

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 23 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID LOCKMILLER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
BRYAN'S MARKET, INC.,

Defendants-Appellees.

No. 19-16999

D.C. No. 3:19-cv-04554-WHA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Submitted February 17, 2021**

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

David Lockmiller appeals pro se from the district court's judgment dismissing his action alleging Federal Tort Claims Act ("FTCA") and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C. § 1915(e)(2)(B). *Barren v. Harrington*, 152 F.3d 1193,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

APPENDIX A

1194 (9th Cir. 1998) (order). We affirm.

The district court properly dismissed Lockmiller's negligence claim against the United States because Lockmiller failed to allege facts sufficient to state a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged."); *Lam v. United States*, 979 F.3d 665, 672 (9th Cir. 2020) (setting forth elements of a FTCA claim).

The district court properly dismissed Lockmiller's negligence claim against Bryan's Market, Inc. because Lockmiller failed to demonstrate diversity jurisdiction. *See* 28 U.S.C. § 1332(a); *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-58 (9th Cir. 2001) (requirements for diversity jurisdiction).

We reject as without merit Lockmiller's contention that the FTCA's limitations on attorney's fees violated his First Amendment rights.

All pending motions are denied.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID LOCKMILLER,

No. C 19-04554 WHA

Plaintiff,

v.

**ORDER DISMISSING
AMENDED COMPLAINT**

UNITED STATES, *et al.*,

Defendants.

In this tort action, *pro se* plaintiff David Lockmiller sues defendants based on alleged violations of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–80 and state law (Dkt. No. 10 at 7–10). A prior order issued by Judge Sallie Kim granted plaintiff's application to proceed *in forma pauperis* and dismissed the complaint for failure to state a claim under 28 U.S.C. § 1915(e) (Dkt. No. 4).^{*} That order gave plaintiff leave to amend the complaint by September 16 (*id.* at 1), which plaintiff timely filed (Dkt. No. 10).

The following facts are taken from plaintiff's amended complaint. Plaintiff alleges that he purchased a "tainted lamb roast at Bryan's Market in San Francisco" (*id.* at 4). On October 3, 2017, after consuming said meat and "[w]ithin hours of going to bed," plaintiff vomited and realized he was paralyzed in both legs (*ibid.*). Two days later, plaintiff called the "Nurse Aide hotline" and was told to visit the Veterans Affairs hospital (*ibid.*). Plaintiff accuses Dr. Harry Han (his emergency room treating physician) of failing to make a "finding of a suspect food

APPENDIX B

^{*} Plaintiff subsequently declined magistrate judge jurisdiction, after which this action was reassigned to the undersigned. Dkt. No. 5, 7.

1 borne illness” and thus failed to make a report “to the local health authorities as required by
2 state law to do so” (Dkt. No. 10 at 5). That is, though Dr. Han diagnosed plaintiff’s illness as
3 “Infectious Gastroenteritis and Dehydration,” plaintiff believes that “*Bacillus cereus* of the
4 emetic toxin type” instead caused his symptoms, which should have been reported (*id.* at 5;
5 Exh. C at 3).

6 Plaintiff thus asserts the following claims, as liberally construed: (1) violation of
7 Sections 1346(b) and 2671–80 of the FTCA for failure to report his “food borne illness” to the
8 “San Francisco Department of Public Health – Environmental Health Branch” under California
9 Code of Regulations, Title 17 § 2500(b), against Drs. Han and Jonathan Garber (the “Chief of
10 the San Francisco VA Hospitable Emergency Department”) and the United States; and (2)
11 negligence and other state law claims against Bryan’s for his medical injury (presumably for
12 selling the meat at issue) (Dkt. No. 10 at 7–16).

13 When a plaintiff proceeds *in forma pauperis* under Section 1915, a court must conduct a
14 preliminary screening of plaintiff’s complaint and dismiss any claims that (1) are frivolous or
15 malicious; (2) fail to state a claim upon which relief can be granted; or (3) seek monetary relief
16 from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). A complaint
17 fails to state a claim upon which relief can be granted when it does not “state a claim to relief
18 that is plausible on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), even when
19 the court takes “all allegations of material fact as true and construes them in the light most
20 favorable” to plaintiff, *Cedars-Sinai Med. Ctr. v. Nat’l League of Postmasters of U.S.*, 474 F.3d
21 1202, 1205 (9th Cir. 2007). *Pro se* pleadings must be liberally construed. *See Balisteri v.*
22 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). “A *pro se* litigant must be given leave
23 to amend his or her complaint unless it is absolutely clear that the deficiencies in the complaint
24 could not be cured by amendment.” *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987),
25 *superseded on other grounds by statute as stated in Lopez v. Smith*, 203 F.3d 1122, 1126–27
26 (9th Cir. 2000) (en banc). A court, however, “is not required to accept legal conclusions cast in
27 the form of factual allegations if those conclusions cannot reasonably be drawn from the facts
28 alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

