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

WILLIAM DALE SMITH, JR.,

Plaintiff,

No. CIV 11-1577 KJM EFB PS

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

_____ /

This case, in which plaintiff is proceeding *in propria persona*, was referred to the undersigned under Local Rule 302(c)(21), pursuant to 28 U.S.C. § 636(b)(1). Plaintiff seeks leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Plaintiff’s declaration makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, the request to proceed *in forma pauperis* will be granted. 28 U.S.C. § 1915(a).

Determining plaintiff may proceed *in forma pauperis* does not complete the required inquiry. Pursuant to § 1915(e)(2), the court is directed to dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

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1 Although *pro se* pleadings are liberally construed, see *Haines v. Kerner*, 404 U.S. 519,
2 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if
3 it fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
4 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41
5 (1957)); see also Fed. R. Civ. P. 12(b)(6). “[A] plaintiff’s obligation to provide the ‘grounds’ of
6 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of
7 a cause of action’s elements will not do. Factual allegations must be enough to raise a right to
8 relief above the speculative level on the assumption that all of the complaint’s allegations are
9 true.” *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable
10 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.
11 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

12 In reviewing a complaint under this standard, the court must accept as true the allegations
13 of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740
14 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in
15 the plaintiff’s favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A *pro se* plaintiff must
16 satisfy the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule
17 8(a)(2) “requires a complaint to include a short and plain statement of the claim showing that the
18 pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the
19 grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007)
20 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

21 Additionally, a federal court is a court of limited jurisdiction, and may adjudicate only
22 those cases authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins.*
23 *Co.*, 511 U.S. 375, 377 (1994). The basic federal jurisdiction statutes, 28 U.S.C. §§ 1331 &
24 1332, confer “federal question” and “diversity” jurisdiction, respectively. Federal question
25 jurisdiction requires that the complaint (1) arise under a federal law or the U. S. Constitution, (2)
26 allege a “case or controversy” within the meaning of Article III, § 2 of the U. S. Constitution, or

1 (3) be authorized by a federal statute that both regulates a specific subject matter and confers
2 federal jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). To invoke the court’s diversity
3 jurisdiction, a plaintiff must specifically allege the diverse citizenship of all parties, and that the
4 matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Bautista v. Pan American World*
5 *Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A case presumably lies outside the jurisdiction
6 of the federal courts unless demonstrated otherwise. *Kokkonen*, 511 U.S. at 376-78. Lack of
7 subject matter jurisdiction may be raised at any time by either party or by the court. *Attorneys*
8 *Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

9 Here, plaintiff’s complaint is nearly incomprehensible. The complaint itself states “FCC
10 written x2 legal mailings earlier this year” and “viewed their hearing yesterday – S Sac
11 residence,” but it is entirely unclear to the undersigned what those statements purport to allege.
12 See Dckt. No. 1. Plaintiff then filed a supplement to the complaint, alleging that “the complaint
13 is § 1512, tampering, basically.” Dckt. No. 3 at 1. Because plaintiff’s filings do not allege any
14 cognizable legal theories and do not allege any facts in support of a cognizable legal theory,
15 plaintiff’s complaint will be dismissed. However, plaintiff is granted leave to file an amended
16 complaint, if he can allege a cognizable legal theory and sufficient facts in support of that
17 cognizable legal theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
18 (district courts must afford pro se litigants an opportunity to amend to correct any deficiency in
19 their complaints). To the extent plaintiff seeks to state a claim under 18 U.S.C. § 1512, for
20 tampering with a witness, plaintiff is informed that 18 U.S.C. § 1512 is a criminal statute that
21 does not provide a private civil right of action.

22 Plaintiff is informed that the court cannot refer to prior pleadings in order to make an
23 amended complaint complete. Local Rule 220 requires that an amended complaint be complete
24 in itself. This is because, as a general rule, an amended complaint supersedes the original
25 complaint. See *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, once plaintiff files
26 an amended complaint, the original no longer serves any function in the case. Therefore, “a

1 plaintiff waives all causes of action alleged in the original complaint which are not alleged in the
2 amended complaint,” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981), and
3 defendants not named in an amended complaint are no longer defendants. *Ferdik v. Bonzelet*,
4 963 F.2d 1258, 1262 (9th Cir. 1992).

5 Finally, the court cautions plaintiff that failure to comply with the Federal Rules of Civil
6 Procedure, this court’s Local Rules, or any court order may result in a recommendation that this
7 action be dismissed. *See* Local Rule 110.

8 Accordingly, IT IS ORDERED that:

- 9 1. Plaintiff’s request for leave to proceed *in forma pauperis* is granted.
- 10 2. Plaintiff’s complaint is dismissed with leave to amend.
- 11 3. Plaintiff is granted thirty days from the date of service of this order to file an amended
12 complaint. The amended complaint must bear the docket number assigned to this case and must
13 be labeled “Amended Complaint.” Plaintiff must file an original and two copies of the amended
14 complaint. Failure to timely file an amended complaint in accordance with this order will result
15 in a recommendation this action be dismissed.

16 DATED: July 6, 2011.

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19 EDMUND F. BRENNAN
20 UNITED STATES MAGISTRATE JUDGE
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