

1 **II. Screening Requirement**

2 When an individual seeks to proceed *in forma pauperis*, the Court is required to review the
3 complaint and shall dismiss a complaint, or portion of the complaint, if it is “frivolous, malicious or
4 fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a defendant
5 who is immune from such relief.” 28 U.S.C. § 1915A(b); 28 U.S.C. § 1915(e)(2). A claim is
6 frivolous “when the facts alleged rise to the level of the irrational or the wholly incredible, whether or
7 not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*, 504 U.S.
8 25, 32-33 (1992).

9 **III. Pleading Standards**

10 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A
11 pleading must include a statement affirming the court’s jurisdiction, “a short and plain statement of the
12 claim showing the pleader is entitled to relief; and . . . a demand for the relief sought, which may
13 include relief in the alternative or different types of relief.” Fed. R. Civ. P. 8(a).

14 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and
15 succinct manner. *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984). The
16 purpose of the complaint is to give the defendant fair notice of the claims against him, and the grounds
17 upon which the complaint stands. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The
18 Supreme Court noted,

19 Rule 8 does not require detailed factual allegations, but it demands more than an
20 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
21 labels and conclusions or a formulaic recitation of the elements of a cause of action will
22 not do. Nor does a complaint suffice if it tenders naked assertions devoid of further
23 factual enhancement.
24 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks and citations omitted). Vague
25 and conclusory allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d 266,
26 268 (9th Cir. 1982). The Court clarified further,

27 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim
28 to relief that is plausible on its face.” [Citation]. A claim has facial plausibility when
the plaintiff pleads factual content that allows the court to draw the reasonable
inference that the defendant is liable for the misconduct alleged. [Citation]. The
plausibility standard is not akin to a “probability requirement,” but it asks for more than
a sheer possibility that a defendant has acted unlawfully. [Citation]. Where a complaint
pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of
the line between possibility and plausibility of ‘entitlement to relief.’”

1 *Iqbal*, 129 S. Ct. at 1949 (citations omitted). When factual allegations are well-pled, a court should
2 assume their truth and determine whether the facts would make the plaintiff entitled to relief; legal
3 conclusions are not entitled to the same assumption of truth. *Id.* The Court may grant leave to amend a
4 complaint to the extent deficiencies of the complaint can be cured by an amendment. *Lopez v. Smith*,
5 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc).

6 **IV. Jurisdiction**

7 Plaintiff seeks review of a decision by the Commissioner of Social Security denying disability
8 benefits. (Doc. 1). The Court would have jurisdiction pursuant to 42 U.S.C. § 405(g), which provides
9 in relevant part:

10 Any individual, after any final decision of the Commissioner made after a hearing to
11 which he was a party, irrespective of the amount in controversy, may obtain a review of
12 such decision by a civil action commenced **within sixty days after the mailing to him**
13 **of such decision or within such further time as the Commissioner may allow.** Such
14 action shall be brought in the district court of the United States for the judicial district
15 in which the plaintiff resides, or has his principal place of business . . . The court shall
16 have power to enter, upon the pleadings and transcript of the record, a judgment
17 affirming, modifying, or reversing the decision of the Commissioner of Social Security,
18 with or without remanding the cause for a rehearing.

19 *Id.* (emphasis added). Except as provided by statute, “[n]o findings of fact or decision of the
20 Commissioner shall be reviewed by any person, tribunal, or governmental agency.” 42 U.S.C. § 405(h).
21 These regulations “operate as a statute of limitations setting the time period in which a claimant may
22 appeal a final decision of the Commissioner.” *Berrigan v. Astrue*, 2010 U.S. Dist. LEXIS 115390, at
23 *4-5 (E.D. Cal. Oct. 29, 2010) (citing *Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Matthews*
24 *v. Eldridge*, 424 U.S. 319, 328 n. 9 (1976)). The time limit is a condition on the waiver of sovereign
25 immunity, and it must be strictly construed. *Id.*

26 **V. Discussion and Analysis**

27 According to Plaintiff, the Appeals Council denied his request for review of the decision
28 rendered by the administrative law judge on July 9, 2013, at which time the decision became the final
decision of the Commissioner. (Doc. 1 at 2). Therefore, Plaintiff’s request for judicial review
pursuant to 42 U.S.C. § 405(g) must have been filed no later than September 12, 2013. However,
Plaintiff’s counsel requested the Appeals Council grant an extension of time of thirty days to file a

1 civil action on September 5, 2013. (Doc. 1, Exh. 1). Notably, Plaintiff does not allege the Appeals
2 Council granted the extension of time. Therefore, from the face of Plaintiff's complaint, it does not
3 appear the Court has jurisdiction over the matter.

4 **VI. Leave to Amend the Complaint**

5 Leave to amend should be granted to the extent that the deficiencies of the complaint can be
6 cured by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). A complaint, or
7 a portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted
8 if it appears beyond doubt that the Plaintiff can prove no set of facts, consistent with the allegations, in
9 support of the claim or claims that would entitle him to relief. *See Hishon v. King & Spalding*, 467
10 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also Palmer v. Roosevelt*
11 *Lake Log Owners' Ass'n., Inc.*, 651 F.2d 1289, 1294 (9th Cir. 1981).

12 Here the Court cannot find with certainty that Plaintiff cannot allege facts supporting a finding
13 that the Court has jurisdiction over the matter. The Court will grant Plaintiff leave to amend the
14 complaint to cure the deficiencies of this complaint by stating the necessary information regarding if
15 and when the request for an extension of time was granted by the Appeals Council. Failure to cure the
16 deficiencies will result in a recommendation that the matter be dismissed.

17 Plaintiff is informed that the Court cannot refer to a prior pleading in order to make his
18 amended complaint complete. Local Rule 220 requires that an amended complaint be complete in
19 itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the
20 original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once Plaintiff files an
21 amended complaint, the original pleading no longer serves any function in the case.

22 The amended complaint must bear the docket number assigned this case and must be labeled
23 "First Amended Complaint." Failure to file an amended complaint in accordance with this order will
24 be considered to be a failure to comply with an order of the Court pursuant to Local Rule 110 and will
25 result in dismissal of this action.

26 Accordingly, **IT IS HEREBY ORDERED:**

- 27 1. Plaintiff's motion to proceed *in forma pauperis* (Doc. 2) is **GRANTED**;
- 28 2. Plaintiff's complaint **IS DISMISSED** with leave to amend; and

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3. Plaintiff is **GRANTED** thirty (30) days from the date of service of this order to file an amended complaint that complies with the requirements of the pertinent substantive law, the Federal Rules of Civil Procedure, and the Local Rules of Practice.

IT IS SO ORDERED.

Dated: November 4, 2013

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE