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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARC OLIN LEVY,  
Plaintiff,  
v.  
AT&T,  
Defendant.

Case No. [17-cv-00411-MEJ](#)

**ORDER DISMISSING COMPLAINT  
WITHOUT LEAVE TO AMEND  
ORDER TO SHOW CAUSE**

**INTRODUCTION**

The Court previously granted Plaintiff Marc Olin Levy’s (“Plaintiff”) Application to Proceed in Forma Pauperis. Dkt. No. 7.<sup>1</sup> The Court now proceeds to review Plaintiff’s Complaint pursuant to 28 U.S.C. § 1915(e)(2). *See* Compl., Dkt. No. 1. For the reasons stated below, the Court **DISMISSES** the Complaint **WITHOUT LEAVE TO AMEND**. In addition, the Court issues an **ORDER TO SHOW CAUSE** as to why Plaintiff should not be deemed a vexatious litigant.

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<sup>1</sup> Defendant AT&T (“AT&T”) has not been served, and therefore is not a party to the suit pursuant to 28 U.S.C. § 636(c). *See Williams v. Oakland Police Dep’t*, 2015 WL 5355393, at \*1 (N.D. Cal. Sept. 14, 2015). On January 26, 2017, Plaintiff filed a “Notice, Consent, and Reference of a Civil Action to a Magistrate Judge” indicating he consents to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). Consent, Dkt. No. 6. As this form was dated December 18, 2016—a month before Plaintiff initiated this action—and unsigned by a district judge, the Court requested Plaintiff to re-file his consent or declination, and served the notice by mailing it to Plaintiff’s address on file. Dkt. Nos. 8 & 8-1. The notice was returned as undeliverable. Dkt. No. 9. As the Court has no other contact information for Plaintiff, it accepts Plaintiff’s original Consent.

**SUA SPONTE SCREENING UNDER 28 U.S.C. § 1915(e)(2)**

**A. Legal Standard**

While the Court has granted Plaintiff’s Application to Proceed In Forma Pauperis, it must also review Plaintiff’s Complaint to determine whether the action may be allowed to proceed. The Court must dismiss the Complaint if it is frivolous, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). To make this determination, courts assess whether there is a factual and legal basis for the asserted wrong, “however inartfully pleaded.” *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984) (quotation omitted). Pro se pleadings are liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Moreover, the Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). Unless it is clear that no amendment can cure the defects of a complaint, a pro se plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before dismissal. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

**B. Allegations in the Complaint**

Plaintiff alleges AT&T failed to publish his advertisement for his Civil Rights law firm in its December 2011-2012 San Francisco Bay Area Yellow Pages. Compl. at ECF p.3. Plaintiff asserts that on October 28, 2011, he emailed AT&T with a specific advertisement that read “Marc Olin Levy Law Firm,” with his slogan “Lawyer For The People” written below it. *Id.* The advertisement listed in bullet points the types of law Plaintiff practiced and provided his contact information. *Id.* Plaintiff asserts AT&T responded to his email with “another advertisement they had made up themselves.” *Id.* AT&T’s advertisement listed a different slogan, disregarded Plaintiff’s bullet points, and stated Plaintiff was an “Attorney at Law.” *Id.* Plaintiff contends “I am not an attorney, I am a lawyer.” *Id.* Plaintiff alleges AT&T “refused to print [his] ad as [he] had created and ordered.” *Id.*

Plaintiff’s claims are less than clear; however, he appears to assert claims of breach of

1 contract, fraud, misrepresentation, unfair business practices, and violation of civil rights. *See id.*  
 2 (“Obviously, AT&T is guilty and liable for breach of contract, fraud, [] misrepresentation, unfair  
 3 business practice, and a civil rights violation.”); *but see* Civil Cover Sheet, Dkt. No. 1-1 (checking  
 4 box indicating contract dispute but not civil rights; listing under “cause of action” only “fraud,  
 5 civil rights”; and providing “brief description of cause” that “ATT [sic] broke contract, violated  
 6 civil rights”). He seeks as damages \$2 billion in preferred AT&T stock. *Id.*

