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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GAVIN B. DAVIS,

Plaintiff,

v.

JASON M. ADLER; ODESSA R.
JORGENSEN; and JANE DOES,

Defendants.

Case No.: 17-cv-387-AJB-JLB

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS
PLAINTIFF’S SECOND AMENDED
COMPLAINT**

Currently pending before the Court is Defendant Jason Adler’s (“Defendant Adler”) motion to dismiss Plaintiff Gavin Davis’s (“Plaintiff”) second amended complaint. (Doc. No. 41.) Plaintiff opposes the motion. (Doc. No. 43.) Pursuant to Civil Local Rule 7.1.d.1, the Court finds the matter suitable for decision on the papers and without oral argument. Accordingly, the motion hearing date set for October 12, 2017, in Courtroom 4A at 2:00 p.m. is **VACATED**. For the reasons explained more fully below, the Court **GRANTS** Defendant Adler’s motion to dismiss.

BACKGROUND

A. Plaintiff’s Original Complaint

On February 27, 2017, Plaintiff, proceeding *pro se*, filed his initial complaint against Defendants Jason M. Adler, Odessa R. Jorgensen, and Jane Does (collectively referred to

1 as “Defendants”). (Doc. No. 1.) From what the Court could decipher, Plaintiff alleged that
2 Defendants had illegally trespassed on his information by cyber-stalking him, created a
3 hate crime website in his likeness, infringed on his reasonable expectation of privacy, and
4 made references to fraud and virtual property law. (*Id.* ¶¶ 5, 6, 8, 33, 55.) Additionally, the
5 majority of Plaintiff’s complaint was filled with references to statutes, definitions of legal
6 terms, and identifies different professors, authors, and the O.J Simpson trial to support his
7 contentions. (*Id.* ¶¶ 41–51.)

8 On March 21, 2017, Defendant Adler filed a motion to dismiss, (Doc. No. 3), which
9 the Court granted on April 26, 2017, (Doc. No. 15). The Court stated that “[f]rom a
10 practical viewpoint . . . it is impossible for the Court to designate the cause or causes of
11 action attempted to be alleged, or the events leading up to Plaintiff instituting this action.”
12 (*Id.* at 4.) Moreover, the Court found dismissal based on a failure to adhere to Federal Rule
13 of Civil Procedure 8 proper.¹ (*Id.*) Furthermore, the Court cautioned Plaintiff against
14 grouping all of the Defendants together without distinguishing between the alleged conduct
15 of each individual Defendant. (*Id.*) Based upon the foregoing, the Court dismissed
16 Plaintiff’s complaint with leave to amend. (*Id.* at 5–6.)

17 B. Plaintiff’s First Amended Complaint

18 The day after his complaint was dismissed, Plaintiff filed his first amended
19 complaint (“FAC”). (Doc. No. 16.) The Court then set a briefing schedule that stated that
20 Plaintiff’s opposition was due May 25, 2017, and Defendant Adler’s reply brief was due
21 on June 8, 2017. (Doc. No. 18.) Subsequently, Plaintiff failed to file his opposition by said
22 date, but instead requested ex parte, an extension of time to file his opposition on May 30,
23 2017, which the Court denied.² (Doc. No. 19.)

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26 ¹ Federal Rule of Civil Procedure 8 states that “[a] pleading that states a claim for relief
27 must contain . . . a short and plain statement of the claim showing that the pleader is entitled
28 to relief[.]” Fed. R. Civ. P. 8(a)(2).

² Plaintiff’s ex parte request was emailed to Judge Battaglia’s E-File through his father.
(Doc. No. 19 at 1.)

1 On June 2, 2017, the Court again dismissed Plaintiff's operative complaint finding
2 that it suffered from many of the same defects as his previously-filed complaint. (Doc. No.
3 20.) Specifically, the Court found that Plaintiff had again failed to comply with Rule 8 and
4 found the FAC replete with fragmented discussions that failed to plead sufficient facts to
5 state a claim on which relief could be granted. (*Id.* at 4.) Moreover, the Court highlighted
6 for Plaintiff's benefit that his copyright protection claims were puzzling as he failed to
7 illustrate what "work" he possessed that was copyrighted and how it was being allegedly
8 violated. (*Id.* at 5.) Consequently, despite construing Plaintiff's pleading liberally, the
9 Court again found dismissal appropriate. (*Id.*) However, noting Plaintiff's pro se status, the
10 Court again granted Plaintiff leave to amend. (*Id.* at 6.)

