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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ZITO FAMILY TRUST; THOMAS J.  
ZITO, SOLE TRUSTEE,

Plaintiffs,

v.

JOHN HANCOCK FINANCIAL  
SERVICES, INC., et al.,

Defendants,

No. 2:21-cv-2098 JAM DB PS

ORDER

Plaintiff Thomas Zito is proceeding in this action pro se. This matter was referred to the undersigned in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). Pending before the undersigned are defendants’ motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and motions to strike. (ECF Nos. 7, 13, & 22.) For the reasons stated below, defendants’ motion to dismiss is granted, plaintiff is granted leave to file an amended complaint, and defendants’ motions to strike are denied.

**BACKGROUND**

Plaintiff, proceeding pro se, commenced this action on September 30, 2021, by filing a complaint in the Sacramento County Superior Court. (ECF No. 1 at 8.<sup>1</sup>) The complaint alleges

<sup>1</sup> Page number citations such as this one are to the page number reflected on the court’s CM/ECF system and not to page numbers assigned by the parties.

1 that the defendants failed to pay full benefits due under a long-term care insurance policy for  
2 assisted living benefits. (Id. at 14-16.) Pursuant to these allegations the complaint alleges a claim  
3 for breach of contract. (Id. at 14.) On November 12, 2021, defendants John Hancock Financial  
4 Services, Inc., Manulife Financial Corp., John Hancock Life Insurance Company (U.S.A.), John  
5 Hancock Life and Health Insurance Company, and John Hancock Life Insurance Company of  
6 New York removed the matter to this court pursuant to diversity jurisdiction. (Id. at 2-5.)

7 On November 19, 2021, defendants filed a motion to dismiss. (ECF No. 7.) Plaintiff filed  
8 an opposition December 3, 2021. (ECF No. 11.) On December 17, 2021, plaintiff filed a motion  
9 for summary judgment. (ECF No. 12.) On December 23, 2021, defendants filed an ex parte  
10 application to strike plaintiff’s motion for summary judgment. (ECF No. 13.) On January 3,  
11 2022, defendants filed a reply to plaintiff’s opposition. (ECF No. 15.)

12 On January 10, 2022, and January 24, 2022, plaintiff filed statements in support of the  
13 motion for summary judgment. (ECF Nos. 17 & 21.) On January 25, 2022, defendants’ motion  
14 to dismiss was taken under submission. (ECF No. 20.) On January 31, 2022, defendants filed an  
15 ex parte application to strike plaintiff’s statements in support of summary judgment. (ECF No.  
16 22.)

## 17 **STANDARDS**

### 18 **I. Legal Standards Applicable to Motions to Dismiss Pursuant to Rule 12(b)(6)**

19 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
20 sufficiency of the complaint. N. Star Int’l v. Ariz. Corp. Comm’n, 720 F.2d 578, 581 (9th Cir.  
21 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of  
22 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901  
23 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to  
24 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A  
25 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw

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1 the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v.  
2 Iqbal, 556 U.S. 662, 678 (2009).

3 In determining whether a complaint states a claim on which relief may be granted, the  
4 court accepts as true the allegations in the complaint and construes the allegations in the light  
5 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.  
6 United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less  
7 stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519,  
8 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the  
9 form of factual allegations. United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
10 Cir. 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than  
11 an unadorned, the defendant-unlawfully-harmed-me accusation.” Iqbal, 556 U.S. at 678. A  
12 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the  
13 elements of a cause of action.” Twombly, 550 U.S. at 555; see also Iqbal, 556 U.S. at 676  
14 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
15 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove  
16 facts which it has not alleged or that the defendants have violated the . . . laws in ways that have  
17 not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,  
18 459 U.S. 519, 526 (1983).

19 In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court is permitted  
20 to consider material which is properly submitted as part of the complaint, documents that are not  
21 physically attached to the complaint if their authenticity is not contested and the plaintiff’s  
22 complaint necessarily relies on them, and matters of public record. Lee v. City of Los Angeles,  
23 250 F.3d 668, 688-89 (9th Cir. 2001).

## 24 ANALYSIS

### 25 I. Plaintiff Zito Family Trust

26 As noted above, plaintiff Thomas Zito is proceeding pro se. However, also named as a  
27 plaintiff in this action is the Zito Family Trust. Generally, “a trust can only be represented by an  
28 attorney in federal court.” Alpha Land Company v. Little, 238 F.R.D. 497, 502 (E.D. Cal. 2006);

1 see also Danziger v. University of Louisville, No. 2:18-cv-0198 HRH, 2019 WL 5103107, at \*2  
2 (D. Ariz. Oct. 10, 2019) (“A non-lawyer trustee cannot appear pro se to represent a trust or trust  
3 beneficiaries.”). “[T]here is an exception to that general rule: an individual who is the trust’s  
4 ‘beneficial owner’ may appear pro se on the trust’s behalf.” Becker v. Wells Fargo Bank, NA,  
5 Inc., No. 2:10-cv-2799 LKK KJN PS, 2012 WL 6005759, at \*4 (E.D. Cal. Nov. 30, 2012). Cf.  
6 C.E. Pope Equity Trust v. U.S., 818 F.2d 696, 697-98 (9th Cir. 1987) (“Because Stradley is not  
7 the actual beneficial owner of the claims being asserted by the Trusts (so far as one can tell from  
8 the record), he cannot be viewed as a ‘party’ conducting his ‘own case personally’ within the  
9 meaning of Section 1654. He may not claim that his status as trustee includes the right to present  
10 arguments pro se in federal court.”).

11 If plaintiff Zito Family Trust is to continue as a plaintiff in this action, plaintiff Thomas  
12 Zito will either have to establish that plaintiff Thomas Zito is the beneficial owner of the trust or  
13 the Zito Family Trust will have to retain counsel.

## 14 **II. Defendants’ Motion to Dismiss**

15 Defendants’ motion to dismiss argues that plaintiff’s complaint “fails to state facts  
16 sufficient to state a claim for relief against Defendants.” (Def.’ MTD (ECF No. 7) at 2.)  
17 Specifically, defendants argue that the complaint fails to allege standing to assert a breach of  
18 contract claim and has sued improper party defendants. (Id.) Having reviewed the parties’  
19 briefing, the undersigned finds that defendants’ motion to dismiss should be granted.

20 In this regard, “[f]ailure to properly allege standing is a ground for dismissal under Rule  
21 12(b)(6).” MAI Systems Corp. v. UIPS, 856 F. Supp. 538, 540 (N.D. Cal. 1994). “Only parties  
22 in privity of contract have standing to sue under a contract.” Grant v. State Farm Life Ins. Co.,  
23 No. CIV. S-05-2389 FCD KJM, 2007 WL 3119738, at \*3 (E.D. Cal. Oct. 23, 2007). “Someone  
24 who is not a party to the contract has no standing to enforce the contract or to recover extra-  
25 contract damages for wrongful withholding of benefits to the contracting party.” Hatchwell v.  
26 Blue Shield of California, 198 Cal.App.3d 1027, 1034 (1988). “A non-party who is nevertheless  
27 entitled to policy benefits, such as an ‘insured’ person under the terms of the policy or an express  
28 beneficiary, has standing only if she is the claimant whose benefits are wrongfully withheld.” Id.

1 Here, the complaint fails to allege facts concerning plaintiff's standing. Indeed, the  
2 complaint fails to allege any factual allegations. In this regard, the complaint consists essentially  
3 of a vague and conclusory paragraph asserting that on December 29, 2019, "Hancock insisted that  
4 only costs invoiced by assisted living facility" were payable at a "daily benefit" of \$200, as  
5 opposed to \$532. (Compl. (ECF No. 1) at 14.) "Defendant must compensate for this difference."  
6 (Id.) Attached to the complaint plaintiff has included a list of "entities . . . added as Defendants"  
7 because "[t]heir financial obligations are not insulated or segregated from the satisfaction of  
8 Plaintiff's breach of contract claims[.]" (Id. at 10.)

9 Although the Federal Rules of Civil Procedure adopt a flexible pleading policy, a  
10 complaint must give the defendant fair notice of the plaintiff's claims and must allege facts that  
11 state the elements of each claim plainly and succinctly. Fed. R. Civ. P. 8(a)(2); Jones v.  
12 Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). "A pleading that offers 'labels  
13 and conclusions' or 'a formulaic recitation of the elements of cause of action will not do.' Nor  
14 does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual  
15 enhancements.'" Ashcroft v. Iqbal, 556 U.S.662, 678 (2009) (quoting Twombly, 550 U.S. at 555,  
16 557). A plaintiff must allege with at least some degree of particularity overt acts which the  
17 defendants engaged in that support the plaintiff's claims. Jones, 733 F.2d at 649.

18 Accordingly, for the reasons stated above, defendants' motion to dismiss will be granted.

## 19 **II. Leave to Amend**

20 The undersigned has carefully considered whether plaintiff could amend the complaint to  
21 state a claim upon which relief could be granted. Valid reasons for denying leave to amend  
22 include undue delay, bad faith, prejudice, and futility." California Architectural Bldg. Prod. v.  
23 Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988); see also Klamath-Lake Pharm. Ass'n  
24 v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that while leave to  
25 amend shall be freely given, the court does not have to allow futile amendments).

26 Given the vague and conclusory nature of the allegations found in the complaint the  
27 undersigned cannot yet say that it appears beyond doubt that leave to amend would be futile.  
28 Plaintiff's complaint will be dismissed and plaintiff will be granted leave to file an amended

1 complaint. Plaintiff is cautioned, however, that if plaintiff elects to file an amended complaint  
2 “the tenet that a court must accept as true all of the allegations contained in a complaint is  
3 inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action,  
4 supported by mere conclusory statements, do not suffice.” Ashcroft, 556 U.S. at 678. “While  
5 legal conclusions can provide the complaint’s framework, they must be supported by factual  
6 allegations.” Id. at 679. Those facts must be sufficient to push the claims “across the line from  
7 conceivable to plausible[.]” Id. at 680 (quoting Twombly, 550 U.S. at 557).

8 Plaintiff is also reminded that the court cannot refer to a prior pleading in order to make an  
9 amended complaint complete. Local Rule 220 requires that any amended complaint be complete  
10 in itself without reference to prior pleadings. The amended complaint will supersede the original  
11 complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Thus, in the amended complaint,  
12 just as if it were the initial complaint filed in the case, each defendant must be listed in the caption  
13 and identified in the body of the complaint, and each claim and the involvement of each  
14 defendant must be sufficiently alleged. Any amended complaint which plaintiff may elect to file  
15 must also include concise but complete factual allegations describing the conduct and events  
16 which underlie plaintiff’s claims.

### 17 **III. Defendants’ Motions to Strike**

18 As noted above, on December 17, 2021, plaintiff filed a motion for summary judgment.  
19 (ECF No. 12.) And on January 24, 2022, plaintiff filed a statement in support of the motion for  
20 summary judgment. (ECF No. 21.) Defendants’ motions seek to strike these filings. (ECF Nos.  
21 13 & 22.) However, on January 3, 2022, the Court notified plaintiff that the motion for summary  
22 judgment filed December 17, 2021, was defective as filed and was to be re-noticed in compliance  
23 with Local Rule 230(b). (ECF No. 14.) Plaintiff failed to comply with this order.

24 Moreover, summary judgment should be entered after adequate time for discovery. See  
25 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Here, there has not been adequate time for  
26 discovery. And issues concerning the adequacy of plaintiff’s complaint remain unresolved.  
27 Accordingly, plaintiff’s motion for summary judgment and defendants’ motions to strike will be  
28 denied without prejudice to renewal.

1 **CONCLUSION**

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Defendants' November 19, 2021 motion to dismiss (ECF No. 7) is granted;

4 2. The complaint filed September 28, 2021 (ECF No. 1) is dismissed with leave to  
5 amend;

6 3. Within twenty-eight days from the date of this order, an amended complaint shall be  
7 filed that cures the defects noted in this order and complies with the Federal Rules of Civil  
8 Procedure and the Local Rules of Practice.<sup>2</sup> The amended complaint must bear the case number  
9 assigned to this action and must be titled "Amended Complaint";

10 4. Plaintiff's December 17, 2021 motion for summary judgment (ECF No. 12) is denied  
11 without prejudice to renewal;

12 5. Defendants' December 23, 2021 ex parte application to strike (ECF No. 13) is denied  
13 without prejudice to renewal; and

14 6. Defendants' January 31, 2022 ex parte application to strike (ECF No. 22) is denied  
15 without prejudice to renewal.

16 Dated: August 1, 2022

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20 DEBORAH BARNES  
21 UNITED STATES MAGISTRATE JUDGE

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24 DB/orders/orders.pro se/zito2098.mtd.ord

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28 <sup>2</sup> Alternatively, if plaintiff no longer wishes to pursue this action plaintiff may file a notice of  
voluntary dismissal of this action pursuant to Rule 41 of the Federal Rules of Civil Procedure.