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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.

FINDINGS AND RECOMMENDATIONS

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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). On July 6, 2011, the undersigned granted plaintiff’s request to proceed *in forma pauperis*, but dismissed plaintiff’s complaint with leave to amend pursuant to 28 U.S.C. § 1915(e)(2). Dckt. No. 4. The court noted that plaintiff’s original complaint was “nearly incomprehensible,” and that neither plaintiff’s original complaint nor his supplement thereto alleged any cognizable legal theories or any facts in support of a cognizable legal theory. *Id.* at 3. Accordingly, the court dismissed plaintiff’s complaint, but provided plaintiff with an opportunity to amend his complaint to the extent that he could “allege a cognizable legal theory and sufficient facts in support of that cognizable legal theory.” *Id.*

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1 On July 8, 2011, plaintiff filed an amended complaint. Dckt. No. 5. However, his  
2 amended complaint once again fails to allege any cognizable legal theories or any facts in  
3 support of a cognizable legal theory. It appears that the gist of plaintiff's complaint is his claim  
4 under 18 U.S.C. § 1512 for witness tampering. However, as the court noted in the July 6 order,  
5 "18 U.S.C. § 1512 is a criminal statute that does not provide a private civil right of action."  
6 Dckt. No. 4 at 3.

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

19 Because it appears that further amendment would be futile, the court will recommend that  
20 this action be dismissed without leave to amend pursuant to 28 U.S.C. § 1915(e)(2). *Noll v.*  
21 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (While the court ordinarily would permit a *pro se*  
22 plaintiff to amend, leave to amend should not be granted where it appears amendment would be  
23 futile).

24 Accordingly, IT IS HEREBY RECOMMENDED that:

25 1. Plaintiff's amended complaint, Dckt. No. 5, be dismissed without leave to amend; and

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