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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DEBBIE BAIZE,

Plaintiff,

v.

LLOYD BURTON AUSTIN,

Defendant.

Case No. 16-cv-01893-BAS(RBB)

**ORDER:**

- (1) GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (ECF NO. 2);**
- (2) DISMISSING ACTION AS FRIVOLOUS UNDER 28 U.S.C. 1915(e); AND**
- (3) TERMINATING AS MOOT MOTION TO APPOINT COUNSEL**

**[ECF Nos. 2, 3]**

On July 27, 2016, Plaintiff Debbie Baize, proceeding pro se, filed a handwritten complaint against Defendant Lloyd Burton Austin asserting he “made false charges of elder abuse and lied under oath.” (ECF No. 1.) On the same day, Plaintiff also filed a motion seeking leave to proceed in forma pauperis (“IFP”) and a motion to appoint counsel. (ECF Nos. 2, 3.) For the following reasons, the Court: (1) **GRANTS** Plaintiff’s IFP motion (ECF No. 2); (2) **DISMISSES** this action as

1 frivolous under 28 U.S.C. 1915(e); and (3) **TERMINATES AS MOOT** Plaintiff's  
2 motion to appoint counsel (ECF No. 3).

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4 **I. MOTION FOR LEAVE TO PROCEED IFP**

5 Under 28 U.S.C. § 1915, a litigant who because of indigency is unable to pay  
6 the required fees or security to commence a legal action may petition the court to  
7 proceed without making such payment. The determination of indigency falls within  
8 the district court's discretion. *Cal. Men's Colony v. Rowland*, 939 F.2d 854, 858 (9th  
9 Cir. 1991), *rev'd on other grounds*, 506 U.S. 194 (1993) (holding that "Section 1915  
10 typically requires the reviewing court to exercise its sound discretion in determining  
11 whether the affiant has satisfied the statute's requirement of indigency"). It is well-  
12 settled that a party need not be completely destitute to proceed IFP. *Adkins v. E.I.*  
13 *DuPont de Nemours & Co.*, 335 U.S. 331, 339–40 (1948). To satisfy the  
14 requirements of 28 U.S.C. § 1915(a), "an affidavit [of poverty] is sufficient which  
15 states that one cannot because of his poverty pay or give security for costs . . . and  
16 still be able to provide himself and dependents with the necessities of life." *Id.* at 339.  
17 At the same time, however, "the same even-handed care must be employed to assure  
18 that federal funds are not squandered to underwrite, at public expense . . . the  
19 remonstrances of a suitor who is financially able, in whole or in material part, to pull  
20 his own oar." *Temple v. Ellerthorpe*, 586 F. Supp. 848, 850 (D.R.I. 1984).

21 District courts, therefore, tend to reject IFP applications where the applicant  
22 can pay the filing fee with acceptable sacrifice to other expenses. See, e.g., *Stehouwer*  
23 *v. Hennessey*, 841 F. Supp. 316, 321 (N.D. Cal. 1994), vacated in part on other  
24 grounds by *Olivares v. Marshall*, 59 F.3d 109 (9th Cir. 1995) (finding that the district  
25 court did not abuse its discretion in requiring a partial fee payment from a prisoner  
26 who had a \$14.61 monthly salary and who received \$110 per month from family).  
27 Moreover, "in forma pauperis status may be acquired and lost during the course of  
28 litigation." *Wilson v. Dir. of Div. of Adult Insts.*, No. CIV S-06-0791, 2009 WL

1 311150, at \*2 (E.D. Cal. Feb. 9, 2009) (citing Stehouwer, 841 F. Supp. at 321); see  
2 also Allen v. Kelly, 1995 WL 396860, at \*2 (N.D. Cal. June 29, 1995) (holding that  
3 a plaintiff who was initially permitted to proceed in forma pauperis should be  
4 required to pay his \$120 filing fee out of a \$900 settlement). Finally, the facts as to  
5 the affiant’s poverty must be stated “with some particularity, definiteness, and  
6 certainty.” United States v. McQuade, 647 F.2d 938, 940 (9th Cir. 1981).

7 Having read and considered Plaintiff’s application, the Court finds that  
8 Plaintiff meets the requirements in 28 U.S.C. § 1915 for IFP status. Plaintiff is  
9 unemployed and receives \$1,054.00 per month in retirement income. (IFP Mot. ¶¶ 1,  
10 2.) No other sources of income are listed. (Id.) Plaintiff’s monthly expenses include  
11 \$650.00 for rent and \$300.00 for medical and dental expenses. (Id. ¶ 8.) Plaintiff does  
12 not own an automobile, real estate, or any other significant asset. (Id. ¶ 5.) Under  
13 these circumstances, the Court finds that requiring Plaintiff to pay the court filing  
14 fees would impair her ability to obtain the necessities of life. See Adkins, 335 U.S. at  
15 339.

