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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GRANVILLE H. MARSHALL, JR.,

Plaintiff,

No. CIV S-10-1286 JAM DAD PS

v.

HAL MEADOWS, et al.,

Defendants.

ORDER

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This matter came before the court on September 24, 2010, for hearing of defendants' motions to strike plaintiff's exhibits, dismiss plaintiff's complaint and for a more definite statement. Plaintiff, proceeding pro se, appeared on his own behalf. J. Hawken Flanagan, Esq. appeared on behalf of defendant Meadows and Jennifer Pruski appeared on behalf of defendant Banner Lassen Medical Center. Oral argument was heard, and the motions were taken under submission.

Upon consideration of the briefing on file, the parties' arguments at the hearing, and the entire file, the court will grant defendants' motion to dismiss. However, in light of the plaintiff's pro status and for the reasons set forth below, the court will also grant plaintiff leave to amend his complaint to attempt to allege a cognizable claim.

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1 PLAINTIFF’S CLAIMS

2 Plaintiff, a medical doctor, alleges that beginning in 2008, defendant Banner  
3 Lassen Medical Center (“Banner Lassen”) and defendant Hal Meadows, a medical doctor  
4 employed by Banner Lassen, began discriminating against plaintiff based on his race. Plaintiff  
5 alleges that the defendants refused to give him an application for “hospital privileges,” treated  
6 plaintiff’s patients with “intentional[] negligent treatment,” and, on some occasions, refused to  
7 treat plaintiff’s patients. (Compl. (Doc. No. 1) at 4.)<sup>1</sup>

8 Sometime in January of 2010, defendant Meadows in the course and scope of his  
9 employment with defendant Banner Lassen attempted to injure plaintiff’s reputation and ability  
10 to practice medicine by altering the medical records of one of plaintiff’s patients and by  
11 providing false information about plaintiff to the patient and the patient’s family. Specifically,  
12 plaintiff alleges that defendant Meadows contacted the wife of one of plaintiff’s patients and told  
13 her that plaintiff was unstable, incompetent, was poisoning her husband and referred to plaintiff  
14 as “the pot doctor.”<sup>2</sup> (Id.)

15 PROCEDURAL HISTORY

16 On May 25, 2010, plaintiff filed this complaint alleging claims pursuant to 42  
17 U.S.C. §§ 1981, 1983, 1985(3) and Title VII of the Civil Rights Act of 1964, as well as several  
18 state law causes of action. (Id. at 1, 5-14.) On June 24, 2010, counsel for defendant Banner  
19 Lassen filed a motion to strike the exhibits attached to plaintiff’s complaint (Doc. No. 6) and a  
20 motion to dismiss plaintiff’s complaint. (“Def. Banner Lassen’s Mot. to Dismiss” (Doc. No. 10  
21 & 11.)) On June 28, 2010, counsel for defendant Meadows filed a motion to dismiss and a  
22 motion for a more definite statement. (“Def. Meadows’ Mot. to Dismiss” (Doc. No. 17.))  
23 Plaintiff filed an opposition to defendants’ motions on September 3, 2010. (“Pl.’s Opp’n.” (Doc.

24 \_\_\_\_\_  
25 <sup>1</sup> Page number citations such as this one are to the page number reflected on the court’s  
CM/ECF system and not to page numbers assigned by the parties.

26 <sup>2</sup> The two paragraphs reflect the full extent of plaintiff’s factual allegations.

1 No. 26.)) On September 8, 2010, defendant Meadows joined in defendant Banner Lassen's  
2 motion to strike. (Doc. No. 27.) Defendants Banner Lassen and Meadows filed replies to  
3 plaintiff's opposition on September 13, 2010. (Doc. No. 30 ("Def. Banner Lassen's Reply");  
4 Doc. No. 32 ("Def. Meadows' Reply").)

5 ARGUMENTS OF THE PARTIES

6 Defendants seek dismissal of plaintiff's complaint pursuant to Federal Rule of  
7 Civil Procedure 12(b)(6) on the grounds that he has failed to state any cognizable claim.  
8 Specifically, defendants advance the following arguments. Plaintiff has failed to allege that the  
9 defendants acted under the color of state law and has failed to allege all the elements necessary to  
10 support a cause of action under 42 U.S.C. § 1985(3). Plaintiff cannot state a cognizable Title VII  
11 claim for employment discrimination because plaintiff and defendants did not have an  
12 employment relationship. Finally, plaintiff has failed to allege facts sufficient to support each of  
13 his state law claims.

14 In his opposition to the pending motion, plaintiff explains in greater detail the  
15 alleged history and relationship between himself and the defendants. Plaintiff states that this  
16 conflict with defendants began in 2002 when he enjoyed hospital privileges at Banner Lassen  
17 Medical Center. Plaintiff alleges that at that time the nursing staff at Banner Lassen refused to  
18 carry out his orders because of his race. Plaintiff complained to the Nursing Board and the Board  
19 of Health.

20 In 2004 plaintiff filed suit against Banner Lassen, the City of Susanville and  
21 Lassen County. Summary Judgment was granted in favor of the City of Susanville and Lassen  
22 County, while defendant Banner Lassen and plaintiff reached a settlement agreement. In 2007  
23 plaintiff filed another civil action against Banner Lassen, claiming that the hospital and Michelle  
24 Joy, a co-defendant in the 2007 action, communicated with a potential employer resulting in  
25 plaintiff being denied an employment opportunity.

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1 Plaintiff claims that on August 31, 2009, one of his patient's was transferred from  
2 plaintiff's office to Banner Lassen Medical Center Emergency Room by ambulance but was  
3 denied medical care by Banner Lassen because he was plaintiff's patient. Similarly, plaintiff  
4 alleges that on September 3, 2009, another patient arrived at the Banner Lassen Medical Center  
5 Emergency Room and was denied care because he was plaintiff's patient.

6 Defendants' argue in reply that plaintiff's opposition to the pending motion to  
7 dismiss does not address the fatal lack of sufficient factual allegations or legal deficiencies of his  
8 complaint. Moreover, defendants argue that plaintiff cannot cure those pleading defects by  
9 providing the factual details of prior lawsuits in an effort to re-litigate those matters.

10 LEGAL STANDARDS APPLICABLE TO DEFENDANTS' MOTION

11 A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the  
12 complaint. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983).  
13 Dismissal of the complaint, or any claim within it, "can be based on the lack of a cognizable  
14 legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri  
15 v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). See also Robertson v. Dean Witter  
16 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). Thus, the court may dismiss a complaint or  
17 any claim within it as frivolous where the claim is based on an indisputably meritless legal theory  
18 or where the factual contentions are clearly baseless. Neitzke v. Williams, 490 U.S. 319, 327  
19 (1989). The critical inquiry is whether a claim, even if inartfully pleaded, has an arguable legal  
20 and factual basis. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989); Franklin v. Murphy,  
21 745 F.2d 1221, 1227 (9th Cir. 1984). As the Supreme Court has explained, in order to state a  
22 claim on which relief may be granted, the plaintiff must allege "enough facts to state a claim to  
23 relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

24 In determining whether a complaint states a claim, the court accepts as true the  
25 material allegations in the complaint and construes those allegations, as well as the reasonable  
26 inferences that may be drawn from them, in the light most favorable to the plaintiff. Erickson v.

1 Pardus, 551 U.S. 89, 94 (2007); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Hosp. Bldg.  
2 Co. v. Trustees of Rex Hosp., 425 U.S. 738, 740 (1976); Love v. United States, 915 F.2d 1242,  
3 1245 (9th Cir. 1989). For purposes of a motion to dismiss, the court also resolves doubts in the  
4 plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

5 Pro se pleadings are held to a less stringent standard than those drafted by lawyers.  
6 Haines v. Kerner, 404 U.S. 519, 520 (1972). However, the court may disregard allegations in the  
7 complaint that are contradicted by facts established by exhibits attached to the complaint.  
8 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). In addition, the court need  
9 not accept as true conclusory allegations, unreasonable inferences, or unwarranted deductions of  
10 fact. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

#### 11 ANALYSIS

##### 12 I. 42 U.S.C. § 1983 & The Fourteenth Amendment

13 Plaintiff alleges that this action was “brought pursuant to” 42 U.S.C. § 1983 and  
14 the Fourteenth Amendment. (Compl. (Doc. No. 1.) at 1-2.) Plaintiff does not, however, provide  
15 any additional factual allegations or analysis with respect to either § 1983 or the Fourteenth  
16 Amendment and does not cite either with respect to any specific claim he has alleged in his  
17 complaint. In this regard, plaintiff's claim is so vague and conclusory that it could be properly  
18 dismissed on that basis alone. See Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th  
19 Cir. 1984) (pro se plaintiff's conclusory allegations unsupported by facts properly dismissed by  
20 district court).

21 Moreover, 42 U.S.C. § 1983 provides as follows:

22 Every person who, under color of [state law] ... subjects, or causes  
23 to be subjected, any citizen of the United States ... to the  
24 deprivation of any rights, privileges, or immunities secured by the  
Constitution ... shall be liable to the party injured in an action at  
law, suit in equity, or other proper proceeding for redress.

25 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
26 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See

1 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
2 (1976).

