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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID ALEXANDER WOLPERT,

Plaintiff,

v.

DISNEY ABC BROADCAST
CORPORATION, NBC CORPORATION,

Defendants.

No. 2:18-cv-299-KJM-EFB PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff has filed an application to proceed *in forma pauperis* pursuant to 28 U.S.C. 1915 (ECF No. 2), motions for injunctive relief (ECF Nos. 3, 4, 5, 6), and a motion to expedite this case (ECF No. 11).¹ For the reasons explained below, plaintiff’s application to proceed *in forma pauperis* is granted but the complaint must be dismissed with leave to amend. Accordingly, his motion to expedite the case is denied as moot. Further, it is recommended that his motions for injunctive relief be denied.

I. Request to Proceed In Forma Pauperis and Screening Requirement

Plaintiff’s application to proceed *in forma pauperis* makes the financial 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.

¹ 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 Determining that plaintiff may proceed *in forma pauperis* does not complete the required
2 inquiry. Pursuant to § 1915(e)(2), the court must dismiss the case at any time if it determines the
3 allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on
4 which relief may be granted, or seeks monetary relief against an immune defendant. As discussed
5 below, plaintiff's complaint fails to state a claim and must be dismissed.

6 Although pro se pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519,
7 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if it
8 fails to set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*
9 *Corp. v. Twombly*, 550 U.S. 544, 562-563, 570 (2007) (citing *Conley v. Gibson*, 355 U.S. 41
10 (1957)); *see also* Fed. R. Civ. P. 12(b)(6). "[A] plaintiff's obligation to provide the 'grounds' of
11 his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of
12 a cause of action's elements will not do. Factual allegations must be enough to raise a right to
13 relief above the speculative level on the assumption that all of the complaint's allegations are
14 true." *Id.* at 555 (citations omitted). Dismissal is appropriate based either on the lack of
15 cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal
16 theories. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

17 Under this standard, the court must accept as true the allegations of the complaint in
18 question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976), construe the
19 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor,
20 *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must satisfy the pleading
21 requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2) requires a
22 complaint to include "a short and plain statement of the claim showing that the pleader is entitled
23 to relief, in order to give the defendant fair notice of what the claim is and the grounds upon
24 which it rests." *Twombly*, 550 U.S. at 555 (citing *Conley*, 355 U.S. at 47).

25 Plaintiff's complaint is difficult to decipher. Plaintiff purports to allege a claim(s) against
26 "Disney ABC Broadcasting Corporation" and NBC Corporation. ECF No. 1 at 2-3. The
27 complaint's "Statement of Claim" consists of the following: "my information was used in a
28 defamatory way that resulted in both personal danger and danger to the United States. I have had

1 gross medical problems that are compounded by misinformation.” *Id.* at 5. In his request for
2 relief, plaintiff writes, “the information used in the show was slightly misrepresented which
3 resulted in the loss of income, loss of establishing credentials, loss of medical treatment, and
4 prolonged personal Danger.” *Id.* at 6.

5 These allegations are insufficient to state a claim upon which relief may be granted.
6 Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice
7 and state the elements of the claim plainly and succinctly. *Jones v. Community Redev. Agency*,
8 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of particularity
9 overt acts which defendants engaged in that support plaintiff’s claim. *Id.* The allegations must be
10 short and plain, simple and direct and describe the relief plaintiff seeks. Fed. R. Civ. P. 8(a);
11 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *Galbraith v. County of Santa Clara*, 307
12 F.3d 1119, 1125 (9th Cir. 2002).

13 Plaintiff’s complaint does not allege a specific cause of action, nor does it contain any
14 facts that would support a cognizable claim against either defendant. Accordingly, the complaint
15 must be dismissed.² See *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 956
16 (9th Cir. 2013) (“Dismissal is proper when the complaint does not make out a cognizable legal
17 theory or does not allege sufficient facts to support a cognizable legal theory.”) Plaintiff,
18 however, is granted leave to file an amended complaint, if he can allege a cognizable legal theory
19 and sufficient facts in support of that cognizable legal theory. *Lopez v. Smith*, 203 F.3d 1122,
20 1126-27 (9th Cir. 2000) (en banc) (district courts must afford pro se litigants an opportunity to
21 amend to correct any deficiency in their complaints). Should plaintiff choose to file an amended
22 complaint, the amended complaint shall clearly set forth the allegations against defendant and
23 shall specify a basis for this court’s subject matter jurisdiction. Any amended complaint shall
24 plead plaintiff’s claims in “numbered paragraphs, each limited as far as practicable to a single set
25 of circumstances,” as required by Federal Rule of Civil Procedure 10(b), and shall be in double-
26 spaced text on paper that bears line numbers in the left margin, as required by Eastern District of
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28 ² In light of this, plaintiff’s motion to expedite (ECF No.11) is denied as moot.

1 California Local Rules 130(b) and 130(c). Any amended complaint shall also use clear headings
2 to delineate each claim alleged and against which defendant or defendants the claim is alleged, as
3 required by Rule 10(b), and must plead clear facts that support each claim under each header.

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

15 II. Motions for Injunctive Relief

16 As discussed above, plaintiff’s complaint fails to state a claim. Necessarily, he has not
17 demonstrated a likelihood of success on the merits that could support the grant of preliminary
18 injunctive relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). At an
19 irreducible minimum plaintiff must establish “serious questions going to the merits” of his claims.
20 *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2010). He has not done so
21 and his motions for injunctive relief must be denied.

22 III. Conclusion

23 Accordingly, it is hereby ORDERED that:

- 24 1. Plaintiff’s request for leave to proceed *in forma pauperis* (ECF No. 2) is granted.
- 25 2. Plaintiff’s motion to expedite (ECF No. 11) is denied.
- 26 3. Plaintiff’s complaint is dismissed with leave to amend, as provided herein.
- 27 4. Plaintiff is granted thirty days from the date of service of this order to file an amended
28 complaint. The amended complaint must bear the docket number assigned to this case and must

1 be labeled “First Amended Complaint.” Failure to timely file an amended complaint in
2 accordance with this order will result in a recommendation this action be dismissed.

3 Further, it is RECOMMENDED that plaintiff’s motions for injunctive relief (ECF No. 3,
4 4, 5, 6) be denied.

5 These findings and recommendations are submitted to the United States District Judge
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
7 after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
10 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
11 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: September 10, 2018.

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14 EDMUND F. BRENNAN
15 UNITED STATES MAGISTRATE JUDGE
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