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

DE SHAWN MALONE,

Plaintiff,

No. 2:11-cv-2468 EFB P

vs.

F. GONZALES,

Defendant.

ORDER

_____/

Plaintiff is a state prisoner proceeding pro se with this civil rights action under 42 U.S.C. § 1983. In addition to filing a complaint, plaintiff has filed an application to proceed in forma pauperis and a motion for injunctive relief. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1) and is before the undersigned pursuant to plaintiff’s consent. Dckt. No. 4; *see* E.D. Cal. Local Rules, Appx. A, at (k)(4).

I. Request to Proceed In Forma Pauperis

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Dckt. Nos. 2, 5, 9. Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

1 **II. Screening Requirement and Standards**

2 Federal courts must engage in a preliminary screening of cases in which prisoners seek
3 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion
5 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
6 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
7 relief.” *Id.* § 1915A(b).

8 In order to avoid dismissal for failure to state a claim a complaint must contain more than
9 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause
10 of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-557 (2007). In other words,
11 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
12 statements do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

13 Furthermore, a claim upon which the court can grant relief has facial plausibility.
14 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
15 content that allows the court to draw the reasonable inference that the defendant is liable for the
16 misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. When considering whether a complaint states a
17 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
18 *Pardus*, 127 S. Ct. 2197, 2200 (2007), and construe the complaint in the light most favorable to
19 the plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

20 A *pro se* plaintiff must satisfy the pleading requirements of Rule 8(a) of the Federal
21 Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and plain
22 statement of the claim showing that the pleader is entitled to relief, in order to give the defendant
23 fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,
24 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

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1 The court has reviewed plaintiff's complaint pursuant to 28 U.S.C. § 1915A and finds it
2 does not state a cognizable claim. The complaint names Gonzales as the sole defendant but
3 includes no factual allegations linking Gonzales to a deprivation of plaintiff's federal rights.
4 Plaintiff alleges in vague and conclusory terms that both the inmate appeals system and the law
5 library at the California Correctional Institution are not adequate. The complaint fails to allege
6 sufficient facts to demonstrate an access to the courts claim. Although the Federal Rules adopt a
7 flexible pleading policy, a complaint must give fair notice and state the elements of the claim
8 plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984).
9 Plaintiff must allege with at least some degree of particularity overt acts which defendants
10 engaged in that support plaintiff's claim. *Id.* Because plaintiff fails to state a claim for relief, the
11 complaint must be dismissed.

12 Plaintiff will be granted leave to file an amended complaint, if plaintiff can allege a
13 cognizable legal theory against a proper defendant and sufficient facts in support of that
14 cognizable legal theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
15 (district courts must afford pro se litigants an opportunity to amend to correct any deficiency in
16 their complaints). Should plaintiff choose to file an amended complaint, the amended complaint
17 shall clearly set forth the claims and allegations against each defendant. Any amended
18 complaint must cure the deficiencies identified above and also adhere to the following
19 requirements:

20 Any amended complaint must identify as a defendant only persons who personally
21 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
22 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
23 constitutional right if he does an act, participates in another's act or omits to perform an act he is
24 legally required to do that causes the alleged deprivation). It must also contain a caption
25 including the names of all defendants. Fed. R. Civ. P. 10(a).

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1 Any amended complaint must be written or typed so that it so that it is complete in itself
2 without reference to any earlier filed complaint. L.R. 220. This is because an amended
3 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
4 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
5 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter
6 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
7 1967)). Plaintiff may not change the nature of this suit by alleging new, unrelated claims in an
8 amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot”
9 complaints).

10 In order to state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1) the violation
11 of a federal constitutional or statutory right; and (2) that the violation was committed by a person
12 acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v.*
13 *Williams*, 297 F.3d 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil
14 rights claim unless the facts establish the defendant’s personal involvement in the constitutional
15 deprivation or a causal connection between the defendant’s wrongful conduct and the alleged
16 constitutional deprivation. *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v.*
17 *Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

18 Prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S.
19 817, 828 (1977). Prisoners also have a right “to litigate claims challenging their sentences or the
20 conditions of their confinement to conclusion without *active interference* by prison officials.”
21 *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011). An inmate alleging a violation of this
22 right must show that he suffered an actual injury. *Lewis v. Casey*, 518 U.S. 343, 349-51 (1996).
23 That is, plaintiff must allege that the deprivation actually injured his litigation efforts, in that the
24 defendant hindered his efforts to bring, or caused him to lose, an actionable claim challenging
25 his criminal sentence or conditions of confinement. *See id.* at 351; *Christopher v. Harbury*, 536
26 U.S. 403, 412-15 (2002).

1 **III. Request for Injunctive Relief**

2 Plaintiff filed a motion for a preliminary injunction, asking the court to order defendant
3 Gonzales to give plaintiff “immediate access to the state form(s) necessary to initiate a civil suit
4 in state court.” Dckt. No. 7 at 7. A preliminary injunction will not issue unless necessary to
5 prevent threatened injury that would impair the court’s ability to grant effective relief in a
6 pending action. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir.
7 1984); *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989). A preliminary injunction
8 represents the exercise of a far reaching power not to be indulged except in a case clearly
9 warranting it. *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). In order to be
10 entitled to preliminary injunctive relief, a party must demonstrate “that he is likely to succeed on
11 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
12 balance of equities tips in his favor, and that an injunction is in the public interest.” *Stormans,*
13 *Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council,*
14 *Inc.*, 555 U.S. 7 (2008)). The Ninth Circuit Court of Appeals has also held that the “sliding
15 scale” approach it applies to preliminary injunctions as it relates to the showing a plaintiff must
16 make regarding his chances of success on the merits survives *Winter* and continues to be valid.
17 *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, at 1134-35 (9th Cir. 2011). Under this
18 sliding scale the elements of the preliminary injunction test are balanced. As it relates to the
19 merits analysis, a stronger showing of irreparable harm to plaintiff might offset a lesser showing
20 of likelihood of success on the merits. *Id.* In cases brought by prisoners involving conditions of
21 confinement, any preliminary injunction “must be narrowly drawn, extend no further than
22 necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive
23 means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

24 As discussed above, plaintiff’s complaint will be dismissed for failure to state a claim
25 upon which relief can be granted. Plaintiff is therefore unlikely to succeed on the merits of his
26 claims, and there are no defendants against whom this court could enter an order. If plaintiff

1 files an amended complaint that states a cognizable claim, the court will order the United States
2 Marshal to serve the amended complaint upon the named defendant(s). The court cannot issue
3 an order against individuals who are not parties to a suit pending before it. *See Zenith Radio*
4 *Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969). *See also Zepeda v. United States*
5 *Immigration Service*, 753 F.2d 719, 727 (9th Cir. 1985) (“A federal court may issue an
6 injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the
7 claim; it may not attempt to determine the rights of persons not before the court.”). Accordingly,
8 the court will deny plaintiff’s motion for a preliminary injunction or as premature.

9 **IV. Order**

10 Accordingly, the court hereby orders that:

11 1. Plaintiff’s request to proceed *in forma pauperis* (Dckt. Nos. 2, 5, 9) is granted.

12 2. The complaint is dismissed with leave to amend within 30 days. The amended
13 complaint must bear the docket number assigned to this case and be titled “First Amended
14 Complaint.” Failure to comply with this order will result in this action being dismissed for
15 failure to state a claim. If plaintiff files an amended complaint stating a cognizable claim the
16 court will proceed with service of process by the United States Marshal.

17 3. Plaintiff’s motion for a preliminary injunction (Dckt. No. 7) is denied.

18 Dated: August 2, 2012.

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20 EDMUND F. BRENNAN
21 UNITED STATES MAGISTRATE JUDGE
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