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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM P. GRANT,

Plaintiff,

No. CIV S-10-0176 GEB DAD PS

v.

ACCESS DENTAL, et al.,

Defendants.

ORDER AND FINDINGS AND
RECOMMENDATIONS

_____/

Plaintiff, proceeding in this action pro se, has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. The case was referred to the undersigned in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

In his in forma pauperis application, plaintiff declares that he was last employed in 1991 and that in the past twelve months he has received money from pensions, annuities, or life insurance payments. Plaintiff does not describe the source of such income and does not state the amount received and what he expects to continue to receive. In the absence of information about the amount of plaintiff's income, the application fails to make the showing required by 28 U.S.C. § 1915(a)(1).

Because plaintiff may be able to submit a new in forma pauperis application that demonstrates indigency, the undersigned has also reviewed plaintiff's complaint. The mere

1 determination that a plaintiff is indigent does not complete the inquiry required by the in forma
2 pauperis statute. Under 28 U.S.C. § 1915(e)(2), the court is required to dismiss an in forma
3 pauperis case at any time if the plaintiff's allegation of poverty is untrue or if the action is
4 frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary
5 relief against an immune defendant. To state a claim on which relief may be granted, the
6 plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl.
7 Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is frivolous when it lacks an arguable
8 basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Balistreri v.
9 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

10 In considering whether a complaint states a cognizable claim, the court accepts as
11 true the material allegations in the complaint and construes the allegations in the light most
12 favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Hosp. Bldg. Co.
13 v. Trustees of Rex Hosp., 425 U.S. 738, 740 (1976); Love v. United States, 915 F.2d 1242, 1245
14 (9th Cir. 1989). Pro se pleadings are held to a less stringent standard than those drafted by
15 lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). However, the court need not accept as
16 true conclusory allegations, unreasonable inferences, or unwarranted deductions of fact. Western
17 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

18 The minimum requirements for a civil complaint in federal court are as follows:

19 A pleading which sets forth a claim for relief . . . shall contain (1) a
20 short and plain statement of the grounds upon which the court's
21 jurisdiction depends . . . , (2) a short and plain statement of the
claim showing that the pleader is entitled to relief, and (3) a
demand for judgment for the relief the pleader seeks.

22 Fed. R. Civ. P. 8(a).

23 Here, plaintiff's complaint does not contain a statement of the grounds upon
24 which the court's jurisdiction depends. Plaintiff alleges that defendants Access Dental, Western
25 Dental, and the Dental Board of California committed "malpractice, malfeasance [sic] and
26 negligence" when Access Dental and Western Dental put amalgam fillings in plaintiff's teeth,

1 despite his objection that such fillings are poisonous, and the Dental Board of California failed to
2 investigate his complaint. (Compl. at 1.) Plaintiff alleges further that the dental companies “are
3 allowed to continue to practice unsafe and unhealthy dental care” and that they have committed
4 “malpractice by dereliction of professional duty and failure of professional skill that resulted in
5 injury and damages, malfeasance [sic] by wrongful conduct and negligence.” (Id. at 2.) Finally,
6 plaintiff seeks damages in the amount of \$5,000,000.00 for injuries described vaguely as
7 “compromised” liver and kidneys, among other parts of his body. Id.

8 Attached to plaintiff’s complaint is a civil cover sheet in which he indicates that
9 all parties are California residents and that jurisdiction is based on federal question. The civil
10 cover sheet also indicates that the nature of plaintiff’s suit is “personal injury, medical
11 malpractice” and that plaintiff’s cause of action is “USCS Title 42 Section 1983/42 CFR
12 sectio[n] 1395” for “Negligence, malfeasance and Fraud.”

13 Section 1983 provides as follows:

14 Every person who, under color of [state law] . . . subjects, or causes
15 to be subjected, any citizen of the United States . . . to the
16 deprivation of any rights, privileges, or immunities secured by the
17 Constitution . . . shall be liable to the party injured in an action at
18 law, suit in equity, or other proper proceeding for redress.

17 42 U.S.C. § 1983. The three defendants sued by plaintiff in this case are not “persons” and
18 cannot be sued under § 1983. Moreover, plaintiff has not alleged that he was deprived of any
19 right, privilege, or immunity secured by the United States Constitution, and his allegations of
20 negligence, malfeasance, and medical malpractice present only state law claims that must be
21 litigated in state court absent diversity of citizenship.

22 If plaintiff were to amend his complaint to sue individual members and employees
23 of the three entity defendants, his claims against employees of the dental companies could not
24 proceed under § 1983 because the companies are not state agencies and their employees do not
25 act under color of state law. Although members of the dental board may be state actors for
26 purposes of § 1983, it does not appear that plaintiff can allege facts demonstrating that any

1 member or employee of the dental board deprived him of a right, privilege, or immunity secured
2 by the federal constitution.

3 In the absence of complete diversity of citizenship or factual allegations that give
4 rise to a federal question, the court finds that plaintiff has not alleged a claim over which this
5 court has jurisdiction. It does not appear that plaintiff's claims can be amended to state any
6 federal claim with an arguable basis in law and fact. Accordingly, the undersigned will
7 recommend that plaintiff's complaint be dismissed for lack of jurisdiction. See Hagans v.
8 Levine, 415 U.S. 528, 543 (1974) (approving dismissal of claims for lack of jurisdiction where
9 the claims do not involve a federal controversy within the jurisdiction of the district court);
10 California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988)
11 (holding that futility is a valid reason for denying leave to amend); Klamath-Lake Pharm. Ass'n
12 v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that, while leave to
13 amend shall be freely given, the court does not have to allow futile amendments).

14 IT IS HEREBY ORDERED that plaintiff's January 22, 2010 application to
15 proceed in forma pauperis (Doc. No. 2) is denied and

16 IT IS RECOMMENDED that:

- 17 1. Plaintiff's complaint be dismissed for lack of jurisdiction; and
- 18 2. This action be dismissed.

19 These findings and recommendations will be submitted to the United States
20 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
21 fourteen (14) days after being served with these findings and recommendations, plaintiff may file
22 written objections with the court. A document containing objections should be titled "Objections
23 to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file

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1 objections within the specified time may, under certain circumstances, waive the right to appeal
2 the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: April 23, 2010.

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6 _____
7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

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