7 **C. Analysis and Screening**

8 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that the complaint set forth a  
 9 “short and plain statement of the claim showing the pleader is entitled to relief.” Rule 8(d)(1)  
 10 requires that each allegation in a pleading be “simple, concise, and direct.” *See McHenry v.*  
 11 *Renne*, 84 F.3d 1172, 1177, 1179 (9th Cir. 1996) (affirming dismissal of complaint that was  
 12 “argumentative, prolix, replete with redundancy, and largely irrelevant”). In addition, the  
 13 complaint must include facts which are “more than labels and conclusions, and a formulaic  
 14 recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S.  
 15 554, 555 (2007). For instance, in *Ashcroft v. Iqbal*, the Supreme Court rejected conclusory  
 16 assertions that “petitioners ‘knew of, condoned, and willfully and maliciously agreed to subject  
 17 [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on the account of [his]  
 18 religion, race, and/or national origin and for no legitimate penological interest.’” 556 U.S. 662,  
 19 680 (2009). The Court reasoned that such allegations were akin to the “formulaic recitation of the  
 20 elements” dismissed in *Twombly*, and therefore, insufficient to meet Rule 8(a). *Id.* In doing so,  
 21 the Court explained, “[a] claim has facial plausibility when the plaintiff pleads factual content that  
 22 allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
 23 alleged.” *Id.* at 678.

24 As an initial matter, Plaintiff already attempted to litigate these claims in 2011, in a case  
 25 styled *Levy v. AT&T Corp.*, Case No. 11-cv-6615-DMR (N.D. Cal.) (“*Levy P*”). The presiding  
 26 judge in that matter, the Honorable Donna M. Ryu, dismissed the action without prejudice on the  
 27 basis that “the court [could] not discern a cognizable legal claim based on Defendant’s alleged  
 28 mere refusal to not publish Plaintiff’s advertisement in the style and with the content that he

1 desired.” Dismissal Order, Dkt. No. 6 at 1-2, *Levy I.*<sup>2</sup> Plaintiff did not amend his complaint. *See*  
2 *Levy I.*

3 Like Judge Ryu, this Court cannot identify a cognizable claim based on AT&T’s alleged  
4 refusal to print Plaintiff’s advertisement in his preferred style. Dismissal Order at 1-2. To the  
5 extent Plaintiff seeks to allege breach of contract, fraud, and misrepresentation, these causes of  
6 action are time barred, as the events at issue occurred in 2011. *See* Cal. Civ. Proc. Code § 337  
7 (four-year statute of limitations on action upon any written contract); Cal. Civ. Proc. Code. § 339  
8 (two-year statute of limitations on “[a]n action upon a contract, obligation or liability not founded  
9 upon an instrument of writing”); Cal. Civ. Proc. Code. § 338(d) (imposing three-year statute of  
10 limitations on fraud action);<sup>3</sup> *Fanucci v. Allstate Ins. Co.*, 638 F. Supp. 2d 1125, 1133 n.5 (N.D.  
11 Cal. 2009) (depending on the circumstances, “[a] negligent misrepresentation claim has either a  
12 two- or three-year statute of limitations.”); *Rae v. Bank of Am., N.A.*, 2017 WL 447306, at \*3  
13 (C.D. Cal. Feb. 1, 2017) (“The statute of limitations for . . . [a] claim for intentional  
14 misrepresentation[] is three years.” (citing Cal. Code Civ. Proc. § 338(d))).

15 Normally, given Plaintiff’s pro se status, the Court would grant Plaintiff leave to amend.  
16 But amendment would be futile as each of Plaintiff’s claims is time barred, and the Court cannot  
17 discern a cognizable claim based on the alleged events.<sup>4</sup> Accordingly, the Court DISMISSES the  
18 Complaint WITHOUT LEAVE TO AMEND.

### 19 VEXATIOUS LITIGANT

20 “When a litigant has filed numerous harassing or frivolous lawsuits, courts have the power  
21 to declare him a vexatious litigant and enter an order requiring that any future complaints be  
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23 <sup>2</sup> Citations to “*Levy I*” refer to documents filed in Case No. 11-cv-6615-DMR.

