in light of defendant’s pending motion to
3 dismiss. ECF No. 41. Plaintiff then filed yet another motion to amend his complaint, which he
4 noticed for hearing on September 9. ECF No. 42. In response, defendant filed a motion to stay,
5 requesting that the court stay the hearing on plaintiff’s most recent motion to amend until
6 resolution of its motion to dismiss. ECF No. 44. Shortly thereafter, plaintiff filed another request
7 for entry of default (ECF No. 45), a motion for sanctions (ECF No. 46), and a motion to shorten
8 time to allow the motion for sanctions to be heard at the same time as most recent motion to
9 amend. The court subsequently granted defendant’s request to stay, and vacated the hearing on
10 plaintiff’s motion to amend. ECF No. 53. The court also vacated the hearing on plaintiff’s
11 motion for sanctions. *Id.*

12 Having reviewed plaintiff’s declaration, the court now screens it and the operative
13 complaint pursuant to 28 U.S.C. § 1915. As explained below, this action must be dismissed.
14 Consequently, it is recommended that all pending motions be denied as moot.

15 I. Screening Requirement and Standard

16 Pursuant to the *in forma pauperis* statute, 28 U.S.C. §1915(e)(2), the court must dismiss
17 the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous
18 or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief
19 against an immune defendant.

20 Although pro se pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519,
21 520-21 (1972), a complaint, or portion thereof, must be dismissed for failure to state a claim if it
22 fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
23 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41
24 (1957)); *see also* Fed. R. Civ. P. 12(b)(6). “[A] plaintiff’s obligation to provide the ‘grounds’ of
25 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of

26 ⁴ Also on July 16, and despite the fact that the Clerk had yet to respond to his request for
27 entry of default, plaintiff filed a “Request for Modification of Clerk’s Entry of Default
28 Judgement,” which requested modification of “the clerk’s default judgment” to reflect that
plaintiff was entitled to receive \$5,829,999.90 in damages. ECF No. 40.

1 a cause of action's elements will not do. Factual allegations must be enough to raise a right to
2 relief above the speculative level on the assumption that all of the complaint's allegations are
3 true." *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable
4 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.
5 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

6 In reviewing a complaint under this standard, the court must accept as true the allegations
7 of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976),
8 construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the
9 plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must satisfy
10 the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2)
11 requires a complaint to include "a short and plain statement of the claim showing that the pleader
12 is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds
13 upon which it rests." *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

14 Additionally, a federal court is a court of limited jurisdiction, and may adjudicate only
15 those cases authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*,
16 511 U.S. 375, 377 (1994). The basic federal jurisdiction statutes, 28 U.S.C. §§ 1331 & 1332,
17 confer "federal question" and "diversity" jurisdiction, respectively. Federal question jurisdiction
18 requires that the complaint (1) arise under a federal law or the U. S. Constitution, (2) allege a
19 "case or controversy" within the meaning of Article III, § 2 of the U. S. Constitution, or (3) be
20 authorized by a federal statute that both regulates a specific subject matter and confers federal
21 jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). To invoke the court's diversity
22 jurisdiction, a plaintiff must specifically allege the diverse citizenship of all parties, and that the
23 matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Bautista v. Pan American World*
24 *Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A case presumably lies outside the jurisdiction
25 of the federal courts unless demonstrated otherwise. *Kokkonen*, 511 U.S. at 376-78. Lack of
26 subject matter jurisdiction may be raised at any time by either party or by the court. *Attorneys*
27 *Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

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1 II. Screening Order

2 The operative complaint purports to assert state law claims against defendant for violation
3 of California Civil Code § 3344 and invasion of privacy in violation of California’s constitution.
4 ECF No. 8 ¶ 1. Plaintiff appears to predicate jurisdiction on diversity. He alleges that he is a
5 resident of Colusa County, California, and that defendant is a Delaware corporation with its
6 principal place of business in Seattle, Washington. *Id.* ¶¶ 3-4.

