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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
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11 DEBBY GENTHNER,

12 Plaintiff,

13 vs.

14 KENNETH CHONG, M.D., *et al.*,

15 Defendants.  
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**Case No. 1:16-cv-01534-AWI-EPG**

**FINDINGS AND RECOMMENDATIONS  
REGARDING PLAINTIFF'S  
COMPLAINT AND MOTION TO  
PROCEED IN FORMA PAUPERIS**

OBJECTIONS DUE WITHIN FIFTEEN (15)  
DAYS

(ECF No. 1)

19 **I. INTRODUCTION**

20 Plaintiff Debby Genthner, appearing *pro se*, filed a Complaint on October 12, 2016.  
21 (ECF No. 1.) The Complaint alleges injuries stemming from medical malpractice by  
22 Defendants Kenneth Chong, M.D. and the Fresno Imaging Center. *Id.* Plaintiff also seeks to  
23 proceed *in forma pauperis* in this action. The Court has screened the Complaint and Motion to  
24 Proceed *In Forma Pauperis* and makes its recommendations herein, namely, that Plaintiff's  
25 Motion be denied and the Complaint be dismissed.

26 **II. APPLICATION TO PROCEED IN FORMA PAUPERIS**

27 As a general rule, all parties instituting any civil action, suit, or proceeding in a district  
28 court must pay a filing fee. 28 U.S.C. § 1914(a). However, the Court may authorize the

1 commencement of an action “without prepayment of fees and costs of security therefor, by a  
2 person who submits an affidavit that . . . the person is unable to pay such fees or give security  
3 therefor.” 28 U.S.C. § 1915(a)(1). Therefore, an action may proceed despite a failure to  
4 prepay the filing fee only if leave to proceed *in forma pauperis* is granted by the Court. *See*  
5 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).

6 The Ninth Circuit has held that “permission to proceed in forma pauperis is itself a  
7 matter of privilege and not right; denial of in forma pauperis status does not violate the  
8 applicant’s right to due process.” *Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984).  
9 The Court has broad discretion to grant or deny a motion to proceed *in forma pauperis*.  
10 *O’Laughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990) (a “district court may deny leave to  
11 proceed [*in forma pauperis*] at the outset if it appears from the face of the proposed complaint  
12 that the action is frivolous or without merit.”). Because, as explained below, Plaintiff’s  
13 Complaint is frivolous and without merit, the application to proceed *in forma pauperis* is  
14 denied.

### 15 **III. LEGAL STANDARD**

16 Under 28 U.S.C. § 1915(e)(2), the Court must conduct a review of a *pro se* complaint to  
17 determine whether it “state[s] a claim on which relief may be granted,” is “frivolous or  
18 malicious,” or “seek[s] monetary relief against a defendant who is immune from such relief.” If  
19 the Court determines that the complaint fails to state a claim, it must be dismissed. *Id.* Leave to  
20 amend may be granted to the extent that the deficiencies of the complaint can be cured by  
21 amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

22 A complaint must contain “a short and plain statement of the claim showing that the  
23 pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
24 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
25 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*  
26 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). Plaintiff must  
27 set forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its  
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1 face.” *Ashcroft v. Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 555). While factual  
2 allegations are accepted as true, legal conclusions are not. *Id.* at 678.

3 In determining whether a complaint states an actionable claim, the Court must accept  
4 the allegations in the complaint as true, *Hospital Bldg. Co. v. Trs. of Rex Hospital*, 425 U.S.  
5 738, 740 (1976), construe *pro se* pleadings liberally in the light most favorable to the Plaintiff,  
6 *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s  
7 favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of *pro se* plaintiffs “must be  
8 held to less stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627  
9 F.3d 338, 342 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally  
10 construed after *Iqbal*).

#### 11 **IV. PLAINTIFF’S ALLEGATIONS**

12 Plaintiff alleges that she received an x-ray at the Fresno Imaging Center on October 7,  
13 2014. She claims that she has a foreign body in her intestines that is causing her discomfort and  
14 problems eating. Although Defendants saw the foreign body during her visit to the Center,  
15 however, Plaintiff asserts that they did not “diagnose” the foreign body or report the foreign  
16 body to the referring physician. She also believes that Defendants should have reported the  
17 existence of the foreign body to law enforcement authorities because “[t]he only way this could  
18 get there is if someone put it there against my will when I was incapacitated.” (Complaint 3:9-  
19 11, ECF No. 1.) Based on this conduct, Plaintiff alleges violations of California Penal Code §§  
20 11160 and 11161. She also makes a passing reference to 42 U.S.C. § 1983. She asks for  
21 compensatory and punitive damages, as well as an order revoking Defendants’ licenses to  
22 practice medicine and imposing criminal charges on Defendants.

#### 23 **V. DISCUSSION**

24 Federal courts are courts of limited jurisdiction and lack inherent or general subject  
25 matter jurisdiction. Federal courts can adjudicate only those cases which the United States  
26 Constitution and Congress authorize them to adjudicate. *Kokkonen v. Guardian Life Ins. Co.*,  
27 511 U.S. 375 (1994). To proceed in federal court, a plaintiff’s pleading must establish the  
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1 existence of subject matter jurisdiction. Generally, there are two potential bases for federal  
2 subject matter jurisdiction: (1) federal question jurisdiction, or (2) diversity jurisdiction.

