



1 Rather, he complains about medical care he received at a private hospital. Thus, the matter is not  
2 properly classified as a “prisoner case” and is **ORDERED** to be reclassified as a “civil case.” Local  
3 Rule 101.

#### 4 **II. Screening requirement**

5 When a plaintiff proceeds *in forma pauperis*, the Court is required to review the complaint, and  
6 dismiss the case if the Court determines that the allegation of poverty is untrue, or the action or appeal  
7 is “frivolous, malicious or fails to state a claim on which relief may be granted; or . . . seeks monetary  
8 relief against a defendant who is immune from such relief.” 28 U.S.C. 1915(e)(2). A claim is  
9 frivolous “when the facts alleged arise to the level of the irrational or the wholly incredible, whether or  
10 not there are judicially noticeable facts available to contradict them.” Denton v. Hernandez, 504 U.S.  
11 25, 32-33 (1992).

#### 12 **III. Pleading Standards**

13 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A  
14 pleading stating a claim for relief must include a statement affirming the court’s jurisdiction, “a short  
15 and plain statement of the claim showing the pleader is entitled to relief; and . . . a demand for the  
16 relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P.  
17 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se* pleadings are held to “less  
18 stringent standards” than pleadings by attorneys. Haines v. Kerner, 404 U.S. 519, 521-21 (1972).

19 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and  
20 succinct manner, and identify the grounds upon which the complaint stands. Swierkiewicz v. Sorema  
21 N.A., 534 U.S. 506, 512 (2002); Jones v. Cmty Redevelopment Agency, 733 F.2d 646, 649 (9th Cir.  
22 1984). The Supreme Court noted,

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

26 Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) (internal quotation marks and citations omitted).

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

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

9 Iqbal, 566 U.S. at 678 (citations omitted). When factual allegations in a complaint are well-pled, a  
10 court should assume their truth and determine whether the facts would make the plaintiff entitled to  
11 relief. Id. However, legal conclusions are not entitled to the same assumption of truth. Id. Leave to  
12 amend a complaint may be granted when its deficiencies can be cured by an amendment. Lopez v.  
13 Smith, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc).

14 **IV. Factual Allegations**

15 Plaintiff alleges that he underwent surgery on August 8, 2013 at Fresno Community Regional  
16 Hospital “for the removal of left nephrectomy procedure for the removal of carcinogenil @ kidney.”  
17 (Doc. 7 at 3) He alleges that during this surgery, the surgeon, Dr. N. Ambati, injured Plaintiff’s “distal  
18 pancreatic and descending/sigmoid colon.” Id. Plaintiff claims he was required to undergo a second  
19 surgery to repair this damage which left him “in pain in the surgical areas and in the testicles as well as  
20 permanant [sic] disfiguration and incissions [sic] that were and are completely disfiguring to the  
21 plaintiff.” Id.

22 He claims that Dr. Ambati “is an underling to Defendant CEO Tim A. Joselin” and seeks to  
23 impose liability upon Joselin for failing to properly supervise Dr. Ambati. (Doc. 7 at 4) He seeks  
24 damages in the amount of \$5 million and reimbursement for his costs and fees. Id. at 5.<sup>1</sup>

25 **V. Diversity jurisdiction**

26 As Plaintiff was advised previously (Doc. 6 at 3), “Federal courts are courts of limited  
27 jurisdiction,” and “[t]hey possess only that power authorized by Constitution and statute, which is not  
28 to be expanded by judicial decree.” Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377,  
(1994) (citations omitted). “It is to be presumed that a cause lies outside this limited jurisdiction, and

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<sup>1</sup> At least as of this time, Plaintiff has not paid any costs and is representing himself such that he would not be entitled to fees.

1 the burden of establishing the contrary rests upon the party asserting jurisdiction.” Kokkonen, 511 U.S.  
2 at 377 (citations omitted). That burden notwithstanding, “[f]ederal courts are always ‘under an  
3 independent obligation to examine their own jurisdiction,’” and “a federal court may not entertain an  
4 action over which it has no jurisdiction.” Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000)  
5 (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990), modified in part on other grounds,  
6 City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 781 (2004)).

7 Here, Plaintiff alleges that while he was housed in California, he underwent the surgeries  
8 described above. (Doc. 7 at 3-4) The face of his complaint details that his current address is in North  
9 Carolina. Id. at 1. However, Plaintiff fails to allege sufficient facts detailing his citizenship.

10 According to 28 U.S.C. § 1332, the parties to the litigation must have diverse citizenships, not  
11 diverse residences. A person’s citizenship is determined first by whether he is a citizen of the United  
12 States and second by the state where he is domiciled. Kanter v. Warner-Lambert Co., 265 F.3d 853,  
13 857 (9th Cir. 2001). To be domiciled in a state, the person must have a physical presence, such as  
14 having a residence or having a location where his belongings are kept, in the state coupled with the  
15 intent to permanently reside there. Id. The fact that Plaintiff is currently housed in North Carolina is  
16 insufficient to demonstrate his citizenship. Indeed, unless that state was where Plaintiff lived at the  
17 time he entered into custody, this is unlikely.

18 Unlike the situation in Mann v. City of Tucson, Dept. of Police, 782 F.2d 790, 793-94 (9th Cir.  
19 1986), here Plaintiff does not allege any facts related to his citizenship nor does he claim that he is  
20 temporarily residing elsewhere.<sup>2</sup> Thus, the Court cannot determine whether its diversity jurisdiction  
21 has been properly invoked and the matter must be **DISMISSED with leave to amend.**

## 22 **VI. Respondeat superior**

23 Plaintiff seeks to impose liability on Tim Joslin as the “CEO and Admin of Fresno Community  
24 Hospital.” (Doc. 7 at 1) However, by alleging that Joslin is the CEO, Plaintiff implies that Fresno  
25 Community Hospital is a corporation such that Joslin is an officer of the corporation, rather than its  
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28 <sup>2</sup> In addition, Plaintiff does not allege the citizenships of the Defendants though the Court presumes their citizenship is in California. In his second amended complaint, should he choose to file one, Plaintiff must set forth the citizenship of any named Defendants.

1 owner. Id. Similarly, Plaintiff alleges, in shorthand fashion, that Joslin is the administrator of the  
2 hospital which, again, implies he is an employee of that entity. Id. The fact that Joslin is alleged to  
3 have had the obligation to supervise Dr. Ambati does not sufficiently demonstrate the application of the  
4 doctrine of respondeat superior.

5 The doctrine recognizes that the employer may be held liable for the acts of the employee if  
6 they are performed in the course of the employer’s business operation. Lisa M. v. Henry Mayo  
7 Newhall Mem’l Hosp., 12 Cal.4th 291, 296 (1995). Though the facts alleged in the complaint  
8 demonstrate that Joslin was a supervisor of Dr. Ambati, there is no showing that Joslin was the  
9 employer of the physician. (Doc. 7 at 5) To the contrary, it appears that Dr. Ambati was employed by  
10 Fresno Community Regional Hospital—just as Jolin was—and, therefore, Joslin may not be held liable  
11 for Dr. Ambati’s wrongful acts. Therefore, the complaint must be **DISMISSED with leave to amend.**

12 **VII. Negligent acts of Defendant Joslin**

13 Though Joslin may be held liable for his own acts of negligence, the complaint fails to provide a  
14 sufficient factual basis for the conclusion that he committed acts which caused Plaintiff’s injuries.  
15 Plaintiff must set forth facts indicating the duty he claims Joslin owed him, how he breached this duty,  
16 how Joslin caused Plaintiff’s injuries. Once again, the complaint fails to do so.<sup>3</sup>

17 **VIII. Medical negligence of Defendant Ambati**

18 “The elements of a medical malpractice claim are (1) the duty of the professional to use such  
19 skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a  
20 breach of that duty; (3) a proximate causal connection between the negligent conduct and resulting  
21 injury; and (4) actual loss or damage resulting from the professional’s negligence.” Avivi v. Centro  
22 Medico Urgente Med. Ctr., 159 Cal.App.4th 463, 468, n.2, (Cal.Ct.App. 2008) (internal quotations and  
23 citation omitted).

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26  
27 <sup>3</sup> Notably, given Joslin was an administrator rather than a medical doctor, Plaintiff must demonstrate that Joslin knew or  
28 had reason to know Ambati’s surgical skills were insufficient to meet the standard of care and despite this knowledge and  
despite having the authority to take action to prevent Dr. Ambati from performing surgery, Joslin failed to do so. The mere  
fact that an error was made during Plaintiff’s surgery is insufficient. Moreover, Plaintiff must allege *facts not mere*  
*conclusions* to properly set forth a cognizable claim against Joslin.

1 Here, Plaintiff alleges Dr. Ambati performed surgery on him related to remove at least part of  
2 his kidney, apparently due to a finding of cancer in the organ. (Doc. 7 at 3) During this surgery,  
3 Plaintiff suffered injury to his pancreas and colon. Id.

4 While these allegations are sufficient to set forth the elements of causation and damages, they  
5 are not sufficient to demonstrate that Dr. Ambati failed to perform Plaintiff's surgery with the skill,  
6 prudence, and diligence as other members of his profession commonly possess and exercise. Thus,  
7 Plaintiff has failed to properly allege a cognizable claim against Dr. Ambati and the complaint must be  
8 **DISMISSED with leave to amend.**

9 In the event Plaintiff chooses to file a second amended complaint, he must set forth **facts—**  
10 **rather than mere conclusions—**demonstrating how it is shown that Dr. Ambati lacked the skills  
11 needed to perform the operation, that he failed to prudently perform the surgery and/or that he failed to  
12 exercise the proper diligence when conducting the surgery. Merely asserting that he lacked the skills  
13 and failed to perform the surgery with prudence and/or diligence is not enough; Plaintiff must outlined  
14 with facts *how* this is shown.

15 **IX. Conclusion and Order**

16 The Court must dismiss Plaintiff's complaint because it provides few facts. The Court will grant  
17 Plaintiff **one, final opportunity** to file a second amended complaint to address the deficiencies. See  
18 Lopez, 203 F.3d at 1130. Plaintiff is reminded that he is required to provide a short, plain statement of  
19 his case sufficient to give each defendant fair notice of the claims against them. Iqbal, 566 U.S. at 678.

20 The amended pleading must bear the docket number assigned this case and must be labeled  
21 "Second Amended Complaint." Plaintiff is advised that the Court cannot refer to a prior pleading in  
22 order to make an amended complaint complete. Local Rule 220 requires an amended complaint to be  
23 "complete in itself without reference to the prior or superseded pleading." As a general rule, an  
24 amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.  
25 1967). Thus, once Plaintiff files a First Amended Complaint, the original complaint no longer serves  
26 any function in the case. Plaintiff is warned that "[a]ll causes of action alleged in an original  
27 complaint which are not alleged in an amended complaint are waived." King v. Atiyeh, 814 F.2d 565,  
28 567 (9th Cir. 1987) (citation omitted).

1 Finally, Plaintiff is informed that the filing of any motion to compel the production of  
2 documents or discovery related to his claims is premature.

3 Based upon the foregoing, **IT IS HEREBY ORDERED:**

- 4 1. The matter is **RECLASSIFIED** as a civil case;
- 5 2. Plaintiff's first amended complaint (Doc. 7) is **DISMISSED** with leave to amend;
- 6 3. Plaintiff **SHALL** file a Second Amended Complaint within thirty days from the date of  
7 service of this Order; and
- 8 4. Plaintiff is advised that the action may be dismissed for failure to comply with this  
9 Order. See e.g. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissing  
10 the action for failure to comply with an order requiring amendment of complaint).

11  
12 IT IS SO ORDERED.

13 Dated: March 24, 2015

/s/ Jennifer L. Thurston  
14 UNITED STATES MAGISTRATE JUDGE