24 <sup>3</sup> A cause of action for fraud deemed accrued only when the plaintiff “discover[s] . . . the facts  
25 constituting the fraud[.]” Cal. Civ. Proc. Code § 338(d). As Plaintiff attempted to sue AT&T in  
26 2011 for claims arising out of the same events (*Levy I*), he discovered the facts constituting the  
27 alleged fraud no later than that time, and cannot rely on the delayed discovery rule to excuse his  
28 untimeliness.

<sup>4</sup> The Court also finds the instant Complaint offers no greater detail as to why AT&T’s alleged  
refusal to print Plaintiff’s advertisement presents a cognizable civil rights claim compared to the  
complaint Plaintiff filed in *Levy I*.

1 subject to an initial review before they are filed.” *Gavin v. City & Cty. of S.F.*, 2015 WL 7272678,  
2 at \*3 (N.D. Cal. Nov. 18, 2015). “The All Writs Act, 28 U.S.C. § 1651(a), provides district courts  
3 with the inherent power to enter pre-filing orders against vexatious litigants.” *Molski v. Evergreen*  
4 *Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (citing *Weissman v. Quail Lodge Inc.*, 179  
5 F.3d 1194, 1197 (9th Cir. 1999)).

6 The Ninth Circuit cautions that “pre-filing orders should rarely be filed.” *De Long v.*  
7 *Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990). Limiting access to the courts is “a serious  
8 matter” that implicates a person’s First Amendment Rights. *Ringgold-Lockhart v. Cty. of L.A.*,  
9 761 F.3d 1057, 1061 (9th Cir. 2014); *see Moy v. United States*, 906 F.2d 467, 470 (9th Cir. 1990).  
10 As such, the Ninth Circuit has set forth the following process courts must follow in declaring an  
11 individual a vexatious litigant:

12 When district courts seek to impose pre-filing restrictions, they  
13 must: (1) give litigants notice and “an opportunity to oppose the  
14 order before it [is] entered”; (2) compile an adequate record for  
15 appellate review, including “a listing of all the cases and motions  
16 that led the district court to conclude that a vexatious litigant order  
was needed”; (3) make substantive findings of frivolousness or  
harassment; and (4) tailor the order narrowly so as “to closely fit the  
specific vice encountered.”

17 *Ringgold-Lockhart*, 761 F.3d at 1062 (quoting *De Long*, 912 F.2d at 1147-48).

18 Since 2010, Plaintiff has filed twenty lawsuits in this district; Exhibit A to this Order lists  
19 those lawsuits and their outcome. Plaintiff has frequently filed multiple—up to six—lawsuits in a  
20 single day.<sup>5</sup> In sixteen of those actions, including this one, Plaintiff has proceeded in forma

21 \_\_\_\_\_  
22 <sup>5</sup> Plaintiff filed four lawsuits on November 10, 2010. *See Levy v. State of Cal.*, Case No. 10-cv-  
23 5113-SI (N.D. Cal.); *Levy v. Private Def. Program*, Case No. 10-cv-05114-RS (N.D. Cal.); *Levy v.*  
24 *Telecare Corp.*, Case No. 10-cv-05115-SI (N.D. Cal.); *Levy v. San Mateo Cty.*, Case No. 10-cv-  
25 05116-SI (N.D. Cal.). On December 22, 2011, Plaintiff filed three lawsuits. *See Levy v. Cumulus*  
26 *Media Inc.*, Case No. 11-cv-06616-WHA (N.D. Cal.); *Levy v. N.Y. Life Ins. Co.*, Case No. 11-cv-  
27 06617-JCS (N.D. Cal.); *Levy I.* He next filed six lawsuits on March 14, 2012. *See Levy v.*  
28 *Newscorp*, Case No. 12-cv-01293-EDL (N.D. Cal.); *Levy v. United States*, Case No. 12-cv-01294-  
EDL (N.D. Cal.); *Levy v. Comerica Bank*, Case No. 12-cv-01296-MEJ (N.D. Cal.); *Levy v. United*  
*States*, Case No. 12-cv-01295-DMR (N.D. Cal.); *Levy v. United States*, Case No. 12-cv-01297-  
DMR (N.D. Cal.); *Levy v. Mass Mut.*, Case No. 12-cv-01298-LB (N.D. Cal.). Most recently, in  
addition to the above-captioned action, Plaintiff filed two other lawsuits on January 26, 2017. *See*  
*Levy v. Vista Holdings*, Case No. 17-cv-0049-JSC (N.D. Cal.); *Levy v. First Grp./Greyhound*, Case

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pauperis. *See* Ex. A. Each case has been dismissed, several for failure to file an amended complaint or to state a cognizable claim. Accordingly, the Court **ORDERS** Plaintiff to show cause why he should not be declared a vexatious litigant subject to a pre-filing order entered against him.

**CONCLUSION**

Based on the analysis above, the Court **DISMISSES** Plaintiff's Complaint **WITHOUT LEAVE TO AMEND**. In addition, the Court **ORDERS** Plaintiff to show cause as to why he should not be declared a vexatious litigant. Plaintiff shall file his response no later than **April 3, 2017**.

**IT IS SO ORDERED.**

Dated: March 2, 2017

  
\_\_\_\_\_  
MARIA-ELENA JAMES  
United States Magistrate Judge

**EXHIBIT A**

	<b>Case Number</b>	<b>Name</b>	<b>Outcome</b>
1.	10-cv-5113-SI*	<i>Levy v. State of Cal.</i>	Dismissed with prejudice
2.	10-cv-5114-RS*	<i>Levy v. Private Def. Program</i>	Dismissed pursuant to Fed. R. Civ. P 41(b)
3.	10-cv-5115-SI*	<i>Levy v. Telecare Corp.</i>	Dismissed without prejudice
4.	10-cv-5116-SI*	<i>Levy v. San Mateo Cty.</i>	Dismissed without prejudice
5.	11-cv-1850-RS	<i>Levy v. Private Def. Program</i>	Dismissed without prejudice after Plaintiff failed to pay filing fee or serve defendants
6.	11-cv-6616-WHA*	<i>Levy v. Cumulus Media Inc.</i>	Dismissed for failure to plead facts sufficient to state a claim
7.	11-cv-6617-JCS*	<i>Levy v. N.Y. Life Ins. Co.</i>	Case terminated after Plaintiff failed to file an amended complaint
8.	12-cv-1293-EDL*	<i>Levy v. Newscorp</i>	Case terminated after Plaintiff failed to file an amended complaint
9.	12-cv-1294-EDL*	<i>Levy v. United States</i>	Dismissed with prejudice for failure to file an amended complaint
10.	12-cv-1296-MEJ*	<i>Levy v. Comerica Bank</i>	Dismissed without prejudice for failure to file an amended complaint
11.	11-cv-6615-DMR*	<i>Levy v. AT&amp;T Corp.</i>	Dismissed without prejudice
12.	12-cv-1295-DMR*	<i>Levy v. United States</i>	Dismissed as frivolous for seeking a remedy only the legislative branch could provide
13.	12-cv-1297-DMR*	<i>Levy v. United States</i>	Dismissed as frivolous because claims fell outside court's subject matter jurisdiction
14.	12-cv-1298-LB*	<i>Levy v. Mass Mut.</i>	Dismissed without prejudice for failure to show cause as to why the case should not be dismissed for lack of service
15.	14-cv-4073-EJD <sup>^</sup>	<i>Levy v. State Farm Mut. Auto. Ins. Co.</i>	Granted defendant's unopposed motion on the pleadings (appeal pending)
16.	16-cv-1254-HRL <sup>^</sup>	<i>Levy v. Primerica, Inc.</i>	Granted defendant's motion to dismiss; complaint dismissed with prejudice
17.	14-cv-4116-EJD <sup>^</sup>	<i>Levy v. Nw. Mut. Life</i>	Granted defendant's unopposed motion to dismiss without leave to amend
18.	15-cv-6136-EDL <sup>^</sup>	<i>Levy v. Mass. Mut. Life Ins. Co.</i>	Granted defendant's unopposed motion to dismiss with prejudice
19.	17-cv-409-JSC*	<i>Levy v. Vista Holdings</i>	Dismissed with leave to amend; case pending
20.	17-cv-412-KAW*	<i>Levy v. First Grp./Greyhound</i>	Case pending
21.	17-cv-411-MEJ*	<i>Levy v. AT&amp;T</i>	Case pending

\* Plaintiff proceeded in forma pauperis.

<sup>^</sup> Case removed from state court.