3           “To make out a cause of action under section 1983, plaintiff[] must plead that (1)  
4 the defendants acting under color of state law (2) deprived plaintiff[] of rights secured by the  
5 Constitution or federal statutes.” Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986).  
6 “[F]or state involvement with a private entity to confer jurisdiction under 42 U.S.C. § 1983 the  
7 involvement must be with the specific activity of which a party complains.” Watkins v. Mercy  
8 Medical Center, 520 F.2d 894, 896 (9th Cir. 1975) (citing Chrisman v. Sisters of St. Joseph of  
9 Peace, 506 F.2d 308, 313 (9th Cir. 1974). Further, “where the impetus for the discrimination is  
10 private, the State must have ‘significantly involved itself with invidious discrimination,’ . . . in  
11 order for the discriminatory action to fall with the ambit of the constitutional prohibition.”  
12 Chrisman, 506 F.2d at 313 (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

13           Likewise, the Fourteenth Amendment to the United States Constitution provides,  
14 among other protections, that “no State” shall deprive any person of life, liberty, or property  
15 without due process of law, or deny to any person within the State’s jurisdiction the equal  
16 protection of the laws. U.S. CONST. AMEND. XIV § 1. “Only when the state becomes ‘to some  
17 significant extent’ involved in the conduct of the affairs of a private institution can that conduct  
18 be classified as state action and thus run afoul of the Fourteenth Amendment.” Ascherman v.  
19 Presbyterian Hospital of Pac. Medical Center, Inc., 507 F.2d 1103, 1104 (9th Cir. 1974) (citing  
20 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

21           Defendants argue that plaintiff has failed to state a cognizable claim under § 1983  
22 or the Fourteenth Amendment because he has failed to allege that the defendants were acting  
23 under color of state law. In his opposition, plaintiff argues that defendant Banner Lassen was  
24 acting under color of state law because the State of California issued it a license to operate a  
25 medical facility. Similarly, plaintiff argues that defendant Meadows was acting under color of  
26 state law because the State of California issued him a license to practice medicine. Plaintiff

1 contends that without these licenses the defendants would have been unable to “damage” him.  
2 Plaintiff also argues that the defendants receipt of state and federal funds render them state  
3 actors. (Def. Banner Lassen’s Mot. to Dismiss (Doc. No. 11) at 10-11; Pl.’s Opp’n. (Doc. No.  
4 26.) at 4-5.)

5 The Ninth Circuit Court of Appeals has specifically rejected an argument similar  
6 to that advanced by plaintiff, holding that:

7 The mere receipt of Hill-Burton funds<sup>3</sup>, even coupled with the  
8 alleged tax exemptions, is not a sufficient connection between the  
9 state and the private activity of which appellant complains to make  
10 out state action. The appellant cites us to no regulation, and our  
11 independent research reveals none, that authorizes the State of  
12 California or the federal government to participate in the  
13 appointment of medical doctors to the staff of Presbyterian  
14 Hospital. Since there is no state action, the termination of  
15 appellant’s staff privileges need not conform to the constitutional  
16 commands of the Fourteenth Amendment.

17 Ascherman, 507 F.2d at 1105. See also Watkins, 520 F.2d at 896 (affirming district court’s  
18 finding that it lacked jurisdiction over a plaintiff’s § 1983 claim against a defendant hospital for  
19 refusing to renew plaintiff’s staff privileges where the plaintiff did not assert that the state had  
20 any connection to the hospital’s decision, beyond the receipt of Hill-Burton funds).

21 Here, plaintiff has not alleged facts establishing that the State of California had  
22 any significant involvement with the defendants’ alleged actions about which plaintiff complains.  
23 In this regard, it appears that any alleged discrimination was the result of merely private conduct.  
24 The Fourteenth Amendment and § 1983 exclude from their reach “merely private conduct, no  
25 matter how discriminatory or wrongful.” American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40,  
26 50 (1999). While plaintiff has attempted to address this issue by asserting in his opposition that  
the defendants were acting under color of state law because they were issued state licenses to  
practice medicine, he cites no authority in support of the proposition that their status as medical

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<sup>3</sup> The Hill-Burton Act provided federal funds to states for the construction and modernization of medical facilities. 42 U.S.C. § 291.

