

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

ERIK AGUILAR LOPEZ,

Plaintiff, No. 2:08-cv-2314-JFM (PC)

VS.

C. W. FINN, et al.,

Defendants. ORDER

Plaintiff is a former state prisoner proceeding pro se. Plaintiff seeks relief U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 915. This proceeding was referred to this court by Local Rule 72-302 pursuant to 36(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

20 The court is required to screen complaints brought by prisoners seeking relief  
21 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
22 § 1915A(a). This requirement includes complaints such as this one which have been filed by  
23 persons, now free, who were in custody at the time relevant to their complaint. The court must  
24 dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous  
25 or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary  
26 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

1           A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
2   Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
3   (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4   indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
5   490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
6   pled, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
7   Cir. 1989); Franklin, 745 F.2d at 1227.

8           Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and  
9   plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
10   defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic  
11   Corp. v. Twombly, \_\_ U.S. \_\_, 127 S.Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S.  
12   41, 47 (1957)). In order to survive dismissal for failure to state a claim a complaint must contain  
13   more than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
14   allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, id.  
15   However, “[s]pecific facts are not necessary; the statement [of facts] need only “‘give the  
16   defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”” Erickson  
17   v. Pardus, \_\_ U.S. \_\_, 127 S.Ct. 2197, 2200 (2007) (quoting Bell, slip op. at 7-8, in turn quoting  
18   Conley v. Gibson, 355 U.S. 41, 47 (1957)). In reviewing a complaint under this standard, the  
19   court must accept as true the allegations of the complaint in question, Erickson, id., and construe  
20   the pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236  
21   (1974).

22           The court finds the allegations in plaintiff’s complaint so vague and conclusory  
23   that it is unable to determine whether the current action is frivolous or fails to state a claim for  
24   relief. The court has determined that the complaint does not contain a short and plain statement  
25   as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading  
26   policy, a complaint must give fair notice and state the elements of the claim plainly and

1 succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff  
2 must allege with at least some degree of particularity overt acts which defendants engaged in that  
3 support plaintiff's claim. Id. Because plaintiff has failed to comply with the requirements of Fed.  
4 R. Civ. P. 8(a)(2), the complaint must be dismissed. The court will, however, grant leave to file  
5 an amended complaint.

6 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
7 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See  
8 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms  
9 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless  
10 there is some affirmative link or connection between a defendant's actions and the claimed  
11 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.  
12 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory  
13 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
14 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

15 In addition, plaintiff is informed that the court cannot refer to a prior pleading in  
16 order to make plaintiff's amended complaint complete. Local Rule 15-220 requires that an  
17 amended complaint be complete in itself without reference to any prior pleading. This is  
18 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
19 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original  
20 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an  
21 original complaint, each claim and the involvement of each defendant must be sufficiently  
22 alleged.

23 On August 29, 2008, plaintiff filed a document entitled "Motion for Discovery."  
24 The court construes this document as a discovery request. Plaintiff is informed that court  
25 permission is not necessary for discovery requests and that neither discovery requests served on  
26 an opposing party nor that party's responses should be filed until such time as a party becomes

1 dissatisfied with a response and seeks relief from the court pursuant to the Federal Rules of Civil  
2 Procedure. Discovery requests between the parties shall not be filed with the court unless, and  
3 until, they are at issue. Plaintiff's August 29, 2008 discovery request shall be disregarded.

4 On November 21, 2008, plaintiff filed a document styled as a request for  
5 extension of time and for appointment of counsel. Plaintiff seeks an extension of ninety days "to  
6 substantiate evidence by 602 measures." Plaintiff is informed that evidence in support of claims  
7 to be raised in this action should not be filed unless and until one or more cognizable claims are  
8 placed in issue by a dispositive motion or trial of this matter. Plaintiff's motion for extension of  
9 time will be denied.

10 The United States Supreme Court has ruled that district courts lack authority to  
11 require counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist.  
12 Court, 490 U.S. 296, 298 (1989). In certain exceptional circumstances, the court may request the  
13 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d  
14 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In  
15 the present case, the court does not find the required exceptional circumstances. Plaintiff's  
16 request for the appointment of counsel will therefore be denied.

17 In accordance with the above, IT IS HEREBY ORDERED that:

18 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

19 2. Plaintiff's complaint is dismissed.

20 3. Within thirty days from the date of this order, plaintiff shall complete the  
21 attached Notice of Amendment and submit the following documents to the court:

22 a. The completed Notice of Amendment; and

23 b. An original and one copy of the Amended Complaint.

24 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the  
25 Federal Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must  
26 bear the docket number assigned this case and must be labeled "Amended Complaint"; failure to

1 file an amended complaint in accordance with this order will result in a recommendation that this  
2 action be dismissed.

3                   4. Plaintiff's August 29, 2008 motion for discovery is construed as a discovery  
4 request and, so construed, shall be disregarded.

5 5. Plaintiff's November 21, 2008 motion for extension of time is denied.

6 6. Plaintiff's November 21, 2008 motion for appointment of counsel is denied.

7 || DATED: January 22, 2009.

John F. Wark  
UNITED STATES MAGISTRATE JUDGE

12  
lope2314.14

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

ERIK A. LOPEZ,

Plaintiff, No. 2:08-cv-2314-JFM (PC)

VS.

C. W. FINN, et al.,

## **NOTICE OF AMENDMENT**

## Defendants.

Plaintiff hereby submits the following document in compliance with the court's order filed :

## Amended Complaint

DATED:

Plaintiff