Here, a prior screening order issued by Judge Kim dismissed the instant action for lack of subject-matter jurisdiction ~~and failure~~ to state a claim. Specifically, that order found a lack of diversity jurisdiction because both plaintiff and Bryan's reside in California (Dkt. No. 4 at 2). That order further found a lack of federal question jurisdiction, as plaintiff failed to adequately state a federal claim. The amended complaint fails to cure any of the deficiencies highlighted in that prior order.

Plaintiff brought this complaint under the FTCA, alleging that Dr. Han failed to report his "food borne illness" as purportedly required under California Code of Regulations, Title 17 § 2500(b). Section 2500(b) provides in relevant part that:

It shall be the duty of every health care provider, knowing of or in attendance on a case or suspected case of any of the diseases or conditions listed in subsection (j) of this section, to report to the local health officer for the jurisdiction where the patient resides as required in subsection (h) of this section.

Section 2500(j) in turn lists the specific diseases and conditions that "[h]ealth care providers shall submit reports for." As Judge Kim pointed out, neither infectious gastroenteritis or "Bacillus cereus" infection is listed in Section 2500(j). Thus neither Dr. Han did not have a duty to report plaintiff's symptoms.

In his amended complaint, plaintiff points to Section 2500(a)(13), which defines "foodborne disease" as "illness suspected to have resulted from consuming a contaminated food, non-water beverage, or other ingestible item such as a dietary supplement or herbal remedy." Plaintiff asserts that "foodborne disease" is a "general term that encompasses a number of specific illnesses with distinctly different causes, and these causes are specifically listed in authoritative medical reference sources available to all Emergency Room physicians" (Dkt. No. 10 at 15). He thus complains of Judge Kim's analysis and reasserts that defendants had a duty to report his "food borne illness." This order disagrees.

Section 2500(a) merely provides governing definitions for various terms. Those definitions, by themselves, do not provide any affirmative duties. Thus only the specific diseases and conditions listed in Section 2500(j) remain relevant to the question of whether Dr. Han had a duty to report plaintiff's symptoms under Section 2500(b). For the reason stated

1 above, he did not. As such, even assuming that Dr. Han erroneously diagnosed plaintiff's
2 symptoms, he still had no duty to report plaintiff's illness under Section 2500(b).

3 Plaintiff also alleges that Dr. Garber had a duty under Section 2500(c), which provides
4 that:

5 The administrator of each health facility, clinic or other setting where
6 more than one health care provider may know of a case, a suspected case
7 or an outbreak of disease within the facility shall establish and be
8 responsible for administrative procedures to assure that reports are made
9 to the local health officer.

10 No defendant had a duty to report under this subsection either. Sections 2500(a)(5) defines
11 "case" as:

12 (A) a person who has been diagnosed by a health care provider, who is
13 lawfully authorized to diagnose, using clinical judgment or laboratory
14 evidence, to have a *particular disease or condition listed in subsection (j)*;
15 or (B) a person who is considered to have a disease or condition that
16 satisfies the most recent communicable disease surveillance case
17 definitions established by the CDC and/or CSTE; or (C) an animal that has
18 been determined, by a person authorized to do so, to have a disease or
19 condition made reportable by these regulations; or (D) a person who has
20 been diagnosed with HIV infection using a currently approved HIV test
21 algorithm, as defined in section 2641.57.

22 Cal. Code Regs. tit. 17, § 2500(a)(5) (emphasis added). Section 2500(a)(25) defines "suspected
23 case" as, in relevant part, a person whom a health care provider believes "probably" has "a
24 particular disease or condition listed in subsection (j)." And, Section 2500(a)(22) defines
25 "outbreak" as "the occurrence of cases of a disease (illness) above the expected or baseline
26 level, usually over a given period of time, in a geographic area or facility, or in a specific
27 population group." None of these definitions covers plaintiff's alleged illness. Plaintiff thus
28 failed to allege facts supporting his theory of liability under the FTCA.

Because plaintiff has already been advised of his pleading deficiencies and only doubled
down on those deficiencies in his amended complaint, this order finds that granting further
leave to amend would be futile. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004)
("Futility alone can justify the denial of a motion for leave to amend."); *In re Vantive Corp. Sec.*
Litig., 283 F.3d 1079, 1097-98 (9th Cir. 2002), *abrogated on other grounds as recognized in*
South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 784 (9th Cir. 2008) ("The district court's
discretion to deny leave to amend is particularly broad where plaintiff has previously amended

1 the complaint.”). Accordingly, plaintiff’s claims against all defendants are **DISMISSED** without
2 leave to amend.

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4 **IT IS SO ORDERED.**

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6 Dated: September 27, 2019.


7 WILLIAM ALSUP
8 UNITED STATES DISTRICT JUDGE
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID LOCKMILLER,

No. C 19-04554 WHA

Plaintiff,

v.

JUDGMENT

UNITED STATES, *et al.*,

Defendants.

For the reasons stated in the accompanying order dismissing plaintiff's amended complaint, **FINAL JUDGMENT IS HEREBY ENTERED** in favor of defendants and against plaintiff. The Clerk shall please close the file.

IT IS SO ORDERED.

Dated: September 27, 2019.


WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID LOCKMILLER,

Plaintiff,

v.

UNITED STATES, et al.,

Defendants.

Case No. 19-cv-04554-SK

SCREENING ORDER

Regarding Docket Nos. 1, 3

Plaintiff David Lockmiller ("Plaintiff") has filed a complaint and an application to proceed *in forma pauperis*. (Dkts. 1, 3.) The Court HEREBY GRANTS the application but orders a HOLD on the service of the complaint. The Court has reviewed the complaint and finds that it fails to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915(e). Plaintiff may file an amended complaint by September 16, 2019, addressing the deficiencies described in this order.

A. Background.

Appearing *pro se*, Plaintiff brings his complaint against the United States for actions allegedly taken by the Director of the San Francisco VA hospital and a physician at the San Francisco VA hospital, and Bryan's Grocery ("Bryan's," erroneously described by Plaintiff as "Bryan's Market, Inc."), a San Francisco grocery store. (Dkt. 1.) Plaintiff states that this Court has jurisdiction pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b). (*Id.*)

Plaintiff recounts an incident wherein he purchased a lamb roast at Bryan's. (*Id.*) The next day, October 3, 2017, Plaintiff cooked and ate the roast. (*Id.*) That night, Plaintiff awoke extremely ill. (*Id.*) He reports that he vomited several times and experienced the sensation of paralysis in both legs. (*Id.*) Plaintiff did not call an ambulance but was instructed by a nurse aide hotline to go to the hospital. (*Id.*) A friend drove him to the San Francisco VA Hospital, where

APPENDIX C

1 Plaintiff reports that he was treated with intravenous fluids and released the next day. (*Id.*)
2 Plaintiff reports that he thereafter filed a complaint with the Department of Veterans affairs, which
3 rejected his tort claim. (*Id.*) Plaintiff now brings two claims in appeal of that denial. First, he
4 asserts that the physician treating him at the VA Hospital, Dr. Harry Han, had a duty to report his
5 illness to the local health authorities pursuant to California Code of Regulations Title 17, § 2500.
6 Second, he claims that the administrator of the San Francisco VA Hospital had the same duty.
7 Additionally, Plaintiff attempts to join Bryan's to his complaint.

8 **B. Jurisdiction.**

9 Federal courts are courts of limited jurisdiction, and a "federal court is presumed to lack
10 jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v.*
11 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citations omitted). Generally, original
12 federal jurisdiction is premised on federal question jurisdiction or diversity jurisdiction. Here,
13 Plaintiff does not sufficiently assert a violation of federal law or diversity jurisdiction.

14 The Court lacks diversity jurisdiction over this action. Diversity jurisdiction exists where
15 the two parties to the lawsuit are residents of different states and the amount in controversy is over
16 \$75,000. 28 U.S.C. § 1332. "When federal subject matter jurisdiction is predicated on diversity
17 of citizenship, complete diversity must exist between opposing parties." *Equity Growth Asset v.*
18 *Holden*, No. C 19-01505 JSW, 2019 WL 2180202, at *2 (N.D. Cal. Apr. 16, 2019) (citing *Iowen*
19 *Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978)). This means that no defendant
20 may be a resident of the same state as any plaintiff for diversity to exist. A corporate defendant is
21 deemed to reside in its state of incorporation or the state where its principal place of business is
22 located. *Albino v. Standard Ins. Co.*, 349 F. Supp. 2d 1334, 1337 (C.D. Cal. 2004). Here, Plaintiff
23 is a California resident because he lives in San Francisco County. Defendant Bryan's has its
24 principal place of business in San Francisco, California. Because both Plaintiff and Defendant
25 Bryan's are residents of California, complete diversity does not exist between the parties.
26 Diversity jurisdiction therefore does not lie over this action.