3 “[A] case ‘arises under’ federal law either where federal law creates the cause of action  
4 or ‘where the vindication of a right under state law necessarily turn[s] on some construction of  
5 federal law.’” *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088–89 (9th Cir.  
6 2002), quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8–9  
7 (1983). The presence or absence of federal question jurisdiction is governed by the “well-  
8 pleaded complaint rule.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under the  
9 well-pleaded complaint rule, “federal jurisdiction exists only when a federal question is  
10 presented on the face of the plaintiff’s properly pleaded complaint.” *Id.*

11 Here, the complaint does not appear contain any allegation of a violation arising under  
12 the Constitution, federal law, or treaties of the United States. Plaintiff cites to 42 U.S.C. § 1983  
13 at one point in her Complaint, but § 1983 does not relate to any of her claims. To state a claim  
14 under § 1983, a plaintiff “must allege a violation of a right secured by the Constitution and laws  
15 of the United States, and must show that the alleged deprivation was committed by a person  
16 acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988). Neither of these has  
17 been alleged in this instance; there is no violation of a constitutional right or of federal law, nor  
18 were any of the Defendants acting under color of state law. Defendants are a private company,  
19 Fresno Imaging Center, and employees of that company. Plaintiff’s claims are state claims for  
20 medical malpractice and do not invoke federal subject matter jurisdiction. *Kaohi v. Kaiser*  
21 *Found. Health Plan, Inc.*, Case No. 15-00266 SOM/RLP, 2015 WL 6472231, at \*5 (D. Haw.  
22 Oct. 27, 2015) (remanding medical malpractice claims to state court).

23 Alternatively, under 28 U.S.C. § 1332, federal district courts have original jurisdiction  
24 over civil actions in diversity cases “where the matter in controversy exceeds the sum or value  
25 of \$75,000” and where the matter is between “citizens of different states.” 28 U.S.C. § 1332.  
26 “Subject matter jurisdiction based upon diversity of citizenship requires that no defendant have  
27 the same citizenship as any plaintiff.” *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d  
28 495, 499 (9th Cir.2001) (per curiam), *abrogated on other grounds by Hertz Corp. v. Friend*,  
559 U.S. 77, 130 S.Ct. 1181 (2010), *citing* 28 U.S.C. § 1332(a). “A plaintiff suing in federal

1 court must show in his pleading, affirmatively and distinctly, the existence of whatever is  
2 essential to federal jurisdiction, and, if he does not do so, the court . . . on discovering the  
3 [defect], must dismiss the case, unless the defect be corrected by amendment.” *Id.*, quoting  
4 *Smith v. McCullough*, 270 U.S. 456 (1926).

5 As an initial matter, Plaintiff does not make any allegation that diversity jurisdiction  
6 exists. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-858 (9th Cir. 2001) (“the party  
7 asserting diversity jurisdiction bears the burden of proof.”). Moreover, Plaintiff resides in  
8 California and Defendant Fresno Imaging Center has its principal place of business in  
9 California. Both parties are citizens of California and diversity jurisdiction thus does not exist.  
10 28 U.S.C. § 1332(c)(1) (“a corporation shall be deemed to be a citizen of every State and  
11 foreign state by which it has been incorporated and of the State or foreign state where it has its  
12 principal place of business.”) Defendant Chong also appears to reside in California, making  
13 diversity jurisdiction impossible. Finally, Plaintiff makes no allegations related to the amount in  
14 controversy in the case, precluding diversity jurisdiction.

15 Dismissal of a *pro se* complaint without leave to amend is appropriate where any  
16 opportunity to amend the complaint would be futile. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th  
17 Cir. 2000) (“a district court should grant leave to amend even if no request to amend the  
18 pleading was made, unless it determines that the pleading could not possibly be cured by the  
19 allegation of other facts.”). Remedial amendments would require Plaintiff to plead new facts  
20 that are completely different from the facts the Complaint already alleges. Dismissal without  
21 leave to amend is thus appropriate.

## 22 **VI. RECOMMENDATION**

23 For the reasons set forth above, the Court finds that the Complaint fails to state a claim  
24 under 28 U.S.C. § 1915(e)(2). Accordingly, the Court RECOMMENDS that the Application to  
25 Proceed *In Forma Pauperis* be DENIED and the Complaint be DISMISSED WITHOUT  
26 LEAVE TO AMEND.

27 These findings and recommendations will be submitted to the United States District  
28 Judge assigned to this case pursuant to the provisions of Title 28 of the United States Code

1 section 636(b)(1). Within fifteen (15) days after being served with these findings and  
2 recommendations, the parties may file written objections with the Court. The document should  
3 be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties  
4 are advised that failure to file objections within the specified time may waive the right to appeal  
5 the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v.*  
6 *Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

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8 IT IS SO ORDERED.

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10 Dated: October 31, 2016

/s/ Eric P. Groj  
11 UNITED STATES MAGISTRATE JUDGE  
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