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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

VANCE S. ELLIOT,  
Plaintiff,  
v.  
THE SAN FRANCISCO DEPARTMENT  
OF PUBLIC HEALTH,  
Defendant.

Case No. [15-cv-03127-MEJ](#)  
**ORDER GRANTING APPLICATION  
TO PROCEED IN FORMA PAUPERIS**  
**ORDER DISMISSING COMPLAINT  
WITH LEAVE TO AMEND**

**INTRODUCTION**

On July 6, 2015, Plaintiff Vance S. Elliot (“Plaintiff”) filed a Complaint (Dkt. No. 1) and an Application to Proceed In Forma Pauperis (Dkt. No. 3). He also filed a consent to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) (Dkt. No. 4), and therefore, the undersigned may exercise jurisdiction to conduct all proceedings in this matter, including the entry of judgment.<sup>1</sup> For the reasons stated below, the Court **GRANTS** the application to proceed in forma pauperis and **DISMISSES** the Complaint **WITH LEAVE TO AMEND**.

**BACKGROUND<sup>2</sup>**

Although not stated in the Complaint, it appears Plaintiff is a resident of a property owned and/or operated by Defendant San Francisco Department of Public Health. In February 2015, Plaintiff received a letter from the Director of the Department of Public Health “citing all kinds of

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<sup>1</sup> Defendant has not been served, and therefore is not a party to the suit pursuant to 28 U.S.C. § 636(c). See *Levy v. United States*, 2012 WL 1439047, at \*1 (N.D. Cal. Apr. 25, 2012); *Third World Media, LLC v. Does 1-1568*, 2011 WL 4344160, at \*3 (N.D. Cal. Sept. 15, 2011).

<sup>2</sup> The following factual allegations are taken from Plaintiff’s Complaint. Dkt. No. 1.

1 filthy things had been found in my room by an Inspector of Department of Public Health and that I  
2 should clean up my my [sic] room forthwith or face eviction.” Plaintiff also alleges he appeared  
3 for an Abatement Hearing at 300 Grove Street where testimony was given by an inspector that his  
4 “room had feces on the floor, cobwebs on the ceiling [sic] and other noxious conditions [sic]  
5 were present.” He alleges he was not given the opportunity to cross-examine the Inspector or see  
6 any evidence that was presented. He further alleges that none of these conditions were present in  
7 his room, “therefore, the man’s testimony was perjured throughout.”

8 Plaintiff captions his Complaint as “Perjury and Slander.” On the Civil Cover Sheet, he  
9 states the nature of his suit is “Personal Injury” for “Assault, Libel & Slander.” He requests the  
10 Court order Defendant to cease and desist any further action “until a person representing me shall  
11 have the opportunity to testify on my behalf at trial that I was the victim of a Kangaroo [sic] Court  
12 in which an Inspector of the Department [of Public] Health had perjured himself.”

13 **APPLICATION TO PROCEED IN FORMA PAUPERIS**

14 Pursuant to 28 U.S.C. § 1915, a district court may authorize the commencement of a civil  
15 action in forma pauperis if it is satisfied that the would-be plaintiff cannot pay the filing fees  
16 necessary to pursue the action. 28 U.S.C. § 1915(a)(1). Here, Plaintiff submitted the required  
17 documentation, and it is evident from the application that the listed assets and income are  
18 insufficient to enable Plaintiff to pay the filing fees. Accordingly, the Court **GRANTS** the  
19 Application to Proceed In Forma Pauperis.

20 **SUA SPONTE SCREENING UNDER 28 U.S.C. § 1915(e)(2)**

21 **A. Legal Standard**

22 Notwithstanding payment of any filing fee or portion thereof, a complaint filed by any  
23 person proceeding in forma pauperis pursuant to 28 U.S.C. § 1915(a) is subject to a mandatory  
24 and sua sponte review and dismissal by the Court if it is frivolous, malicious, fails to state a claim  
25 upon which relief may be granted, or seeks monetary relief from a defendant who is immune from  
26 such relief. 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001);  
27 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc). Section 1915(e)(2) mandates  
28 that the court reviewing an in forma pauperis complaint make and rule on its own motion to

