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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GARRY L. MCCUE,

Plaintiff,

v.

TOYOTA MOTOR SALES, U.S.A.,
INC.,

Defendant.

Case No. 15-cv-1059-BAS(MDD)

**ORDER DISMISSING
COMPLAINT WITH PREJUDICE
FOR FAILING TO STATE A
CLAIM PURSUANT TO 28 U.S.C. §
1915(e)(2)(B)(ii)**

Plaintiff Garry L. McCue, a non-prisoner proceeding *pro se*, filed a complaint for several alleged injuries arising from an odor emanating from his 2008 Toyota Camry. This action is brought against Defendant Toyota Motor Sales, U.S.A., Inc. The Court previously granted Plaintiff leave to proceed *in forma pauperis*, but dismissed his complaint with leave to amend for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii) and for lack of subject matter jurisdiction. On June 25, 2015, Plaintiff timely filed his amended complaint.

For the following reasons, the Court **DISMISSES WITH PREJUDICE** the action in its entirety for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii).

1 **I. *SUA SPONTE* SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

2 Notwithstanding payment of any filing fee or portion thereof, a complaint filed
3 by any person proceeding *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) is subject
4 to a mandatory and *sua sponte* review and dismissal by the court to the extent it is
5 “frivolous, malicious, failing to state a claim upon which relief may be granted, or
6 seeking monetary relief from a defendant immune from such relief.” 28 U.S.C. §
7 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions
8 of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d
9 1122, 1126-27 (9th Cir. 2000) (en banc).

10 Prior to its amendment by the Prison Litigation Reform Act, the former 28
11 U.S.C. § 1915(d) permitted *sua sponte* dismissal of only frivolous and malicious
12 claims. *Lopez*, 203 F.3d at 1130. Section 1915(e)(2), however, mandates that the court
13 reviewing a complaint filed pursuant to the IFP provisions of § 1915 make and rule on
14 its own motion to dismiss before directing that the complaint be served by the U.S.
15 Marshal pursuant to Federal Rule of Civil Procedure 4(c)(3). *Lopez*, 203 F.3d 1127
16 (“[S]ection 1915(e) not only permits, but requires a district court to dismiss an *in forma*
17 *pauperis* complaint that fails to state a claim.”); *see also Barren v. Harrington*, 152
18 F.3d 1193, 1194 (9th Cir. 1998) (noting the “the language of § 1915(e)(2)(B)(ii)
19 parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). As currently
20 pleaded, it appears as though Plaintiff’s complaint is subject to *sua sponte* dismissal
21 under 28 U.S.C. § 1915(e)(2)(B)(ii) because it fails to state a claim upon which relief
22 may be granted.

23 In the two-page handwritten amended complaint, Plaintiff alleges several
24 different physical ailments from the earlier complaint—including asthma, pacemaker
25 syndrome, headache, coughing, and chest pain¹—which all appear to be connected to
26 an odor emanating from the dashboard of his 2008 Toyota Camry. The Court

27 ¹ Plaintiff previously alleged that he suffered from glaucoma, a “heart condition,” bowel
28 obstructions, and depression as a result of the dashboard odor. It is unclear what prompted the drastic
change in alleged injuries.

1 previously stated that it was unclear exactly what the claim or claims asserted against
2 Defendant were. That has not changed. The first page of the amended complaint does
3 not assert any legal claim for relief. And the second page has a list. That list mentions
4 court documents, statutes, and letters, but nothing that adequately describes a legal
5 claim for relief. Once again, the complaint is so incomprehensible that the Court is
6 unable to determine what claim is asserted and whether Plaintiff states a cognizable
7 claim for relief. Moreover, the amended complaint does not contain a short and plain
8 statement as required by Federal Rule of Civil Procedure 8(a)(2).

9
10 **II. CONCLUSION & ORDER**

11 In light of the foregoing, the Court **DISMISSES WITH PREJUDICE**
12 Plaintiff's complaint in its entirety for failing to state a claim upon which relief can be
13 granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). *See Cervantes v. Countrywide*
14 *Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir.2011) (“[A] district court may dismiss
15 without leave where . . . amendment would be futile.”); *McHenry v. Renne*, 84 F.3d
16 1172, 1177-79 (9th Cir. 1996) (holding that court may dismiss action pursuant to
17 Federal Rule of Civil Procedure 41(b) if Plaintiff fails to comply with previous court
18 order regarding amendment).

19 **IT IS SO ORDERED.**

20
21 **DATED: June 25, 2015**

22 
23 **Hon. Cynthia Bashant**
24 **United States District Judge**