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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CAROL THOMAS,
Plaintiff,
v.
ELDERHELP OF SAN DIEGO
Defendant.

Case No.: 3:17-cv-0941-GPC-MDD

ORDER:

- 1) GRANTING PLAINTIFF’S REQUEST TO PROCEED IN FORMA PAUPERIS;**
 - 2) DISMISSING CIVIL ACTION FOR FAILURE TO STATE A CLAIM PURSUANT TO 28 U.S.C. § 1915(e)(2)(B)(ii)**
 - 3) DENYING AS MOOT PLAINTIFF’S REQUEST FOR COURT-APPOINTED COUNSEL**
- AND**
- 4) GRANTING PLAINTIFF LEAVE TO AMEND WITHIN 30 DAYS**

[ECF Nos. 1, 2, 3.]

1 On May 8, 2017, Plaintiff Carol Thomas (“Plaintiff”), proceeding *pro se*, filed a
2 Complaint alleging gross negligence against ElderHelp of San Diego (“Defendant”).
3 (Dkt. No. 1.) Plaintiff concurrently filed a motion to proceed *in forma pauperis* (“IFP”)
4 and a motion for court-appointed counsel. (Dkt. Nos. 2, 3.) For the reasons set forth
5 below, the Court **GRANTS** Plaintiff’s motion to proceed *in forma pauperis*,
6 **DISMISSES** Plaintiff’s Complaint for failure to state a claim pursuant to 28 U.S.C. §
7 1915(e)(2)(B)(ii), and **DENIES AS MOOT** Plaintiff’s request for court-appointed
8 counsel.

9 DISCUSSION

10 I. Motion for Leave to Proceed *In Forma Pauperis*

11 All parties instituting any civil action, suit or proceeding in a district court of the
12 United States, except an application for writ of habeas corpus, must pay a filing fee of
13 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
14 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
15 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
16 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). The plaintiff must submit an affidavit
17 demonstrating his inability to pay the filing fee, and the affidavit must include a complete
18 statement of the plaintiff’s assets. 28 U.S.C. § 1915(a)(1). The facts as to the affiant’s
19 poverty must be stated “with some particularity, definiteness, and certainty.” *United*
20 *States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981). When a plaintiff moves to
21 proceed IFP, the court first “grants or denies IFP status based on the plaintiff’s financial
22 resources alone and then independently determines whether to dismiss the complaint”
23 pursuant to 28 U.S.C. § 1915(e)(2) (“§ 1915(e)(2)”). *Franklin v. Murphy*, 745 F.2d 1221,
24 1226 n.5 (9th Cir. 1984). IFP status may be acquired and lost during the course of

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26
27 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50.
28 See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14
(eff. Dec. 1, 2016)). The additional \$50 administrative fee does not apply to persons granted leave to
proceed IFP. *Id.*

1 litigation. *Wilson v. Dir. of Div. of Adult Insts.*, No. CIV S–06–0791, 2009 WL 311150,
2 at *2 (E.D. Cal. Feb. 9, 2009) (internal citation omitted).

3 Here, Plaintiff has supplied an affidavit in support of her application to proceed *in*
4 *forma pauperis*. (Dkt. No. 2.) Plaintiff declares that she receives \$330.72 in
5 supplemental security income and \$585 in social security benefits per month, resulting in
6 a total monthly income of \$915.72. (*Id.* at 2.) Plaintiff declares that her monthly
7 expenses total \$930. (*Id.* at 4.)² Plaintiff thus has a monthly deficit of \$14.28 per month.
8 Further, Plaintiff declares that she is \$15,000 in debt. (Dkt. No. 3 at 6.)

9 In light of Plaintiff’s monthly income and economic circumstances, the Court
10 concludes that Plaintiff cannot afford the filing fee. Accordingly, the Court **GRANTS**
11 Plaintiff’s request to proceed *in forma pauperis*.

12 **II. Sua Sponte Screening**

13 Notwithstanding Plaintiff’s IFP status, the Court must review complaints filed by
14 all persons proceeding IFP and must *sua sponte* dismiss any complaint, or any portion of
15 a complaint, which is frivolous, malicious, fails to state a claim, or seeks damages from
16 defendants who are immune. *See* 28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d
17 1122, 1126–27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)).

18 All complaints must contain “a short and plain statement of the claim showing that
19 the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations are
20 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
21 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
22 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
23 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
24 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
25 The “mere possibility of misconduct” falls short of meeting this plausibility standard.

26
27 ² Including the \$100 worth of supplements recommended by her doctor, Plaintiff’s monthly total
28 expenses appear to add up to \$930. (Dkt. No. 2 at 4). Alternatively, Plaintiff states that her total
monthly expenses add up to \$1,100 in her affidavit in support of request for counsel. (Dkt No. 3 at 6.)

1 *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

2 “When there are well-pleaded factual allegations, a court should assume their
3 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
4 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
5 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
6 allegations of material fact and must construe those facts in the light most favorable to
7 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
8 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6).”).

9 However, while the court “ha[s] an obligation where the Plaintiff is pro se,
10 particularly in civil rights cases, to construe the pleadings liberally and to afford the
11 Plaintiff the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
12 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
13 “supply essential elements of claims that were not initially pled,” *Ivey v. Bd. of Regents of*
14 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

15 Here, Plaintiff claims that the Court has jurisdiction to hear her case under 28
16 U.S.C. § 1343(a)(3). (Dkt. No. 1 at 1.) This statute serves as the jurisdictional
17 counterpart to 42 U.S.C. § 1983 (“§ 1983”). *Lynch v. Household Fin. Corp.*, 405 U.S.
18 538, 540 (1972). To state a claim for relief under § 1983, “plaintiffs must plead that (1)
19 the defendants acting under color of state law (2) deprived plaintiffs of rights secured by
20 the Constitution or federal statutes.” *Gibson v. United States*, 781 F.2d 1334, 1338 (9th
21 Cir. 1986).

22 First, Plaintiff fails to show that Defendant acted “under color of state law.” *Am.*
23 *Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). Section 1983 claims are
24 directed only to acts “under color of state law” or state action and exclude from its
25 purview merely private conduct, no matter how discriminatory or wrongful. *Id.*; *Marsh*
26 *v. Cty. of San Diego*, 680 F.3d 1148, 1158 (9th Cir. 2012). In the absence of allegations
27 of fact showing a defendant acted under color of state law, a complaint should be
28 dismissed. See *Brunette v. Humane Soc’y of Ventura Cty.*, 294 F.3d 1205, 1214 (9th Cir.

1 2002), *as amended on denial of reh'g and reh'g en banc* (Aug. 23, 2002) (affirming the
2 district court's dismissal of a complaint for failure to state a claim where the plaintiff
3 failed to demonstrate that the defendants engaged in state action). Even broadly
4 construing the Complaint as asserting a § 1983 claim, Plaintiff has not shown that
5 Defendant acted under color of state law. Plaintiff solely indicates that Defendant is a
6 non-profit organization. (Dkt. No. 1 at 1.)

7 Further, Plaintiff has failed to allege that Defendant has violated a right protected
8 by the federal Constitution or created by federal statute. *See Gibson v. United States*, 781
9 F.2d 1334, 1338 (9th Cir. 1986). Section 1983 claims do not cover conduct that only
10 violates state law. *See Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001). Plaintiff asserts
11 a gross negligence claim, which involves a violation of state law. (Dkt. No. 1 at 1.) *See*
12 *Ladd v. Cty. of San Mateo*, 12 Cal. 4th 913, 917 (Cal. 1996). The federal court is one of
13 limited jurisdiction. *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 997 (9th Cir.
14 2007). It possesses only that power authorized by the Constitution or a statute. *See*
15 *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Thus, Plaintiff's
16 Complaint fails to allege a violation of a federally secured right that can be entertained by
17 this Court.

18 Accordingly, because the Complaint fails to allege that Defendant deprived
19 Plaintiff of a federal right while acting under color of state law, the Court **DISMISSES**
20 Plaintiff's claim.

21 **III. Motion to Appoint Counsel**

22 Plaintiff concurrently filed a motion seeking court-appointed counsel. (Dkt. No.
23 3.) In light of the Court's dismissal of this civil action for failure to state a claim
24 pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the Court **DENIES AS MOOT** Plaintiff's
25 motion for court-appointed counsel.

26 **CONCLUSION**

27 For the foregoing reasons, the Court **GRANTS** Plaintiff's motion to proceed *in*
28 *forma pauperis*, **DISMISSES** Plaintiff's Complaint for failure to state a claim upon

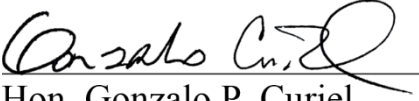
1 which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), and **DENIES AS**
2 **MOOT** Plaintiff’s request for court-appointed counsel.

3 The Court **GRANTS** Plaintiff **thirty (30)** days leave from the date of this Order in
4 which to re-open the case. To re-open the case, Plaintiff shall, within thirty days of this
5 Order:

- 6 1. File an Amended Complaint which cures all of the deficiencies of pleading
7 described in this Order. If Plaintiff elects to file an Amended Complaint, it must
8 be complete by itself without reference to the original pleading. *See* S.D. CAL.
9 Civ. LR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d
10 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”);
11 *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims
12 dismissed with leave to amend which are not re-alleged in an amended pleading
13 may be “considered waived if not repled.”).
- 14 2. If Plaintiff fails to file an Amended Complaint within the time provided, this civil
15 action will remain dismissed based both on Plaintiff’s failure to state a claim upon
16 which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and
17 1915A(b)(1), and her failure to prosecute in compliance with a Court order
18 requiring amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005)
19 (“If a plaintiff does not take advantage of the opportunity to fix his complaint, a
20 district court may convert the dismissal of the complaint into dismissal of the entire
21 action.”).

22 **IT IS SO ORDERED.**

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24 Dated: May 26, 2017


25 Hon. Gonzalo P. Curiel
26 United States District Judge
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