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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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DOLORES MARTINEZ,

Case No. 2:13-cv-5533-ODW(FFMx)

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Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS [24] AND
DENYING PLAINTIFF'S MOTION
TO STRIKE DEFENDANT'S
PLEADINGS, STRIKE RECAST
COMPLAINT, AND SERVE
SUPPLEMENTAL PLEADING [26]**

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v.

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NAVY LEAGUE OF THE UNITED
STATES,

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Defendant.

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I. INTRODUCTION

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Plaintiff Dolores Martinez, proceeding *pro se*, alleges in her First Amended Complaint (“FAC”) that she had a “trip and fall” accident while attending an event sponsored by Defendant Navy League of the United States (“Navy League”). (FAC ¶ 7.) This Court has subject-matter jurisdiction based on diversity under 28 U.S.C. § 1332(a). On October 21, 2013, Navy League filed the present Motion to Dismiss Martinez’s FAC under Federal Rules of Civil Procedure 41(b), or in the alternative, under Rule 12(b)(6). (ECF No. 24.) Subsequently, Martinez filed a Motion to Strike Defendant’s Pleading, Strike Recast Complaint, and Serve Supplemental Pleading. (ECF No. 26.) For the reasons discussed below, the Court **GRANTS** Navy League’s Motion to Dismiss and **DENIES** Martinez’s Motion.¹

¹ After carefully considering the papers filed in connection with these Motions, the Court deems these matters appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

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II. BACKGROUND

Martinez is appearing *pro se* in this action. Her FAC lists one claim for personal injury against Navy League. (FAC ¶ 17.) She asserts that she was injured as a direct result of Navy League’s negligence in violation of section 39933 of the California Government Code. (FAC ¶¶ 1–2.) This claim relates to Martinez’s attendance at a Navy Week event at the Los Angeles Harbor on July 31, 2011, where she had planned to take a tour of the USS Abraham Lincoln. (FAC ¶ 13.) Martinez alleges that on her way to the aircraft carrier she was forced by the crowd to walk along the perimeter of the path, against a fence. (FAC ¶ 15.) She then alleges that she tripped over a bracket holding up the fence and sustained serious injuries. (FAC ¶ 20.)

Martinez filed her original Complaint on July 31, 2013. (ECF No. 1.) On September 19, 2013, the Court granted with leave to amend Navy League’s Motion to Dismiss Martinez’s original Complaint for non-opposition. (ECF No. 11.)

On October 3, 2013, Martinez filed her FAC, along with a “Request for Review of Recast Complaint”. (ECF Nos. 16, 17.) The Court then struck as moot her “Request for Review,” since it had no legal foundation. (ECF No. 19.) Navy League filed the present Motion to Dismiss Martinez’s FAC on October 21, 2013. (ECF No. 24.) Martinez subsequently filed her own Motion on November 4, 2013. (ECF No. 26.) She asks the Court to (1) “strike Defendant’s pleading,” (2) “strike recast complaint,” and (3) to allow her to “serve supplemental pleadings.” She filed no formal opposition to Navy League’s Motion to Dismiss her FAC.

III. LEGAL STANDARD

Dismissal under Rule 12(b)(6) can be based on “the lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint need only satisfy the minimal notice pleading requirements of Rule 8(a)(2)—a short and plain statement—to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); Fed. R. Civ.

1 P. 8(a)(2). For a complaint to sufficiently state a claim, its “[f]actual allegations must
2 be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*
3 *Twombly*, 550 U.S. 544, 555 (2007). While specific facts are not necessary so long as
4 the complaint gives the defendant fair notice of the claim and the grounds upon which
5 the claim rests, a complaint must nevertheless “contain sufficient factual matter,
6 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
7 *Iqbal*, 556 U.S. 662, 678 (2009).

8 *Iqbal*’s plausibility standard “asks for more than a sheer possibility that a
9 defendant has acted unlawfully,” but does not go so far as to impose a “probability
10 requirement.” *Id.* Rule 8 demands more than a complaint that is merely consistent
11 with a defendant’s liability—labels and conclusions, or formulaic recitals of the
12 elements of a cause of action do not suffice. *Id.* Instead, the complaint must allege
13 sufficient underlying facts to provide fair notice and enable the defendant to defend
14 itself effectively. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The
15 determination whether a complaint satisfies the plausibility standard is a “context-
16 specific task that requires the reviewing court to draw on its judicial experience and
17 common sense.” *Iqbal*, 556 U.S. at 679.

18 When considering a Rule 12(b)(6) motion, a court is generally limited to the
19 pleadings and must construe “[a]ll factual allegations set forth in the complaint . . . as
20 true and . . . in the light most favorable to [the plaintiff].” *Lee v. City of L.A.*, 250 F.3d
21 668, 688 (9th Cir. 2001). Conclusory allegations, unwarranted deductions of fact, and
22 unreasonable inferences need not be blindly accepted as true by the court. *Sprewell v.*
23 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Yet, a complaint should be
24 dismissed only if “it appears beyond doubt that the plaintiff can prove no set of facts”
25 supporting plaintiff’s claim for relief. *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.
26 1999).

27 In addition, pleadings of *pro se* litigants are held to less rigid standards than
28 those drafted by attorneys. *Haines v. Kerner*, 404 US 519, 520 (1972). Yet, even *pro*

1 *se* pleadings “must meet some minimum threshold in providing a defendant with
2 notice of what it is that it allegedly did wrong.” *Brazil v. U.S. Dep’t. of the Navy*, 66
3 F3d 193, 199 (9th Cir. 1995).

4 **IV. DISCUSSION**

5 Martinez argues in her Motion that the filing of her FAC was “inadvertent” and
6 that the Court should strike it. She also argues that Navy League’s Motion to Dismiss
7 is a “sham” and that the Court should allow her to re-file her FAC. (ECF No. 26
8 ¶¶ 1–3.) In the Motion to Dismiss, Navy League argues that the FAC should be
9 dismissed under Rule 41(b) for failure to comply with a court order, or in the
10 alternative, under Rule 12(b)(6) for failure to state a claim. (ECF No. 24.)

11 **A. Plaintiff’s Motion to Strike Defendant’s Pleadings, Strike Recast 12 Complaint, and Serve Supplemental Pleadings**

13 While Martinez’s Motion was filed after Navy League’s Motion to Dismiss, the
14 Court finds it appropriate to address her Motion first. Martinez moves the court to (1)
15 strike Defendant’s pleadings, strike recast complaint, and serve supplemental
16 pleadings. *Id.* For the reasons discussed below, the Court **DENIES** the Motion and
17 instead interprets it as Martinez’s Opposition to the Motion to Dismiss.

18 First, in Martinez’s Motion, she initially asks the Court to “strike Defendant’s
19 pleadings.” She refers to docket number 24 as the “pleading” she argues should be
20 stricken. (ECF No. 26, ¶ 1.) Docket number 24 is Navy League’s Motion to
21 Dismiss—not a pleading. Fed R. Civ. P. 7(a)–(b). Because Navy League has yet to
22 plead anything in this case, Martinez’s Motion to Strike is flatly inapplicable at this
23 stage of litigation. Therefore, the Court is unable to grant the requested relief.

24 Second, Martinez’s request that the Court strike her FAC cannot be granted.
25 On October 3, 2013, Martinez filed what she called a “Request for Review of Recast
26 Complaint.” (ECF No. 17.) Attached to that request was her FAC. (ECF No. 16.)
27 Martinez asserts that she did not intend these documents to be filed separately, but
28 instead wanted her FAC to be an attachment to the request for review. (ECF No. 26,

1 5.) She claims she wanted the Court to review her FAC, but instead the two
2 documents were detached, and her FAC was inadvertently filed upon the insistence of
3 the intake clerk. *Id.* The request for review was improper, and groundless. The Court
4 does not play the role of counsel, and will not review pleadings before they are
5 submitted. Further, Martinez’s FAC—rather than a request for review—needed to be
6 filed on or before October 3, 2013. The docket in this case reflects that Martinez’s
7 FAC was filed on time, despite her best efforts to the contrary. (ECF No. 16.)
8 Obliging her request for review would have rendered any subsequently filed “official”
9 FAC untimely. Consequently, the Court cannot grant Martinez’s request that her FAC
10 be stricken.

11 Martinez also moves the Court to “serve supplemental pleadings.” Her request
12 is unintelligible. She quotes the entire text of Rule 15(d), and then inexplicably makes
13 reference to ongoing settlement negotiations with Navy League. References to
14 settlement negotiations have no bearing on Martinez’s statement of a claim. *See* Fed.
15 R. Civ. P. 15(d). The Court further notes that references to settlement negotiations are
16 utterly inappropriate and inadmissible as evidence of liability under Federal Rule of
17 Evidence 408. The Court is unable discern what it is Martinez wants, and thus cannot
18 grant Martinez’s request.

19 In light of the discussion above, the Court instead construes Martinez’s Motion
20 as an opposition to Navy League’s Motion to Dismiss. The caption to her Motion
21 reads “L.R. 7-9 Opposing Papers.” Also, the filing makes multiple references to Navy
22 League’s Motion to Dismiss. Although Martinez’s Motion did not address any of the
23 merits of Navy League’s arguments, it seemed at times to be attacking the procedural
24 validity of Navy League’s Motion to dismiss. Therefore, the Court finds that
25 Martinez intended her noticed Motion to actually be an opposition to Navy League’s
26 Motion to Dismiss. In so far as an actual noticed motion has been filed, the Court
27 **DENIES** that Motion. With this in mind, the Court now turns to the substance of
28 Navy League’s Motion to Dismiss.

1 **B. Defendant’s Motion to Dismiss**

2 Navy League moves to dismiss on two grounds. First, Navy League argues that
3 Martinez’s FAC should be dismissed under Rule 41(b) for failure to comply with a
4 court order. Second, Navy League contends that the FAC fails to state a claim and
5 should be dismissed under Rule 12(b)(6).

6 **1. Rule 41(b): Failure to Comply With Court Order**

7 Navy League first argues that Martinez’s FAC should be dismissed under Rule
8 41(b) because she failed to correct the deficiencies identified in Navy League’s prior
9 Motion to Dismiss, as ordered by this Court, and she failed to timely file her FAC.
10 (Def.’s Mot. 10.) As discussed below, the Court finds these arguments unavailing.

11 A defendant may move to dismiss an action or any claim against it, if a plaintiff
12 fails to comply with a court order. Fed. R. Civ. P. 41(b). However, dismissal on these
13 grounds rests in the court’s sound discretion. *Link v. Wabash R.R. Co.*, 370 US 626,
14 633 (1962). In addition, courts are strongly inclined to reach decisions on the merits.
15 *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999).

16 Martinez’s failure to correct the deficiencies identified in Navy League’s
17 original Motion to Dismiss does not warrant dismissal. On September 19, 2013, this
18 Court granted Navy League’s Motion to Dismiss the original Complaint with 14 days
19 leave to amend. (ECF No. 11.) The Court warned that “refiling the original
20 Complaint without addressing the deficiencies raised in Navy League’s Motion to
21 Dismiss may result in dismissal of this case.” *Id.* at 3. Although the Court alluded to
22 the deficiencies in her original Complaint, those issues were not specifically addressed
23 by the Court, and the ultimate grounds for dismissal were procedural, in that she failed
24 to oppose Navy League’s Motion to Dismiss. Absent an express order from the Court
25 regarding the particular defects in Martinez’s Complaint, dismissal under this
26 argument is unwarranted.

27 Additionally, Martinez’s timely submission of her FAC is not at issue, and
28 cannot serve as grounds for dismissal under the instant Motion. Under the Court’s

1 Order, Martinez was required to file an FAC no later than October 3, 2013. (ECF No.
2 11.) As discussed above, rather than intending to file an amended complaint,
3 Martinez tried to file what she called a “Request to Review Recast Complaint” and
4 attached to that request her FAC. (ECF Nos. 16, 17.) Yet the docket reflects her FAC
5 was filed on time, notwithstanding Martinez’s intention to merely submit a draft.
6 (ECF No. 16.) The Court considers the FAC timely.

7 While Martinez’s original Complaint was dismissed on procedural grounds,
8 the Court this time around chooses to reach the merits of Martinez’s FAC. *Yourish*,
9 191 F.3d at 990. The Court thus finds dismissal under 41(b) unfitting.

10 **2. Rule 12(b)(6): Failure to State a Claim**

11 Navy League’s second ground for dismissal is more availing. Navy League
12 next argues that the Court should dismiss Martinez’s FAC because it fails to state a
13 claim for relief. (Def.’s Mot 12.) In her FAC, Martinez refers generally to her “cause
14 of action” as a “personal injury” claim, and the facts alleged in her FAC could be
15 construed as an attempt to plead a general negligence claim. (FAC ¶ 48.) She further
16 cites violation of section 39933 of the California Government Code as her basis of
17 Navy League’s duty under what looks to be negligence *per se*. *Id* at 2. As grounds
18 for dismissal under Rule 12(b)(6) Navy League contends that (1) section 39933 is
19 inapposite in the instant case, and (2) Martinez fails to sufficiently plead general
20 negligence in her FAC. (Def.’s Mot. 13–14.)

21 Under California law, where a negligence action is predicated on a defendant's
22 violation of a statute, plaintiffs may be entitled to the benefit of the negligence *per se*
23 doctrine in establishing their prima facie case. Cal. Evid. Code § 669(a); *Quiroz v.*
24 *Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222, 244 (Cal. Ct. App. 2006). This evidentiary
25 doctrine presumes defendant's duty and breach, and the only issue left for plaintiff to
26 prove is whether the violation proximately caused the injury. *Id*.

27 Here, Martinez predicates her negligence claim on a violation of section 39933
28 titled “Public Access to Navigable Waters, Water Fronts, And Streets.” Martinez’s

1 reliance on this statute is misplaced. Section 39933 addresses the public trust doctrine
2 in California, essentially the state’s power to control, regulate and utilize its navigable
3 waterways and the lands lying beneath them. *Pers. Watercraft Coal. v. Bd. of*
4 *Supervisors*, 122 Cal. Rptr. 2d 425, 437 (Cal. Ct. App. 2002). Martinez’s claim has
5 no relation to the public trust doctrine, and the Court finds no authority for section
6 39933’s appropriate application under these circumstances. Moreover, Martinez’s
7 FAC does not provide the Court with any support—and the Court finds none—for the
8 assertion that Martinez’s alleged injury was of a “nature which [section 39933] was
9 designed to prevent.” Cal. Evid. Code § 669(a)(3). Accordingly, section 39933
10 cannot avail Martinez of the benefit of the negligence *per se* doctrine.

11 As stated above, the facts alleged in Martinez’s FAC could also be construed as
12 an attempt to plead a general negligence claim. (FAC ¶ 16.) The first element of any
13 negligence claim is the existence of a duty, and where there is no duty, there can be no
14 negligence. *Toomer v. U.S.*, 615 F.3d 1233, 1236 (9th Cir. 2010). Furthermore, the
15 existence of a duty of care is a separate issue from the question of whether a defendant
16 breached that duty of care. *Kockelman v. Segal*, 71 Cal. Rptr. 2d 552, 556 (Cal. Ct.
17 App. 1998). Here, Martinez merely pleads that she was injured at a Navy League
18 sponsored event, and as such Navy League owed her a duty, yet she provides no
19 further facts to support that claim. Martinez fails to assert that Navy League was the
20 owner of the premises, or that it was in possession of the premises where she was
21 injured. *Cody F. v. Falletti*, 112 Cal. Rptr. 2d 593, 601 (Cal. Ct. App. 2001). She also
22 fails to allege that Navy League had reason to anticipate the probability of an injury,
23 or that it had an opportunity to prevent the injury or warn of the peril. *Id.* Not only
24 has Martinez failed to establish a duty owed to her by Navy League, she fails to plead
25 facts relevant to whether any breach of such a duty constitutes actionable negligence.
26 *Id.* In other words, Martinez has failed to plead *how* Navy League failed to act
27 reasonably. Legal labels and conclusions, or formulaic recitals of the elements of a
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1 cause of action do not suffice when stating a claim. *Iqbal*, 556 U.S. at 678.
2 Therefore, the FAC fails to state a claim under Rule 12(b)(6).

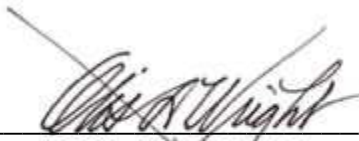
3 Accordingly, the Court **GRANTS** Navy League's Motion to Dismiss.

4 **V. CONCLUSION**

5 For the above reasons, the Court construes Martinez's Motion as her opposition,
6 and in so far as an actual noticed motion has been filed, the Court **DENIES** that
7 Motion. (ECF No. 26.) Also, the Court **GRANTS** Navy League's Motion to Dismiss
8 with **LEAVE TO AMEND**. (ECF No. 24.) Martinez may file a Second Amended
9 Complaint within 14 days of this order. However, she is warned that filing another
10 Complaint without addressing the deficiencies raised in this Order will result in
11 dismissal of this case *with prejudice*.

12 **IT IS SO ORDERED.**

13 November 25, 2013

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17 **OTIS D. WRIGHT, II**
18 **UNITED STATES DISTRICT JUDGE**