

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

MDR

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

Gavino Lomeli,	)	No. CV 1-08-1575-FJM
Plaintiff,	)	<b>ORDER</b>
vs.	)	
California Department of Corrections, et	)	
al.,	)	
Defendants.	)	

On September 23, 2008, Plaintiff Gavino Lomeli, who is confined in the California State Prison-Corcoran in Corcoran, California, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. #1), in the United States District Court for the Northern District of California. The case was transferred to this District.

This case was reassigned to the undersigned judge on November 24, 2008. On December 12, 2008, Plaintiff filed a “Motion for a Restraining Order on a Correctional Officer that has been Har[.]assing Plaintiff” (Doc. #11). The Court will dismiss the Complaint with leave to amend and will deny without prejudice the Motion for a Restraining Order.

**I. Statutory Screening of Prisoner Complaints**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.

JDDL

1 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised  
2 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may  
3 be granted, or that seek monetary relief from a defendant who is immune from such relief.  
4 28 U.S.C. § 1915A(b)(1), (2). If the Court determines that a pleading could be cured by the  
5 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint  
6 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)  
7 (*en banc*).

8 The Court should not, however, advise the litigant how to cure the defects. This type  
9 of advice “would undermine district judges’ role as impartial decisionmakers.” Pliler v.  
10 Ford, 542 U.S. 225, 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide  
11 whether the court was required to inform a litigant of deficiencies). Plaintiff’s Complaint  
12 will be dismissed with leave to amend because the Complaint may possibly be saved by  
13 amendment.

14 Rule 8(a) of the Federal Rules of Civil Procedure requires a “short and plain statement  
15 of the claim.” Fed. R. Civ. P. 8(a)(2). Rule 8(d)(1) states that “[e]ach allegation must be  
16 simple, concise, and direct.” A complaint having the factual elements of a cause of action  
17 scattered throughout the complaint and not organized into a “short and plain statement of the  
18 claim” may be dismissed for failure to satisfy Rule 8(a). See Sparling v. Hoffman Constr.  
19 Co., 864 F.2d 635, 640 (9th Cir. 1988); see also McHenry v. Renne, 84 F.3d 1172 (9th Cir.  
20 1996). Rule 10(b) of the Federal Rules of Civil Procedure also requires a plaintiff to state  
21 claims in “numbered paragraphs, each limited as far as practicable to a single set of  
22 circumstances.” Fed. R. Civ. P. 10(b). Moreover, “[i]f doing so would promote clarity, each  
23 claim founded on a separate transaction or occurrence . . . must be stated in a separate  
24 count.” Fed. R. Civ. P. 10(b). It is not the responsibility of the Court to review a rambling  
25 narrative in an attempt to determine the number and nature of a plaintiff’s claims.

26 The Court has reviewed Plaintiff’s Complaint. It is a convoluted collection of vague  
27 and conclusory contentions. The Court concludes that the Complaint fails to comply with  
28 Rules 8 and 10 of the Federal Rules of Civil Procedure. The Court cannot meaningfully

1 review the Complaint, as required by 28 U.S.C. § 1915A(a). Accordingly, the Court will  
2 dismiss the Complaint with leave to amend.

3 **II. Leave to Amend**

4 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to  
5 comply with Rules 8 and 10 of the Federal Rules of Civil Procedure. Within 30 days,  
6 Plaintiff may submit a first amended complaint on the form provided with this Order. If  
7 Plaintiff fails to use the form provided with this Order, the Court may strike the amended  
8 complaint and dismiss this action without further notice to Plaintiff.

9 Plaintiff must clearly designate on the face of the document that it is the “First  
10 Amended Complaint.” The amended complaint must be retyped or rewritten in its entirety  
11 on the form provided with this Order and may not incorporate any part of the original  
12 Complaint by reference.

13 Plaintiff must comply with the instructions provided with the form. Plaintiff should  
14 pay close attention to the instructions provided with the form. If Plaintiff fails to comply  
15 with the instructions provided with the form, the Court may strike the amended complaint  
16 and dismiss this action without further notice to Plaintiff.

17 Among other requirements contained in the instructions, Plaintiff must provide  
18 information in an amended complaint regarding the Court’s jurisdiction and the defendants,  
19 and he must divide his lawsuit into separate counts. In each count, Plaintiff must identify  
20 the federal constitutional civil right allegedly violated, check the box for the issue most  
21 closely involved, state how each defendant participated in the alleged violation at issue,  
22 explain how Plaintiff was injured by the alleged violation, and mark whether Plaintiff  
23 exhausted any available administrative remedies. Plaintiff must repeat this process for each  
24 civil rights claim. Plaintiff may allege only one claim per count.

25 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963  
26 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,  
27 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as  
28 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original

1 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d  
2 565, 567 (9th Cir. 1987).

3 **III. Motion for a Restraining Order**

4 Whether to grant or deny a motion for a temporary restraining order is within the  
5 Court’s discretion. See Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1132-33 (9th Cir.  
6 1979). “The standard for issuing a temporary restraining order is identical to the standard  
7 for issuing a preliminary injunction.” Whitman v. Hawaiian Tug & Barge  
8 Corporation/Young Bros., Ltd. Salaried Pension Plan, 27 F. Supp. 2d 1225, 1228 (D. Haw.  
9 1998). To obtain a preliminary injunction, the moving party must show “that he is likely to  
10 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
11 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in  
12 the public interest.” Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365,  
13 374 (2008). The moving party has the burden of proof on each element of the test.  
14 Environmental Council of Sacramento v. Slater, 184 F. Supp. 2d 1016, 1027 (E.D. Cal.  
15 2000).

16 An injunction is appropriate to grant intermediate relief of the same character as  
17 which may be granted finally, and relief is not proper when requested on matters lying  
18 wholly outside the issues in suit. DeBeers Consol. Mines v. United States., 325 U.S. 212,  
19 220 (1945); Kaimowitz v. Orlando, Fla., 122 F.3d 41, 43 (11th Cir.), amended, 131 F.3d 950  
20 (11th Cir. 1997). To obtain injunctive relief, the party “must necessarily establish a  
21 relationship between the injury claimed in the party’s motion and the conduct asserted in the  
22 complaint.” Devose v. Herrington, 42 F.3d 470, 471 (8th Cir. 1994).

23 Because the Court is dismissing the Complaint with leave to amend, the Court cannot  
24 determine at this time whether the relief requested in the Motion for Restraining Order  
25 relates to the conduct that will be asserted in the amended complaint. Thus, the Court will  
26 deny without prejudice the Motion for Restraining Order.

27 . . . .

28 . . . .

1 **IV. Warnings**

2 **A. Address Changes**

3 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
4 83-182(f) and 83-183(b) of the Local Rules of Civil Procedure. Plaintiff must not include  
5 a motion for other relief with a notice of change of address. Failure to comply may result  
6 in dismissal of this action.

7 **B. Copies**

8 Plaintiff must submit an additional copy of every filing for use by the Court. See  
9 LRCiv 5-133(d)(2). Failure to comply may result in the filing being stricken without further  
10 notice to Plaintiff.

11 **C. Possible Dismissal**

12 If Plaintiff fails to timely comply with every provision of this Order, including these  
13 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at  
14 1260-61 (a district court may dismiss an action for failure to comply with any order of the  
15 Court).

16 **IT IS ORDERED:**

17 (1) The Complaint (Doc. #1) is **dismissed** for failure to comply with Rules 8 and  
18 10 of the Federal Rules of Civil Procedure. Plaintiff has **30 days** from the date this Order  
19 is filed to file an amended complaint in compliance with this Order.

20 (2) Plaintiff's Motion for a Restraining Order (Doc. #11) is **denied without**  
21 **prejudice**.

22 (3) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of  
23 Court must, without further notice, enter a judgment of dismissal of this action with  
24 prejudice.

25 . . . .

26 . . . .

27 . . . .

28 . . . .

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

(4) The Clerk of Court must include with this Order a copy of this judge's required form for filing a civil rights complaint by a prisoner.

DATED this 12<sup>th</sup> day of February, 2009.

*Frederick J. Martone*  
\_\_\_\_\_  
Frederick J. Martone  
United States District Judge