

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 3 2017

FOR THE NINTH CIRCUIT

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

ARLEN PORTER SMITH,

Plaintiff-Appellant,

v.

KEEFE COMMISSARY NETWORK,

Defendant-Appellee.

No. 16-35996

D.C. No. 2:16-cv-01530-SI

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Submitted September 26, 2017**

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

Arlen Porter Smith, an Oregon state prisoner, appeals pro se from the district court's judgment dismissing for lack of subject matter jurisdiction his diversity action arising from the loss of his legal materials and intellectual property. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Naffe v. Frey*, 789

* 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).

F.3d 1030, 1035 (9th Cir. 2015). We affirm.

The district court properly dismissed Smith’s action for lack of subject matter jurisdiction because Smith failed to allege facts sufficient to show that the amount in controversy was satisfied. *See* 28 U.S.C. § 1332(a) (requirements for diversity jurisdiction); *Naffe*, 789 F.3d at 1139-40 (while the amount claimed on the face of the complaint generally controls, dismissal is warranted if it appears “to a legal certainty that the claim is really for less than the jurisdictional amount” (citation and internal quotation marks omitted)). We treat the dismissal of the action for lack of subject matter jurisdiction as being without prejudice. *See Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1036 (9th Cir. 2004).

AFFIRMED.