7 Plaintiff’s allegations are whimsical; even delusional. In summary, he claims that in 2002
8 he created a licensing agreement for the use of his personal information. *Id.* ¶ 7. The purpose of
9 the licensing agreement was to protect his privacy and prevent the improper use of his personal
10 information. *Id.* It also served to protect a number of his constitutional rights, and to “curtail the
11 false perception that just because there is a device, the internet, that provides the means to snoop
12 in other persons private affairs does not create a right to snoop any more than a window creates a
13 right to peeping toms to intrude in another’s personal affairs.”⁵ *Id.*

14 He further alleges that defendant “commercially exploited” his personal information,
15 including his name, address, and telephone number, through the sale of subscriptions for their
16 personal benefit and profit. *Id.* ¶ 11. He alleges that defendant made no attempt to acquire
17 plaintiff’s consent to “the commercial exploitation” of plaintiff’s personal information because it
18 wanted to evade gaining knowledge that such information was subject to licensing fees. *Id.*
19 ¶¶ 12-13.

20 The complaint also alleges that “[p]laintiff does not participate in the internet subculture
21 and had no knowledge that the Defendants maintained a webpage on the internet until November”
22 2014. *Id.* ¶ 16. Plaintiff adds that he “has information and based on that information believes
23 that Defendants are unregistered agents of foreign governments employed to spy and gather
24 personal information to sell to foreign governments and enemies of the United States of
25 America.” *Id.* ¶ 17.

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28 ⁵ Attached as exhibit 1 to the complaint is a copy of the purported “Licensing Agreement
to use the Personal Information of Darrel L. Espinosa for Commercial Purposes.” *Id.* at 16-19.

1 The essence of plaintiff’s complaint is that defendant’s alleged unauthorized use of his
2 personal information violated California Civil Code § 3344. *Id.* at 7-9. California recognizes a
3 right to privacy for protecting one’s name and likeness from appropriation from others for their
4 advantage. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001). California
5 recognizes both a common law cause of action for misappropriation, and a statutory remedy
6 under California Civil Code § 3344. However, to state a common law cause of action for
7 misappropriation, the plaintiff must allege “(1) the defendant’s use of the plaintiff’s identity; (2)
8 the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or
9 otherwise; (3) lack of consent; and (4) resulting injury.” *Id.* To state a claim for violation of
10 section 3344, in addition to alleging all the elements for common law cause of action, a plaintiff
11 must allege “a knowing use by the defendant as well as a direct connection between the alleged
12 use and the commercial purpose.” *Id.* The complaint fails state a claim under either theory.

13 Plaintiff’s allegations are too vague and conclusory to state a claim for violation of
14 § 3344. He alleges that defendant “is in the business of selling [its] products on the internet.” *Id.*
15 ¶ 19. He further claims that defendant used “Plaintiff’s name on the internet to advertise and
16 promote [its] products on the internet.” *Id.* ¶ 20. Plaintiff also concludes that defendant
17 “commercially exploited Plaintiff’s personal information . . . through the sale of subscriptions and
18 other monetary transactions.” *Id.* ¶ 10. It is unclear from these conclusory allegations how
19 plaintiff’s personal information was used to achieve some commercial purpose. Plaintiff does not
20 identify the products defendant allegedly sells, nor is it clear how plaintiff’s information,
21 including his name, address, and phone number were used to sell such products. Instead, he
22 simply contends that defendant exploited his personal information to promote some type of
23 product on the internet and for its “personal gain and monetary profits.” These allegations do not
24 establish a direct connection between the alleged use and commercial purpose. Accordingly, the
25 complaint contains insufficient allegations to support a cause of action for misappropriation and
26 therefore necessarily fails to state a claim under California Civil Code § 3344.

27 Plaintiff’s remaining claim appears to be for invasion of privacy in violation of
28 California’s constitution. ECF No. 8 at 9-12. To state a claim for violation of the right to privacy

1 in violation of the Article I, § 1 of the California Constitution, a complaint must allege: (1) a
2 legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) conduct that
3 amounts to a serious invasion of the protected privacy interest. *Hill v. Nat'l Collegiate Athletic*
4 *Ass'n*, 7 Cal. 4th 1, 35-37 (1994).

