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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY SHARP, et al.,  
Plaintiffs,  
v.  
CLARK KELSO, et al.,  
Defendants.

No. 2:17-cv-1528 KJN P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiffs, four state prisoners proceeding pro se, seek relief pursuant to 42 U.S.C. § 1983, and request that this action proceed as a class action. Plaintiff Sharp requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

I. Application to Proceed In Forma Pauperis

Plaintiff Sharp submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). However, the court will not assess a filing fee at this time. Instead, the undersigned recommends summary dismissal of the complaint.

II. Statutory Screening of Prisoner Complaints

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally

1 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek  
2 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

3 A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”  
4 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
5 Cir. 1984). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
6 meritless legal theories or whose factual contentions are clearly baseless.” Jackson v. Arizona,  
7 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), superseded by statute  
8 on other grounds as stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Neitzke, 490  
9 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,  
10 has an arguable legal and factual basis. Id.

11 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the  
12 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
13 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550  
14 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
15 However, in order to survive dismissal for failure to state a claim, a complaint must contain more  
16 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
17 allegations sufficient “to raise a right to relief above the speculative level.” Id. (citations  
18 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that  
19 merely creates a suspicion [of] a legally cognizable right of action.” Id. (alteration in original)  
20 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d  
21 ed. 2004)).

22 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
23 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell  
24 Atl. Corp., 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
25 content that allows the court to draw the reasonable inference that the defendant is liable for the  
26 misconduct alleged.” Id. (citing Bell Atl. Corp., 550 U.S. at 556). In reviewing a complaint  
27 under this standard, the court must accept as true the allegations of the complaint in question,  
28 Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading

1 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, Jenkins v.  
2 McKeithen, 395 U.S. 411, 421 (1969).

3 III. Complaint

4 Plaintiffs allege that defendant Kelso refuses to disclose the name of the state employee  
5 who left his state laptop in his car, where the laptop was stolen, and allegedly placed plaintiffs’  
6 private information at risk. Plaintiffs allege that the laptop was password protected but object that  
7 the laptop should have been encrypted. Further, plaintiffs’ contend that John Doe defendants, the  
8 California Correctional Health Care Services (“CCHCS”), and other unidentified state employees  
9 waited two months before notifying the victims of the breach of information, in which they  
10 identified a “potential breach of data.” (ECF No. 1 at 12.) Plaintiffs also allege a violation of  
11 HIPAA.<sup>1</sup> Plaintiffs contend that the laptop contained confidential information “which may have  
12 included medical, mental health and custodial information.” (ECF No. 1 at 9.) Plaintiffs seek  
13 monetary damages.

14 IV. Standing

15 “[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing  
16 [and ripeness].” B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). The  
17 Article III case or controversy requirement limits federal courts’ subject matter jurisdiction by  
18 requiring that plaintiffs have standing. Valley Forge Christian Coll. v. Ams. United for  
19 Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). To have Article III standing, a  
20 plaintiff must plead and prove that he has suffered sufficient injury to satisfy the “case or  
21 controversy” requirement of Article III of the United States Constitution. Clapper v. Amnesty  
22 Int’l USA, 133 S. Ct. 1138, 1146 (2013) (“One element of the case-or-controversy requirement’  
23 is that plaintiffs ‘must establish that they have standing to sue.’” (quoting Raines v. Byrd, 521  
24 U.S. 811, 818 (1997))). To satisfy Article III standing, a plaintiff must therefore allege: (1)  
25 injury-in-fact that is concrete and particularized, as well as actual or imminent; (2) that the injury  
26 is fairly traceable to the challenged action of the defendant; and (3) that the injury is redressable  
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28 <sup>1</sup> Health Insurance Portability and Accountability Act of 1996.

1 by a favorable ruling. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010) (citation  
2 omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). “The party invoking  
3 federal jurisdiction bears the burden of establishing these elements . . . with the manner and  
4 degree of evidence required at the successive stages of the litigation.” Lujan, 504 U.S. at 561  
5 (citations omitted).

6 Although “HIPAA itself does not provide for a private right of action,” Webb v. Smart  
7 Document Solutions, LLC, 499 F.3d 1078, 1082 (9th Cir. 2007) (citing Standards for Privacy of  
8 Individually Identifiable Health Information, 65 Fed. Reg. 82462-01, 82601 (Dec. 28, 2000) (to  
9 be codified at 45 C.F.R. pt. 160 and 164) (“Under HIPAA, individuals do not have a right to court  
10 action.”)), the Ninth Circuit has held that the constitutional right to informational privacy extends  
11 to medical information, Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269 (9th  
12 Cir. 1998) (“The constitutionally protected privacy interest in avoiding disclosure of personal  
13 matters clearly encompasses medical information and its confidentiality.”) (citing Doe v.  
14 Attorney Gen. of the United States, 941 F.2d 780, 795 (9th Cir. 1991)). However, the disclosure  
15 of plaintiffs’ medical information, and therefore any injury, is entirely speculative here.

16 While potential future harm can in some instances confer standing, plaintiffs must face “a  
17 credible threat of harm” that is “both real and immediate, not conjectural or hypothetical.”  
18 Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010) (citations and internal quotation  
19 marks omitted) (holding that threat of potential identity theft created by theft of a laptop known to  
20 contain plaintiffs’ unencrypted names, addresses, and social security numbers was sufficient to  
21 confer standing, but that “more conjectural or hypothetical” allegations would make threat “far  
22 less credible”); Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1147 (2013) (“[A]n injury must  
23 be concrete, particularized, and actual or imminent.”) (citation and internal quotation marks  
24 omitted). Plaintiff’s allegations are based upon a notification which states that there was a  
25 “potential breach of data,” and “which may have included medical, mental health and custodial  
26 information.” (ECF No. 1 at 9, 12.) It appears it is even uncertain whether any of these four  
27 plaintiffs’ information was contained in the stolen laptop. In other words, whether plaintiffs’  
28 sensitive information has even been compromised is unknown. Plaintiffs cannot state a claim for

1 relief based upon the speculative breach of sensitive information. Plaintiffs' claim for violation  
2 of their constitutional right to informational privacy should be dismissed without prejudice for  
3 lack of standing. See Fleck & Assoc., Inc. v. City of Phoenix, 471 F.3d 1100, 1106-07 (9th Cir.  
4 2006) (dismissal for lack of standing is without prejudice).

5 V. No Leave to Amend

6 If the court finds that a complaint should be dismissed for failure to state a claim, the court  
7 has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-  
8 30 (9th Cir. 2000) (en banc). Leave to amend should be granted if it appears possible that the  
9 defects in the complaint could be corrected, especially if a plaintiff is pro se. Id. at 1130-31; see  
10 also Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) ("A pro se litigant must be given  
11 leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely  
12 clear that the deficiencies of the complaint could not be cured by amendment.") (citing Noll v.  
13 Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)). However, if, after careful consideration, it is clear  
14 that a complaint cannot be cured by amendment, the Court may dismiss without leave to amend.  
15 Cato, 70 F.3d at 1005-06.

16 The undersigned finds that, as set forth above, plaintiffs lack standing and amendment  
17 would be futile because the allegations establish only speculative injury that is not real or  
18 immediate. Because plaintiffs lack standing to pursue their federal claims, the court should  
19 dismiss the complaint in its entirety.

20 VI. Class Action

21 In light of the above findings, the undersigned declines to recommend that this action  
22 proceed as a class action.

23 VII. Requests for Counsel

24 Plaintiffs have filed two requests for the appointment of counsel. (ECF Nos. 12, 13.)

25 District courts lack authority to require counsel to represent indigent prisoners in section  
26 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional  
27 circumstances, the court may request an attorney to voluntarily represent such a plaintiff. See 28  
28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v.

1 Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether “exceptional  
2 circumstances” exist, the court must consider plaintiff’s likelihood of success on the merits as  
3 well as the ability of the plaintiff to articulate his claims pro se in light of the complexity of the  
4 legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not  
5 abuse discretion in declining to appoint counsel). The burden of demonstrating exceptional  
6 circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such as lack of  
7 legal education and limited law library access, do not establish exceptional circumstances that  
8 warrant a request for voluntary assistance of counsel.

9 Having considered the factors under Palmer, the court finds that plaintiffs failed to meet  
10 their burden of demonstrating exceptional circumstances warranting the appointment of counsel  
11 at this time.

12 VIII. Summary

13 The undersigned recommends that the complaint be dismissed without prejudice because  
14 the facts show only that plaintiffs’ sensitive information might have been stolen and it does not  
15 look like they can show that their information was actually stolen. Plaintiffs’ injuries are  
16 therefore too speculative to support a claim.

17 In accordance with the above, IT IS HEREBY ORDERED that

- 18 1. Plaintiff Sharp’s request to proceed in forma pauperis (ECF No. 2) is granted;
- 19 2. Plaintiffs’ motions for the appointment of counsel (ECF Nos. 12, 13) are denied  
20 without prejudice; and
- 21 3. The Clerk of the Court shall randomly assign a United States District Judge to this  
22 action.<sup>2</sup>

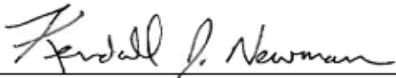
23 IT IS FURTHER RECOMMENDED that plaintiffs’ request that this action proceed as a  
24 class action be denied, and this action be dismissed without prejudice.

25 These findings and recommendations are submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days

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28 <sup>2</sup> Although the remaining defendants subsequently consented to Magistrate Judge jurisdiction  
(ECF Nos. 4, 6, 7, 11), plaintiff Piccione did not (ECF No. 1 at 3.)

1 after being served with these findings and recommendations, plaintiff may file written objections  
2 with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
3 and Recommendations." Plaintiffs are advised that failure to file objections within the specified  
4 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
5 (9th Cir. 1991).

6 Dated: August 28, 2017

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KENDALL J. NEWMAN  
9 UNITED STATES MAGISTRATE JUDGE

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