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5 **UNITED STATES DISTRICT COURT**

6 EASTERN DISTRICT OF CALIFORNIA
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9 DEBBY GENTHNER,) 1:16-cv-00581-DAD-BAM
10)
11 Plaintiff,)
12) ORDER GRANTING APPLICATION TO
13 v.) PROCEED IN FORMA PAUPERIS
14 CLOVIS COMMUNITY HOSPITAL and)
15 DAVID STONE N. P.,) ORDER DISMISSING COMPLAINT WITH
16) LEAVE TO AMEND
17 Defendants.) THIRTY-DAY DEADLINE
18)
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20)
21)
22)

23 Plaintiff Debby Genthner (“Plaintiff”), proceeding pro se, initiated this action on April
24 25, 2016. Plaintiff alleges negligence, medical negligence and intentional and negligent
25 infliction of emotional distress against Defendants Clovis Community Hospital and Nurse
26 Practitioner David Stone. (Doc. 1). In conjunction with her complaint, Plaintiff filed an
27 application to proceed in forma pauperis. (Doc. 2).

28 **Request to Proceed without Payment of Fees**

Plaintiff is proceeding pro se and has requested leave to proceed in forma pauperis pursuant to Title 28 of the United States Code section 1915(a). Plaintiff has made the showing required by section 1915(a), and accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

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1 **Plaintiff's Allegations**

2 Plaintiff brings suit against Clovis Community Hospital and Nurse Practitioner David
3 Stone. Plaintiff alleges that she went to the Clovis Community Emergency room because her
4 throat and mouth were “on fire.” (Doc. 1 at 5). Her throat was raw, she had sores all around her
5 mouth, the sides of her mouth had deep burn marks and she had a deep pit on one side and a cut
6 mark on the other. Plaintiff waited for forty minutes and then was called into a room to check
7 her vitals. Plaintiff told Defendant Stone and a nurse about her mouth and that she was in a lot
8 of pain. They did not check her throat. When she asked how long it would take to see the
9 doctor, Defendant Stone said the wait was over four hours. Plaintiff did not know that Defendant
10 Stone was a Nurse Practitioner who could see patients.

11 Plaintiff further alleges that Defendants made her sit in the waiting room for four and a
12 half hours and suffer with a raw, sore, burned throat and mouth. She was not offered any pain
13 medication. Plaintiff’s name was called at 8:30 p.m. A male nurse looked at her throat and said
14 it was a little red. Defendant Stone then came in, barely looked at her throat and said it was a
15 little red. Plaintiff alleges that Defendant Stone could have looked at her earlier and provided
16 medical care and pain medication. Plaintiff also alleges that Defendant Stone had to have seen
17 the injuries and sores around her mouth because he offered her a prescription. She further
18 alleges that he should have treated her so her mouth would not continue to burn and that she
19 should have seen a specialist. Plaintiff also contends that Defendant Stone should have reported
20 the damages to the authorities. Plaintiff asserts that Defendant Stone allowed an unknown
21 perpetrator(s) to continue to harm her by not reporting the injuries to law enforcement.

22 Defendant Stone reportedly said Plaintiff’s sore throat made the sides of her mouth swell
23 up. When he offered a prescription, Plaintiff told him she already had one and that she came
24 through the emergency room to see a specialist. Defendant Stone stated that they did not have
25 any specialists. Plaintiff alleges that Defendant Sone could have paged a specialist to examine
26 her.

27 Plaintiff seeks compensatory and punitive damages, along with a form of injunctive
28 relief.

1 **Subject Matter Jurisdiction**

2 Federal courts are courts of limited jurisdiction and lack inherent or general subject
3 matter jurisdiction. Federal courts can adjudicate only those cases in which the United States
4 Constitution and Congress authorize them to adjudicate. *Kokkonen v. Guardian Life Ins. Co.*, 511
5 U.S. 375, 114 S.Ct. 1673, 1677 (1994). To proceed in federal court, Plaintiff’s complaint must
6 establish the existence of subject matter jurisdiction. *See id.* Federal courts are presumptively
7 without jurisdiction over civil actions, and the burden to establish the contrary rests upon the
8 party asserting jurisdiction. *Kokkonen*, 511 U.S. at 377, 114 S.Ct. at 1677. Lack of subject
9 matter jurisdiction is never waived and may be raised by the court sua sponte. *Attorneys Trust v.*
10 *Videotape Computer Products, Inc.*, 93 F.3d 593, 594 595 (9th Cir. 1996); *Demery v.*
11 *Kupperman*, 7356 F.2d 1139, 1149 n. 8 (9th Cir. 1984). “If the court determines at any time that
12 it lacks subject-matter jurisdiction, the court *must* dismiss the action.” Fed. R. Civ. P. 12(h)(3)
13 (emphasis added).

14 **1. Federal Question Jurisdiction**

15 Although Plaintiff asserts that this Court has federal question jurisdiction, Plaintiff does
16 not plead a cognizable federal claim. Pursuant to 28 U.S.C. § 1331, federal district courts have
17 jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United
18 States.” “A case ‘arises under’ federal law either where federal law creates the cause of action or
19 ‘where the vindication of a right under state law necessarily turn[s] on some construction of
20 federal law.’” *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088–89 (9th Cir. 2002)
21 (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8–9, 103 S.Ct.
22 2841, 77 L.Ed.2d 420 (1983)). The presence or absence of federal-question jurisdiction is
23 governed by the “well-pleaded complaint rule.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392,
24 107 S.Ct. 2425, 963 L.Ed.2d 318 (1987). Under the well-pleaded complaint rule, “federal
25 jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly
26 pleaded complaint.” *Id.*

1 Plaintiff's claims for negligence (including the alleged failure to report under California
2 law), medical negligence and intentional and negligent infliction of emotional distress are state
3 law causes of action.¹ Her claims do not implicate a federal question.

4 **2. Diversity Jurisdiction**

5 Further, there is no basis for diversity jurisdiction. Pursuant to 28 U.S.C. § 1332, federal
6 district courts have diversity jurisdiction over civil actions "where the matter in controversy
7 exceeds the sum or value of \$75,000," and where the matter is between "citizens of different
8 states." 28 U.S.C. § 1332(a)(1).

9 Here, Plaintiff fails to allege an amount in controversy in excess of statutory threshold.
10 More importantly, however, she has not shown that the parties are completely diverse. The
11 complaint indicates that both Plaintiff and Defendant Stone are residents of California. (Doc. 1
12 at 2). If the parties are California citizens, this destroys the requisite "complete diversity." *See*
13 *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 722 (9th Cir. 2008), *cert. denied*, 556 U.S.
14 1221, 129 S.Ct. 2159, 173 L.Ed.2d 1156 (2009).

15 **CONCLUSION AND RECOMMENDATION**

16 Plaintiff's complaint fails to allege subject matter jurisdiction. However, as Plaintiff is
17 proceeding pro se, the Court will provide her with the opportunity to file a first amended
18 complaint in the event she can allege facts establishing this Court's jurisdiction. *Lopez v. Smith*,
19 203 F.3d 1122, 1130 (9th Cir. 2000). Plaintiff may not change the nature of this suit by adding
20 new, unrelated claims in her amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir.
21 2007) (no "buckshot" complaints).

22 Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but it must state what
23 the named defendant did that led to the deprivation of Plaintiff's rights, *Iqbal*, 556 U.S. at 678-
24 79, 129 S.Ct. at 1948-49. Although accepted as true, the "[f]actual allegations must be

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27 ¹ Insofar as Plaintiff requests that Defendants be criminally charged, the Court cannot grant such relief. As the
28 judicial branch of the federal government, the Court does not have the power to criminally prosecute an individual.
See United States v. Nixon, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive authority and absolute
discretion to decide whether to prosecute a case.").

1 [sufficient] to raise a right to relief above the speculative level. . . .” Twombly, 550 U.S. at 555
2 (citations omitted).

3 Finally, Plaintiff is advised that an amended complaint supersedes the original complaint.
4 *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012) (en banc). Therefore, Plaintiff’s first
5 amended complaint must be “complete in itself without reference to the prior or superseded
6 pleading.” Local Rule 220.

7 Based on the foregoing, it is HEREBY ORDERED that:

- 8 1. Plaintiff’s complaint is dismissed for lack of subject matter jurisdiction;
- 9 2. Within thirty (30) days from the date of service of this order, Plaintiff shall file a first
10 amended complaint; and
- 11 3. If Plaintiff fails to file a first amended complaint in compliance with this order, the
12 Court will recommend that this action be dismissed with prejudice.

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14 IT IS SO ORDERED.

15 Dated: April 27, 2016

16 /s/ Barbara A. McAuliffe
17 UNITED STATES MAGISTRATE JUDGE
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