5 Plaintiff contends that defendant violated his right to privacy by commercially exploiting
6 his name. *Id.* ¶ 34. He claims that defendant published his personal information on its website
7 for personal gain and monetary profit. *Id.* ¶ 35. Defendant also allegedly engaged in “snooping”
8 and secret gathering of the Plaintiff’s personal information.” *Id.* “Defendants were engaged in
9 gathering and storing information that Plaintiff had given to governmental entities for a specific
10 purpose.” *Id.* ¶ 37. Plaintiff further contends that defendant has fabricated “Plaintiff’s personal
11 information history” to publicly embarrass, ridicule, dishonor and injure plaintiff’s reputation. *Id.*
12 ¶ 40.

13 These allegations do not support a claim for invasion of privacy. “Actionable invasions of
14 privacy must be sufficiently serious in their nature, scope, and actual or potential impact to
15 constitute an egregious breach of the social norms underlying the privacy right.” *Hill*, 7 Cal. 4th
16 at 37. Although plaintiff concludes that defendant’s conduct shows a “total disregard for the
17 normative rules of society,” he simply alleged defendant published his name, address, and phone
18 number on the internet. ECF No. 8 ¶ 10. Such conduct does not constitute an egregious breach
19 of social norms. *See Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 991-992 (2001)
20 (finding that even if plaintiff had a privacy interest in his home address, defendant obtaining
21 plaintiff’s address without knowledge and using it to send plaintiff advertisements was not
22 sufficiently serious); *see also McNutt v. N.M. State Tribune Co.*, 88 N.M. 162, 166 (1975) (“an
23 individual’s home address is a public fact and . . . mere publication, without more, cannot be
24 viewed as an invasion of privacy.”); Phillip E. Hassman, Annotation, *Publication of Address as*
25 *well as Name of Person as Invasion of Privacy*, 84 A.L.R. 3d 1159 (1978) (“It would therefore
26 seem that under the Restatement, the mere publication of a person’s address, no matter what the
27 circumstances, could not constitute an invasion of his privacy.”). Thus, plaintiff also fails to state
28 a claim for invasion of privacy.

1 Fundamentally, the curious allegations of plaintiff’s complaint fail to state a plausible
2 claim. Although a court should generally grant a pro se plaintiff leave to amend, the court finds
3 that the instant action is frivolous and therefore granting such leave would be futile. *See Noll v.*
4 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (While the court ordinarily would permit a pro se
5 plaintiff to amend, leave to amend should not be granted where it appears amendment would be
6 futile). A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
7 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227–28 (9th
8 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
9 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
10 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
11 pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th
12 Cir.1989); *Franklin*, 745 F.2d at 1227.

13 In addition to the various conclusory allegations discussed above, the complaint includes
14 allegations that have no basis in reality. For example, the complaint alleges that “Plaintiff has
15 information and based on that information believes that Defendants are unregistered agents of
16 foreign governments employed to spy and gather personal information to sell to foreign
17 governments and enemies of the United States of America.” *Id.* ¶ 17. He further contends that
18 defendant engaged in “snooping” and “secret gathering.” *Id.* ¶ 35. His purported injury is said to
19 be based on a licensing agreement that he created to “curtail the false perception that just because
20 there is a device, the internet, that provides the means to snoop . . . does not create a right to
21 snoop. . . .” *Id.* ¶ 7. Plaintiff does not allege that defendant signed this agreement or otherwise
22 agreed to be bound by its terms. Rather, he simply states that defendant is bound by it because
23 plaintiff notified defendant of it. *Id.* ¶¶ 22, 27-31. He adds that under his licensing agreement, a
24 party seeking to obtain the non-exclusive commercial use of his “personal information” must pay
25 him \$1,300,000, while an exclusive five year terms requires payment of \$39 million. *Id.* at 18.
26 Plaintiff claims that based on this licensing agreement, and the defendant’s alleged misuse of his
27 personal information, defendant is now liable for nearly half a billion dollars in damages. *Id.* at
28 13.

