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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY BRYAN BROOKS,  
Plaintiff,  
v.  
BANK OF AMERICA,  
Defendant.

No. 2:17-cv-1430-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 the allegation of poverty is untrue, or if 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 fails to state a claim and must be dismissed.

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

18 Plaintiff’s complaint alleges that defendant Bank of America closed his business checking  
19 and savings accounts without prior notification. ECF No. 1 at 5. When plaintiff contacted  
20 defendant’s risk department, he learned that a fraudulent check in the amount of \$19,873 had  
21 been deposited into his business checking account at an Atlanta, Georgia branch. *Id.* Plaintiff  
22 claims that a representative from the risk department wrongly accused him of personally  
23 depositing the fraudulent check. *Id.* However, plaintiff claims that he could not have deposited  
24 the fraudulent check because he was at work at the time it was deposited. *Id.* Plaintiff concludes  
25 that the defendant violated his Fourteenth Amendment rights by providing “no fair procedural  
26 process before [it] closed plaintiff’s business checking/savings” accounts and failing to return the  
27 funds that were in those accounts. *Id.* at 4.

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1           These allegations suggest an attempt to assert a procedural due process claim under 42  
2 U.S.C. § 1983. But such a claim necessarily fails. To state a claim for violation of a  
3 constitutional right under 42 U.S.C. § 1983, a plaintiff must allege: (1) that a right secured by the  
4 Constitution or laws of the United States was violated, and (2) that the alleged violation was  
5 committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48  
6 (1988). ““Section 1983 excludes from its reach merely private conduct, no matter how  
7 discriminatory or wrong.”” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th  
8 Cir. 1999) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)); *see also Apao v.*  
9 *Bank of New York*, 324 F.3d 1091, 1093 (9th Cir. 2003) (Fourteenth Amendment “shields citizens  
10 from unlawful governmental action, but does not affect conduct by private entities.”). Here,  
11 plaintiff fails to allege that defendant is a state actor or was otherwise acting under color of state  
12 law. Accordingly, he fails to state a procedural due process claim.

13           It is unclear how plaintiff might otherwise state a claim against this defendant that would  
14 be cognizable in federal court, either as a claim arising under federal question jurisdiction or as a  
15 state law claim properly before this court based on diversity jurisdiction. Plaintiff is granted  
16 leave to file an amended complaint. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en  
17 banc) (district courts must afford pro se litigants an opportunity to amend to correct any  
18 deficiency in their complaints). Such a complaint must allege a cognizable legal theory against a  
19 proper defendant and sufficient facts in support of that cognizable legal theory. The amended  
20 complaint shall clearly set forth the allegations against each defendant and shall specify a basis  
21 for this court’s subject matter jurisdiction. Any amended complaint shall plead plaintiff’s claims  
22 in “numbered paragraphs, each limited as far as practicable to a single set of circumstances,” as  
23 required by Federal Rule of Civil Procedure 10(b), and shall be in double-spaced text on paper  
24 that bears line numbers in the left margin, as required by Eastern District of California Local  
25 Rules 130(b) and 130(c). Any amended complaint shall also use clear headings to delineate each  
26 claim alleged and against which defendant or defendants the claim is alleged, as required by Rule  
27 10(b), and must plead clear facts that support each claim under each header.

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1           Additionally, plaintiff is informed that the court cannot refer to prior pleadings in order to  
2 make an amended complaint complete. Local Rule 220 requires that an amended complaint be  
3 complete in itself. This is because, as a general rule, an amended complaint supersedes the  
4 original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, once  
5 plaintiff files an amended complaint, the original no longer serves any function in the case.  
6 Therefore, “a plaintiff waives all causes of action alleged in the original complaint which are not  
7 alleged in the amended complaint,” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir.  
8 1981), and defendants not named in an amended complaint are no longer defendants. *Ferdik v.*  
9 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Finally, the court cautions plaintiff that failure to  
10 comply with the Federal Rules of Civil Procedure, this court’s Local Rules, or any court order  
11 may result in a recommendation that this action be dismissed. *See* E.D. Cal. L.R. 110.

12           Accordingly, IT IS ORDERED that:

- 13           1. Plaintiff’s request for leave to proceed *in forma pauperis* (ECF No. 2) is granted.
- 14           2. Plaintiff’s complaint is dismissed with leave to amend, as provided herein.
- 15           3. Plaintiff is granted thirty days from the date of service of this order to file an amended  
16 complaint. The amended complaint must bear the docket number assigned to this case and must  
17 be labeled “First Amended Complaint.” Failure to timely file an amended complaint in  
18 accordance with this order will result in a recommendation this action be dismissed.

19 DATED: November 7, 2018.

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21 EDMUND F. BRENNAN  
22 UNITED STATES MAGISTRATE JUDGE  
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