

1 A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”
2 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th
3 Cir. 1984). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
4 meritless legal theories or whose factual contentions are clearly baseless.” *Jackson v. Arizona*,
5 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), *superseded by statute*
6 *on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Neitzke*, 490
7 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,
8 has an arguable legal and factual basis. *Id.*

9 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the
10 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
11 what the . . . claim is and the grounds upon which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S.
12 544, 555 (2007) (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).
13 However, in order to survive dismissal for failure to state a claim, a complaint must contain more
14 than “a formulaic recitation of the elements of a cause of action;” it must contain factual
15 allegations sufficient “to raise a right to relief above the speculative level.” *Id.* (citations
16 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that
17 merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (alteration in original)
18 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 1216 (3d
19 ed. 2004)).

20 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
21 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
22 *Corp.*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content
23 that allows the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556). In reviewing a complaint
25 under this standard, the court must accept as true the allegations of the complaint in question,
26 *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), as well as construe the pleading
27 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, *Jenkins v.*
28 *McKeithen*, 395 U.S. 411, 421 (1969).

1 sock,” plaintiff fails to provide any detail regarding this incident. *Id.* He does not, for instance,
2 describe the time and location of the assault or, importantly, how each of the defendants was
3 specifically and personally involved. Thus, to the extent plaintiff seeks to raise a failure to
4 protect or retaliation claim based on this incident, he fails to allege facts necessary to support such
5 a claim.

6 Leave to Amend

7 The only remaining question is whether to grant plaintiff further leave to amend his
8 complaint. As noted *supra*, the current complaint represents plaintiff’s second attempt at stating a
9 potentially cognizable claim. The court will grant plaintiff one **final** opportunity to amend his
10 complaint to state a cognizable claim.

11 If plaintiff chooses to amend his complaint he is cautioned that any amended complaint
12 must identify as a defendant only persons who personally participated in a substantial way in
13 depriving him of his constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a
14 person subjects another to the deprivation of a constitutional right if he does an act, participates in
15 another’s act or omits to perform an act he is legally required to do that causes the alleged
16 deprivation). In particular, any claim predicated on the alleged assault by another inmate must
17 include facts demonstrating that the defendants were somehow involved in the attack. Plaintiff
18 may also include any allegations based on state law that are so closely related to his federal
19 allegations that “they form the same case or controversy.” *See* 28 U.S.C. § 1367(a).

20 The amended complaint must also contain a caption including the names of all defendants.
21 Fed. R. Civ. P. 10(a).

22 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *See*
23 *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007). Nor may he bring unrelated claims against
24 multiple defendants. *Id.*

25 Any amended complaint must be written or typed so that it so that it is complete in itself
26 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
27 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
28 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114

1 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes the original, the latter
2 being treated thereafter as non-existent.’”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
3 1967)).

4 Finally, any amended complaint should be as concise as possible in fulfilling the above
5 requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of procedural or factual
6 background which has no bearing on his legal claims. He should also take pains to ensure that his
7 amended complaint is as legible as possible. This refers not only to penmanship, but also spacing
8 and organization. Plaintiff should carefully consider whether each of the defendants he names
9 actually had involvement in the constitutional violations he alleges. A “scattershot” approach in
10 which plaintiff names dozens of defendants will not be looked upon favorably by the court.

11 Conclusion

12 Accordingly, IT IS HEREBY ORDERED that plaintiff’s amended complaint (ECF No.
13 13) is dismissed with leave to amend within 30 days. Any newly filed amended complaint must
14 bear the docket number assigned to this case and be titled “Second Amended Complaint.” Failure
15 to comply with this order will result in dismissal of this action for failure to prosecute. If plaintiff
16 files an amended complaint stating a cognizable claim, the court will proceed with service of
17 process by the United States Marshal.

18 DATED: October 11, 2018.

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20 EDMUND F. BRENNAN
21 UNITED STATES MAGISTRATE JUDGE
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