1 Plaintiff's claims are patently frivolous and lack even "an arguable basis either in law or
2 in fact," and appear "fanciful," "fantastic," or "delusional." *Neitzke v. Williams*, 490 U.S. 319,
3 325, 328, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Accordingly, the second amended complaint
4 be must dismissed without leave to amend.⁶

5 IV. Motion for Sanctions

6 Plaintiff has also moved for sanctions against defendant's counsel based on plaintiff's
7 contention that counsel impermissibly failed to comply with Local Rule 230(c). ECF No. 46. He
8 asserts that counsel failed to properly notice for hearing its motion to stay proceedings until
9 resolution of the pending motion to dismiss. *Id.* at 8. However, counsel filed the request to stay
10 in direct response to the numerous motions filed by plaintiff. Under the circumstances, the court
11 finds that sanctions are not appropriate. Accordingly, the motion is denied.

12 V. Motion for Default Judgement

13 On July 16, 2015, plaintiff filed a motion for default judgment (ECF No. 39), together
14 with a request for entry of defendant's default. ECF No. 40. Plaintiff contends default is
15 appropriate because defendant failed to timely respond to plaintiff's first amended complaint.
16 ECF No. 39 at 1-2.

17 Federal Rule of Civil Procedure 55(a) provides that "[w]hen a party against whom a
18 judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is
19 shown by affidavit or otherwise, the clerk must enter the party's default."⁷ Entry of default
20 against a defendant cuts off that defendant's right to appear in the action or to present evidence.
21 *Clifton v. Tomb*, 21 F.2d 893, 897 (4th Cir. 1927).

22 Here, the Clerk of Court declined plaintiff's request for entry of default based on
23 defendant's pending motion to dismiss the second amended complaint. ECF No. 41. Instead of
24 filing a response to plaintiff's first amended complaint, defendant filed a non-opposition to

25 ⁶ In light of the recommended disposition of this case, defendant's motion to dismiss
26 (ECF No. 17), and plaintiff's motions to amend the complaint (ECF Nos. 26, 33, 42) are denied
27 without prejudice.

28 ⁷ Because the court finds that entry of default under Federal Rule of Civil Procedure 55(a)
is improper, the standards for entry of default judgment under 55(b) need not be addressed.

1 plaintiff filing his second amended complaint and a motion to dismiss the second amended
2 complaint. There was nothing improper with defendant proceeding in this manner.⁸ In any event,
3 defendant has filed a motion to dismiss and therefore entry of default is inappropriate. *Direct*
4 *Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 689 (9th Cir. 1988)
5 (no default can be entered if defendant has filed a response indicating its intent to defend the
6 action). Furthermore, as this action must be dismissed without leave to amend, there are no
7 claims upon which to enter judgment. Accordingly, plaintiff's motion for default judgment must
8 be denied.

9 IV. Conclusion

10 Accordingly, it is hereby ORDERED that:

11 1. Defendant's motion to dismiss (ECF No. 17) is denied without prejudice to renewal,
12 should the district judge not adopt the recommendation below.

13 2. Plaintiff's motions to amend the complaint (ECF Nos. 26, 33, 42) are denied without
14 prejudice to renewal, should the district judge not adopt the recommendation below.

15 3. Plaintiff's motion for sanctions (ECF No. 46) is denied, and plaintiff's request to
16 shorten time for hearing on the motion for sanctions (ECF No. 48) is denied as moot.

17 Further, it is hereby RECOMMENDED that:

18 1. Plaintiff's complaint be dismissed pursuant to 28 U.S.C. § 1915(e)(2) as frivolous and
19 for failure to state a claim;

20 2. Plaintiff's motion for default judgment (ECF No. 39) be denied;


21 3. The Clerk be directed to close the case.

22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
24 after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

27 ⁸ Rule 15 allows a party to amend their complaint with the opposing party's written
28 consent. Fed. R. Civ. P. 15(a)(2).

1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 30, 2015.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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