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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAWNE C. SHACKELFORD,  
Plaintiff,  
v.  
VIRTU INVESTMENTS, LLC,  
Defendant.

No. 2:16-cv-1601-TLN-EFB PS

ORDER

Plaintiff seeks leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.<sup>1</sup> His declaration makes the showing required by 28 U.S.C. §1915(a)(1) and (2). *See* ECF No. 2. Accordingly, the request to proceed *in forma pauperis* is granted. 28 U.S.C. § 1915(a).

Determining that plaintiff may proceed *in forma pauperis* does not complete the required inquiry. Pursuant to § 1915(e)(2), the court must dismiss the case at any time if it determines that the allegation of poverty is untrue, or that the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant. As discussed below, plaintiff’s complaint must be dismissed for failure to state a claim.

Although pro se pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if it

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<sup>1</sup> This case, in which plaintiff is proceeding *in propria persona*, was referred to the undersigned under Local Rule 302(c)(21). *See* 28 U.S.C. § 636(b)(1).

1 fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
2 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41  
3 (1957)); see also Fed. R. Civ. P. 12(b)(6). “[A] plaintiff’s obligation to provide the ‘grounds’ of  
4 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of  
5 a cause of action’s elements will not do. Factual allegations must be enough to raise a right to  
6 relief above the speculative level on the assumption that all of the complaint’s allegations are  
7 true.” *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable  
8 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.  
9 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

10 In reviewing a complaint under this standard, the court must accept as true the allegations  
11 of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976),  
12 construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the  
13 plaintiff’s favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must satisfy  
14 the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2)  
15 “requires a complaint to include a short and plain statement of the claim showing that the pleader  
16 is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds  
17 upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing  
18 *Conley v. Gibson*, 355 U.S. 41 (1957)).

19 Additionally, a federal court is a court of limited jurisdiction, and may adjudicate only  
20 those cases authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*,  
21 511 U.S. 375, 377 (1994). The basic federal jurisdiction statutes, 28 U.S.C. §§ 1331 & 1332,  
22 confer “federal question” and “diversity” jurisdiction, respectively. Federal question jurisdiction  
23 requires that the complaint (1) arise under a federal law or the U. S. Constitution, (2) allege a  
24 “case or controversy” within the meaning of Article III, § 2 of the U. S. Constitution, or (3) be  
25 authorized by a federal statute that both regulates a specific subject matter and confers federal  
26 jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). To invoke the court’s diversity  
27 jurisdiction, a plaintiff must specifically allege the diverse citizenship of all parties, and that the  
28 matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Bautista v. Pan American World*

1 *Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A case presumably lies outside the jurisdiction  
2 of the federal courts unless demonstrated otherwise. *Kokkonen*, 511 U.S. at 376-78. Lack of  
3 subject matter jurisdiction may be raised at any time by either party or by the court. *Attorneys*  
4 *Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

5 Here, the allegations of plaintiff's first amended complaint<sup>2</sup> fail to state a claim. Plaintiff  
6 brings this action against defendant Virtu Investments, LLC, and all its officers, employees,  
7 agents, and stockholders, alleging claims under the Americans with Disabilities Act ("ADA"), 42  
8 U.S.C. §§ 12101, *et seq.*, and state law. ECF No. 3. The allegations, however, are too vague and  
9 conclusory to state a claim upon which relief may be granted. Plaintiff claims to be seeking \$25  
10 million from defendants due to "intentional infliction of additional ailments as well as intentional  
11 delay of ailment recovery & reemployment disruption [that] left plaintiff incapacitated to conduct  
12 home sale, clear up interest accruing pre-ailment debts, and successfully complete in progress  
13 employment retraining." *Id.* at 3. Plaintiff further alleges that defendants "made efforts to hide  
14 harm & sources to continue profiting by increased bodily harm, physical pain and financial  
15 malice to disabled Gulf War veteran." *Id.* at 4. Plaintiff also alleges that defendants modified  
16 documents and made dishonest statements to "induce physical pain and suffering" and exacerbate  
17 plaintiff's stress. *Id.*

18 These allegations are insufficient to state a claim for violation of the ADA. Title II of the  
19 ADA prohibits a public entity from discriminating against a qualified individual with a disability  
20 on the basis of disability. 42 U.S.C. § 12132. "To state a claim of disability discrimination under  
21 Title II, the plaintiff must allege four elements: (1) the plaintiff is an individual with a disability;  
22 (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public  
23 entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in  
24 or denied the benefits of the public entity's services, programs, or activities, or was otherwise  
25 discriminated against by the public entity; and (4) such exclusion, denial of benefits, or

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26 <sup>2</sup> Prior to screening of the original complaint, plaintiff filed a first amended complaint  
27 pursuant to Fed. R. Civ. P. 15(a) (Permitting an amendment once as a matter of course within 21  
28 days after the filing of a responsive pleading). Therefore, the court screens the first amended  
complaint.

1 discrimination was by reason of the plaintiff's disability." *Thompson v. Davis*, 295 F.3d 890, 895  
2 (9th Cir.2002); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) ("If a  
3 public entity denies an otherwise 'qualified individual' 'meaningful access' to its 'services,  
4 programs, or activities' 'solely by reason of' his or her disability, that individual may have an  
5 ADA claim against the public entity.").

6 While plaintiff alleges that she is disabled, she fails to allege that defendants wrongfully  
7 denied her services, programs, or activities that she was otherwise qualified to receive on account  
8 of her disability. Accordingly, plaintiff fails to state a claim upon which relief may be granted.

9 Plaintiff also purports to assert tort claims of negligent and intentional infliction of  
10 emotional distress and a variety of other state law claims. But plaintiff has yet to assert a properly  
11 pleaded federal cause of action which precludes supplemental jurisdiction over the state law  
12 claims. Further, plaintiff fails to establish diversity of citizenship that could support diversity  
13 jurisdiction over the state law claims. As noted above, to establish diversity jurisdiction plaintiff  
14 must allege diverse citizenship of all parties. *Bautista*, 828 F.2d at 552. Although the amended  
15 complaint does allege that plaintiff is a citizen of California, it does not adequately allege Virtu  
16 Investments, LLC's state of incorporation or principal place of business.<sup>3</sup> *See* 28 U.S.C.  
17 § 1332(c)(1) (corporation is a citizen of both the state of incorporation and state where principal  
18 place of businesses located). Thus, plaintiff has failed to establish diversity jurisdiction over his  
19 claims.<sup>4</sup>

20 Accordingly, the amended complaint must be dismissed. However, plaintiff is granted  
21 leave to file an amended complaint. Any amended complaint must allege a basis for this court's  
22 jurisdiction, as well as a cognizable cause of action against a proper defendant and sufficient facts

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23 <sup>3</sup> The amended complaint alleges that Virtu Investments, LLC's principal place of  
24 business is located in California, Colorado, Nevada, Texas, and "others." ECF No. 3 at 7. A  
25 corporation, however, can only have one principal place of business, which is located in the state  
26 "where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz  
Corp v. Friend*, 559 U.S. 77, 92-93 (2010).

27 <sup>4</sup> Aside from the jurisdictional issue, plaintiff also fails to properly plead a state law claim  
28 because her allegations are too vague and conclusory to provide defendants fair notice of the basis  
for any of his claims. *See Twombly*, 550 U.S. at 554.

1 to support that cause of action. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
2 (district courts must afford pro se litigants an opportunity to amend to correct any deficiency in  
3 their complaints). Should plaintiff choose to file an amended complaint, the amended complaint  
4 shall clearly identify the claims asserted as to each defendant and set forth the factual allegations  
5 against that defendant(s) which give rise to a cause. It shall specify a basis for this court's subject  
6 matter jurisdiction. Any amended complaint shall plead plaintiff's claims in "numbered  
7 paragraphs, each limited as far as practicable to a single set of circumstances," as required by  
8 Federal Rule of Civil Procedure 10(b), and shall be in double-spaced text on paper that bears line  
9 numbers in the left margin, as required by Eastern District of California Local Rules 130(b) and  
10 130(c). Any amended complaint shall also use clear headings to delineate each claim alleged and  
11 against which defendant or defendants the claim is alleged, as required by Rule 10(b), and must  
12 plead clear facts that support each claim under each header.

13           Additionally, plaintiff is informed that the court cannot refer to prior pleadings in order to  
14 make an amended complaint complete. Local Rule 220 requires that an amended complaint be  
15 complete in itself. This is because, as a general rule, an amended complaint supersedes the  
16 original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, once  
17 plaintiff files an amended complaint, the original no longer serves any function in the case.  
18 Therefore, "a plaintiff waives all causes of action alleged in the original complaint which are not  
19 alleged in the amended complaint," *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir.  
20 1981), and defendants not named in an amended complaint are no longer defendants. *Ferdik v.*  
21 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Finally, the court cautions plaintiff that failure to  
22 comply with the Federal Rules of Civil Procedure, this court's Local Rules, or any court order  
23 may result in a recommendation that this action be dismissed. *See E.D. Cal. L.R. 110.*

24           Accordingly, IT IS ORDERED that:

- 25           1. Plaintiff's request for leave to proceed *in forma pauperis* (ECF No. 2) is granted.
- 26           2. Plaintiff's first amended complaint is dismissed with leave to amend, as provided  
27 herein.

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1           3. Plaintiff is granted thirty days from the date of service of this order to file an amended  
2 complaint. The amended complaint must bear the docket number assigned to this case and must  
3 be labeled "Second Amended Complaint." Failure to timely file an amended complaint in  
4 accordance with this order will result in a recommendation this action be dismissed.

5 DATED: October 4, 2017.

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7 EDMUND F. BRENNAN  
8 UNITED STATES MAGISTRATE JUDGE  
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