27 The Court also lacks federal question jurisdiction over this matter. "The presence or
28 absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule.'"

1 *Caterpillar Inc. v. Williams*, 482 U.S. 382, 392 (1987). Under the well-pleaded complaint rule,
2 federal question jurisdiction arises where the “complaint establishes either that federal law creates
3 the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a
4 substantial question of federal law.” *Franchise Tax Bd. of State of Cal. v. Constr. Laborers*
5 *Vacation Tr. for S. California*, 463 U.S. 1, 27-28 (1983). Here, federal question jurisdiction does
6 not exist because Plaintiff’s complaint does not adequately state a federal claim, as described
7 below.

8 **C. Plaintiff’s Claims.**

9 Plaintiff asserts that VA Hospital physician Dr. Harry Han and VA Hospital Director Dr.
10 Jonathan Garber were obligated to report his illness to local health authorities under California
11 Code of Regulations, Title 17 § 2500. It is not clear from the face of the complaint exactly what
12 Plaintiff was diagnosed with at the hospital. However, Plaintiff submits Exhibit D, a health
13 inspection report conducted at Bryan’s in response to a complaint submitted by Plaintiff. (Dkt. 1
14 Ex. D). That report indicates that Plaintiff was “admitted to the SF VA ER where he was
15 diagnosed with infectious gastroenteritis and severe dehydration.” (*Id.*) In contrast, Plaintiff
16 states: “I now believe that the cause of my illness was *Bacillus cereus* of the emetic toxin type.”
17 (*Id.*) Plaintiff provides no medical records of any kind to substantiate his claims. However,
18 section 2500(j), which provides the list of diseases healthcare providers must report to local
19 authorities, does not require reporting of either infectious gastroenteritis or “*Bacillus cereus*”
20 infection. Doctors Han and Garber were therefore had no duty to report Plaintiff’s symptoms and
21 were not negligent in failing to do so. As a consequence, Plaintiff has failed to state a claim
22 against the United States under 28 U.S.C. § 1346(b).

23 Because these claims fail, Bryan’s cannot be joined to them, and the claim against Bryan’s
24 also fails. However, construing the complaint liberally because Plaintiff is proceeding *pro se*, the
25 Court finds that Plaintiff might be attempting to state a separate claim against Bryan’s, rather than
26 solely attempting joinder. Even under this metric, Plaintiff has failed to state a plausible claim for
27 relief against Bryan’s because he has not clearly established that he was injured by Bryan’s
28 conduct. Plaintiff has not provided sufficient facts to link his illness to any conduct by Bryan’s.
Plaintiff has not clearly shown what illness he was actually diagnosed with; further, either of the

1 illnesses described likewise could have multiple sources, and Plaintiff has not clearly linked either
2 to Bryan's. Plaintiff likewise has not clearly established what harm he suffered. He does not
3 describe particularized damages related to hospital bills. He alleges that his enjoyment of life has
4 been affected by severe injuries to his sense of taste and smell, but does not claim any damages
5 related to that injury. Further, because Plaintiff's claims against the United States fail and because
6 Plaintiff and Bryan are not diverse for citizenship purposes, the Court likely cannot assert
7 jurisdiction over any claim against Bryan's based on state law.

8 **D. Conclusion.**

9 Based on the allegations in the current complaint, the Court does not have jurisdiction over
10 this action, and Plaintiff has not sufficiently pleaded any of his claims. Plaintiff may file an
11 amended complaint by September 16, 2019, correcting these problems. Failure to amend the
12 complaint to cure the defects described in this order by September 16, 2019, will result in a
13 recommendation that this action be dismissed.

14 Finally, the Court ADVISES Plaintiff that the district court has produced a guide for *pro se*
15 litigants called Representing Yourself in Federal Court: A Handbook for *Pro Se* Litigants, which
16 provides instructions on how to proceed at every stage of your case, including discovery, motions,
17 and trial. It is available electronically online (<http://cand.uscourts.gov/prosehandbook>) or in hard
18 copy free of charge from the Clerk's Office. The Court further advises Plaintiff that he also may
19 wish to seek assistance from the Legal Help Center. Plaintiff may call the Legal Help Center at
20 415-782-8982 for a free appointment with an attorney who may be able to provide basic legal
21 help, but not legal representation.

22 **IT IS SO ORDERED.**

23 Dated: August 14, 2019



24 SALLIE KIM
25 United States Magistrate Judge
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**Additional material
from this filing is
available in the
Clerk's Office.**