11 C. Plaintiff's Subsequent Filings

12 Shortly thereafter, Plaintiff filed a motion for leave to electronically file documents,
13 (Doc. No. 22), which was denied on June 15, 2017, (Doc. No. 24). This motion was sent
14 to Plaintiff at his listed address, however, it was returned as undeliverable. (Doc. No. 25.)
15 In total, the Court tried to mail Plaintiff various court documents on five different
16 occasions, but each time the mail was returned. (Doc. Nos. 25, 26, 27, 28, 30.)

17 Plaintiff then filed a motion for relief from judgment on June 28, 2017. (Doc. No.
18 32.) Specifically, Plaintiff requested that his late-filed reply³ brief to Defendant Adler's
19 motion to dismiss the FAC be accepted, and to re-calendar the briefing schedule. (*Id.* at 6.)
20 Defendant filed an opposition to the motion. (Doc. No. 36.) Plaintiff then filed his second
21 amended complaint ("SAC")⁴, and a reply to support his motion for relief. (Doc. Nos. 38,
22 40.) Based on the filing of his SAC, the Court found Plaintiff's motion for relief from
23 judgment moot. (Doc. No. 39.) Defendant Adler then filed the present motion, his motion
24 to dismiss the SAC on July 26, 2017. (Doc. No. 41.) The motion was fully briefed on
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27 ³ The Court believes that Plaintiff meant to request that his opposition to the motion to
28 dismiss be accepted.

⁴ Plaintiff's SAC is missing the eighth page. (*See generally* Doc. No. 38.)

1 August 21, 2017. (Doc. No. 44.)

2 **LEGAL STANDARD**

3 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff's
4 complaint and allows a court to dismiss a complaint upon a finding that the plaintiff has
5 failed to state a claim upon which relief may be granted. *See Navarro v. Block*, 250 F.3d
6 729, 732 (9th Cir. 2001). “[A] court may dismiss a complaint as a matter of law for (1) lack
7 of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim.”
8 *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996)
9 (citation and internal quotation marks omitted). However, a complaint will survive a
10 motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on
11 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In making this
12 determination, a court reviews the contents of the complaint, accepting all factual
13 allegations as true, and drawing all reasonable inferences in favor of the nonmoving party.
14 *Cedars-Sinai Med. Ctr. v. Nat’l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir.
15 2007).

16 Notwithstanding this deference, the reviewing court need not accept “legal
17 conclusions” as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for a
18 court to assume “the [plaintiff] can prove facts that [he or she] has not alleged”
19 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.
20 519, 526 (1983).

21 **DISCUSSION**

22 Defendant Adler contends that Plaintiff has again failed to follow the Court’s
23 instructions by filing a SAC that fails to adhere to Rule 8. (Doc. No. 41-1 at 2.) In response,
24 Plaintiff takes several different stances in opposition including that his complaint includes
25 facts that can be reasonably inferred, that Defendant has fair notice of the claim, and that
26 Defendant Adler has made a character attack on Plaintiff. (Doc. No. 43-1 at 4.)

27 The Court first notes that it appreciates that Plaintiff has attempted to follow the
28 Court’s previous instructions in composing his SAC. Nevertheless, despite his efforts, the

1 Court finds that the operative complaint still fails to plead a claim on which relief may be
2 provided.

3 Presently, Plaintiff’s SAC states that Defendant Adler is directly or indirectly
4 working on a mixed media project that allegedly is utilizing Plaintiff’s protected
5 information in violation of 15 U.S.C. § 1125. (Doc. No. 38 ¶ 4.) However, Plaintiff asserts
6 that due to the project’s “fluidity in design” he is unable to properly plead the details
7 surrounding the project, nor the specific actions of Defendant Adler that has resulted in the
8 alleged illegal commercialization of Plaintiff’s likeness. (*Id.*) Plaintiff’s failure to provide
9 any general allegations regarding his causes of action is a common theme throughout his
10 SAC. For instance, in asserting violations of his intellectual property, all Plaintiff can allege
11 is that “[g]iven the early stage of the production process . . . it is reasonably difficult to
12 describe with specificity exactly how and where the Plaintiff’s intellectual property is being
13 violated” (*Id.* ¶ 7.)

