UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEOFFREY FITZGERALD WILSON, Plaintiff, v. TANNAZ H. AZINKHAN, Ph.D, et al., Defendants.	Case No. CV 16-8092 JVS(JC) ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND

I. BACKGROUND AND SUMMARY

On October 31, 2016, Geoffrey Fitzgerald Wilson ("plaintiff"), who is at liberty, is proceeding without a lawyer (*i.e.*, "pro se"), and has been granted leave to proceed *in forma pauperis*, filed a Civil Rights Complaint ("Complaint" or "Comp.") pursuant to 42 U.S.C. § 1983 ("Section 1983") against: (1) Tannaz H. Azinkhan, Ph.D. ("Azinkhan"); (2) Sharper Future; and (3) multiple unnamed individuals identified only as "Does 1-10" ("Doe Defendants") (collectively "defendants"). (Comp. at 1-4). Plaintiff seeks monetary relief from defendant Azinkhan in her individual capacity only, from defendant Sharper Future in its official capacity only, and from the Doe Defendants in their individual and official capacities.

As the Complaint is deficient in multiple respects, including those detailed below, it is dismissed with leave to amend.

II. THE SCREENING REQUIREMENT

As plaintiff is proceeding *in forma pauperis*, the Court must screen the Complaint, and is required to dismiss the case at any time it concludes the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. §§ 1915(e)(2)(B).

When screening a complaint to determine whether it states any claim that is viable (*i.e.*, capable of succeeding), the Court applies the same standard as it would when evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Rosati v. Igbinoso, 791 F.3d 1037, 1039 (9th Cir. 2015) (citation omitted). Rule 12(b)(6), in turn, is read in conjunction with Rule 8(a) of the Federal Rules of Civil Procedure ("Rule 8"). Zixiang Li v. Kerry, 710 F.3d 995, 998-99 (9th Cir. 2013). Under Rule 8, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require detailed factual allegations, at a minimum a complaint must allege enough specific facts to provide *both* "fair notice" of the particular claim being asserted *and* "the grounds upon which [that claim] rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 & n.3 (2007) (citation and quotation marks omitted); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Rule 8 pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (citing id. at 555).

Thus, to avoid dismissal, a civil rights complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Nordstrom v. Ryan, 762 F.3d 903, 908 (9th Cir. 2014) (citations and quotation marks omitted). A claim is "plausible" when the facts alleged in the complaint would support a reasonable inference that the plaintiff is entitled to relief

from a specific defendant for specific misconduct. Iqbal, 556 U.S. at 678 (citation omitted). Allegations that are "merely consistent with" a defendant's liability, or reflect only "the mere possibility of misconduct" do not "*show[]* that the pleader is entitled to relief" (as required by Fed. R. Civ. P. 8(a)(2)), and thus are insufficient to state a claim that is "plausible on its face." Iqbal, 556 U.S. at 678-79 (citations and quotation marks omitted). At this preliminary stage, "well-pleaded factual allegations" in a complaint are assumed true, while "[t]hreadbare recitals of the elements of a cause of action" and "legal conclusion[s] couched as a factual allegation" are not. Id. (citation and quotation marks omitted); Jackson v. Barnes, 749 F.3d 755, 763 (9th Cir. 2014) ("mere legal conclusions 'are not entitled to the assumption of truth'") (quoting id.), cert. denied, 135 S. Ct. 980 (2015).

Pro se complaints in civil rights cases are interpreted liberally to give plaintiffs "the benefit of any doubt." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation and internal quotation marks omitted). If a *pro se* complaint is dismissed because it does not state a claim, the court must freely grant "leave to amend" (that is, give the plaintiff a chance to file a new, corrected complaint) if it is "at all possible" that the plaintiff could fix the identified pleading errors by alleging different or new facts. Cafasso v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1058 (9th Cir. 2011) (citation omitted); Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000) (en banc) (citations and internal quotation marks omitted).

III. THE COMPLAINT

Liberally construed, the Complaint alleges the following:

Defendant Sharper Future provides mental health services under a contract with the State of California. (Comp. at 2, 4). As a condition of his parole, plaintiff was required to attend therapy sessions conducted by defendant Azinkhan, a psychologist and employee of Sharper Future. (Comp. at 2, 5).

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On October 25, 2014, during a group therapy session, defendant Azinkhan

read plaintiff's arrest record to the attendees without plaintiff's consent. (Comp. at 4-5). Defendant Azinkhan had privileged access to plaintiff's arrest record and had a duty to refrain from releasing the private, confidential, or privileged information, and a duty to attempt to protect persons from harm, misuse, or misrepresentation as a result of her statements. (Comp. at 5). Defendant Azinkhan breached her duty by disclosing information from plaintiff's arrest record to members of the therapy group. (Comp. at 5).

On November 1, 2014, starting at approximately 12:05 p.m., defendant Azinkhan conducted a group therapy session with plaintiff in attendance. (Comp. at 5). Defendant Azinkhan told plaintiff that he would not be allowed to answer questions during the session by saying "I did not commit the crime." (Comp. at 5). When plaintiff wrote down the defendant's prohibition on the back of a questionnaire, defendant Azinkhan asked plaintiff, "What are you writing?" (Comp. at 5). Plaintiff replied, "What you said." (Comp. at 5). Defendant Azinkhan ordered plaintiff to "get out." (Comp. at 5). Plaintiff said "thank you," and left approximately 11 minutes after the group therapy session had started. (Comp. at 5).

Defendant Azinkhan later "misrepresented" in her report to a law enforcement agent that plaintiff had disrupted the November 1 group-therapy session for up to 40 minutes. (Comp. at 5-6). Due to the inaccurate report, plaintiff was "arrested and jailed." (Comp. at 6).

Defendant Sharper Future and the Doe Defendants "created an atmospher[e] where this mistreatment was tol[e]rated and condoned." (Comp. at 6).

Plaintiff claims defendants deprived him of due process under the Fifth, Sixth, and Fourteenth Amendments, violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment, and deprived plaintiff of his First Amendment right to free speech. (Comp. at 6-8).

IV. DISCUSSION

A. Pertinent Law – Section 1983 Claims; "Color of Law" Requirement

To state a claim under Section 1983, a plaintiff must allege that a defendant, while acting under color of state law, caused a deprivation of the plaintiff's federal rights. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988) (citations omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (citation omitted).

It is generally presumed that private individuals and entities do *not* act "under color of state law" within the meaning of Section 1983. See Florer v. Congregation Pidyon Shevuyim, N.A., 639 F.3d 916, 922 (9th Cir. 2011) (citation omitted), cert. denied, 565 U.S. 1116 (2012). Such private parties may be held liable under Section 1983 for constitutional deprivations, but only to the extent their actions "are fairly attributable to the state. . . ." Id. (citing Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922, 937 (1982)).

The U.S. Supreme Court has established at least four tests for determining when the conduct of a private party may properly be considered "state action" for purposes of Section 1983, namely, "(1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1140 (9th Cir. 2012) (citation and quotation marks omitted). A Section 1983 plaintiff has the burden to plead and prove state action by a private defendant. See id. (citing Lugar, 457 U.S. at 937).

When a private business entity engages in "state action," it still cannot be held liable under Section 1983 unless the plaintiff's constitutional violation was caused by the entity's "policy, practice, or custom" or by an "order by a policy-making officer[.]" See Tsao, 698 F.3d at 1138-39 (applying "reasoning underlying Monell [v. Department of Social Services, 436 U.S. 658, 691 (1978)] . . . [to] private entities acting under color of state law") (citations omitted).

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B. Analysis

1. Defendant Azinkhan

Here, the Complaint does not plausibly allege that the conduct of defendant Azinkhan – a psychologist employed by what appears to be a private mental health care provider – amounted to state action under any of the foregoing tests.

First, under the "public function test," private individuals or entities are deemed to be state actors for purposes of Section 1983 only when they perform a public function that has been "traditionally the *exclusive* prerogative of the State." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (citations and quotation marks omitted; emphasis in original). Here, the Complaint does not plausibly allege that defendant Azinkhan acted pursuant to an *exclusive* governmental function by providing group therapy. Cf, e.g., Jensen v. Lane County, 222 F.3d 570, 574 (9th Cir. 2000) (involuntary "mental health commitments" facilitated by private physician "do not constitute a function 'exclusively reserved to the State'"); Merrill v. Mental Health Systems, 2016 WL 4761789, *4 (S.D. Cal. Sept. 13, 2016) (dismissing complaint against private entity that provided treatment services for parolees where plaintiff failed to allege that provision of treatment to parolees traditionally an exclusive function of state so as to satisfy state action public function test); Craig v. City of King City, 2012 WL 1094327, *4 (N.D. Cal. Mar. 29, 2012) (administration of police fitness for duty examination by private psychologist "not a traditional and exclusive government function"); Heggem v. Holmes, 2011 WL 7758243, *5 (W.D. Wash. Dec. 9, 2011) ("Providing chemical dependency counseling is not traditionally and exclusively a governmental function. . . ."), report and recommendation adopted, 2012 WL 1378786 (W.D. Wash. Apr. 20, 2012); see also Rendell-Baker, 457 U.S. at 842 ("That a private entity performs a function which serves the public does not make its acts state action.") (footnote omitted).

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Second, under the joint action test, a private individual may be liable as a

state actor under Section 1983 if he or she was part of a conspiracy or was a "willful participant in [other] joint action" with a state actor that caused the constitutional violation. Franklin v. Fox, 312 F.3d 423, 445 (9th Cir. 2002) (joint action test "focuses on whether the state has 'so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity'") (citations and internal quotation marks omitted); DeGrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000) ("Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.") (citation omitted). There must be "a substantial degree of cooperation" between private individuals and the government to establish Section 1983 liability under the joint action test. Franklin, 312 F.3d at 445.

Here, allegations that defendant Azinkhan breached a duty to protect plaintiff's private information during the October 25 group therapy session, and/or "misrepresented" to law enforcement the nature and extent of plaintiff's actions during the November 1 session, without more, do not plausibly suggest that defendant Azinkhan cooperated to any substantial degree with a state actor, much less engaged in a conspiracy with a state actor to violate plaintiff's constitutional rights. Cf., e.g., Dietrich v. John Ascuaga's Nugget, 548 F.3d 892, 899-900 (9th Cir. 2008) (granting summary judgment in favor of defendant private employees of event organizer who requested that plaintiff and other petition gatherers be removed from public sidewalk where plaintiff presented no evidence that defendants "did anything more than summon police"); Lovelace v. Oregon, 2009 WL 2450298, *6 (D. Or. Aug. 10, 2009) ("providing sex offender treatment and reporting to parole officials on the progress of [parolee's] treatment" insufficient to treat therapist as "state actor") (citing, in part, Kirtley v. Rainey, 326 F.3d 1088, 1093 (9th Cir. 2003)).

Third, the Complaint does not plausibly allege that defendant Azinkhan's

private conduct was effectively converted into state action through governmental compulsion/coercion or due to any *close* nexus between defendant Azinkhan and a governmental entity. See generally Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 295 (2001) ("[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'") (citation omitted); Rendell-Baker, 457 U.S. at 840 ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.") (citation and quotation marks omitted); Kirtley, 326 F.3d at 1094 ("The compulsion test considers whether the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action.") (citation omitted); Merrill, 2016 WL 4761789 at *4-5 (dismissing Section 1983 claim where plaintiff parolee, who was required to undergo treatment at private defendant treatment facility as condition of parole, failed adequately to allege state action under public function test because State neither directly compelled nor was directly involved in defendant's conduct about which plaintiff complained; fact that the State authorized defendant to coordinate and provide treatment to parolees does not convert defendant's conduct into state action under governmental nexus test); Heggem, 2011 WL 7758243 at *6 (noting that under Washington state law, private chemical dependency counselor "functions independently from the State, exercising professional obligations primarily to his or her client" and "is under [no] governmental compulsion to submit an allegedly fraudulent report if asked to do so by the State"). Without more, conclusory allegations that defendant Azinkhan was employed by a private mental health services organization that contracted with the state (Comp. at 2, 4-5) do not show that defendant Azinkhan was acting under color of law under the circumstances. See, e.g., Rendell-Baker, 457 U.S. at 840-41 (acts

of private entity that primarily does business with the government "do not become acts of the government by reason of [the entity's] significant or even total engagement in performing public contracts").

Finally, plaintiff's bare allegations that defendant Azinkhan was "at all times [] acting under color of state law" and/or was "acting for and on behalf of the California Department of Corrections" (Comp. at 4), without more, are insufficient to state a cognizable Section 1983 claim against the private defendant. See, e.g., DeGrassi, 207 F.3d at 647 ("[A] bare allegation of [] joint action will not overcome a motion to dismiss; the plaintiff must allege "facts tending to show . . . [acts] under color of state law or authority.") (citation, internal quotation marks, and brackets omitted); see also Iqbal, 556 U.S. at 680-84 (conclusory allegations in complaint which amount to nothing more than a "formulaic recitation of the elements" are insufficient under pleading standard in Fed. R. Civ. P. 8) (citations omitted).

2. Defendant Sharper Future

The Complaint also fails plausibly to allege that Sharper Future is liable under Section 1983 for any deprivation of plaintiff's constitutional rights under color of state law. Plaintiff does not allege facts which plausibly suggest that Sharper Future, which allegedly contracted with California to provide the mental health services plaintiff was required to attend, maintained a policy, decision, or custom which in any way caused a deprivation of plaintiff's constitutional rights, much less one that may properly be attributed to the government for purposes of Section 1983. Plaintiff's conclusory allegation that "Sharper Future . . . created an atmospher[e] where [] mistreatment was tol[e]rated and condoned" (Comp. at 6), without more, is insufficient. Cf., e.g., AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 636-37 (9th Cir. 2012) (To survive motion to dismiss complaint must contain "factual allegations that . . . plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation" – a "bare allegation" that officer's conduct

conformed to unspecified government policy, custom or practice is insufficient.) (citations and internal quotation marks omitted).

3. Doe Defendants

As noted above, the Complaint names ten Doe Defendants. (Comp. at 1). While the Local Rules permit plaintiff to sue up to ten unidentified "Doe" defendants (see Local Rule 19-1), as a general rule the use of fictitiously named parties is disfavored in federal court. Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). Moreover, since plaintiff has not made individualized allegations about any of the Doe Defendants, such unidentifiable defendants may be dismissed from the Complaint. See id.; McConnell v. Marine Engineers Beneficial Association Benefit Plans, District 1 - Pacific Coast District, 526 F. Supp. 770, 774 (N.D. Cal. 1981). At a minimum, plaintiff must refer to each unidentified defendant by a separate fictitious name (*i.e.*, "John Doe # 1," "John Doe # 2," etc.) and allege facts that demonstrate a causal link between each such individual's actions under color of law and an alleged constitutional violation.

V. ORDERS

In light of the foregoing, IT IS HEREBY ORDERED:

1. The Complaint is dismissed with leave to amend. If plaintiff intends to pursue this matter, he shall file a First Amended Complaint within fourteen (14) days of the date of this Order which cures the pleading defects set forth herein.[1]

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[1]Any First Amended Complaint must: (a) be labeled "First Amended Complaint"; (b) be complete in and of itself and not refer in any manner to the original Complaint – *i.e.*, it must include all claims on which plaintiff seeks to proceed (Local Rule 15-2); (c) contain a "short and plain" statement of the claim(s) for relief (Fed. R. Civ. P. 8(a)); (d) make each allegation "simple, concise and direct" (Fed. R. Civ. P. 8(d)(1)); (e) present allegations in sequentially numbered paragraphs, "each limited as far as practicable to a single set of circumstances" (Fed. R. Civ. P. 10(b)); (f) state each claim founded on a separate transaction or occurrence in a separate count as needed for clarity (Fed. R. Civ. P. 10(b)); (g) set forth clearly the sequence of events giving rise to the claim(s) for relief; (h) allege specifically what each defendant did and how that defendant's conduct specifically violated plaintiff's civil rights; and (i) not change the

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2. In the event plaintiff elects not to proceed with this action, he shall sign and return the attached Notice of Dismissal by the foregoing deadline which will result in the voluntary dismissal of this action without prejudice.

3. Plaintiff is cautioned that, absent further order of the Court, plaintiff's failure timely to file a First Amended Complaint or Notice of Dismissal, may be deemed plaintiff's admission that amendment is futile, and may result in the dismissal of this action with or without prejudice on the grounds set forth above, on the ground that amendment is futile, for failure diligently to prosecute and/or for failure to comply with the Court's Order.

IT IS SO ORDERED.

DATED: July 25, 2017

HONORABLE JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

Attachment

[1](...continued)
nature of this suit by adding new, unrelated claims or defendants, cf. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (civil rights plaintiff may not file "buckshot" complaints – *i.e.*, a pleading that alleges unrelated violations against different defendants).