1 dismiss before directing that the complaint be served by the United States Marshal pursuant to  
2 Federal Rule of Civil Procedure (“Rule”) 4(c)(2). *Lopez*, 203 F.3d at 1127; *see also Barren v.*  
3 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that the language of § 1915(e) (2)(B)(ii)  
4 parallels the language of Rule 12(b)(6)). As the United States Supreme Court has explained, “[the  
5 in forma pauperis statute] is designed largely to discourage the filing of, and waste of judicial and  
6 private resources upon, baseless lawsuits that paying litigants generally do not initiate because of  
7 the costs of bringing suit.” *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

8 “Frivolousness” within the meaning of the in forma pauperis standard of 28 U.S.C. §  
9 1915(d) and failure to state a claim under Rule 12(b)(6) are distinct concepts. A complaint is  
10 “frivolous” when it lacks an arguable basis either in law or in fact. *Id.* at 325 (definition of  
11 “frivolous . . . embraces not only the arguable legal conclusion, but also the fanciful factual  
12 allegation”). When determining whether to dismiss a complaint as “frivolous” under 28 U.S.C. §  
13 1915(e)(2)(B)(i), the Court has “the unusual power to pierce the veil of the complaint’s factual  
14 allegations,” meaning that the Court “is not bound, as it usually is when making a determination  
15 based solely on the pleadings, to accept without question the truth of the plaintiff’s allegations.”  
16 *Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (quoting *Nietzke*, 490 U.S. at 327). Further, the  
17 Ninth Circuit has expressly held that frivolous litigation “is not limited to cases in which a legal  
18 claim is entirely without merit . . . . [A] person with a measured legitimate claim may cross the  
19 line into frivolous litigation by asserting facts that are grossly exaggerated or totally false.”  
20 *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1060-61 (9th Cir. 2007).

21 The Court may also dismiss a complaint sua sponte under Rule 12(b)(6). *Sparling v.*  
22 *Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). Under Rule 12(b)(6), a district court  
23 must dismiss a complaint if it fails to state a claim upon which relief can be granted. Rule 8(a)(2)  
24 requires that a complaint include a “short and plain statement” showing the plaintiff is entitled to  
25 relief. “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
26 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.  
27 662, 678 (2009) (internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S.  
28 544, 570 (2007). The complaint need not contain detailed factual allegations, but the plaintiff

1 must “provide the ‘grounds’ of his ‘entitle[ment]’ to relief,” which “requires more than labels and  
2 conclusions,” and merely “a formulaic recitation of the elements of a cause of action” is  
3 insufficient. *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 555.

4 In ruling on a motion to dismiss, courts may consider only “the complaint, materials  
5 incorporated into the complaint by reference, and matters of which the court may take judicial  
6 notice.” *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). The  
7 factual allegations pled in the complaint must be taken as true and reasonable inferences drawn  
8 from them must be construed in favor of the plaintiff. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,  
9 337-38 (9th Cir. 1996). However, the Court cannot assume that “the [plaintiff] can prove facts  
10 which [he or she] has not alleged.” *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of*  
11 *Carpenters*, 459 U.S. 519, 526 (1983). “Nor is the court required to accept as true allegations that  
12 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*  
13 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted).

14 When dismissing a case for failure to state a claim, the Ninth Circuit has “repeatedly held  
15 that a district court should grant leave to amend even if no request to amend the pleading was  
16 made, unless it determines that the pleading could not possibly be cured by the allegation of other  
17 facts.” *Lopez*, 203 F.3d at 1130. Pro se pleadings are liberally construed. *Haines v. Kerner*, 404  
18 U.S. 519, 520-21 (1972); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).  
19 Unless it is clear that no amendment can cure the defects of a complaint, a pro se plaintiff  
20 proceeding in forma pauperis is entitled to notice and an opportunity to amend before dismissal.  
21 *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

22 **B. Application to the Case at Bar**

23 At first glance, it is not clear that Plaintiff’s Complaint is properly before this Court. As to  
24 Plaintiff’s claim for “perjury,” it must be dismissed because there is no private right of action for  
25 such a claim. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (criminal statutes  
26 “provide no basis for civil liability”); *see also Ellis v. City of San Diego*, 176 F.3d 1183, 1189 (9th  
27 Cir. 1999) (criminal statutes do not generally provide a private cause of action nor basis for civil  
28 liability). As to Plaintiff’s remaining claim for slander, the Federal district courts are courts of

1 limited jurisdiction; “[t]hey possess only that power authorized by Constitution and statute, which  
2 is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.  
3 375, 377 (1994) (internal citation omitted). Accordingly, “[i]t is to be presumed that a cause lies  
4 outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party  
5 asserting jurisdiction.” *Id.*

6 There are two bases for federal subject matter jurisdiction: (1) federal question jurisdiction  
7 under 28 U.S.C. § 1331, and (2) diversity jurisdiction under 28 U.S.C. § 1332. Pursuant to the  
8 federal question jurisdiction statute, district courts have original jurisdiction over all civil actions  
9 arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. For  
10 diversity jurisdiction pursuant to 28 U.S.C. § 1332, each plaintiff must be diverse from each  
11 defendant, and the amount in controversy must exceed \$75,000.

12 Diversity jurisdiction does not exist here because Plaintiff and Defendant both reside in  
13 California. As to federal question jurisdiction, Plaintiff alleges only a tort-based claim for slander,  
14 which does not fall within the limited jurisdiction of federal courts. *Franklin v. Oregon*, 662 F.2d  
15 1337, 1344 (9th Cir. 1981) (no subject matter jurisdiction over claim of slander by police officer  
16 because no violation of federal right). The Court may adjudicate state tort claims only through  
17 supplemental jurisdiction, which is discretionary, and should only be used to promote judicial  
18 economy or convenience. 28 U.S.C. § 1367; *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715,  
19 726 (1966). Accordingly, as Plaintiff does not allege a federal cause of action the Court is unable  
20 to exercise supplemental jurisdiction over his state law claim.

21 Although Plaintiff does not currently allege a federal cause of action, the Court is mindful  
22 that pro se pleadings must be liberally construed. *Haines*, 404 U.S. at 520-21. Plaintiff alleges  
23 that he appeared for an abatement hearing, but was not given the opportunity to cross-examine the  
24 inspector or see any evidence that was presented. From this allegation, it appears Plaintiff may be  
25 attempting to state a claim under 42 U.S.C. § 1983 for violation of his due process rights. The  
26 Due Process Clause of the Fourteenth Amendment prohibits states from depriving “any person of  
27 life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. This  
28 provision imposes “procedural limitations on a State’s power to take away protected entitlements.”

1 *Dist. Att’y’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67 (2009). Procedural due  
2 process requires that the government’s deprivation of life, liberty, or property, even if consistent  
3 with substantive due process, “be implemented in a fair manner.” *United States v. Salerno*, 481  
4 U.S. 739, 746 (1987) (analyzing the Due Process Clause of the Fifth Amendment) (internal  
5 quotation marks and citation omitted).

6 If Plaintiff intends to state a claim under 42 U.S.C. § 1983, he must allege two essential  
7 elements: (1) that a right secured by the Constitution or laws of the United States was violated,  
8 and (2) that the alleged violation was committed by a person acting under the color of state law.  
9 *West v. Atkins*, 487 U.S. 42, 48 (1988).

10 Liability may be imposed on an individual defendant under § 1983 if the plaintiff can show  
11 that the defendant proximately caused the deprivation of a federally protected right. *Leer v.*  
12 *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Harris v. City of Roseburg*, 664 F.2d 1121, 1125 (9th  
13 Cir. 1981). A person deprives another of a constitutional right within the meaning of § 1983 if he  
14 does an affirmative act, participates in another’s affirmative act or omits to perform an act which  
15 he is legally required to do, that causes the deprivation of which the plaintiff complains. *Leer*, 844  
16 F.2d at 633.

