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

CARLOS GILBERT LAW,  
Plaintiff,  
\_\_\_\_\_ vs.

CASE NO. CV F 06-1061 OWW LJO

**ORDER TO DISMISS COMPLAINT WITH  
LEAVE TO AMEND**

\_\_\_\_\_ /  
KENNY BENITEZ,  
et al.,  
Defendants.

**BACKGROUND**

Plaintiff Carlos Gilbert Law (“plaintiff”) is a state prisoner and proceeds pro se and in forma pauperis in this purported civil rights action under 42 U.S.C. § 1983 (“section 1983”). Plaintiff proceeds with a form section 1983 complaint (“complaint”) to allege that defendant Kenny Benitez (“Mr. Benitez”), a Valero gas station clerk, assaulted plaintiff. The complaint also names “Valero Gas Station Owners” as defendants and seeks “money damages from each person held libel [sic].”

**DISCUSSION**

**Standards For Screening**

This Court is required to screen complaints brought by prisoners seeking relief against a

1 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). This Court  
2 must dismiss a complaint, or portion thereof, which “is frivolous, malicious or fails to state a claim upon  
3 which relief may be granted” or “seeks monetary relief from a defendant who is immune from such  
4 relief.” 28 U.S.C. § 1915A(b)(1) and (2). Moreover, “[a] trial court may dismiss a claim sua sponte  
5 under Fed.R.Civ.P. 12(b)(6). . . . Such dismissal may be made without notice where the claimant cannot  
6 possibly win relief.” *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9<sup>th</sup> Cir. 1987); *see Wong v.*  
7 *Bell*, 642 F.2d 359, 361-362 (9<sup>th</sup> Cir. 1981). Sua sponte dismissal may be made before process is served  
8 on defendants. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d)  
9 are often made sua sponte); *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9<sup>th</sup> Cir. 1984) (court may dismiss  
10 frivolous in forma pauperis action sua sponte prior to service of process on defendants).

11 When a plaintiff proceeds in forma pauperis, a Court, notwithstanding any filing fee that may  
12 have been paid, shall dismiss a case at any time if the court determines the action is frivolous, malicious,  
13 fails to state a claim on which relief may be granted, or seeks monetary relief against an immune  
14 defendant. *See* 28 U.S.C. § 1915(e); 2 Schwarzer, Tashima & Wagstaffe, California Practice Guide:  
15 Federal Civil Procedure Before Trial (2006) Attacking the Pleadings, para. 9:226.1, pp. 9-69. A court  
16 need not accept as true factual allegations in in forma pauperis complaints and may reject “completely  
17 baseless” allegations, including those which are “fanciful,” “fantastic” or “delusional.” *Denton v.*  
18 *Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 1733 (1992).

19 A claim is legally frivolous when it lacks an arguable basis either in law or fact. *Neitzke*, 490  
20 U.S. at 325; *Franklin*, 745 F.2d at 1227-1228. A federal court may dismiss a claim as frivolous where  
21 it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless.  
22 *Neitzke*, 490 U.S. at 327.

23 The test for maliciousness is a subjective one and requires the court to “determine the . . . good  
24 faith of the applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); *see Wright v.*  
25 *Newsome*, 795 F.2d 964, 968 n. 1 (11<sup>th</sup> Cir. 1986). A lack of good faith is found most commonly in  
26 repetitive suits filed by plaintiffs who have used the advantage of cost-free filing to file a multiplicity  
27 of suits. A complaint is malicious if it suggests an intent to vex defendants or abuse the judicial process  
28 by relitigating claims decided in prior cases. *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981);

1 *Phillips v. Carey*, 638 F.2d 207, 209 (10<sup>th</sup> Cir. 1981); *Ballentine v. Crawford*, 563 F.Supp. 627, 628-629  
2 (N.D. Ind. 1983); *cf. Glick v. Gutbrod*, 782 F.2d 754, 757 (7<sup>th</sup> Cir. 1986) (court has inherent power to  
3 dismiss a case demonstrating “clear pattern of abuse of judicial process”). A lack of good faith or malice  
4 also can be inferred from a complaint containing untrue material allegations of fact or false statements  
5 made with intent to deceive the court. *See Horsey v. Asher*, 741 F.2d 209, 212 (8<sup>th</sup> Cir. 1984).

6 A complaint, or portion thereof, may be dismissed for failure to state a claim if it appears beyond  
7 doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to  
8 relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41,  
9 45-46, 78 S.Ct. 99 (1957)); *see also Palmer v. Roosevelt Lake Log Owners Ass’n*, 651 F.2d 1289, 1294  
10 (9<sup>th</sup> Cir. 1981). “[W]hen a federal court reviews the sufficiency of a complaint, before the reception of  
11 any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not  
12 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to  
13 support claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1688 (1974); *Gilligan v. Jamco*  
14 *Development Corp.*, 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997).

15 As further explained below, the complaint demonstrates that plaintiff is entitled to offer no  
16 evidence for its vague, deficient claims.

#### 17 **General Deficiencies**

18 F.R.Civ.P. 8 establishes general pleading rules and provides in pertinent part:

19 (a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall  
20 contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction  
21 depends, unless the court already has jurisdiction and the claim needs no new grounds  
22 of jurisdiction to support it, (2) a short plain statement of the claim showing that the  
23 pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader  
24 seeks.

25 . . .

26 (e) Pleading to be Concise and Direct; Consistency.

27 (1) Each averment of a pleading shall be simple, concise and direct.

28 A pleading may not simply allege a wrong has been committed and demand relief. The  
underlying requirement is that a pleading give “fair notice” of the claim being asserted and the “grounds  
upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957); *Yamaguchi v.*

1 *United States Dept. of Air Force*, 109 F.3d 1475, 1481 (9<sup>th</sup> Cir. 1997). Although a complaint need not  
2 outline all elements of a claim, “[i]t must be possible . . . for an inference to be drawn that these elements  
3 exist.” *Walker v. South Cent. Bell Telephone Co.*, 904 F.2d 275, 277 (5<sup>th</sup> Cir. 1990); *Lewis v. ACB*  
4 *Business Service, Inc.*, 135 F.3d 389, 405-406 (6<sup>th</sup> Cir. 1998). Despite the flexible pleading policy of  
5 the Federal Rules of Civil Procedure, a complaint must give fair notice and state the elements of the  
6 claim plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9<sup>th</sup> Cir. 1984).  
7 A plaintiff must allege with at least some degree of particularity overt facts which defendant engaged  
8 in to support plaintiff’s claim. *Jones*, 733 F.2d at 649.

9 Plaintiff’s complaint lacks a short, plain statement of this Court’s jurisdiction. Although plaintiff  
10 proceeds on a form 1983 complaint, as discussed below, the complaint fails to satisfy section 1983  
11 requirements. This Court surmises plaintiff refers to section 1983 as a subterfuge to attempt to invoke  
12 this Court’s jurisdiction. The complaint establishes neither federal question jurisdiction under 28 U.S.C.  
13 § 1331 nor diversity jurisdiction under 28 U.S.C. § 1332. The complaint fails to allege all elements of  
14 either a section 1983 or state tort claim to demonstrate plaintiff is entitled to relief.

15 Moreover, in personam jurisdiction is required when a judgment is sought as to a defendant  
16 personally. Personal jurisdiction is an essential element of a court’s jurisdiction and without it, a court  
17 “is powerless to proceed to an adjudication.” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct.  
18 1563, 1572 (1999). “Because a court without jurisdiction over the parties cannot render a valid  
19 judgement, [the court] must address Defendants’ personnel jurisdiction argument before reaching the  
20 merits of the case.” *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1090 (10<sup>th</sup> Cir.  
21 1998).

22 Federal courts lack nationwide personal jurisdiction and have no broader power over persons  
23 outside the state in which they sit than do local state courts. *Omni Capital Int’l v. Rudolph Wolff & Co.,*  
24 *Ltd.*, 484 U.S. 97, 104-105, 108 S.Ct. 404, 410 (1987); *see* F.R.Civ.P. 4(k)(1)(A).

25 In addition to not establishing subject matter jurisdiction, the complaint fails to establish in  
26 personam jurisdiction over defendants. In the absence of subject matter or in personam jurisdiction, this  
27 Court is unable to proceed on plaintiff’s claims.

28 ///

1 **The Complaint's Section 1983 Deficiencies**

2 Plaintiff proceeds on a form complaint under section 1983, which provides:

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

6 42 U.S.C. § 1983.

7 To state a section 1983 claim, a plaintiff must plead that: (1) defendant acted under color of state  
8 law at the time the complained of act was committed; and (2) defendant deprived plaintiff of rights,  
9 privileges or immunities secured by the Constitution or laws of the United States. *Gibson v. United*  
10 *States*, 781 F.2d 1334, 1338 (9<sup>th</sup> Cir. 1986). The complaint fails to state colorable claims against a  
11 defendant. The complaints fails to a allege defendant acted under color of state law. The complaint  
12 points to no constitutional right of which a defendant deprived plaintiff.

13 Moreover, section 1983 requires that there be an actual connection or link between the actions  
14 of defendant and deprivation allegedly suffered. *See Monell v. Department of Social Services*, 436 U.S.  
15 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit Court of Appeals has held that “[a]  
16 person ‘subjects’ another to deprivation of a constitutional right, within the meaning of section 1983,  
17 if he does an affirmative act, participates in another’s affirmative acts or omits to perform an act which  
18 he is legally required to do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*,  
19 588 F.2d 740, 743 (9<sup>th</sup> Cir. 1978). The complaint fails to satisfy the linking requirement as to a  
20 defendant and to articulate how a defendant deprived plaintiff of constitutional rights and resulting harm.

21 Municipalities and other local government units are persons to whom section 1983 applies.  
22 *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also Board of County Comm’rs v.*  
23 *Brown*, 117 S.Ct. 1382, 1387-1388 (1997); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9<sup>th</sup> Cir.  
24 1996), *cert. denied*, 117 S.Ct. 950 (1997); *Hervey v. Estes*, 65 F.3d 784, 791 (9<sup>th</sup> Cir. 1995). A defendant  
25 has acted under color of state law when he or she has “exercised power ‘possessed by virtue of state law  
26 and made possible only because the wrongdoer is clothed with authority of state law.’” *West v. Atkins*,  
27 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *Polk County v.*  
28 *Dodson*, 454 U.S. 312, 317-318 (1981); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9<sup>th</sup> Cir.), *cert. denied*,

1 118 S.Ct. 559 (1997); *Vang v. Xiong*, 944 F.2d 476, 479 (9<sup>th</sup> Cir. 1991); *Shah v. County of Los Angeles*,  
2 797 F.2d 743, 746 (9<sup>th</sup> Cir. 1986). Generally, private parties are not acting under color of state law. *See*  
3 *Price v. Hawaii*, 939 F.2d 702, 707-708 (9<sup>th</sup> Cir. 1991).

4 The complaint names private party defendants which are unable to act under color of state law  
5 or to exercise power possessed by virtue of state law. There are no allegations that a defendant  
6 conspired with a state official to deprive plaintiff of constitutional rights to constitute action under color  
7 of state law. Plaintiff appears unable to state a cognizable section 1983 claim under the facts set forth  
8 in the complaint.

9 **Malice**

10 This Court is concerned that plaintiff has brought this action in absence of good faith and  
11 attempts to take advantage of cost-free filing to vex a defendant. Such attempt provides further grounds  
12 to dismiss plaintiff's complaint.

13 **Attempt At Amendment**

14 Plaintiff is granted an opportunity to attempt to amend his complaint to cure deficiencies.  
15 Plaintiff is further admonished that this Court's Local Rule 15-220 requires an amended complaint to  
16 be complete in itself without reference to any prior pleading. As a general rule, an amended complaint  
17 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9<sup>th</sup> Cir. 1967). After the filing  
18 of an amended complaint, the original pleadings serves no further function. Thus, in an amended  
19 complaint, each claim and involvement of each defendant must be sufficiently alleged.

20 **CONCLUSION AND ORDER**

21 For the reasons discussed above, this Court:

- 22 1. DISMISSES plaintiff's complaint and GRANTS plaintiff leave to amend;  
23 2. ORDERS plaintiff, no later than September 22, 2006, to file an amended complaint; and  
24 3. **Admonishes plaintiff that failure to file an amended complaint in compliance with**  
25 **this order will result in a recommendation to dismiss this action for failure to obey**  
26 **a court order.**

27 IT IS SO ORDERED.

28 **Dated: August 16, 2006**

**/s/ Lawrence J. O'Neill**

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UNITED STATES MAGISTRATE JUDGE

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