1 license holders transforms all of their conduct into state action and the court is aware of no such  
2 authority. See Blum v. Yaretsky, 457 U.S. 991, 1007-12 (1982) (that nursing home decisions to  
3 discharge or transfer patients are made by State-licensed physicians or that the state heavily  
4 regulates the nursing home industry does not render those decisions “state action” for purposes  
5 of § 1983 or the Fourteenth Amendment); see also Aasum v. Good Samaritan Hospital, 542 F.2d  
6 792, 795 (9th Cir. 1976) (that State Board of Health inspects private hospitals does not render  
7 hospital’s refusal to allow a licensed physician to use its clinical laboratory facilities state action);  
8 Ouzts v. Maryland Nat. Ins. Co., 470 F.2d 790, 793 (9th Cir. 1972) (“Merely acting under a state  
9 license is not state action within the meaning of the civil rights acts.”); Carter v. Norfolk  
10 Community Hospital Ass’n., Inc., 761 F.2d 970, 974 (4th Cir. 1985) (hospital’s termination of  
11 physician’s professional privileges did not involve state action and § 1983 action brought by  
12 physician should be dismissed for failure to state a claim); Fridman v. City of New York, 183 F.  
13 Supp. 2d 642, 651 (S.D.N.Y. 2002) (“[T]hat the State of New York licenses the physicians does  
14 not render them subject to Constitutional limitations. Such a rule would render essentially all  
15 medical care state action and would bring all medical malpractice actions into the purview of 18  
16 U.S.C. § 1331 (federal question jurisdiction).”)

17 For the reasons stated above, plaintiff has failed to state a cognizable claim for  
18 relief under either 42 U.S.C. § 1983 or the Fourteenth Amendment, and those claims must  
19 therefore be dismissed.

20 II. 42 U.S.C. § 1985(3)

21 Plaintiff also alleges that the defendants violated his rights under 42 U.S.C. §  
22 1985(3). Specifically, plaintiff alleges that the defendants:

23 conspired to deprive plaintiff, either directly or indirectly, of the  
24 equal protection of the law or of equal privileges and immunities  
25 afforded under the laws of the United States and the laws of the  
state of California.

26 (Compl. (Doc. No. 1) at 5.) Plaintiff alleges no additional facts in support of this claim, aside

1 from incorporating the allegations already set forth above. Accordingly, this claim too is so  
2 vague and conclusory that it could be properly dismissed on that basis alone.

3           Moreover, to state a cognizable claim for a violation of § 1985(3), a plaintiff must  
4 allege four elements:

5           (1) a conspiracy; (2) for the purpose of depriving, either directly or  
6 indirectly, any person or class of persons of the equal protection of  
7 the laws, or of equal privileges and immunities under the laws; and  
8 (3) an act in furtherance of this conspiracy; (4) whereby a person is  
either injured in his person or property or deprived of any right or  
privilege of a citizen of the United States.

9 Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (citing United States  
10 Brotherhood of Carpenters and Joiners of America v. Scott, 463 U.S. 825, 828-29 (1983)). See  
11 also Scott v. Ross, 140 F.3d 1275, 1284 (9th Cir. 1998). To establish the second element of a §  
12 1985(3) claim, the plaintiff must identify a legally protected right and allege facts showing that  
13 the deprivation of the right was “motivated by ‘some racial, or perhaps otherwise class-based,  
14 invidiously discriminatory animus behind the conspirators’ action.’ ” Sever, 978 F.2d at 1536  
15 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). “ [T]he plaintiff must be a member  
16 of a class that requires special federal assistance in protecting its civil rights.’ ” McCalden v.  
17 California Library Ass’n, 955 F.2d 1214, 1223 (9th Cir. 1990) (quoting Gerritsen v. de la Madrid  
18 Hurtado, 819 F.2d 1511, 1519 (9th Cir. 1987)).

19           Here, plaintiff alleges, in mere conclusory manner, that the defendants  
20 discriminated against him “based on his race.” (Compl. (Doc. No. 1) at 4.) However, in the  
21 allegations of his complaint, plaintiff does not identify his race nor the race of any other  
22 individual, nor does plaintiff allege facts supporting the inference that defendants’ actions were  
23 motivated by racial animus. Plaintiff also fails to specify how the defendants’ alleged actions  
24 deprived him of a legally protected right. Plaintiff merely states vague and conclusory  
25 allegations that the defendants deprived him of “the equal protection of the law,” of “equal  
26 privileges and immunities” afforded him under the law, and “of rights and privileges afforded to

1 citizens” of the United States and the State of California. (Id. at 5.) Moreover, plaintiff’s  
2 conspiracy claim is not supported by an allegation of any specific act of the defendants’ that  
3 could be construed as an act in furtherance of the alleged conspiracy. Instead, plaintiff again  
4 merely states his vague and conclusory allegation that the defendants “conspired.” (Id.) See  
5 Karim-Panahi v. Los Angeles Police Dep’t, 839 F.2d 621, 626 (9th Cir. 1988) (“A mere  
6 allegation of conspiracy without factual specificity is insufficient.”)<sup>4</sup>

7 For the reasons stated above, plaintiff has failed to state a cognizable claim for  
8 relief under 42 U.S.C. § 1985(3) and that claim must also be dismissed.

9 III. 42 U.S.C. § 1981

10 \_\_\_\_\_ Plaintiff claims that the defendants violated his rights under 42 U.S.C. § 1981.

11 Specifically, plaintiff alleges that defendant Meadows, acting as an agent for defendant Banner  
12 Lassen, refused to provide plaintiff an application for hospital privileges because of plaintiff’s  
13 race. (Compl. (Doc. No. 1) at 13.) Plaintiff also alleges that the defendants discriminated against  
14 him by prohibiting him “from seeing his patients at Banner Lassen Medical Center.” (Id.)  
15 \_\_\_\_\_

16 <sup>4</sup> Plaintiff alleges that defendant Meadows was an employee of defendant Banner Lassen,  
17 a corporation, and was at all times “acting in the course and scope of such agency employment.”  
18 (Compl. (Doc. No. 1) at 2-3.) It has been held that a corporation cannot conspire with its agents  
19 who are acting within the scope of their employment. Nelson Radio & Supply Co. v. Motorola,  
20 Inc., 200 F.2d 911, 914 (5th Cir. 1952); see also Harvey v. Fearless Farris Wholesale, Inc., 589  
21 F.2d 451, 455, n. 7 (9th Cir. 1978) (“Two or more individual officers, directors or agents within a  
22 single corporation, acting on behalf of that corporation, are considered incapable of conspiring  
23 with each other or with their corporation . . . .”) While the Ninth Circuit has expressly declined  
24 to decide this issue, (see Portman v. County of Santa Clara, 995 F.2d 898, 910 (9th Cir. 1995),  
25 other circuit courts have held that this so-called “intracorporate conspiracy doctrine” applies with  
26 equal force to § 1985 claims. See Hoefler v. Fluor Daniel, Inc., 92 F. Supp.2d 1055, 1057-58  
(C.D. Cal. 2000) (noting that the Second, Fourth, Sixth, Seventh and Eighth Circuits have so  
held, while the First and Third Circuits have refuse to apply the doctrine to § 1985 cases alleging  
conspiracies to discriminate based on the basis of race or sex). Federal district courts within  
California are split on the issue as well. See Mory v. City of Chula Vista, No. 07CV0462, 2008  
WL 360449, at \*6 (S.D. Cal. 2008); Hoefler, 92 F. Supp.2d at 1059. But see Washington v. Duty  
Free Shoppers, 696 F. Supp. 1323, 1325 (N.D. Cal. 1988); Rebel Van Lines v. City of Compton,  
663 F. Supp. 786, 792 (C.D. Cal. 1987). In addition, there are recognized exceptions to the  
application of the doctrine. See Webb v. County of Trinity, No. Civ. S-10-0012 LKK/CMK,  
2010 WL 4628097, at \*5 (E.D. Cal. Nov. 4, 2010). In any event, the court need not resolve the  
question here, in light of the grounds for dismissal discussed above.

1 42 U.S.C. § 1981 provides as follows:

2 (a) Statement of equal rights-All persons within the jurisdiction of  
3 the United States shall have the same right in every State and  
4 Territory to make and enforce contracts, to sue, be parties, give  
5 evidence, and to the full and equal benefit of all laws and  
6 proceedings for the security of persons and property as is enjoyed  
7 by white citizens, and shall be subject to like punishment, pains,  
8 penalties, taxes, licenses, and exactions of every kind, and to no  
9 other.

10 (b) “Make and enforce contracts” defined-For purposes of this  
11 section, the term “make and enforce contracts” includes the  
12 making, performance, modification, and termination of contracts,  
13 and the enjoyment of all benefits, privileges, terms, and conditions  
14 of the contractual relationship.

15 (c) Protection against impairment-The rights protected by this  
16 section are protected against impairment by nongovernmental  
17 discrimination and impairment under color of State law.

18 42 U.S.C. § 1981.

19 However, § 1981 is not “a general proscription of racial discrimination . . . it  
20 expressly prohibits discrimination only in the *making and enforcement of contracts*.” Patterson  
21 v. McLean Credit Union, 491 U.S. 164, 176 (1989) (emphasis added). See also Georgia v.  
22 Rachel, 384 U.S. 780, 791 (1966) (“The legislative history of the 1866 Act clearly indicates that  
23 Congress intended to protect a limited category of rights”).

24 In this respect, [§ 1981] prohibits discrimination that infects the  
25 legal process in ways that prevent one from enforcing contract  
26 rights, by reason of his or her race, and this is so whether this  
discrimination is attributed to a statute or simply to existing  
practices. It also covers wholly private efforts to impede access to  
the courts or obstruct nonjudicial methods of adjudicating disputes  
about the force of binding obligations, as well as discrimination by  
private entities, such as labor unions, in enforcing the terms of a  
contract.

