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

BENNY MARTINEZ,

Plaintiff,

No. CIV S-11-0416 GEB EFB (TEMP) PS

vs.

SCOTT KAYS, et al.,

Defendants.

ORDER

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Plaintiff is proceeding in this action pro se. Plaintiff 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(c)(21).

Plaintiff has submitted the affidavit required by § 1915(a) showing that plaintiff is unable to prepay fees and costs or give security for them. Accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

The federal in forma pauperis statute authorizes federal courts to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

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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 (9th  
3 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.

6 In order to avoid dismissal for failure to state a claim a complaint must contain more than  
7 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause  
8 of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-557 (2007). In other words,  
9 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
10 statements do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Furthermore, a  
11 claim upon which the court can grant relief has facial plausibility. *Twombly*, 550 U.S. at 570.  
12 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
13 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*,  
14 129 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can  
15 be granted, the court must accept the allegations as true, *Erickson v. Pardus*, 127 S. Ct. 2197,  
16 2200 (2007), and construe the complaint in the light most favorable to the plaintiff, *see Scheuer*  
17 *v. Rhodes*, 416 U.S. 232, 236 (1974).

18 The court finds the allegations in plaintiff’s complaint so vague and conclusory that it is  
19 unable to determine whether the current action is frivolous or fails to state a claim for relief. The  
20 court has determined that the complaint does not contain a short and plain statement as required  
21 by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a  
22 complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones*  
23 *v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at  
24 least some degree of particularity overt acts which defendants engaged in that support plaintiff’s  
25 claim. *Id.* Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P.  
26 8(a)(2), the complaint must be dismissed. The court will, however, grant leave to file an

1 amended complaint.

2           If plaintiff chooses to amend the complaint, plaintiff must set forth the jurisdictional  
3 grounds upon which the court’s jurisdiction depends. Federal Rule of Civil Procedure 8(a).  
4 Further, plaintiff must demonstrate how the conduct complained of has resulted in a deprivation  
5 of plaintiff’s federal rights. *See Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980).

6           It appears plaintiff is seeking damages for an allegedly wrongful conviction on a felony  
7 charge and related sex offender registration. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the  
8 United States Supreme Court held that a suit for damages on a civil rights claim concerning an  
9 allegedly unconstitutional conviction or imprisonment cannot be maintained absent proof “that  
10 the conviction or sentence has been reversed on direct appeal, expunged by executive order,  
11 declared invalid by a state tribunal authorized to make such determination, or called into  
12 question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” *Heck*, 512  
13 U.S. at 486.

14           Under *Heck*, the court is required to determine whether a judgment in plaintiff’s favor in  
15 this case would necessarily invalidate his conviction or sentence. *Id.* If it would, the complaint  
16 must be dismissed unless the plaintiff can show that the conviction or sentence has been  
17 invalidated. This court finds that plaintiff’s action implicates the validity of plaintiff’s  
18 conviction. In any amended complaint, plaintiff must show that his conviction has been  
19 invalidated.

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

1           Accordingly, it is hereby ORDERED that:

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

3           2. Plaintiff's complaint is dismissed with leave to amend; and

4           3. Plaintiff is granted thirty days from the date of service of this order to file an amended  
5 complaint that complies with the requirements of the Federal Rules of Civil Procedure, and the  
6 Local Rules of Practice; the amended complaint must bear the docket number assigned this case  
7 and must be labeled "Amended Complaint"; plaintiff must file an original and two copies of the  
8 amended complaint; failure to file an amended complaint in accordance with this order will  
9 result in a recommendation that this action be dismissed.

10 DATED: February 17, 2011.

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12 EDMUND F. BRENNAN  
13 UNITED STATES MAGISTRATE JUDGE  
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