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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JOHN FREDERICK WHEELER,)	Case No.: 1:12-cv-00541 - AWI - JLT
)	
Plaintiff,)	FINDINGS AND RECOMMENDATION
)	DENYING PLAINTIFF’S MOTION TO PROCEED
v.)	IN FORMA PAUPERIS AND DISMISSING THE
)	COMPLAINT WITHOUT LEAVE TO AMEND
UNITED STATES, et al.,)	
)	
Defendants.)	

John Frederick Wheeler (“Plaintiff”) seeks to proceed with an action for racial discrimination and violation of his civil rights against the United States and Jon Van Boening, the president of Bakersfield Memorial Hospital (collectively, “Defendants”). (Doc. 1). Plaintiff alleges the defendants violated his civil rights and discriminated against him based upon Plaintiff’s race. For the following reasons, the Court recommends Plaintiff’s motion to proceed in forma pauperis (Doc. 2) be **DENIED** and the complaint be **DISMISSED** without leave to amend.

I. MOTION TO PROCEED IN FORMA PAUPERIS

As a general rule, all parties instituting any civil action, suit or proceeding in a United States District Court must pay a filing fee. 28 U.S.C. § 1914(a). However, the Court may authorize the commencement of an action “without prepayment of fees and costs of security therefor, by a person who submits an affidavit that . . . the person is unable to pay such fees or give security therefor.” 28 U.S.C. § 1915(a)(1). Therefore, an action may proceed despite a failure to prepay the filing fee only if

1 leave to proceed *in forma pauperis* (“IFP”) is granted by the Court. *See Rodriguez v. Cook*, 169 F.3d
2 1178, 1177 (9th Cir. 1999).

3 The Ninth Circuit has held “permission to proceed in forma pauperis is itself a matter of
4 privilege and not a right; denial of an informa pauperis status does not violate the applicant’s right to
5 due process.” *Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (citing *Weller v. Dickson*, 314
6 F.2d 598, 600 (9th Cir. 1963)). In addition, the Court has broad discretion to grant or deny a motion to
7 proceed IFP. *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990); *Weller*, 314 F.2d at 600-01. In
8 making a determination, the court “must be careful to avoid construing the statute so narrowly that a
9 litigant is presented with a Hobson’s choice between eschewing a potentially meritorious claim or
10 foregoing life’s plain necessities.” *Temple v. Ellertorpe*, 586 F.Supp. 848, 850 (D.R.I. 1984).

11 Here, the Court recommends Plaintiff’s application to proceed be denied because, as discussed
12 below, Plaintiff’s complaint fails to state a meritorious claim upon which relief may be granted.¹ *See*
13 28 U.S.C. § 1915(e)(2).

14 **II. SCREENING REQUIREMENT**

15 When an individual seeks to proceed *in forma pauperis*, the Court is required to review the
16 complaint and identify “cognizable claims.” *See* 28 U.S.C § 1915(a)-(b). The Court must dismiss a
17 complaint, or portion of the complaint, if it is “frivolous, malicious or fails to state a claim upon which
18 relief may be granted; or . . . seeks monetary relief from a defendant who is immune from such relief.”
19 28 U.S.C. § 1915A(b); 28 U.S.C. § 1915(e)(2). A claim is frivolous “when the facts alleged rise to the
20 level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts
21 available to contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992).

22 ¹ Previously, Plaintiff has filed a number of non-meritorious lawsuits in this district. *See, e.g., Wheeler v. Payless*
23 *Towing*, No. 1:09-cv-1829-LJO-SMS, 2010 U.S. Dist. LEXIS 1684 (E.D. Cal. Jan. 11, 2010) (dismissed for failure to state
24 a claim); *Wheeler v. Healthy Smiles*, No. 1:09-cv-1772-OWW-SKO, 2010 U.S. Dist. LEXIS 125232 (dismissed with
25 prejudice for failure to state a claim upon which relief could be granted and failure to obey the court’s order); *Wheeler v.*
26 *United States*, No. 1:11-cv-1045-LJO-JLT, 2011 U.S. Dist. LEXIS 85366 (E.D. Cal. Aug. 3, 2011) (dismissed for lack of
27 jurisdiction); *Wheeler v. Bakersfield City*, No. 1:11-cv-1832-LJO-JLT, 2011 U.S. Dist. LEXIS 141203 (E.D. Cal. Dec. 8,
28 2011) (dismissed with prejudice as barred by the doctrine of res judicata); *Wheeler v. Bank of America*, No. 1:11-cv-1270-
LJO-JLT, 2012 U.S. Dist. LEXIS 8522 (E.D. Cal. Jan. 25, 2012) (dismissed with prejudice for failure to state a claim);
Wheeler v. Silver Chair, No. 1:12-cv-0260-LJO-JLT, 2012 U.S. Dist. LEXIS 32851 (E.D. Cal. Mar. 12, 2012) (motion to
proceed IFP denied, and complaint dismissed without leave to amend for failure to state a claim). **Consequently, Plaintiff
has been warned– and is here warned again– that repeated filing of cases lacking merit may result in the Court
ordering Plaintiff to show cause why he should not be declared a vexatious litigant and pre-filing restrictions be
imposed.** *See De Long v. Hennessy*, 912 F.2d 1144 (9th Cir. 1990).

1 **III. PLEADING STANDARDS**

2 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A
3 pleading stating a claim for relief must include a statement affirming the court’s jurisdiction, “a short
4 and plain statement of the claim showing the pleader is entitled to relief; and . . . a demand for the
5 relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P.
6 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se* pleadings are held to “less
7 stringent standards” than pleadings by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

8 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and
9 succinct manner. *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). The
10 purpose of the complaint is to give the defendant fair notice and the grounds upon which the complaint
11 stands. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The Supreme Court noted,

12 Rule 8 does not require detailed factual allegations, but it demands more than an
13 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
14 labels and conclusions or a formulaic recitation of the elements of a cause of action will
15 not do. Nor does a complaint suffice if it tenders naked assertions devoid of further
16 factual enhancement.

17 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks and citations omitted).

18 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d
19 266, 268 (9th Cir. 1982). The Court clarified further,

20 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim to
21 relief that is plausible on its face.” [Citation]. A claim has facial plausibility when the
22 plaintiff pleads factual content that allows the court to draw the reasonable inference that
23 the defendant is liable for the misconduct alleged. [Citation]. The plausibility standard is
24 not akin to a “probability requirement,” but it asks for more than a sheer possibility that a
25 defendant has acted unlawfully. [Citation]. Where a complaint pleads facts that are
26 “merely consistent with” a defendant’s liability, it “stops short of the line between
27 possibility and plausibility of ‘entitlement to relief.’

28 *Iqbal*, 129 S. Ct. at 1949 (citations omitted). When factual allegations are well-pled, a court should
assume their truth and determine whether the facts would make the plaintiff entitled to relief;
conclusions in the pleading are not entitled to the same assumption of truth. *Id.* The Court may grant
leave to amend a complaint to the extent that deficiencies of the complaint can be cured by an
amendment. *Lopez v. Smith*, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc).

1 **IV. PLAINTIFF’S ALLEGATIONS**

2 Plaintiff, a white male, alleges discrimination based on race by the United States and Jon Van
3 Boening, the president of Bakersfield Memorial Hospital. (Doc. 1 at 1). According to Plaintiff, a
4 physician at Memorial Hospital, Dr. Paw, refuses to perform an operation upon Plaintiff. *Id.* at 4.
5 Plaintiff contends Dr. Paw is “not of the same race,” and believes that if he was not white, “Dr. Paw
6 would not refuse to operate on him . . .” *Id.*

7 Plaintiff asserts he went to Memorial Hospital for treatment on January 24, 2012. (Doc. 1 at 5).
8 While treated in the emergency room, a nurse put an IV in his right hand, which Plaintiff believed was
9 stabbed through his vein and “down into his hand, causing blood to go into his hand and causing him
10 seveal [sic] pain[.]” *Id.* Due to the pain, Plaintiff pulled his hand back as a natural reaction. *Id.*
11 Plaintiff alleges the nurse then pulled the needle out of the IV “and instead of connecting the tubs that
12 she was supposed to collect the blood samples with . . . let blood drip on to plaintiffs [sic] hand and
13 then into the tubs.” *Id.* at 5-6. After his blood was drawn, he was hooked up to machines for an EKG
14 on his heart. *Id.* at 7. Then a man “with tatoos [sic] all over both his arms” told Plaintiff he was going
15 to put an IV in his arm and “no matter how much it hert [sic] Plaintiff better not move his arm.” *Id.*
16 (emphasis omitted). Plaintiff contends he feared for his safety and suffered “mental and emotional
17 distress” due to his treatment by the nurses.