27 Patterson, 491 U.S. at 177. “Any claim brought under § 1981, therefore, must initially identify  
28 an impaired ‘contractual relationship,’ § 1981(b), under which the plaintiff has rights.”

29 Domino’s Pizza, Inc. v. McDonald, 546 U.S. 470, 476 (2006). “[A] plaintiff cannot state a claim

30 ////

1 under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that  
2 he wishes ‘to make and enforce.’ ” (Id. at 479-80.)

3 Here, plaintiff’s complaint is devoid of any allegations regarding a contractual  
4 relationship between the parties.<sup>5</sup> Instead, plaintiff has merely alleged that the defendants  
5 “refused plaintiff an application for hospital privileges based on plaintiff’s race.” (Compl. (Doc.  
6 No. 1) at 13.) Presented with only this bare, unexplained declaration that plaintiff was denied an  
7 application for hospital privileges, it is left unclear how such an application implicated a  
8 contractual relationship. See generally Ennix v. Stanten, 556 F. Supp.2d 1073, 1082-84 (N.D.  
9 Cal. 2008) (examining whether plaintiff doctor had a contractual relationship with defendant  
10 medical center for purposes of stating a claim pursuant to § 1981 and concluding that the  
11 allegations of such a relationship in that case defeated the medical center’s summary judgment  
12 motion); Janda v. Madera Community Hospital, 16 F. Supp. 2d 1181, 1186-87 (E.D. Cal. 1998)  
13 (employment contract between physician and hospital supported by consideration found to exist).

14 The bare allegations of plaintiff’s complaint in this regard, fail to state a  
15 cognizable claim for relief under 42 U.S.C. § 1981 and that claim must, therefore, be dismissed  
16 as well.

17 IV. Title VII

18 Plaintiff also asserts a cause of action for violation of his rights under Title VII.  
19 Specifically, plaintiff alleges that defendant Meadows, acting as an agent for defendant Banner  
20 Lassen, refused to provide plaintiff an application for hospital privileges because of his race.  
21 (Compl. (Doc. No. 1) at 13.) In addition, plaintiff alleges that the defendants discriminated  
22 against him by denying plaintiff “from seeing his patients at Banner Lassen Medical Center.”  
23 (Id.) Finally, plaintiff claims that defendant Meadows told plaintiff’s patients that plaintiff was  
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25 <sup>5</sup> Under California contract law, “[i]t is essential to the existence of a contract that there  
26 should be: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and, (4) A  
sufficient cause or consideration.” CAL. CIV. CODE § 1550.

1 unstable, incompetent, was poisoning them and referred to plaintiff as the “pot doctor.” (Id. at  
2 14.)

3 Title VII makes it unlawful for an employer to “discriminate against any  
4 individual with respect to [her] compensation, term, conditions, or privileges of employment,  
5 because of such individual’s race . . . .” 42 U.S.C. § 2000e-2(a)(1). A person is discriminated  
6 against through disparate treatment “when he or she is singled out and treated less favorably than  
7 others similarly situated on account of race.” McGinest v. GTE Service Corp., 360 F.3d 1103,  
8 1121 (9th Cir. 2004) (quoting Jauregui v. City of Glendale, 852 F.2d 1128, 1134 (9th Cir. 1988)).

9 “One of Congress’ objectives in enacting Title VII was ‘to achieve equality of  
10 employment opportunities . . . .’” Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir.  
11 1999) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)). “Consequently, there  
12 must be some connection with an employment relationship for Title VII protections to apply.”  
13 Id. (quoting Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980)). “Title VII  
14 protects employees, but does not protect independent contractors.” Id. (citing Lutcher, 633 F.2d  
15 at 883 and Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762, 766 (9th Cir. 1988)).

16 Defendants argue that plaintiff has not alleged that an employment relationship  
17 existed between plaintiff and the defendants. Defendant Banner Lassen notes that plaintiff filed a  
18 claim with the Equal Employment Opportunity Commission (“EEOC”) based on the allegations  
19 found in his complaint and that the EEOC responded by stating: “The EEOC is closing its file on  
20 this charge for the following reason: Other (briefly state) No jurisdiction.” (Def. Banner Lassen’s  
21 Mot. to Dismiss (Doc. No. 11) at 21-22.) Defendant Banner Lassen asserts that the EEOC did  
22 not have jurisdiction over plaintiff’s allegations because plaintiff did not have an employment  
23 relationship with Banner Lassen. (Id. at 22.) In opposing defendants’ motion to dismiss plaintiff  
24 does not dispute defendants’ argument but instead argues that there “is no purer form of  
25 employment discrimination than denying an applicant an application for employment.” (Pl.’s  
26 Opp’n. (Doc. No. 26.) at 6.)

1 As noted above, plaintiff has failed to allege in his complaint that “hospital  
2 privileges” would have established an employment relationship between himself and the  
3 defendants. See generally Johnson v. Riverside Healthcare System, LP, 534 F.3d 1116, 1126  
4 (9th Cir. 2008) (finding doctor who received compensation from defendant that retained control  
5 over doctor’s activities was an employee); Mitchell v. Frank R. Howard Memorial Hosp., 853  
6 F.2d 762, 766-67 (9th Cir. 1988) (finding plaintiff radiologist alleged sufficient facts to establish  
7 plaintiff was an employee and not an independent contractor for purpose of Title VII). But see  
8 Wojewski v. Rapid City Regional Hosp., Inc., 450 F.3d 338, 343-44 (8th Cir. 2006) (doctor  
9 challenging termination of hospital privileges was an independent contractor, not an employee);  
10 Shah v. Deaconess Hosp., 355 F.3d 496, 500 (6th Cir. 2004) (doctor with surgical privileges was  
11 not an employee for Title VII purposes); Alexander v. Rush North Shore Medical Center, 101  
12 F.3d 487, 494 (7th Cir. 1996) (finding plaintiff doctor was an independent contractor precluding  
13 Title VII action against defendant hospital that revoked his privileges); Diggs v. Harris Hospital -  
14 - Methodist, Inc., 847 F.2d 270, 272-73 (5th Cir. 1988) (no employee-employer relationship  
15 between physician and hospital for purposes of Title VII claim challenging termination of  
16 privileges) . Nor has plaintiff addressed defendants’ argument on this issue in his opposition to  
17 the pending motion to dismiss,

18 Even assuming plaintiff’s request for hospital privileges would have established  
19 an employment relationship between himself and defendants, plaintiff has failed to alleges facts  
20 necessary to establish a prima facie case of racial discrimination “by showing (i) that he belongs  
21 to a racial minority; (ii) that he applied and was qualified for a job for which the employer was  
22 seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his  
23 rejection, the position remained open and the employer continued to seek applicants from  
24 persons of complainant’s qualifications.” McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802  
25 (1973). See also Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998). Nor has

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1 plaintiff in his complaint alleged facts that would, alternatively, establish discriminatory animus.  
2 See Vasquez v. County of Los Angeles, 349 F.3d 634, 640 (9th Cir. 2003).

3 For these reasons, plaintiff has failed allege facts establishing a claim for relief  
4 under Title VII and that claim must be dismissed.

5 V. State Law Claims

6 Under the analysis set forth above, plaintiff's federal claims will be dismissed.  
7 Because there would then be no federal claims remaining, this court would decline to exercise  
8 supplemental jurisdiction over plaintiff's various state law claims. See 28 U.S.C. § 1367(c) (3)  
9 (The district courts may decline to exercise supplemental jurisdiction over a claim . . . if - the  
10 district court has dismissed all claims over which it has original jurisdiction"). "In the usual  
11 case in which all federal-law claims are eliminated before trial, the balance of factors . . . will  
12 point toward declining to exercise jurisdiction over the remaining state-law claims." Acri v.  
13 Varian Associates, Inc., 114 F.3d 999, 1000-01 (9th Cir. 1997) (quoting Carnegie-Mellon  
14 University. v. Cohill, 484 U.S. 343, 350, n. 7 (1988)). See also Gini v. Las Vegas Metropolitan  
15 Police Dept., 40 F.3d 1041, 1046 (9th Cir. 1984) (same). Considerations of comity weigh  
16 heavily in favor of declining to exercise supplemental jurisdiction since all of plaintiff's  
17 remaining claims arise under California law. See Gibbs v. United Mine Workers of America,  
18 383 U.S. 715, 726 (1966) ("Needless decisions of state law should be avoided [.]") Moreover,  
19 federal judicial economy is promoted by declining to exercise supplemental jurisdiction. See  
20 Otto v. Heckler, 802 F.2d 337, 338 (9th Cir.1986) ("The district court, of course, has the  
21 discretion to determine whether its investment of judicial energy justifies retention of  
22 jurisdiction.")

23 For all of these reasons, pursuant to 28 U.S.C. § 1367(c)(3) the court would  
24 decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims in the  
25 event all his federal claims were dismissed.

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1 VI. Leave to Amend

2 \_\_\_\_\_ The undersigned has carefully considered whether plaintiff may be able to cure  
3 the defects noted above in a first amended complaint. In making this assessment, the  
4 undersigned has taken into consideration plaintiff's pleadings and all briefing filed in connection  
5 with the pending motion. "Valid reasons for denying leave to amend include undue delay, bad  
6 faith, prejudice, and futility." California Architectural Bldg. Prod. v. Franciscan Ceramics, 818  
7 F.2d 1466, 1472 (9th Cir. 1988). See also Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv.  
8 Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that, while leave to amend shall be freely  
9 given, the court does not have to allow futile amendments). However, when evaluating the  
10 failure to state a claim, the complaint of a pro se plaintiff may be dismissed "only where 'it  
11 appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which  
12 would entitle [her] to relief.'" Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984) (quoting  
13 Haines v. Kerner, 404 U.S. 519, 521 (1972)). See also Weilburg v. Shapiro, 488 F.3d 1202, 1205  
14 (9th Cir. 2007) ("Dismissal of a pro se complaint without leave to amend is proper only if it is  
15 absolutely clear that the deficiencies of the complaint could not be cured by amendment.")  
16 (quoting Schucker v. Rockwood, 846 F.2d 1202, 1203-04 (9th Cir. 1988)).

17 Here, because of the vague and conclusory nature of plaintiff's claims the court  
18 cannot say that it appears beyond doubt that leave to amend would be futile with respect to any of  
19 the federal claims addressed above.<sup>6</sup> Plaintiff's original complaint will therefore be dismissed,  
20 and he will be granted leave to file an amended complaint. Plaintiff is cautioned however that, if

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22 <sup>6</sup> Plaintiff is however cautioned that, should he elect to file an amended complaint, he  
23 must carefully review this order to determine if any or all of his federal claims are indeed  
24 meritless before raising any such claim in an amended complaint. The court is particularly  
25 mindful that defendants have argued that plaintiff cannot cure the defects in his original  
26 complaint simply by attempting to re-litigate prior lawsuits in which either settlements were  
reached or the defendants prevailed. Those arguments are well-taken. Plaintiff is cautioned to  
heed them in determining whether he can allege facts stating a cognizable claim in any amended  
complaint he considers filing with this court. If he determines that no cognizable federal claim  
can be stated, plaintiff should seek to voluntarily dismiss this action pursuant to Federal Rule of  
Civil Procedure 41(a).

1 he elects to file an amended complaint, “the tenet that a court must accept as true all of the  
2 allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of  
3 the elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
4 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S. Ct. 1937, 1949 (2009). “While legal conclusions can  
5 provide the complaint’s framework, they must be supported by factual allegations.” Id. at 1950.  
6 Those facts must be sufficient to push the claims “across the line from conceivable to  
7 plausible[.]” Id. at 1951 (quoting Twombly, 550 U.S. at 557).

8 Plaintiff is reminded that any amended complaint he elects to file must be  
9 complete in itself without reference to prior pleadings that have been dismissed. See Local Rule  
10 220. The court cannot refer to prior pleadings in order to make plaintiff’s first amended  
11 complaint complete. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Moreover, plaintiff’s  
12 first amended complaint must contain factual allegations describing the conduct and events  
13 which underlie his claims against each defendant named in the pleading.

#### 14 CONCLUSION

15 For the reasons set forth above, IT IS HEREBY ORDERED that:

- 16 1. Defendant Banner Lassen’s June 24, 2010 motion to strike (Doc. No. 6) is  
17 denied as moot;
- 18 2. Defendant Banner Lassen’s June 24, 2010 motion to dismiss (Doc. No. 10) is  
19 granted;
- 20 3. Defendant Meadows’ June 28, 2010 motion for a more definite statement  
21 (Doc. No. 17) is denied as moot;
- 22 4. Defendant Meadows’ June 28, 2010 motion to dismiss (Doc. No. 17) is  
23 granted;
- 24 5. Plaintiff’s complaint (Doc. No. 1) is dismissed;
- 25 6. Plaintiff is granted thirty days from the date of service of this order to file a  
26 first amended complaint that complies with the requirements of the Civil Rights Act, the Federal

1 Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the  
2 docket number assigned to this case and must be labeled "Amended Complaint;" failure to file an  
3 amended complaint in accordance with this order will result in a recommendation that this action  
4 be dismissed without prejudice; and

5 7. If Defendant Meadows or Defendant Banner Lassen is named as a defendant in  
6 any amended complaint plaintiff elected to file, that defendant shall respond to the pleading  
7 within thirty days after it is filed and served.

8 DATED: March 15, 2011.

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11 \_\_\_\_\_  
12 DALE A. DROZD  
13 UNITED STATES MAGISTRATE JUDGE

12 DAD:6  
13 orders.pro se/marshall1286.MTD

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