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

DEBBY GENTHNER,

Plaintiff,

v.

DR. FARIBORZ NAENI, et al.,

Defendants.

Case No. 1:17-cv-00290-DAD-SAB

ORDER DISMISSING FIRST AMENDED  
COMPLAINT WITH LEAVE TO AMEND  
FOR FAILURE TO STATE A CLAIM

(ECF No. 5)

THIRTY DAY DEADLINE

On March 1, 2017, Plaintiff Debby Genthner (“Plaintiff”), proceeding pro se and in forma pauperis, filed this action. (ECF No. 1.) On March 10, 2017, the complaint was screened and dismissed for failure to state a claim. (ECF No. 4.) Plaintiff was granted leave to file an amended complaint within thirty days. Currently before the Court is Plaintiff’s first amended complaint, filed April 10, 2017. (ECF No. 5.)

**I.**

**SCREENING REQUIREMENT**

The district court must perform a preliminary screening and must dismiss a case if at any time the Court determines that the complaint fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2); see Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) (section 1915(e) applies to all in forma pauperis complaints, not just those filed by prisoners). In determining whether a complaint fails to state a claim, the Court uses the same pleading standard

1 used under Federal Rule of Civil Procedure 8(a). A complaint must contain “a short and plain  
2 statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2).  
3 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause  
4 of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.  
5 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

6 In reviewing the pro se complaint, the court is to liberally construe the pleadings and  
7 accept as true all factual allegations contained in the complaint. Erickson v. Pardus, 551 U.S. 89,  
8 94 (2007). Although a court must accept as true all factual allegations contained in a complaint,  
9 a court need not accept a plaintiff’s legal conclusions as true. Iqbal, 556 U.S. at 678. “[A]  
10 complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops  
11 short of the line between possibility and plausibility of entitlement to relief.’” Iqbal, 556 U.S. at  
12 678 (quoting Twombly, 550 U.S. at 557). Therefore, the complaint must contain sufficient  
13 factual content for the court to draw the reasonable conclusion that the defendant is liable for the  
14 misconduct alleged. Iqbal, 556 U.S. at 678.

## 15 II.

### 16 COMPLAINT ALLEGATIONS

17 On February 29, 2016, Plaintiff went to the Surgical Services Clinic for a left ankle  
18 injury. (First Amended Complaint (“FAC”) at 10,<sup>1</sup> ECF No. 5.) Dr. Okoro told Plaintiff that she  
19 and Dr. Fariborz Naeni looked at the x-rays that were taken of Plaintiff’s left ankle that day and  
20 that Dr. Naeni would come see Plaintiff. (FAC at 10.) Plaintiff claims that Dr. Naeni did not  
21 examine her and Dr. Okoro did not examine her foot and barely touched her ankle. (FAC at 10,  
22 11.) Dr. Okoro told Plaintiff that “everything was fine with [her] x-rays.” (FAC at 11.) Dr.  
23 Okoro told Plaintiff that her “left foot had no other breaks or trauma and it was okay to continue  
24 to walk on [her] left foot.” (FAC at 10.) Dr. Okoro said it was a sprain and to stay off of it for a  
25 while if it hurt, but that it was okay to walk on it, and even power walk on it. (FAC at 11.)  
26 Plaintiff alleges that she walked around in pain for over seven months with no diagnosis or

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28 <sup>1</sup> All references to pagination of specific documents pertain to those as indicated on the upper right corners via the  
CM/ECF electronic court docketing system.

1 treatment for her ankle fracture. (FAC at 11.)

2 On May 26, 2016, Plaintiff went to the emergency room at Community Regional Medical  
3 Center (“CRMC”). (FAC at 12.) Plaintiff alleges that her ankle was re-injured, looked bruised  
4 again, was really swollen, and she had a hard time walking on it. (Id.) Plaintiff claims that she  
5 waited over ten hours to see a doctor and have x-rays taken. (Id.) Plaintiff claims that Dr.  
6 Yolanda Moore looked at the February 29, 2016 and May 29, 2016 x-rays and then talked to  
7 Plaintiff in the hallway. (Id.) Plaintiff alleges that Dr. Yolanda Moore told her that she had  
8 some fragmented bones in her ankle and the prior fracture had healed. (FAC at 10.) Plaintiff  
9 contends that the doctors who looked at her x-rays on May 29, 2016, did not note her avulsion  
10 fracture, that her ankle was “really swollen,” and that she could barely walk. (FAC at 13.) She  
11 claims that Dr. Moore, Dr. Brian Chinnock, and others at CRMC did not diagnose new fractures,  
12 swelling, and bruising on May 26, 2016. (FAC at 12.) Plaintiff begged Dr. Moore for a referral  
13 to an orthopedic specialist because Dr. Luong, her doctor, would not give her one, but Dr. Moore  
14 said she could not give her one because it was an old injury. (Id.) Dr. Moore gave Plaintiff a flat  
15 foot support and told Plaintiff to go to her doctor for a referral. (Id.) She claims that she should  
16 have seen an orthopedic doctor and been fitted with a boot at CRMC and had a follow-up  
17 appointment scheduled with an orthopedic doctor. (FAC at 13.)