18 According to Plaintiff, he had a lung infection and fluid around his heart. (Doc. 1 at 8). A
19 physician wanted to perform an examination on his heart, which Plaintiff refused because he believed
20 there was a chance the dye used could damage his kidney. *Id.* As described by Plaintiff, the doctor
21 “wanted to go inside his hart [sic] with a needle to take the excess flued [sic] from around his hart
22 [sic].” *Id.* A doctor attributed the fluid around Plaintiff’s heart to Plaintiff’s failure to take his thyroid
23 medication regularly, and Plaintiff signed himself out of the hospital. *Id.* at 12.

24 On March 13, 2012, Plaintiff returned to Memorial Hospital for chest pain and difficulty
25 breathing. (Doc. 1 at 13). Plaintiff alleges he was admitted to the hospital, and Dr. Paw informed
26 Plaintiff they would do a procedure to remove the fluid around his heart. *Id.* Plaintiff requested a
27 written explanation of the procedure, and upon reading the description discovered the doctor failed to
28 discuss the risks, including: puncture of the heart muscle, coronary artery, lung, liver, or stomach;

1 bleeding; a collapsed lung; heart attack; infection (pericarditis); and irregular heartbeats. *Id.* at 13-14.
2 Plaintiff reports he was given a consent form for the procedure, which included a section for “special
3 instructions.” *Id.* at 14. Under this section, Plaintiff wrote that he would hold the president and vice
4 president of Memorial Hospital, the doctor and others responsible for any injuries, and then signed the
5 form. *Id.* Plaintiff alleges a nurse later informed him the doctor would not perform the procedure with
6 the conditions set by Plaintiff. *Id.*

7 Plaintiff contends the president and vice president of Memorial Hospital are responsible for his
8 life, and that he is at risk of a heart attack because the physician refuses to perform the surgery. (Doc.
9 1 at 15-16). According to Plaintiff, “the consent forms are a contract to allow the [doctor] to operate
10 on him.” *Id.* at 17. Plaintiff believes that if he allows the doctor to operate and does not make it clear
11 the doctor would be responsible for any injuries to Plaintiff, he would lose the ability to sue the doctor
12 for the injuries caused. *Id.* at 17. On March 18, 2012, Plaintiff was discharged from Memorial
13 Hospital without having the fluid around his heart removed. *Id.*

14 **V. DISCUSSION AND ANALYSIS**

15 Based upon the above facts, Plaintiff alleges Defendants violated the Fifth and Fourteenth
16 Amendments to the United States Constitution. (Doc. 1 at 1-2). In addition, Plaintiff contends
17 Defendants discriminated against him because he is white, in violation of 42 U.S.C. §§2000a, et seq.,
18 which prohibits discrimination on the basis of race in places of public accommodations. *Id.* at 2.

19 **A. Violations of constitutional rights under 42 U.S.C. § 1983**

20 Notably, the Fifth Amendment and Fourteenth Amendment do not create direct causes of
21 action. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 929 (9th Cir. 2001) (“a litigant
22 complaining of a violation of a constitutional right does not have a direct cause of action under the
23 United States Constitution.” However, 42 U.S.C. § 1983 (“Section 1983”) “is a method for
24 vindicating federal rights elsewhere conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Thus,
25 an individual may bring an action for the deprivation of civil rights pursuant to Section 1983, which
26 states in relevant part:

27 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of
28 any State or Territory... subjects, or causes to be subjected, any citizen of the United
States or other person within the jurisdiction thereof to the deprivation of any rights,

1 privileges, or immunities secured by the Constitution and laws, shall be liable to the party
2 injured in an action at law, suit in equity, or other proper proceeding for redress...

3 42 U.S.C. § 1983. To plead a Section 1983 violation, a plaintiff must allege facts from which it may
4 be inferred that (1) a constitutional right was deprived, and (2) a person who committed the alleged
5 violation acted under color of state law. *West v. Atkins*, 487 U.S. 42, 28 (1988); *Williams v. Gorton*,
6 529 F.2d 668, 670 (9th Cir. 1976).