16 In light of the foregoing, the Court **GRANTS** Plaintiff’s application for leave  
17 to proceed IFP (ECF No. 2).

## 18 19 **II. DISMISSAL UNDER 28 U.S.C. § 1915(e)**

20 Under 28 U.S.C. § 1915(e)(2)(B)(i), the court must dismiss an action where  
21 the plaintiff is proceeding IFP if the court determines that the action “is frivolous or  
22 malicious.” An IFP complaint “is frivolous if it has ‘no arguable basis in fact or law.’”  
23 *O’Loughlin v. Doe*, 920 F.2d 614, 617 (9th Cir. 1990) (quoting *Franklin v. Murphy*,  
24 745 F.2d 1221, 1228 (9th Cir.1984)). In addition, an IFP complaint “that merely  
25 repeats pending or previously litigated claims” is subject to dismissal as frivolous.  
26 See *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995) (quoting *Bailey v.*  
27 *Johnson*, 846 F.2d 1019, 1021 (5th Cir.1988)) (construing former version of 28  
28 U.S.C. § 1915(d), which then governed dismissal for frivolousness); see also

1 Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir. 1984) (affirming dismissal of  
2 plaintiff's claims as "frivolous or malicious" where the plaintiff's four previous  
3 actions concerning the same issue were dismissed for lack of subject matter  
4 jurisdiction).

5 Here, the Court finds Plaintiff's Complaint is frivolous because it merely  
6 repeats claims that have been previously dismissed with prejudice in two actions.  
7 Plaintiff alleges Defendant "made false charges of elder abuse and lied under oath."  
8 (Compl., ECF No. 1.) She seeks to clear her name of "all false allegations and charges  
9 made against [her] personally" and requests compensation for "false imprisonment."  
10 (Id.) Plaintiff made the same allegations in a previous action against Austin Burton  
11 Lloyd, who is presumably the same person as Defendant Lloyd Burton Austin. See  
12 Complaint, Baize v. Lloyd, No. 14-CV-02573-BAS(JMA) (S.D. Cal. Oct. 29, 2014),  
13 ECF No. 1. In that case, this Court granted Plaintiff IFP status, but it dismissed her  
14 action without prejudice for lack of subject matter jurisdiction and for failure to state  
15 a claim. Order, Baize v. Lloyd, No. 14-CV-02573-BAS(JMA) (S.D. Cal. Nov. 13,  
16 2014), ECF No. 4. Plaintiff amended her complaint, but the Court again dismissed  
17 her action. Baize v. Lloyd, No. 14-CV-02573-BAS(JMA), 2015 WL 2165293, at \*1  
18 (S.D. Cal. May 7, 2015). Next, after Plaintiff amended her complaint for the final  
19 time, the Court dismissed the action with prejudice for failure to state a claim. Baize  
20 v. Lloyd, No. 14-CV-02573-BAS(JMA), 2015 WL 5040047, at \*4 (S.D. Cal. Aug.  
21 26, 2015).

22 Thereafter, Plaintiff filed another action against Defendant regarding the same  
23 allegations made in her first action. See Complaint, Baize v. Austin, 15-cv-02547-  
24 LAB(WVG) (S.D. Cal. Nov. 12, 2015), ECF No. 1. This second action was similarly  
25 dismissed with prejudice after Plaintiff failed to establish subject matter jurisdiction  
26 or explain why the action was not related to her previous case. Order, Baize v. Austin,  
27 15-cv-02547-LAB(WVG) (S.D. Cal. Feb. 29, 2016), ECF No. 8.

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1 Based on the foregoing, the Court finds Plaintiff's Complaint "merely repeats  
2 pending or previously litigated claims" that were dismissed with prejudice in the two  
3 prior actions described above. See Cato, 70 F.3d at 1105 n.2. Therefore, this action  
4 is frivolous, and it must be dismissed. See id.; 28 U.S.C. § 1915(e)(2)(B)(i); see also  
5 Denton, 504 U.S. at 30 (recognizing Congress's concern that "a litigant whose filing  
6 fees and court costs are assumed by the public, unlike a paying litigant, lacks an  
7 economic incentive to refrain from filing frivolous, malicious, or repetitive  
8 lawsuits").<sup>1</sup>

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10 **III. CONCLUSION**

11 In sum, the Court **GRANTS** Plaintiff's motion to proceed IFP (ECF No. 2).  
12 However, the Court also **DISMISSES WITH PREJUDICE** this action in its entirety  
13 under 28 U.S.C. § 1915(e)(2)(B)(i) because it is frivolous. In addition, the Court  
14 **TERMINATES AS MOOT** Plaintiff's motion to appoint counsel (ECF No. 3)  
15 because this action is being dismissed.

16 **IT IS SO ORDERED.**

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18 **DATED: August 3, 2016**

  
**Hon. Cynthia Bashant**  
**United States District Judge**

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27 <sup>1</sup> The Court also finds it appropriate to dismiss this action for failure to state a claim  
28 pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and for lack of subject matter jurisdiction for the same  
reasons expressed in its prior order. See Order, Baize v. Lloyd, No. 14-CV-02573-BAS(JMA) (S.D.  
Cal. Nov. 13, 2014), ECF No. 4.