17 Local governments are “persons” subject to liability under 42 U.S.C. § 1983 where official  
18 policy or custom causes a constitutional tort, *see Monell v. Dep’t of Social Servs.*, 436 U.S. 658,  
19 690 (1978); however, a city or county may not be held vicariously liable for the unconstitutional  
20 acts of its employees under the theory of respondeat superior, *see Bd. of Cty. Comm’rs. of Bryan*  
21 *Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436 U.S. at 691. To impose municipal liability  
22 under § 1983 for a violation of constitutional rights, a plaintiff must show: (1) that the plaintiff  
23 possessed a constitutional right of which he or she was deprived; (2) that the municipality had a  
24 policy; (3) that this policy amounts to deliberate indifference to the plaintiff’s constitutional rights;  
25 and (4) that the policy is the moving force behind the constitutional violation. *Plumeau v. Sch.*  
26 *Dist. # 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

27 **CONCLUSION**

28 Based on the analysis above, the Court finds dismissal appropriate. However, given

1 Plaintiff's pro se status and because it is not clear that the deficiencies of the Complaint could not  
2 be cured by amendment, the Court shall grant Plaintiff leave to amend. Accordingly, the Court  
3 **GRANTS** the Application to Proceed In Forma Pauperis and **DISMISSES** the Complaint **WITH**  
4 **LEAVE TO AMEND.**

5 If Plaintiff files an amended complaint, it must comply with the guidelines set forth in Rule  
6 8(a). This rule requires that a complaint for relief include (1) a short and plain statement of the  
7 grounds for the court's jurisdiction; (2) a short and plain statement of the claim showing that the  
8 pleader is entitled to relief; and (3) a demand for the relief sought. A pleading may not simply  
9 allege a wrong has been committed and demand relief; it must state the elements of the claim  
10 plainly and succinctly. Plaintiff must allege with at least some degree of particularity the facts in  
11 which the defendant(s) engaged to support the claim. *Jones v. Cmty. Redev. Agency*, 733 F.2d  
12 646, 649 (9th Cir. 1984).

13 In addition, Plaintiff is informed that the Court cannot refer to a prior pleading in order to  
14 make Plaintiff's amended complaint complete. This is because, as a general rule, an amended  
15 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967).  
16 Once Plaintiff files an amended complaint, the original pleading no longer serves any function in  
17 the case. Therefore, in an amended complaint, as in an original complaint, each claim and the  
18 involvement of each defendant must be sufficiently alleged.

19 In preparing the amended complaint, Plaintiff may wish to seek assistance from the Legal  
20 Help Center, a free service of the Volunteer Legal Services Program, by calling 415-782-8982, or  
21 by signing up for an appointment on the 15th Floor of the Federal Courthouse in San Francisco,  
22 450 Golden Gate Avenue, San Francisco, California. At the Legal Help Center, you will be able  
23 to speak with an attorney who may be able to provide basic legal help but not representation.  
24 More information is available at <http://cand.uscourts.gov/helpcentersf>. The Court also  
25 recommends that Plaintiff obtain a copy of the Court's *Handbook for Litigants Without a Lawyer*,  
26 which is available free of charge in the Clerk's Office, or online at  
27 <http://cand.uscourts.gov/prosehandbk>. This handbook provides an explanation of the required  
28 components of a complaint.

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Consistent with the instructions in this Order, Plaintiff shall file any amended complaint by **August 13, 2015**. Failure to file an amended complaint by this deadline shall result in the dismissal of this case with prejudice. The Clerk is directed to close the file in this case if an amended complaint is not filed by August 13.

**IT IS SO ORDERED.**

Dated: July 10, 2015

  
\_\_\_\_\_  
MARIA-ELENA JAMES  
United States Magistrate Judge



1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 VANCE S. ELLIOT,  
4 Plaintiff,

5 v.

6 THE SAN FRANCISCO DEPARTMENT  
7 OF PUBLIC HEALTH,  
8 Defendant.

Case No. [15-cv-03127-MEJ](#)

**CERTIFICATE OF SERVICE**

9  
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
District Court, Northern District of California.

11 That on July 10, 2015, I SERVED a true and correct copy(ies) of the attached, by placing  
12 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
13 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
receptacle located in the Clerk's office.

14 Vance S. Elliot  
15 640 Eddy Street, Room 214  
16 San Francisco, CA 94109

17  
18 Dated: July 10, 2015

19  
20 Richard W. Wieking  
Clerk, United States District Court

21  
22 

23 Chris Nathan, Deputy Clerk to the  
24 Honorable MARIA-ELENA JAMES