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

BURCH MICHAEL BOWEN,

Plaintiff,

No. 2:12-cv-1519 MCE AC P

vs.

MATTHEW CATE, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner seeking relief pursuant to 42 U.S.C. § 1983. On August 13, 2012, plaintiff’s complaint was dismissed with leave to amend. Plaintiff was then granted appointment of counsel for the limited purpose of filing an amended complaint. On October 14, 2012, plaintiff, through appointed counsel, filed a first amended complaint (“FAC”) against defendants Cate, Milliner, Carrick, Swarthout, McAlpine, Shadday, Hartley, McElroy, Chapnick, Boparai, Conanan, and Kamen. The FAC is now before the court.

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may

1 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28
2 U.S.C. § 1915A(b)(1),(2).

3 A claim is legally frivolous when it lacks an arguable basis either in law or in
4 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-
5 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
6 indisputably meritless legal theory or where the factual contentions are clearly baseless.
7 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however
8 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d
9 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

10 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and
11 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
12 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell
13 Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964 (2007) (quoting Conley v.
14 Gibson, 355 U.S. 41, 47 (1957)). In order to survive dismissal for failure to state a claim a
15 complaint must contain more than “a formulaic recitation of the elements of a cause of action;” it
16 must contain factual allegations sufficient “to raise a right to relief above the speculative level.”
17 Bell Atlantic, id. However, “[s]pecific facts are not necessary; the statement [of facts] need only
18 “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”
19 Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200 (2007) (quoting Bell, 127 S.Ct. at 1964,
20 in turn quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). In reviewing a complaint under this
21 standard, the court must accept as true the allegations of the complaint in question, Erickson, id.,
22 and construe the pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416
23 U.S. 232, 236 (1974).

24 The court finds the allegations in plaintiff’s FAC so conclusory that it is unable to
25 determine whether the current action is frivolous or fails to state a claim for relief. While the
26 court finds service appropriate for defendant Shadday, there are simply no factual allegations as

1 to any of the other eleven defendants. The court has thus determined that the complaint does not
2 contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal
3 Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements
4 of the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th
5 Cir. 1984). Plaintiff must allege with at least some degree of particularity overt acts which
6 defendants engaged in that support plaintiff's claim. Id. Because plaintiff has failed to comply
7 with the requirements of Fed. R. Civ. P. 8(a)(2), the complaint must be dismissed. The court
8 will, however, grant leave to file a second amended complaint.

9 If plaintiff chooses to file a second amended complaint, plaintiff must
10 demonstrate how the conditions complained of have resulted in a deprivation of plaintiff's
11 constitutional rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). **Also, the second**
12 **amended complaint must allege in specific terms how each named defendant is involved.**
13 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or
14 connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S.
15 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d
16 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation
17 in civil rights violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir.
18 1982).

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

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

2 1. Plaintiff’s October 14, 2012 amended complaint is dismissed;

3 2. Gregory P. Wayland is appointed as limited purpose counsel in the above
4 entitled matter. This appointment is for the limited purpose of drafting and filing a second
5 amended complaint;

6 3. The second amended complaint shall be filed within 60 days;

7 4. Gregory P. Wayland’s appointment will terminate when plaintiff’s second
8 amended complaint is filed;

9 5. Gregory P. Wayland shall notify Sujean Park, at (916) 930-4278, or via email
10 at spark@caed.uscourts.gov, if he has any questions related to the appointment; and

11 6. The Clerk of the Court is directed to serve a copy of this order upon Gregory
12 P. Wayland, Law Office of Gregory P. Wayland, 1010 Sagamore Way, Sacramento, California
13 95822.

14 DATED: March 18, 2013.

15 
16 ALLISON CLAIRE
17 UNITED STATES MAGISTRATE JUDGE

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