7 A plaintiff must allege a specific injury was suffered, and show causal relationship between the
8 defendant's conduct and the injury suffered. *See Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).
9 Thus, Section 1983 "requires that there be an actual connection or link between the actions of the
10 defendants and the deprivation alleged to have been suffered by the plaintiff." *Chavira v. Ruth*, 2012
11 U.S. Dist. LEXIS 53946, at *3 (E.D. Cal. Apr. 17, 2012). An entity or individual deprives another of
12 a federal right "if he does an affirmative act, participates in another's affirmative acts, or omits to
13 perform an act which he is legally required to do so that it causes the deprivation of which complaint
14 is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). In other words, "[s]ome culpable
15 action or inaction must be attributable to defendants." *See Puckett v. Cororan Prison- CDCR*, 2012
16 U.S. Dist. LEXIS 52572, at *7 (E.D. Cal. Apr. 13, 2012).

17 Here, Plaintiff does not allege any conduct by the defendants in relation to his alleged
18 constitutional violations, or demonstrate Defendants had a legal duty to act and failed to do so. In fact,
19 it does not appear Plaintiff had any interactions with the president of Memorial Hospital or with any
20 agent of the United States during his stays at the hospital. Because Defendants have not been linked to
21 any constitutional violations, Plaintiff has failed to demonstrate Defendants may be held liable under
22 Section 1983.

23 **B. Discrimination under 42 U.S.C. §§ 2000a, et seq.**

24 Title II of the Civil Rights Act of 1964 ("Title II"), set forth in 42 U.S.C. §§ 2000a, et seq.,
25 prohibits discrimination by state actors in places of public accommodation on the basis of race, color,
26 religion, or national origin. *See* 42 U.S.C. §§ 2000a-1, 2000a-2 (proscribing discrimination and
27 segregation on the basis of "race, color, religion, or national origin" by state actors, and prohibiting
28 deprivation of an individual's right not to be subjected to such discrimination). Thus, to succeed on a

1 claim for a violation of Title II, a claimant must show the defendant “acted with a specific racial
2 animus or discriminatory intent.” *See McGee v. California*, 2010 U.S. Dist. LEXIS 128992, at *8
3 (E.D. Cal. Dec. 7, 2010).

4 In this case, Plaintiff has not alleged facts such that the Court may determine Defendants acted
5 with the specific intent to discriminate on the basis of his race. Notably, the only allegations related to
6 race concern a non-party, because Plaintiff asserts Dr. Paw was not white and would not perform the
7 surgery Plaintiff desired. Therefore, the Court recommends Plaintiff’s claim for a violation of Title II
8 be dismissed.

9 **VI. FINDINGS AND RECOMMENDATIONS**

10 Plaintiff fails to demonstrate a causal relationship between Defendants’ conduct and the
11 injuries allegedly suffered. *See Rizzo*, 423 U.S. at 371-72, 377. *Johnson*, 588 F.2d at 743. Further,
12 Plaintiff has not demonstrated Defendants acted with a specific discriminatory intent, as required by
13 42 U.S.C. §§ 1983 and 2000a. Plaintiff provides only the conclusion that Dr. Paw refused to perform
14 the surgery because he is white, and this conclusion alone is insufficient to support a claim for racial
15 discrimination. *See Ivey*, 673 F.2d at 268. Moreover, Dr. Paw is not identified as a defendant in the
16 action.

17 Based upon these facts, it does not appear the deficiencies can be cured by amendment.
18 Because leave to amend would be futile, Plaintiff should not be given leave to amend his complaint.
19 *See Lopez*, 203 F.3d at 1130 (requiring leave to be granted to the extent deficiencies can be cured by
20 amendment).

21 Accordingly, **IT IS HEREBY RECOMMENDED:**

- 22 1. Plaintiff’s motion to proceed *in forma pauperis* (Doc. 2) be **DENIED**; and
- 23 2. Plaintiff’s complaint be **DISMISSED** without leave to amend.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local
26 Rules of Practice for the United States District Court, Eastern District of California. Within fourteen
27 days after being served with these findings and recommendations, Plaintiff may file written objections
28 with the court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and

1 Recommendations.” Plaintiff is advised failure to file objections within the specified time may waive
2 the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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6 IT IS SO ORDERED.

7 Dated: April 24, 2012

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE