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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DEREK TODD,

Plaintiff,

v.

OFFICER TALTON B# 410; JOHN
OBERHOLTZER #A55023; JOHN
HOFFMAN; BRENDA HOFFMAN;
SETH HOFFMAN; SHARON
HOFFMAN; SUZANNE HOFFMAN; and
SONDRA HOFFMAN,

Defendants.

No. 2:13-cv-1596-KJM-EFB PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

This case, in which plaintiff is proceeding *in propria persona*, was referred to the undersigned under Local Rule 302(c)(21), pursuant to 28 U.S.C. § 636(b)(1). Plaintiff seeks leave to proceed *in forma pauperis* pursuant to 28 U.S.C. 1915. His declaration makes the showing required by 28 U.S.C. §1915(a)(1) and (2). *See* ECF No. 2. Accordingly, the request to proceed *in forma pauperis* is granted. 28 U.S.C. § 1915(a).

Determining that plaintiff may proceed *in forma pauperis* does not complete the required inquiry. Pursuant to § 1915(e)(2), the court must dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

1 Although pro se pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519,
2 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if it
3 fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
4 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41
5 (1957)); *see also* Fed. R. Civ. P. 12(b)(6). “[A] plaintiff’s obligation to provide the ‘grounds’ of
6 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of
7 a cause of action’s elements will not do. Factual allegations must be enough to raise a right to
8 relief above the speculative level on the assumption that all of the complaint’s allegations are
9 true.” *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable
10 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.
11 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

12 In reviewing a complaint under this standard, the court must accept as true the allegations
13 of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976),
14 construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the
15 plaintiff’s favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must satisfy
16 the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2)
17 “requires a complaint to include a short and plain statement of the claim showing that the pleader
18 is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds
19 upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing
20 *Conley v. Gibson*, 355 U.S. 41 (1957)).

21 Additionally, a federal court is a court of limited jurisdiction, and may adjudicate only
22 those cases authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*,
23 511 U.S. 375, 377 (1994). The basic federal jurisdiction statutes, 28 U.S.C. §§ 1331 & 1332,
24 confer “federal question” and “diversity” jurisdiction, respectively. Federal question jurisdiction
25 requires that the complaint (1) arise under a federal law or the U. S. Constitution, (2) allege a
26 “case or controversy” within the meaning of Article III, § 2 of the U. S. Constitution, or (3) be
27 authorized by a federal statute that both regulates a specific subject matter and confers federal
28 jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). To invoke the court’s diversity

1 jurisdiction, a plaintiff must specifically allege the diverse citizenship of all parties, and that the
2 matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Bautista v. Pan American World*
3 *Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A case presumably lies outside the jurisdiction
4 of the federal courts unless demonstrated otherwise. *Kokkonen*, 511 U.S. at 376-78. Lack of
5 subject matter jurisdiction may be raised at any time by either party or by the court. *Attorneys*
6 *Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

7 Plaintiff's complaint is brought under 42 U.S.C. §§ 1983 and 1985. He alleges that in
8 2004, his three-year old daughter resided with defendants Sondra Hoffman (the mother of
9 plaintiff's daughter), John Hoffman and Brenda Hoffman (the daughter's maternal grandparents),
10 and Seth Hoffman and Sharon Hoffman (the daughter's maternal uncle and aunt). ECF No. 1 at
11 5. Plaintiff alleges that on May 4, 2004, Brenda and John¹ brought plaintiff's "daughter to him
12 for court ordered visitation with bloody panties." *Id.* at 3. The day before plaintiff's daughter
13 was examined by defendant John Oberholtzer, a medical doctor. *Id.* Plaintiff claims that Dr.
14 Oberholtzer concealed the fact that plaintiff's daughter had been sexually assaulted because he
15 wanted Sondra and her family to get away with lewd conduct. *Id.* at 3, 10.

16 In May 2013, more than nine years later, plaintiff reported to the Vacaville Police
17 Department that his daughter was the victim of lewd conduct by Brenda, John, Seth, Sharon
18 and/or Sondra. *Id.* at 4, 8. However, defendant Talton, a Vacaville police officer, refused to
19 investigate the lewd conduct, write a report about the incident, or report the incident to Child
20 Protective Services or the District Attorney's Office. *Id.* Plaintiff claims that Talon wanted the
21 other defendants to get away with lewd conduct. *Id.* at 72. He further claims that Talton
22 conspired with the other defendants to violate his and his daughter's right to equal protection. *Id.*
23 at 3-5.

24 As currently pleaded, the allegations of plaintiff's complaint fail to satisfy the state action
25 requirement. To state a claim under § 1983, plaintiff must allege: (1) the violation of a federal
26 constitutional or statutory right; and (2) that the violation was committed by a person acting under

27 ¹ As six of the defendants have the last name Hoffman, the court refers to the Hoffman
28 defendants by their first name for ease of reference.