18 On September 20, 2016, Plaintiff was seen by Dr. Douglas M. Bluth, who told Plaintiff  
19 that she had an avulsion fracture in her left ankle. (FAC at 10.) Plaintiff wore a boot for over a  
20 month and her ankle started to feel better. (FAC at 12.) She wears a brace for her left ankle  
21 daily. (Id.) She still has pain and does not think it healed properly, but she has not had any  
22 follow-up care. (Id.) She thinks she should have another x-ray and a consultation with an  
23 orthopedic doctor to see if it healed properly and if there is permanent damage. (Id.)

24 Plaintiff brings this action against CRMC, Surgical Services Clinic, Dr. Naeni, Dr.  
25 Moore, and Dr. Chinnock alleging federal-question jurisdiction because of respondeat superior,  
26 doctrine of corporate negligence, hospital corporate liability, and California Penal Code §§11160  
27 and 11161. (FAC at 2-4.)

28 Plaintiff claims that she suffered emotional distress because Dr. Naeni and Dr. Okoro did

1 not diagnose and treat her for the avulsion fracture in her left ankle on February 29, 2016, at the  
2 Surgical Services Clinic, and Dr. Moore, Dr. Chinnock, and other doctors did not do so on May  
3 26, 2016, at CRMC. (FAC at 11-12.) She alleges intentional infliction of emotional distress and  
4 negligent infliction of emotional distress. (FAC at 18.)

5 Plaintiff brings a claim under California Penal Code §§ 11160(a)(2) and (b) and 11161  
6 for Dr. Naeni and Dr. Okoro’s failure to report her left ankle avulsion fracture to authorities on  
7 February 29, 2016, and for Dr. Moore, Dr. Chinnock, and other involved doctors’ failure to  
8 report her left ankle avulsion fracture to authorities on May 26, 2016. (FAC at 11, 14.) Plaintiff  
9 alleges that she has “continued to suffer from repeated injuries by this perpetrator or perpetrators  
10 because Dr. Fariborz Naeni and Dr. Okoro did not report these injuries to law enforcement  
11 authorities.” (FAC at 11.) Plaintiff also alleges that she has “continued to suffer from repeated  
12 injuries by this perpetrator or perpetrators because Dr. Yolanda Moore and Dr. Brian Chinnock  
13 did not report these injuries to law enforcement authorities.” (FAC at 14.)

14 Plaintiff seeks compensatory damages and punitive damages. (FAC at 18.) She also asks  
15 the Court to criminally charge Defendants. (Id.) She states that the doctors named in this  
16 complaint should have their licenses revoked. (Id.)

### 17 III.

### 18 DISCUSSION

19 Federal courts are courts of limited jurisdiction and their power to adjudicate is limited to  
20 that granted by Congress. U.S. v. Sumner, 226 F.3d 1005, 1009 (9th Cir. 2000). Pursuant to  
21 Section 1331 of Title 28 of the United States Code, federal district courts have jurisdiction over  
22 “all civil actions arising under the Constitution, laws, or treaties of the United States.” “A case  
23 ‘arises under’ federal law either where federal law creates the cause of action or ‘where the  
24 vindication of a right under state law necessarily turns on some construction of federal law.’ ”  
25 Republican Party of Guam v. Gutierrez, 277 F.3d 1086, 1088 (9th Cir. 2002) (quoting Franchise  
26 Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8–9 (1983) (citations omitted)).  
27 “[T]he presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded  
28 complaint rule,’ which provides that federal jurisdiction exists only when a federal question is

1 presented on the face of the plaintiff’s properly pleaded complaint.” Republican Party of Guam,  
2 277 F.3d at 1089 (citations omitted). Plaintiff brings this action alleging federal question  
3 jurisdiction.

