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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

\_\_\_\_\_ /

Plaintiff is proceeding in this action pro se and in forma pauperis. Plaintiff has filed an amended complaint.

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).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327.

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

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

24 Plaintiff is again advised that plaintiff must set forth the jurisdictional grounds upon  
25 which the court’s jurisdiction depends. Federal Rule of Civil Procedure 8(a). Further, plaintiff  
26 must demonstrate how the conduct complained of has resulted in a deprivation of plaintiff’s

1 federal rights. *See Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980).

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

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

15           Plaintiff names as a defendant a judge of the Superior Court of California. It appears  
16 from the allegations of the complaint that the actions taken by the judge which form the basis of  
17 plaintiff’s amended complaint were taken during the course of criminal proceedings over which  
18 the judge presided and as such, judicial immunity attaches. *See Sadoski v. Mosley*, 435 F.3d  
19 1076, 1079 (9th Cir.2006) (*quoting Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978)) (judge  
20 immune from suit for damages based on judicial conduct when not acting in “clear absence” of  
21 jurisdiction).

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

1 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
2 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

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

4 1. Plaintiff's amended complaint is dismissed; and

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

12 DATED: June 1, 2011.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE