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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN KEMPER,  
  
Plaintiff,  
  
v.  
  
CALIFORNIA STATE UNIVERSITY,  
SACRAMENTO,  
  
Defendant.

No. 2:17-cv-0895 GEB AC PS

ORDER

Plaintiff is proceeding in this action pro se. This matter was accordingly referred to the undersigned by E.D. Cal. 302(c)(21). Plaintiff has filed a request for leave to proceed in forma pauperis (“IFP”) pursuant to 28 U.S.C. § 1915, and has submitted the affidavit required by that statute. See 28 U.S.C. § 1915(a)(1). The motion to proceed IFP will therefore be granted.

I. SCREENING STANDARDS

Granting IFP status does not end the court’s inquiry. The federal IFP statute requires federal courts to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Plaintiff must assist the court in determining whether or not the complaint is frivolous, by drafting the complaint so that it complies with the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”). Under the Federal Rules of Civil Procedure,

1 the complaint must contain (1) a “short and plain statement” of the basis for federal jurisdiction  
2 (that is, the reason the case is filed in this court, rather than in a state court), (2) a short and plain  
3 statement showing that plaintiff is entitled to relief (that is, who harmed the plaintiff, and in what  
4 way), and (3) a demand for the relief sought. Fed. R. Civ. P. (“Rule”) 8(a). Plaintiff’s claims  
5 must be set forth simply, concisely and directly. Rule 8(d)(1).

6 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). In reviewing a complaint under this standard, the  
8 court will (1) accept as true all of the factual allegations contained in the complaint, unless they  
9 are clearly baseless or fanciful, (2) construe those allegations in the light most favorable to the  
10 plaintiff, and (3) resolve all doubts in the plaintiff’s favor. See Neitzke, 490 U.S. at 327;  
11 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010),  
12 cert.denied, 564 U.S. 1037 (2011).

13 The court applies the same rules of construction in determining whether the complaint  
14 states a claim on which relief can be granted. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (court  
15 must accept the allegations as true); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (court must  
16 construe the complaint in the light most favorable to the plaintiff). Pro se pleadings are held to a  
17 less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520  
18 (1972). However, the court need not accept as true conclusory allegations, unreasonable  
19 inferences, or unwarranted deductions of fact. Western Mining Council v. Watt, 643 F.2d 618,  
20 624 (9th Cir. 1981). A formulaic recitation of the elements of a cause of action does not suffice  
21 to state a claim. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007); Ashcroft v. Iqbal,  
22 556 U.S. 662, 678 (2009). To state a claim on which relief may be granted, the plaintiff must  
23 allege enough facts “to state a claim to relief that is plausible on its face.” Twombly, 550 U.S. at  
24 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
25 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
26 Iqbal, 556 U.S. at 678.

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1 A pro se litigant is entitled to notice of the deficiencies in the complaint and an  
2 opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. See  
3 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

## 4 II. THE COMPLAINT

5 Plaintiff names California State University, Sacramento, as the sole defendant in this  
6 lawsuit. ECF No. 1 at 1. The complaint alleges a single state law claim for breach of contract.  
7 Id. at 1-2.

8 Although plaintiff does not specify a basis for federal court jurisdiction, diversity  
9 jurisdiction can be inferred from the allegations of the complaint. 28 U.S.C. § 1332 provides for  
10 diversity of citizenship jurisdiction. A plaintiff properly invokes § 1332 jurisdiction “when she  
11 presents a claim between parties of diverse citizenship that exceeds the required jurisdictional  
12 amount, currently \$75,000.” Arbaugh v. Y&H Corp., 546 U.S. 500, 513 (2006); 28 U.S.C.  
13 § 1332. Review of the court docket and the complaint reveals plaintiff is domiciled in Arizona.  
14 Plaintiff further asserts he “moved to Arizona in 1980 and has been there ever since.” ECF No. 1  
15 at 1 ¶ C. Although defendant does not affirmatively allege the citizenship of the defendant, it is  
16 reasonable to infer that the California State University, Sacramento, is a citizen of California.  
17 Furthermore, plaintiff's assertion of damages in the amount of \$500,010,000 is sufficient to  
18 satisfy the amount in controversy requirement. 28 U.S.C. § 1332(a). For screening purposes, the  
19 complaint is sufficient to establish the court's jurisdiction.

20 Plaintiff alleges that he was a student at the university for both his undergraduate and  
21 graduate studies. ECF No. 1 at 1 ¶ A. Upon completing his undergraduate studies he received  
22 both his diploma and transcripts. Id. After completing his graduate program, plaintiff requested  
23 from the university his “up-dated transcripts which would declare his graduate courses and date  
24 of their completion and date of acceptance of his thesis” as well as “his diploma displaying a  
25 Master's Degree in Educational Technology.” Id. at 1 at 1 ¶ C. For the last 36 years, plaintiff has  
26 not been able to receive his transcript and diploma from the university despite writing, calling and  
27 receiving “assurances from the university” that the documents would be forwarded to plaintiff.  
28 Id. at 1 at 1 ¶ D. Plaintiff alleges a contract was entered into when he “sign[ed] with the

1 university to attend” their school in exchange for a “timely consequence/receipt of transcripts and  
2 diploma.” Id. at 2. Plaintiff asserts these documents were to be to be issued by the university  
3 when plaintiff completed the requirements for his degree. Id. Plaintiff alleges that failure to  
4 produce the transcript and diploma resulted in a breach. Id. at 1-2. Consequently, plaintiff  
5 alleges he has suffered a “myriad [of lost] teaching opportunities because he was unable to  
6 provide [these] documents [to] prospective employers.” Id. at 1 at 1 ¶¶ D, F. As “relief,”  
7 plaintiff seeks “\$10,000 general damages and \$500,000,000 punitive damages for egregious  
8 behavior.” Id. at 2.

9 California law of contracts applies in cases brought in the federal courts. See Klaxon  
10 Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). To state a claim for breach of contract  
11 under California law, a plaintiff must allege facts demonstrating: (1) the existence of a contract;  
12 (2) plaintiff’s performance of his contractual duties; (3) defendant’s failure to perform his  
13 contractual duties; and (4) the damage resulting to the plaintiff. Oasis West Realty, LLC. v.  
14 Goldman, 51 Cal.4th 811, 821 (2011); see also J&J Pumps, Inc. v. Star Ins. Co., 795 F. Supp. 2d  
15 1023, 1027 (E.D. Cal. 2011). The complaint before the court fails to state a claim because it does  
16 not set forth the nature of the purported contract, what duties the contact imposes on the parties,  
17 the date the contract was entered into, or any other relevant terms. Plaintiff neither specifies these  
18 essential facts in his complaint nor attaches a copy of the contract at issue. See N. Cty.  
19 Commc’ns Corp. v. Verizon Glob. Networks, Inc., 685 F. Supp. 2d 1112, 1122 (S.D. Cal. 2010)  
20 (“To sufficiently plead breach of contract under California law, the claimant must plead, among  
21 other things, the contract either ‘by its terms, set out verbatim in the complaint or a copy of the  
22 contract attached to the complaint and incorporated therein by reference, or by its legal effect.’”  
23 (internal citations omitted)).

24 Plaintiff’s allegations related to the existence of a contract involve an “advertisement” and  
25 “solicit[ation]” of students “to attend [the] university” with “assur[ances]” that in attending the  
26 university, “[students] will have a timely consequence/receipt of transcripts and diploma.” ECF  
27 No. 1 at 1-2. These allegations are insufficient to support the existence of an oral or implied  
28 contract. See Khoury v. Maly’s of California Inc., 14 Cal. App. 4th 612, 616 (1993) (pleading

1 requirements for oral contract); Silva v. Providence Hospital of Oakland, 14 Cal. 2d 762, 773  
2 (1939) (elements of implied contract). No advertisement or solicitation is provided in or attached  
3 to the instant complaint, nor are the specific contents of any advertisement or solicitation alleged.  
4 Accordingly, the existence of a contract cannot be determined. See Sinai Memorial Chapel v.  
5 Dudler, 231 Cal. App. 3d 190, 198 (1991) (general language in an advertisement does not create a  
6 contract); cf. Kirstein v. Bekins Van & Storage Co., 27 Cal. App. 586, 588 (1915) (customer's  
7 reliance on advertisements specifically offering fireproof storage created implied contract to store  
8 goods in fireproof facility).

9 In sum, plaintiff's allegation that a contract existed is the kind of conclusory legal  
10 assertion that the court does not accept as true on screening. Because the complaint does not  
11 allege specific facts demonstrating the existence of a contract, the complaint is not sufficient to  
12 proceed. Although the complaint will be dismissed, plaintiff will be provided the opportunity to  
13 amend.

### 14 III. AMENDING THE COMPLAINT

15 The amended complaint must contain a short and plain statement of plaintiff's claims.  
16 That is, it must state what the defendant did that harmed the plaintiff. The amended complaint  
17 must not force the court and the defendant to guess at what is being alleged against whom. See  
18 McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (affirming dismissal of a complaint where  
19 the district court was "literally guessing as to what facts support the legal claims being asserted  
20 against certain defendants"). To the extent possible, plaintiff should provide the information  
21 identified as missing above.

22 In setting forth the facts, plaintiff must not go overboard, however. He must avoid  
23 excessive repetition of the same allegations. He must avoid narrative and storytelling. That is,  
24 the complaint should not include every detail of what happened, nor recount the details of  
25 conversations (unless necessary to establish the claim), nor give a running account of plaintiff's  
26 hopes and thoughts. Rather, the amended complaint should contain only those facts needed to  
27 show how the defendant legally wronged the plaintiff.

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1 Also, the amended complaint must not refer to a prior pleading in order to make plaintiff's  
2 amended complaint complete. An amended complaint must be complete in itself without  
3 reference to any prior pleading. Local Rule 220. This is because, as a general rule, an amended  
4 complaint supersedes the original complaint. See Pacific Bell Telephone Co. V. Linkline  
5 Communications, Inc., 555 U.S. 438, 456 n.4 (2009)("[n]ormally, an amended complaint  
6 supersedes the original complaint") (citing 6 C. Wright & A. Miller, Federal Practice &  
7 Procedure § 1476, pp. 556-57 (2d ed. 1990)). Therefore, an amended complaint, as in an original  
8 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

#### 9 IV. PLAIN LANGUAGE SUMMARY FOR PRO SE PLAINTIFF

10 Your application to proceed in forma pauperis will be granted, but your complaint is being  
11 dismissed and you are being given an opportunity to submit an amended complaint within 30  
12 days. The amended complaint should include specific facts that demonstrate (1) the existence of  
13 a contract; (2) your performance of your contractual duties; (3) defendant's failure to perform its  
14 contractual duties; and (4) the resulting damage to you. Facts relevant to the existence of a  
15 contract include (1) whether the contract was written, oral or implied; (2) if oral or implied, the  
16 specific facts, circumstances, communications and/or actions that you claim created the contract;  
17 (3) the date the contract was entered into; (4) the duties and obligations of you and the defendant  
18 under the contract; (5) what specific promises were made to you regarding receipt of your  
19 transcript and diploma; (6) other facts demonstrating the existence of the contract. An amended  
20 complaint should briefly provide the necessary information, following the directions above.

#### 21 V. CONCLUSION

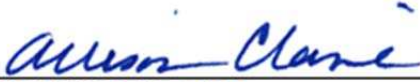
22 For the reasons explained above, IT IS HEREBY ORDERED that:

- 23 1. Plaintiff's request to proceed in forma pauperis (ECF No. 2) is GRANTED;
- 24 2. The complaint (ECF No. 1), is DISMISSED with leave to amend;
- 25 3. Plaintiff may file an amended complaint within 30 days of the date of this order. If  
26 plaintiff files an amended complaint, he must comply with the instructions given above. If  
27 plaintiff fails to timely comply with this order, the undersigned may recommend that this action be  
28 dismissed for failure to prosecute.

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4. Failure to comply with this order may result in a recommendation that this action be dismissed.

DATED: July 28, 2017.

  
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ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE