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

GILBERT S. MARTINEZ,

Plaintiff,

No. CIV S-10-1485 GGH P

vs.

YOLANDA RODRIGUEZ,

Defendant.

ORDER

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Plaintiff is a county inmate proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. His original complaint, filed June 16, 2010, alleges that plaintiff’s parole agent, named as defendant, improperly placed a hold on him pursuant to California Penal Code § 3056, which provides for prisoners on parole to be returned to prison. In that complaint, petitioner sought both injunctive relief and money damages. (Doc. No. 1.)

On August 31, 2010, plaintiff moved to amend his complaint by retracting his request for money damages. (Doc. No. 9.) While the motion refers generally to the allegations in plaintiff’s original complaint, it does not restate them, and does not itself constitute an amended complaint. The action therefore proceeds on the original complaint. Plaintiff also has filed a motion for summary judgment (Doc. No. 10.)

The court is required to screen complaints brought by prisoners seeking relief

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

6 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
7 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
8 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
9 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
10 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
11 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
12 Cir. 1989); Franklin, 745 F.2d at 1227.

13 A complaint must contain more than a “formulaic recitation of the elements of a  
14 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the  
15 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).  
16 “The pleading must contain something more...than...a statement of facts that merely creates a  
17 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal  
18 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient  
19 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft  
20 v. Iqbal, No. 07-1015, 2009 WL 1361536 at \* 12 (May 18, 2009) (quoting Twombly, 550 U.S. at  
21 570, 127 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content  
22 that allows the court to draw the reasonable inference that the defendant is liable for the  
23 misconduct alleged.” Id.

24 In reviewing a complaint under this standard, the court must accept as true the  
25 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
26 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,

1 and resolve all doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.  
2 1843 (1969).

3 Here, it appears that plaintiff is simply claiming a violation of his rights under  
4 state law. Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1183 (9th Cir.2002), quoting  
5 Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) ("The  
6 presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint  
7 rule,' which provides that federal jurisdiction exists only when a federal question is presented on  
8 the face of the plaintiff's properly pleaded complaint"; White v. White, 731 F.2d 1440, 1442 (9th  
9 Cir. 1984) ("Federal jurisdiction exists if a complaint claims a right to recover under the  
10 Constitution and laws of the United States and the claim is not wholly insubstantial and  
11 frivolous"). In this case, plaintiff's complaint is neither "well-pleaded," nor is a federal question  
12 presented on the face of it.

13 Plaintiff's assertion that defendant's action violated his "constitutional rights" is  
14 not sufficient to state a federal claim. Section 1983 "is not itself a source of substantive rights,"  
15 but merely provides "a method for vindicating federal rights elsewhere conferred." Baker v.  
16 McCollan, 443 U.S. 137, 144, n. 3, 99 S.Ct. 2689, 2694, n. 3, 61 L.Ed.2d 433 (1979). The first  
17 step in any such claim is to identify the specific constitutional right allegedly infringed. Graham  
18 v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989); and Baker v.  
19 McCollan, supra, 443 U.S., at 140, 99 S.Ct., at 2692." As the complaint does not set forth a  
20 colorable federal due process claim, it will be dismissed with leave to amend.

21 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
22 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See  
23 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms  
24 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless  
25 there is some affirmative link or connection between a defendant's actions and the claimed  
26 deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d

1 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,  
2 vague and conclusory allegations of official participation in civil rights violations are not  
3 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

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

12 1. The complaint (Doc. No. 1) is dismissed for the reasons discussed above, with  
13 leave to file an amended complaint within twenty-eight days from the date of service of this  
14 order. Failure to file an amended complaint will result in a recommendation that the action be  
15 dismissed.

16 2. Plaintiff's motion to amend the complaint (Doc. No. 9) is denied as moot.

17 3. Plaintiff's motion for summary judgment (Doc. No. 10) is denied as premature.

18 DATED: September 15, 2010

19 /s/ Gregory G. Hollows

20 UNITED STATES MAGISTRATE JUDGE

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