4 Liberally construing the claims in the complaint, Plaintiff’s claims are for medical  
5 malpractice, negligence, intentional infliction of emotional distress, and negligent infliction of  
6 emotional distress, which are state law causes of action.<sup>2</sup> Therefore, the Court finds that Plaintiff  
7 has not alleged a cognizable claim to implicate a federal question. For this action to arise under  
8 federal law, Plaintiff must establish that “federal law creates the cause of action” or her “asserted  
9 right to relief depends on the resolution of a substantial question of federal law.” K2 America  
10 Corp. v. Roland Oil & Gas, LLC, 653 F.3d 1024, 1029 (9th Cir. 2011) (citations omitted).  
11 Therefore, Plaintiff has failed to set forth allegations to establish federal jurisdiction.<sup>3</sup> Plaintiff  
12 shall be granted one final opportunity to file an amended complaint to cure the jurisdictional  
13 deficiencies.

14 Further, the Court notes that it cannot grant Plaintiff’s request to criminally charge  
15 Defendants. The Constitution delegates powers of the Federal Government into three defined  
16 categories: the Legislative Branch, the Executive Branch, and the Judicial Branch. Bowsher v.  
17 Synar, 478 U.S. 714, 721 (1986). It is the Executive Branch of the United States that has  
18 exclusive authority and absolute discretion to decide whether to prosecute a case. United States  
19 v. Nixon, 418 U.S. 683, 693 (1974). As the Judicial Branch, this Court does not have the power  
20 to criminally prosecute Defendants.

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23 <sup>2</sup> Plaintiff also brings claims based on two sections of the California Penal Code. However, these claims also do not  
24 implicate a federal question.

25 <sup>3</sup> The Court notes that the first amended complaint does not set forth a basis for diversity jurisdiction. District courts  
26 also have original jurisdiction of all civil actions between citizens of different States in which “the matter in  
27 controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.” 28 U.S.C. § 1332(a). Section  
28 1332 of Title 28 requires complete diversity of citizenship and the presence “of a single plaintiff from the same State  
as a single defendant deprives the district court of original diversity jurisdiction over the entire action.” Abrego  
Abrego v. The Dow Chemical Co., 443 F.3d 676, 679 (9th Cir. 2006) (citations omitted). Plaintiff has not shown  
that the parties are completely diverse. The complaint indicates that Plaintiff and Defendants are residents of  
California. (FAC at 2-3.)

1 IV.

2 CONCLUSION AND ORDER

3 For the reasons stated, Plaintiff’s complaint fails to state a claim for violation of her  
4 federal rights. Plaintiff is granted one final opportunity to file an amended complaint within  
5 thirty (30) days. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff may not  
6 change the nature of this suit by adding new, unrelated claims in her amended complaint.  
7 George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

8 Plaintiff’s amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what  
9 each named defendant did that led to the deprivation of Plaintiff’s constitutional or other federal  
10 rights. Iqbal, 556 U.S. 662, 678. “The inquiry into causation must be individualized and focus  
11 on the duties and responsibilities of each individual defendant whose acts or omissions are  
12 alleged to have caused a constitutional deprivation.” Leer v. Murphy, 844 F.2d 628, 633 (9th  
13 Cir. 1988). Although accepted as true, the “[f]actual allegations must be [sufficient] to raise a  
14 right to relief above the speculative level . . .” Twombly, 550 U.S. at 555 (citations omitted).

15 Finally, an amended complaint supersedes the original complaint, Forsyth v. Humana,  
16 Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987),  
17 and must be “complete in itself without reference to the prior or superseded pleading,” Local  
18 Rule 220. “All causes of action alleged in an original complaint which are not alleged in an  
19 amended complaint are waived.” King, 814 F.2d at 567 (citing to London v. Coopers &  
20 Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

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

- 2 1. Plaintiff's first amended complaint, filed April 10, 2017, is dismissed with leave  
3 to amend for failure to state a claim;
- 4 2. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file a  
5 second amended complaint; and
- 6 3. If Plaintiff fails to file a second amended complaint in compliance with this order,  
7 this action will be dismissed for failure to state a claim.

8 IT IS SO ORDERED.

9 Dated: April 18, 2017

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12 UNITED STATES MAGISTRATE JUDGE