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

MARVIN GLENN HOLLIS,

No. CIV S-08-2674 GGH P

vs.

PHILLIP SLOAN, et al.,

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983 and has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(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.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$5.82 will be assessed by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the

1 preceding month's income credited to plaintiff's prison trust account. These payments will be
2 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's
3 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be
8 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
11 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
12 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
13 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
15 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
16 Cir. 1989); Franklin, 745 F.2d at 1227.

17 A complaint must contain more than a "formulaic recitation of the elements of a
18 cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the
19 speculative level." Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007).
20 "The pleading must contain something more...than...a statement of facts that merely creates a
21 suspicion [of] a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal
22 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). In reviewing a complaint under this
23 standard, the court must accept as true the allegations of the complaint in question, Hospital
24 Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light
25 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. Jenkins v.
26 McKeithen, 395 U.S. 411, 421 (1969).

1 The complaint states a colorable claim for relief against defendants Sloan,
2 Jenesky, Murray, Cummings, Dennis, Boretz and Acquaviva pursuant to 42 U.S.C. § 1983 and
3 28 U.S.C. § 1915A(b).

4 As to the conspiracy claims against all defendants, vague and conclusory
5 allegations are not sufficient to support a claim for civil rights violations based on conspiracy.
6 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982); see also Pena v. Gardner, 976 F.2d
7 469, 471 (9th Cir. 1992). Plaintiff must make some showing of an agreement or a meeting of the
8 minds on the part of defendants to violate his constitutional rights. Woodrum v. Woodward
9 County, 866 F.2d 1121, 1126 (9th Cir. 1989), citing Fonda v. Gray, 707 F.2d 435 (9th Cir. 1983).
10 Conspiracy allegations must be supported by material facts and not be merely conclusory
11 statements. Lockary v. Kayfetz, 587 F. Supp. 631 (N. D. Cal. 1984). See also Moord v. Konkel,
12 288 Fed. Appx. 372 (9th Cir. 2008). Plaintiff will be provided leave to file an amended complaint
13 within thirty days from the date of service of this Order. Failure to file an amended complaint
14 will result in a recommendation that this claim be dismissed from this action.

15 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
16 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
17 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
18 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless
19 there is some affirmative link or connection between a defendant's actions and the claimed
20 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.
21 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory
22 allegations of official participation in civil rights violations are not sufficient. See Ivey v. Board
23 of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

24 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
25 order to make plaintiff's amended complaint complete. Local Rule 15-220 requires that an
26 amended complaint be complete in itself without reference to any prior pleading. This is

1 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.
2 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original
3 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an
4 original complaint, each claim and the involvement of each defendant must be sufficiently
5 alleged.

6 Accordingly, IT IS HEREBY ORDERED that:

7 1. Plaintiff's request to proceed in forma pauperis is granted;

8 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

9 Plaintiff is assessed an initial partial filing fee of \$5.82. All fees shall be collected and paid in
10 accordance with this court's order to the Director of the California Department of Corrections
11 and Rehabilitation filed concurrently herewith.

12 3. Plaintiff's conspiracy claims against all defendants are dismissed for the
13 reasons discussed above, with leave to file an amended complaint within thirty days from the
14 date of service of this Order. Failure to file an amended complaint will result in a
15 recommendation that these defendants be dismissed from this action.

16 4. Upon filing an amended complaint or expiration of the time allowed therefor,
17 the court will make further orders for service of process upon some or all of the defendants.

18 DATED: January 20, 2009

19 /s/ Gregory G. Hollows

20 _____
21 GREGORY G. HOLLOWES
22 UNITED STATES MAGISTRATE JUDGE

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