

APPENDIX A

FILED

April 14, 2021

MOLLY C. DWYER, Clerk

U.S. COURT OF APPEALS

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Henryk S. Borecki,

No. 21-15572

Plaintiff-Appellant,

D.C. No. 2:21-cv-00415-MTL

District of Arizona

Phoenix

v.

United States Department of Homeland
Security; Arizona Department
of Transportation,

ORDER

Defendants-Appellees.

Before: CLIFTON, MURGUIA, and BRESS, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc) (dismissal of complaint with leave to amend is not appealable). Consequently, this appeal is dismissed for lack of jurisdiction.

DISMISSED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Henryk S. Borecki,

No. CV-21-00415-PHX-MTL

Plaintiff,

ORDER

v.

United States Department of Homeland
Security, et al.,

Defendants.

Pending before the Court are *pro se* Plaintiff's Complaint (Doc. 1) and Application to Proceed in District Court Without Prepaying Fees or Costs. (Doc. 2.) For the following reasons, the Court exercises its authority pursuant to 28 U.S.C. § 1915(e)(2) and dismisses Plaintiff's Complaint with leave to amend.

I. LEGAL STANDARDS

When a party seeks to proceed *in forma pauperis*, as Plaintiff does here, the Court "shall dismiss the case at any time if the court determines that —

(A) the allegation of poverty is untrue; or

(B) the action or appeal —

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief."

28 U.S.C. § 1915(e)(2). "While much of the § 1915 outlines how prisoners can file {2} proceedings *in forma pauperis*, § 1915(e) applies to all *in forma pauperis* proceedings, not just those filed by prisoners." *Long v. Maricopa Cmty. College Dist.*, 2012 WL 588965, at * 1 (D. Ariz. Feb. 22, 2012)(citing *Lopez v. Smith*, 203F.3d 1122, 1126 n. 7 (9th Cir. 2000)("[S]ection (e) applies to all *in forma pauperis* complaints[.]").

A complaint is frivolous if it is based on a nonexistent legal interest or delusional factual scenario. *Nietzke v. Williams*, 490 U.S. 319, 327-30 (1989); *see also Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (dismissal is also appropriate when the facts alleged are “clearly baseless,” “fanciful,” “fantastic,” or “delusional”). A district court judge has “not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” *Nietzke*, 490 U.S. at 328.

In addition to being nonfrivolous, Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain a short and plain statement of the grounds for the court’s jurisdiction, a short and plain statement of the claim showing the pleader is entitled to relief, and a demand for the relief sought. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. ANALYSIS

A. Plaintiff’s Complaint

The Court finds that Plaintiff’s Complaint fails to state a claim upon which relief may be granted. Plaintiff provides two claims for relief. (Doc. 1.) First, Plaintiff asserts “Constitutional, Statutory & Tortious Error by the State of Arizona and State Officials.” (*Id.* ¶¶ 10-13.) In this first claim, Plaintiff also raises statutory and constitutional concerns regarding the Arizona Department of Transportation’s failure to issue him a “Real Travel ID.” (*Id.*) Besides stating these legal conclusions, Plaintiff does not tie in facts to show why these specific legal theories apply to his first cause of action. (*Id.*) Second, Plaintiff asserts “Constitutional, Statutory & Tortious Negligent Entrustment against the United States of America and Federal Officials.” (*Id.* ¶¶ 14-16.) Plaintiff again alleges that this {3} second cause of action includes multiple statutory violations, such as depriving persons of rights or privileges and obstructing justice. (*Id.*) Plaintiff again does not tie in any facts to these legal theories. (*Id.*)

These allegations — to the extent they are construed as such — do not warrant consideration by this Court. The Complaint fails to state a claim because

its alleged facts are not “plausibly suggestive of a claim entitling the plaintiff to relief” and have not “raise[d] a reasonable expectation that discovery will reveal evidence” of a claim. *See Twombly*, 550 U.S. at 556. The Complaint contains only conclusory legal allegations about how the Arizona Department of Transportation and certain United States officials failed to provide Plaintiff with a “Real Travel ID.” Although Plaintiff provided a statement of facts, he did not connect those allegations to his multiple legal conclusions or show how the facts alleged are relevant to his multiple legal conclusions or show how the facts alleged are relevant to his claims for relief. Plaintiff only mentions that he was denied this identification card and was sent “on a search for a document” which he “could not possibly apply.” (*Id.* ¶ 9.) This Complaint does not contain “simple, concise, and direct” allegations as required. Fed. R. Civ. P. 8(d)(1). The Complaint will be dismissed.

B. Leave to Amend

If a defective complaint can be cured, the plaintiff is entitled to amend the complaint before the action is dismissed. *See Lopez v. Smith*, 203 F.3d 1122, 1127-30 (9th Cir. 2000). Therefore, Plaintiff will be given one opportunity to amend the Complaint. Any amended complaint must contain sufficient factual allegations to state a claim for relief and must otherwise conform to the requirements of the Federal Rules of Civil Procedure.

If Plaintiff elects to file an amended complaint and fails to comply with the instructions given in this order, the action will be dismissed pursuant to section 28 U.S.C. § 1915(e) and/or Rule 41(b) of the Federal Rules of Civil Procedure.

III. CONCLUSION

Accordingly, {4}

IT IS ORDERED that, pursuant to 28 U.S.C. § 1915(e)(2), the Complaint (Doc. 1) is **dismissed without prejudice** for failing to state a claim upon which

relief may be granted. Plaintiff has permission to file an amended complaint by **April 12, 2021**.

IT IS FURTHER ORDERED that Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 2) is **granted**.

IT IS FURTHER ORDERED that if Plaintiff elects to file an amended complaint, the amended complaint may not be served until and unless the Court screens the amended complaint pursuant to 18 U.S.C. § 1915(e)(2). If Plaintiff is given leave to serve an amended complaint, Plaintiff shall be responsible for service of the summons and complaint.

Dated this 22nd day of March, 2021.

Michael T. Liburdi
United States District Judge

Reprint 1

FILED

July 23, 2021

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

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Henryk S. Borecki,

No. 21-15572

Plaintiff-Appellant,

D.C. No. 2:21-cv-00415-MTL

District of Arizona

v.

Phoenix

United States Department of Homeland
Security; Arizona Department
of Transportation,

ORDER

Defendants-Appellees.

Before: CLIFTON, MURGUIA, and BRESS, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 3) is denied. *See* 9th Cir. R. 27-10. This denial is without prejudice to appellant filing a new notice of appeal from a final order or judgment entered by the district court. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc)(“[W]hen a district court expressly grants leave to amend, it is plain that the order is not final. Something more is both anticipated and required. In that event, a further step must be taken to ‘fix an unequivocal terminal date for appealability,’ and to avoid ‘the hazards of confusion or misunderstanding as to the time of appeal.’ A final judgment must be obtained before the case becomes appealable.” (internal citation omitted)).

The Clerk will send a copy of this order to the district court.

No further filings will be entertained in this closed case.

Reprint 2

FILED

AUG 02 2021

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

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HENRYK S. BORECKI,

No. 21-15572

Plaintiff-Appellant,

D.C. No. 2:21-cv-00415-MTL
U.S. District Court for Arizona,
Phoenix

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; ARIZONA
DEPARTMENT OF TRANSPORTATION,

MANDATE

Defendants-Appellees.

The judgment of this Court, entered April 14, 2021, takes effect on this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Quy Le
Deputy Clerk
Ninth Circuit Rule 27-7

Reprint 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Henryk S. Borecki,

No. CV-21-00415-PHX-MTL

Plaintiff,

ORDER

v.

United States Department of Homeland
Security, et al.,

Defendants.

On 7/28/2021, this Court ordered Plaintiff to file an amended complaint by 8/11/2021. (Doc.11.) Plaintiff has not filed an amended complaint and the deadline to do so has expired. Accordingly,

IT IS ORDERED that this action is dismissed without prejudice for failure to prosecute pursuant to Rule 41(b). The Clerk of the Court shall enter judgment accordingly and close this case.

Dated this 17th day of August, 2021.

Michael T. Liburdi
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Henryk S. Borecki,

NO. CV-21-00415-PHX-MTL

Plaintiff,

**JUDGEMENT OF DISMISSAL IN A
CIVIL CASE**

v.

United States Department of Homeland
Security, et al.,

Defendants.

Decision by Court. This action came for consideration before the Court. The issued have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed August 17, 2021, Plaintiff to take nothing, and the complaint and action are dismissed without prejudice for failure to prosecute.

Debra D. Lucas
District Court Executive/Clerk of Court

August 17, 2021

s/Rebecca Kobza
By Deputy Clerk