1 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). The complaint does not allege
2 that defendants Oberholtzer, John, Brenda, Seth, Sharon, Suzanne, or Sondra were state actors.
3 Plaintiff contends, however, that all defendants were acting under color of state law because
4 defendant Talon, a police officer, “wanted the other Defendants to get away with sexually
5 assaulting the Plaintiff’s daughter after he read the Plaintiff’s report and Defendant Oberholtzer’s
6 medical record.” ECF No. 1 at 86. He further argues that the “other Defendants were considered
7 to be state actors when they conspired with Defendant Talon.” *Id.*

8 A private party may be considered to have acted under color of state law when the party
9 “is a willful participant in joint action with the State or its agents.” *Dennis v. Spartks*, 449 U.S.
10 24, 27 (1980). To establish joint action between state actors and a private party, a plaintiff must
11 establish “an agreement or ‘meeting of the minds’ to violate constitutional rights.” *Fonda v.*
12 *Gray*, 707 F.2d 435, 438 (9th Cir. 1983). Mere acquiescence to the wrongful conduct is
13 insufficient. *Id.* Rather, the plaintiff must demonstrate that each participant “share[d] the general
14 conspiratorial objective.” *Id.*

15 Plaintiff has failed to allege facts demonstrating that the defendants had an agreement or
16 acted in concert to violate his constitutional rights. Instead, he only alleges that Talon wanted the
17 defendants to get away with assaulting his daughter and that the other defendants became state
18 actors when they conspired with Talon. These conclusory allegations are insufficient to establish
19 that the other defendants were acting under color of state law.

20 Furthermore, plaintiff has failed to allege that any of the defendants violated his right to
21 equal protection under the Fourteenth Amendment. “To state a § 1983 claim for violation of the
22 Equal Protection Clause, a plaintiff must show that he was treated in a manner inconsistent with
23 others similarly situated, and that the defendants acted with an intent or purpose to discriminate
24 against the plaintiff based upon membership in a protected class.” *Thornton v. City of St. Helens*,
25 425 F.3d 1158, 1166 (9th Cir. 2005). Plaintiff alleges that he “became a disfavored person to
26 Defendant Talton when he discovered that Defendant John was a retired Solano County local
27 religious leader (Jehovah Witness).” ECF No. 1 at 88. Plaintiff alleges that he is Catholic, that
28 no other defendants are Catholic, and that Talton denied him his “right to equal protection of the

1 law as a courtesy to Defendant John.” *Id.* This “courtesy” was somehow engaged in based upon
2 the fact that defendant John and Talon worked in the same building complex. *Id.*

3 A court cannot “accept as true allegations that are merely conclusory, unwarranted
4 deduction of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979,
5 988 (9th Cir. 2001). Plaintiff speculates that he was discriminated against because he was a
6 different religion than defendant John, and John and Talon worked in the same complex. Such
7 speculation is insufficient to demonstrate that plaintiff was discriminated against based upon
8 membership in a protected class. Accordingly, plaintiff has failed to state a cognizable claim
9 under section 1983.

10 Plaintiff also fails to state a conspiracy claim under 42 U.S.C. § 1985. To state a claim for
11 conspiracy to violate constitutional rights, the plaintiff must establish (1) the existence of a
12 conspiracy to deprive the plaintiff of the equal protection of the laws; (2) an act in furtherance of
13 the conspiracy; and (3) a resulting injury. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1141 (9th
14 Cir. 2000) (citing *Scott v. Ross*, 140 F.3d 1275, 1284 (9th Cir.1998)). Furthermore, a plaintiff
15 cannot state a conspiracy claim under § 1985 in the absence of a claim for deprivation of rights
16 under 42 U.S.C. § 1983. *See Caldeira v. Cnty. of Kauai*, 866 F.2d 1175, 1182 (9th Cir. 1989)
17 (holding that “the absence of a section 1983 deprivation of rights precludes a section 1985
18 conspiracy claim predicated on the same allegations”), *cert. denied*, 493 U.S. 817 (1989). As
19 discussed above, plaintiff’s complaint fails to state a cognizable claim under section 1983, and
20 also fails to allege facts in support of a conspiracy. Accordingly, plaintiff fails to state a claim
21 under section 1985.

22 Finally, the court notes that the instant case is simply one of several actions plaintiff has
23 filed in this district. Plaintiff has filed at least three other actions against law enforcement
24 defendants based on their alleged failure to adequately respond to his allegations of child abuse
25 against his children. *See Todd v. Briesenick*, 2:12-cv-856 MCE GGH PS (E.D. Cal.); *Todd v.*
26 *Briesenick*, 2:13-cv-752 KJM KJN PS (E.D. Cal.); *Todd v. Briesenick*, 2:13-cv-2231 JAM CKD
27 PS (E.D. Cal). Each case was dismissed with prejudice. *See Todd v. Briesenick*, 2:12-cv-856
28 MCE GGH PS, ECF No. 5; *Todd v. Briesenick*, 2:13-cv-752 KJM KJN PS, ECF No. 8; *Todd v.*

1 *Briesenick*, 13-cv-2231 JAM CKD PS, ECF No. 6. In a fourth action filed subsequent to the
2 instant case, plaintiff was declared a vexatious litigant and is now subject to a prefiling screening
3 order. *See Todd v. Canby*, 2:13-cv-1018 GEB AC PS, ECF No. 5.

4 In light of the deficiencies in the complaint, as well as plaintiff's history of filing frivolous
5 actions, it does not appear that the defects of the complaint may be cured by amendment.
6 Accordingly, it is recommended that the complaint be dismissed without leave to amend pursuant
7 to 28 U.S.C. 1915(e)(2). *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (While the court
8 ordinarily would permit a pro se plaintiff to amend, leave to amend should not be granted where it
9 appears amendment would be futile).

10 Accordingly, it is hereby ORDERED that plaintiff's request to proceed *in forma pauperis*,
11 ECF No. 2, is granted.

12 Further, it is RECOMMENDED that plaintiff's complaint be dismissed without leave to
13 amend and the Clerk be directed to close this case.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
19 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
20 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: March 31, 2015.

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23 EDMUND F. BRENNAN
24 UNITED STATES MAGISTRATE JUDGE
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