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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DANNY BAUCUM, et al.,  
Plaintiffs,  
v.  
CHERYL WICKS, et al.,  
Defendants.

No. 2:17-cv-01141-MCE-AC

**ORDER**

By way of this action, Plaintiffs Danny Baucum and Jutta Kosielowsky originally sought to recover from Defendants Cheryl Wicks, Nevada County Animal Control, and Sammies Friends (collectively "Defendants") for violations of federal and state laws arising out of the retention and euthanizing of Kosielowsky's dog. Defendants moved to dismiss that Complaint, which Motions the Court granted with leave to amend. Plaintiff Kosielowsky subsequently filed a Second Amended Complaint ("SAC") setting forth the same claims based on slightly modified facts.<sup>1</sup> Presently before the Court are Defendants' subsequent Motions to Dismiss (ECF Nos. 31, 36) the SAC in its entirety. For the following reasons, those Motions are GRANTED without leave to amend.<sup>2</sup>

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<sup>1</sup> Plaintiffs have abandoned any claims brought by Plaintiff Baucum by failing to re-allege them in the SAC.

<sup>2</sup> Having determined that oral argument was not of material assistance, the Court ordered this matter submitted on the briefing in accordance with E.D. Local Rule 230(g).

1           On a motion to dismiss for failure to state a claim under Federal Rule of Civil  
2 Procedure 12(b)(6), all allegations of material fact must be accepted as true and  
3 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.  
4 Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only “a short and plain  
5 statement of the claim showing that the pleader is entitled to relief” in order to “give the  
6 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell  
7 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,  
8 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require  
9 detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of  
10 his entitlement to relief requires more than labels and conclusions, and a formulaic  
11 recitation of the elements of a cause of action will not do.” Id. (internal citations and  
12 quotations omitted). A court is not required to accept as true a “legal conclusion  
13 couched as a factual allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
14 Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right to relief  
15 above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright &  
16 Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the  
17 pleading must contain something more than “a statement of facts that merely creates a  
18 suspicion [of] a legally cognizable right of action.”)).

19           Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket  
20 assertion, of entitlement to relief.” Twombly, 550 U.S. at 556 n.3 (internal citations and  
21 quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard  
22 to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of  
23 the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles  
24 Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading must contain “only enough  
25 facts to state a claim to relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . .  
26 have not nudged their claims across the line from conceivable to plausible, their  
27 complaint must be dismissed.” Id. However, “[a] well-pleaded complaint may proceed  
28 even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a

1 recovery is very remote and unlikely.” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S.  
2 232, 236 (1974)).

3 A court granting a motion to dismiss a complaint must then decide whether to  
4 grant leave to amend. Leave to amend should be “freely given” where there is no  
5 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice  
6 to the opposing party by virtue of allowance of the amendment, [or] futility of the  
7 amendment . . . .” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.  
8 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to  
9 be considered when deciding whether to grant leave to amend). Not all of these factors  
10 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .  
11 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,  
12 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that  
13 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,  
14 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,  
15 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.  
16 1989) (“Leave need not be granted where the amendment of the complaint . . .  
17 constitutes an exercise in futility . . . .”)).

18 In each complaint the Court has considered, Plaintiff contends that she entered  
19 an agreement with Defendants Wicks and Sammies Friends by which Defendants  
20 agreed to board her dog through April 1, 2016. In addition, according to Plaintiff,  
21 “established law states that if any animal care facility takes custody of an animal for  
22 boarding, and the animal is not picked-up on the agreed-upon day, then the animal care  
23 facility must hold the dog for 14 days before the dog is considered to be abandoned.”  
24 SAC, ECF No. 29, ¶ 12 (citing Cal. Civ. Code § 1834.5). In both complaints, Plaintiff  
25 goes on to allege that after she was unable to pick up her dog on April 1, it was  
26 designated as “dangerous” and eventually euthanized. Based on the foregoing, Plaintiff

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1 contends her rights to due process and to be free of unreasonable search and seizure  
2 were violated.<sup>3</sup>

3 The Court already determined that the problem with each of these arguments is  
4 that Plaintiff failed to sufficiently allege ownership of the dog at the time of Defendants'  
5 above actions. Plaintiff admits she failed to pick the dog up on the appointed date, but  
6 she never avers that she made any attempt to retrieve the dog before it was deemed  
7 abandoned. If she did try to pick up the dog within the allotted fourteen days, as the  
8 Court previously noted, such an averment could have been easily pled.

9 Instead of adding such an allegation, however, Plaintiff instead offers a new  
10 vague averment that Defendant Wicks advised Plaintiff if she attempted to pick up the  
11 dog, Defendant Wicks would contact the sheriff. Plaintiff later indicates she had a  
12 subjective fear that if she tried to pick up her dog, she would go to jail and that she at  
13 some point spoke to an attorney about trying to get her dog. But, again, Plaintiff never  
14 alleges she actually tried to pick the dog up from the shelter because, based on her own  
15 allegations, she did not. Indeed, even assuming that Defendant Wicks made such a  
16 statement, as the Court must do even though it is unclear why Plaintiff failed to include  
17 such an allegation in either of her two first complaints, Plaintiff still does not allege she  
18 ever had any intention or ability to pick up the dog or why a statement that the sheriff  
19 would be called would dissuade her from doing so. Accordingly, Plaintiff's SAC is again  
20 flawed for what it does not say (i.e., Plaintiff tried to pick up the dog at any point before it  
21 was legally deemed abandoned).

22 Once again, Plaintiff's failure to allege ownership is fatal to each of her  
23 constitutional claims, and Defendants' Motions (ECF Nos. 31, 36) are thus GRANTED as  
24 to those causes of action. Because Plaintiff apparently cannot add any allegations that  
25 she attempted to pick up her dog prior to it being deemed abandoned, those claims are  
26 hereby DISMISSED without leave to amend. Finally, the Court again declines to


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28 <sup>3</sup> Plaintiff also pursues a conversion claim based on the foregoing facts and a defamation claim  
based on facts that are related, but not recounted here.

1 exercise supplemental jurisdiction over Plaintiff's state claims and they are DISMISSED  
2 as well. The Clerk of the Court is directed to close this case.

3 IT IS SO ORDERED.

4 Dated: July 30, 2018

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6 MORRISON C. ENGLAND, JR.  
7 UNITED STATES DISTRICT JUDGE  
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