14 First, the Court notes that even applying the liberal pleading standard under Rule 8,
15 Plaintiff’s SAC is still deficient. The Court highlights that the Rule 8 standard does not
16 require “detailed factual allegations,” but “naked assertion[s] devoid” of any factual
17 enhancement do not suffice. *Ashcroft*, 556 U.S. at 678 (citation and internal quotation
18 marks omitted). Presently, at this juncture, Plaintiff’s claims are still visibly unsupported
19 by even a minutia of contentions. Moreover, Plaintiff’s inability to provide details
20 surrounding his causes of action as a whole fails to demonstrate the proper standing to be
21 in this Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555 (1992) (holding that a
22 plaintiff has standing when he can demonstrate that he has suffered an injury in fact, *i.e.*,
23 “a concrete and particularized, actual or imminent invasion of a legally protected interest”).

24 Moreover, Plaintiff has again resorted to contending that Defendant Adler has
25 violated 15 U.S.C. § 1125. (Doc. No. 38 at 5.) However, 15 U.S.C. § 1125 relates to a trade
26 dress infringement claim. “Trade dress refers generally to the total image, design, and
27 appearance of a product and may include features such as size, shape, color, color
28 combinations, texture or graphics.” *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d

1 1252, 1257 (9th Cir. 2001) (citation and internal quotation marks omitted). Thus, as an
2 example, a proper trade dress infringement claim would involve a restaurant appropriating
3 another establishments' eating atmosphere, interior dining and patio areas, and decorations.
4 *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992). Unfortunately for
5 Plaintiff, his SAC is devoid of any allegations surrounding a product whose features have
6 been appropriated by Defendants or Defendant Adler and his contention that his likeness
7 is being commercialized is not an appropriate trade dress claim under the law.

8 Next, the Court expounds that Plaintiff's SAC is also lacking in that it asks the Court
9 to incorporate pages thirteen and fourteen, and paragraphs twenty to twenty-three of his
10 FAC without actually pleading these allegations in his SAC. (Doc. No. 38 ¶ 12.) However,
11 the Court notes that "[g]enerally, after an amended pleading has been filed, courts will
12 disregard the original pleading." *Larson v. USH of Rancho Springs, Inc.*, 230 Cal. App. 4th
13 336, 434 (2014) (citation and internal quotation marks omitted). Thus, Plaintiff's request
14 that the Court look at allegations present in his FAC is an unsuitable method of pleading.

15 Consequently, despite liberally construing Plaintiff's complaint, *see Erickson v.*
16 *Pardus*, 551 U.S. 89, 94 (2007), the Court finds that Plaintiff's SAC has again failed to
17 plead a claim upon which relief may be granted. Accordingly, the Court **GRANTS**
18 Defendant Adler's motion to dismiss Plaintiff's SAC. *See Ramirez v. Exec. Branch of U.S.*,
19 No. CV 12-2851 JSL (SS), 2012 WL 3710612, *5 (C.D. Cal. July 6, 2012) ("Courts have
20 also routinely exercised discretion to dismiss complaints without leave to amend relatively
21 early in the litigation where, as here, the allegations are patently "incoherent and
22 delusional").

23 As Plaintiff has been granted leave to amend previously to no avail, and based on
24 the fact that Plaintiff's amended complaints continue to repeat the same errors, the Court
25 finds it appropriate at this point in time to **DISMISS** Plaintiff's complaint **WITHOUT**
26 **LEAVE TO AMEND**. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that the grant
27 or denial of a motion to amend is committed to the discretion of the district court); *see also*
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1 *Vaillette v. Fireman's Fund Ins. Co.*, 18 Cal. App. 4th 680, 685 (1993) (holding that leave
2 to amend should not be granted where in all probability, amendment would be futile).

3 **CONCLUSION**

4 As set forth more fully above, the Court **GRANTS** Defendant Adler's motion to
5 dismiss and **DISMISSES** Plaintiff's second amended complaint **WITHOUT LEAVE TO**
6 **AMEND**. The Clerk of Court is directed to **CLOSE** this case.

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8 **IT IS SO ORDERED.**

9 Dated: September 12, 2017

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11 Hon. Anthony J. Battaglia
12 United States District Judge
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