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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EURAL DEBBS, SR.,
Plaintiff,
v.
AM/PM GAS STATION,
Defendant.

Case No. 1:22-cv-000403-DAD-BAK (BAM)
FINDINGS AND RECOMMENDATIONS
REGARDING DISMISSAL OF ACTION
(Doc. 4)
FOURTEEN-DAY DEADLINE

Plaintiff Eural Debbs, Sr. (“Plaintiff”), proceeding pro se and *in forma pauperis*, initiated this purported civil rights action against AM/PM Gas Station on April 7, 2022. (Doc. 1.)

On May 3, 2022, the Court screened Plaintiff’s complaint and granted Plaintiff leave to amend within thirty (30) days of service of the Court’s order. (Doc. 4.) Plaintiff was expressly warned that if he failed to file an amended complaint in compliance with the Court’s order, then the Court would recommend dismissal of this action, with prejudice, for failure to obey a court order and for failure to state a claim. (*Id.*) The deadline for Plaintiff to file his amended complaint has passed and Plaintiff has not complied with the Court’s order. The Court therefore will recommend dismissal of this action for failure to state a claim, failure to establish this Court’s jurisdiction, failure to obey a court order and failure to prosecute.

1 **I. Failure to State a Claim**

2 **A. Screening Requirement and Standard**

3 The Court screens complaints brought by persons proceeding in pro se and in forma
4 pauperis. 28 U.S.C. § 1915(e)(2). Plaintiff’s complaint, or any portion thereof, is subject to
5 dismissal if it is frivolous or malicious, if it fails to state a claim upon which relief may be
6 granted, or if it seeks monetary relief from a defendant who is immune from such relief. 28
7 U.S.C. § 1915(e)(2)(B)(ii).

8 A complaint must contain “a short and plain statement of the claim showing that the
9 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
10 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
12 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as
13 true, courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*,
14 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

15 To survive screening, Plaintiff’s claims must be facially plausible, which requires
16 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
17 for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss v. U.S. Secret*
18 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully
19 is not sufficient, and mere consistency with liability falls short of satisfying the plausibility
20 standard. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss*, 572 F.3d at 969.

21 **B. Plaintiff’s Allegations**

22 In summary, Plaintiff alleges that he rode his wheelchair into the AM/PM on a hot day in
23 June 2021. As Plaintiff lifted his cup to get “some slurpe,” he did not notice the machine was
24 being cleaned and he filled up his cup. (Doc. 1 at 5.) There was cleaning solution in the machine
25 and Plaintiff drank it. He had to go to the emergency room and was diagnosed with toxic
26 chemicals.

27 Plaintiff feels that his constitutional rights were violated when the defendant failed to act
28 in a safe manner by posting a sign. Plaintiff also contends that defendant breached its duty,

1 constituting negligence. He requests compensatory damages in the amount of \$3 million dollars.
2 In a supporting declaration, Plaintiff contends that defendant's failure to post any sign violated his
3 constitutional rights under 42 U.S.C. § 1983 and is a civil rights deprivation. (Doc. 1 at 7.)

4 **C. Discussion**

5 Plaintiff's complaint fails to state a cognizable claim under 42 U.S.C. § 1983 and fails to
6 establish this Court's jurisdiction.

7 1. 42 U.S.C. § 1983

8 Section 1983 provides:

9 Every person who, under color of any statute, ordinance, regulation, custom, or
10 usage, of any State or Territory or the District of Columbia, subjects, or causes to
11 be subjected, any citizen of the United States or other person within the jurisdiction
12 thereof to the deprivation of any rights, privileges, or immunities secured by the
13 Constitution and laws, shall be liable to the party injured in an action at law....

14 42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must both (1) allege the deprivation
15 of a right secured by the federal Constitution or statutory law, and (2) allege that the deprivation
16 was committed by a person acting under color of state law." *Anderson v. Warner*, 451 F.3d 1063,
17 1067 (9th Cir. 2006). Generally, private parties do not act under color of state law for § 1983
18 purposes. *See Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). Indeed, the law presumes
19 that conduct by private actors is not state action. *Florer v. Congregation Pidyon Shevuyim, N.A.*,
20 639 F.3d 916, 922 (9th Cir. 2011). The ultimate issue in determining whether a person is subject
21 to suit under § 1983 is whether the alleged infringement of federal rights is fairly attributable to
22 the state. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *see also Huffman v. Cty. of L.A.*, 147
23 F.3d 1054, 1057 (9th Cir. 1998) (holding that a defendant must have acted "under color of law" to
24 be held liable under § 1983). Simply put, § 1983 "excludes from its reach merely private conduct,
25 no matter how discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S.
26 40, 50 (1999) (citations and internal quotations omitted).

27 Here, Plaintiff fails to plead sufficient facts to establish that the defendant gas station (or
28 corporation) was acting under color of state law. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d
1056, 1060 (9th Cir. 2007) (allegation of state action is "necessary element of a § 1983 claim").

1 2. Jurisdiction

2 Federal courts are courts of limited jurisdiction and may adjudicate only those cases
3 authorized by the Unites States Constitution and Congress. *Kokkonen v. Guardian Life Ins. Co.*,
4 511 U.S. 375, 377 (1994). “Federal courts are presumed to lack jurisdiction, ‘unless the contrary
5 appears affirmatively from the record.’” *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993)
6 (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986)). Without jurisdiction,
7 the district court must dismiss the case. *See Morongo Band of Mission Indians v. California State*
8 *Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988).

9 Generally, there are two bases for subject matter jurisdiction: (1) diversity jurisdiction;
10 and (2) federal question jurisdiction. 28 U.S.C. §§ 1331, 1332.

11 a. Diversity Jurisdiction

12 Pursuant to 28 U.S.C. § 1332, federal district courts have diversity jurisdiction over civil
13 actions “where the matter in controversy exceeds the sum or value of \$75,000,” and where the
14 matter is between “citizens of different states.” 28 U.S.C. § 1332(a)(1).

15 Here, Plaintiff affirmatively states in his complaint that jurisdiction is not based on
16 diversity of citizenship. (Doc. 1 at 4.) Moreover, Plaintiff’s complaint does not allege diversity
17 jurisdiction. For instance, Plaintiff does not allege that the parties are citizens of different states.
18 He notes only that the AM/PM Corporation has its principal place of business in California. (*Id.*
19 at 5.) Further, Plaintiff does not establish that the matter in controversy exceeds the sum or value
20 of \$75,000. Although he seeks compensatory damages in the amount of \$3 million, he does not
21 identify any concrete injuries or damages. Thus, as currently pled, Plaintiff’s complaint does not
22 establish diversity jurisdiction.

23 b. Federal Question Jurisdiction

24 Pursuant to 28 U.S.C. § 1331, federal district courts have jurisdiction over “all civil
25 actions arising under the Constitution, laws, or treaties of the United States.” “A case ‘arises
26 under’ federal law either where federal law creates the cause of action or ‘where the vindication
27 of a right under state law necessarily turn[s] on some construction of federal law.’” *Republican*
28 *Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088–89 (9th Cir. 2002) (quoting *Franchise Tax Bd.*

1 *v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8–9 (1983)). The presence or absence of
2 federal-question jurisdiction is governed by the “well-pleaded complaint rule.” *Caterpillar, Inc. v.*
3 *Williams*, 482 U.S. 386, 392 (1987). Under the well-pleaded complaint rule, “federal jurisdiction
4 exists only when a federal question is presented on the face of the plaintiff’s properly pleaded
5 complaint.” *Id.* In this instance, Plaintiff does not allege any violation arising under the
6 Constitution, laws or treaties of the United States. Thus, as pled, Plaintiff’s complaint does not
7 establish federal question jurisdiction.

8 3. State Law Claims

9 Plaintiff appears to assert a state law claim for negligence. Under 28 U.S.C. § 1367(a), in
10 any civil action in which the district court has original jurisdiction, the “district courts shall have
11 supplemental jurisdiction over all other claims that are so related to claims in the action within
12 such original jurisdiction that they form part of the same case or controversy under Article III of
13 the United States Constitution,” except as provided in subsections (b) and (c). The Supreme Court
14 has stated that “if the federal claims are dismissed before trial, ... the state claims should be
15 dismissed as well.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Although
16 the Court may exercise supplemental jurisdiction over state law claims, Plaintiff must first have a
17 cognizable claim for relief under federal law. 28 U.S.C. § 1367. As Plaintiff has not stated a
18 cognizable claim for relief under federal law, it is recommended that the Court decline to exercise
19 supplemental jurisdiction over any purported state law claims and those claims be dismissed
20 without prejudice.

21 II. Failure to Obey Court Order and Failure to Prosecute

22 A. Legal Standard

23 Local Rule 110 provides that “[f]ailure . . . of a party to comply with these Rules or with
24 any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .
25 within the inherent power of the Court.” District courts have the inherent power to control their
26 dockets and “[i]n the exercise of that power they may impose sanctions including, where
27 appropriate, . . . dismissal.” *Thompson v. Hous. Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A
28 court may dismiss an action, with prejudice, based on a party’s failure to prosecute an action,

1 failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*, 46
2 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v. Bonzelet*,
3 963 F.2d 1258, 1260–61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
4 amendment of complaint); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130–33 (9th Cir. 1987)
5 (dismissal for failure to comply with court order).

6 In determining whether to dismiss an action, the Court must consider several factors: (1)
7 the public’s interest in expeditious resolution of litigation; (2) the Court’s need to manage its
8 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
9 cases on their merits; and (5) the availability of less drastic sanctions. *Henderson v. Duncan*, 779
10 F.2d 1421, 1423 (9th Cir. 1986); *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988).

11 **B. Discussion**

12 Here, Plaintiff’s amended complaint is overdue. The action cannot proceed without
13 Plaintiff’s cooperation and compliance with the Court’s order. Moreover, the Court cannot hold
14 this case in abeyance awaiting compliance by Plaintiff. The Court additionally cannot effectively
15 manage its docket if Plaintiff ceases litigating his case. Thus, the Court finds that both the first
16 and second factors weigh in favor of dismissal.

17 The third factor, risk of prejudice to the defendant, also weighs in favor of dismissal, as a
18 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
19 *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs
20 against dismissal because public policy favors disposition on the merits. *Pagtalunan v. Galaza*,
21 291 F.3d 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose
22 responsibility it is to move a case toward disposition on the merits but whose conduct impedes
23 progress in that direction,” which is the case here. *In re Phenylpropanolamine (PPA) Prods.*
24 *Liab. Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006) (citation omitted).

25 Finally, the Court’s warning to a party that failure to obey the Court’s order will result in
26 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;
27 *Malone*, 833 at 132–33; *Henderson*, 779 F.2d at 1424. The Court’s May 3, 2022 screening order
28 expressly warned Plaintiff that his failure to comply would result in a recommendation for

1 dismissal of this action. (Doc. 4 at 6.) Thus, Plaintiff had adequate warning that dismissal could
2 result from his noncompliance.

3 Additionally, at this stage in the proceedings there is little available to the Court that
4 would constitute a satisfactory lesser sanction while protecting the Court from further
5 unnecessary expenditure of its scarce resources. Plaintiff's *in forma pauperis status* in this action
6 indicates that monetary sanctions are of little use, and the preclusion of evidence or witnesses is
7 likely to have no effect given that Plaintiff has ceased litigating his case.

8 **III. Conclusion and Recommendation**

9 For the reasons stated, it is HEREBY RECOMMENDED as follows:

- 10 1. Plaintiff's federal claims be dismissed, with prejudice, based on Plaintiff's failure to
11 state a claim, failure to establish this Court's jurisdiction, failure to obey the Court's
12 order and failure to prosecute; and
- 13 2. Plaintiff's state law claims be dismissed without prejudice.

14 These Findings and Recommendations will be submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
16 **fourteen (14) days** after being served with these Findings and Recommendations, Plaintiff may
17 file written objections with the Court. The document should be captioned "Objections to
18 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
19 objections within the specified time may result in the waiver of the "right to challenge the
20 magistrate's factual findings" on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014)
21 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22
23 IT IS SO ORDERED.

24 Dated: June 14, 2022

25 /s/ Barbara A. McAuliffe
26 UNITED STATES MAGISTRATE JUDGE
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28