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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA NEIL HARRELL,
Plaintiff,
v.
SOLANO COUNTY JAIL, et al.,
Defendants.

No. 2:14-cv-01592 AC P

ORDER

Plaintiff, a state prisoner who spent time at Solano County Jail as an arrestee and pretrial detainee, is proceeding pro se with a civil rights action filed pursuant to 42 U.S.C. § 1983. By order filed September 30, 2015, plaintiff’s second amended complaint was dismissed with leave to amend. ECF No. 29. Plaintiff has now filed a third amended complaint, ECF No. 30. Plaintiff has consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c) and Local Rule 305(a). ECF No. 7.

I. Screening Requirement

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

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

8 A complaint must contain more than a “formulaic recitation of the elements of a cause of
9 action;” it must contain factual allegations sufficient to “raise a right to relief above the
10 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “The pleading
11 must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of]
12 a legally cognizable right of action.” Id. (quoting 5 C. Wright & A. Miller, *Federal Practice and*
13 *Procedure* § 1216, pp. 235-35 (3d ed. 2004)). “[A] complaint must contain sufficient factual
14 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
15 566 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility
16 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
17 that the defendant is liable for the misconduct alleged.” Id.

18 In reviewing a complaint under this standard, the court must accept as true the allegations
19 of the complaint in question, Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 740 (1976),
20 construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the
21 plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

22 II. Plaintiff’s Allegations

23 In his third amended complaint, plaintiff alleges that while he was held at Solano County
24 Jail¹ as “an arrestee, a pretrial detainee, and a sentenced prisoner,” his constitutional rights were
25 violated when he was not allowed to contact his family in Belize, Central America by mail or
26 ///

27 ¹ The California Department of Corrections online inmate locator service shows plaintiff is
28 currently incarcerated at California Men’s Colony.

1 phone.² ECF No. 30 at 5-7; ECF No. 30-1 at 1-3. Specifically, plaintiff alleges that he could not
2 contact his family because the phone system at the jail did not allow international phone calls and
3 the postal system at Solano County Jail did not allow inmates to send international mail. ECF
4 No. 30 at 5-6; ECF No. 30-1 at 2. Because plaintiff was unable to contact his family, he was
5 unable to make bail arrangements, hire an attorney in his Solano County criminal case, recover
6 his trailer home that had been towed, and “pursue non-frivolous claims concerning [his]
7 conviction and/or [his] conditions of confinement.” ECF No. 30 at 6. Plaintiff further alleges
8 that a Solano County Superior Court judge granted him two phone calls to his mother in Belize,
9 yet Solano County Jail Commander Rod Marsh refused to allow him to make the calls, which
10 prevented him from “making arrangements prior to sentencing.” Id. at 6-7.

11 III. Right of Access to the Courts

12 Plaintiff has a constitutional right of access to the courts, and prison officials may not
13 actively interfere with his right to litigate. Silva v. Di Vittorio, 658 F.3d 1090, 1101-02 (9th Cir.
14 2011), overruled on other grounds as stated by Richey v. Dahne, 807 F.3d 1202, 1209 n.6 (9th
15 Cir. 2015)). The right is limited to bringing complaints to federal court in direct criminal appeals,
16 habeas petitions, and civil rights actions. Lewis v. Casey, 518 U.S. 343, 354 (1996). It is not a
17 right to discover such claims or to litigate them effectively once filed with a court. Id. at 354-55.
18 A plaintiff must show that he suffered an “actual injury,” i.e. prejudice with respect to
19 contemplated or existing litigation, such as the inability to meet a filing deadline or present a non-
20 frivolous claim. Id. at 348-49. An “actual injury” is one that hinders the plaintiff’s ability to
21 pursue a legal claim. Id. at 351.

22 In dismissing his second amended complaint with leave to amend, the court informed
23 plaintiff of the following:

24 Plaintiff’s lawsuit is predicated on his complaints about
25 various alleged deficiencies in phone and mail systems at Solano
26 County Jail. Specifically, plaintiff claims he was harmed by (1) his
inability to contact his mother by phone through the collect-only

27 ² Plaintiff names as defendants Solano County Jail, Solano County, Solano County Sheriff’s
28 Office, Solano County Sheriff Thomas Ferrara, Solano County Jail Commander Rod Marsh,
Global Tel Link, and Aramark. ECF No. 30 at 4.

1 phone system; (2) his inability to send his mother international
2 mail; (3) his inability to use the free phone for criminal pro per
3 inmates; and (4) the denial of his requests for legal mail,
4 photocopies, and envelopes.

5 At the outset, the court notes that plaintiff does not allege
6 that the above deficiencies interfered with his access to retained or
7 appointed counsel. Rather, plaintiff alleges that he was unable to
8 find an attorney to handle “other civil matters” because none of the
9 attorneys he called would accept collect phone calls, and although
10 he attempted to contact a number of attorneys by mail, none
11 responded to his letters. See ECF No. 20 at 9, 10-11, 13.

12 Even assuming that plaintiff’s inability to find counsel
13 constitutes interference with “access to counsel,” plaintiff’s claim
14 must be dismissed because he has not alleged that he suffered an
15 actual injury as a result of the alleged deficiencies in the mail and
16 phone systems. While plaintiff alleges that he was unable to post
17 bail, recover his trailer home after it was towed, or make
18 arrangements to repay a loan to his mother, he has not alleged that
19 his inability to contact his mother or use the free phone line has
20 hindered his effort to pursue a non-frivolous claim concerning his
21 conviction or conditions of confinement. See Lewis v. Casey, 518
22 U.S. at 354-55. For example, plaintiff has not alleged that he
23 missed a filing deadline or was unable to present a specific non-
24 frivolous claim as a result of the alleged deprivations. See id. at
25 348-49.

26 While plaintiff appears to allege that he was hindered in his
27 efforts to pursue a claim with the County of Solano to recover his
28 trailer, see ECF No. 20 at 12-13, “the actual injury requirement is
not satisfied by just any type of frustrated legal claim.” Lewis v.
Casey, 518 U.S. at 354-55. Rather, plaintiff must allege that he was
hindered in his efforts to attack his sentence, either directly or
collaterally, or to challenge the conditions of his confinement. Id.
Here, plaintiff’s attempts to recover his trailer do not appear to be
related to any challenge to plaintiff’s conviction or conditions of
confinement. See ECF No. 22 at 5-7. Accordingly, the difficulties
plaintiff encountered regarding his trailer do not constitute an actual
injury for purposes of a denial of access to the courts claim. See
Lewis v. Casey, 518 U.S. at 354-55.

To the extent plaintiff alleges that he “could not litigate”
because he was unable to call his credit card company, his phone
insurance company, the Social Security Administration, Child
Support Services, a towing company, and AAA Roadside
Assistance, see ECF No. 20 at 12-13, none of these allegations
involve interference with plaintiff’s access to the courts or access to
counsel. Nor are they related to any claims involving plaintiff’s
conviction or conditions of confinement.

Plaintiff’s claim is dismissed but plaintiff will be given
leave to amend. If he wishes to plead a claim for denial of access to
the courts in his amended complaint, plaintiff must identify an
actual injury caused by the deficiencies in the phone and mail

1 systems at Solano County Jail. In addition to identifying the
2 particular case or cases in which he was harmed, plaintiff should
3 explain how he was injured. For example, if the problem was that
4 plaintiff missed a filing deadline or was prevented from even filing
5 a complaint in the first place, he should explain as much. With
6 respect to his allegations that he was unable to hire an attorney, it
7 would also be helpful for plaintiff to explain which “civil matters”
8 plaintiff sought representation for.

9 ECF No. 29 at 5-6.

10 In the third amended complaint, plaintiff claims again that he was harmed by (1) his
11 inability to contact his family by phone through the Solano County Jail’s phone system; and (2)
12 his inability to send his family international mail. Plaintiff further alleges that because of the
13 above deficiencies, he was unable to contact his family and thereby unable to secure funds to hire
14 an attorney to represent him at trial in his Solano County criminal case. Plaintiff cannot state a
15 claim for access to the courts on these facts. Plaintiff’s original criminal case is not a direct
16 criminal appeal, habeas petition, or civil rights action, and the right to access to the courts does
17 not extend to the ability to effectively litigate a case once it is filed. See Lewis, 518 U.S. at 354-
18 55; Glass v. CDCR, No. 1:15-CV-00988-LJO, 2015 WL 4873124, at *4, 2015 U.S. Dist. LEXIS
19 106882, at *9-10 (E.D. Cal. Aug. 12, 2015).

20 Although plaintiff makes a general allegation that his inability to contact his family “has
21 hindered his effort to pursue non-frivolous claims concerning his conviction and/or conditions of
22 confinement,” plaintiff has not identified any non-frivolous direct criminal appeal, habeas corpus
23 proceeding, or other civil rights action challenging the conditions of confinement in which he was
24 harmed or prevented from initiating. Nor has plaintiff alleged that he missed a filing deadline or
25 was unable to present a *specific* non-frivolous claim as a result of the alleged deprivations. With
26 respect to his allegations that he was unable to hire an attorney, plaintiff has failed to identify
27 which cases (except the original criminal case) plaintiff sought representation for.

28 The third amended complaint fails to cure the defects identified in the court’s September
30, 2015 screening order (ECF No. 29). The court will provide plaintiff one final opportunity to
amend this cause of action. In amending, he must identify an actual injury caused by the
deficiencies in the phone and mail systems at Solano County Jail. Plaintiff must identify the

1 particular direct criminal appeal, or habeas corpus proceeding, or other civil rights action
2 challenging the conditions of confinement, in which he was harmed. In addition, plaintiff should
3 explain how he was injured. For example, if the problem was that plaintiff missed a filing
4 deadline or was prevented from even initiating a legal action, he should explain as much. With
5 respect to his allegations that he was unable to hire an attorney, plaintiff must explain which
6 matters (i.e., a direct criminal appeal, habeas corpus proceeding, or other civil rights action
7 challenging the conditions of confinement) plaintiff sought representation for.

8 IV. First Amendment

9 Plaintiff alleges that his First Amendment rights to freedom of speech were violated when
10 he was unable to contact his family in Belize by phone or mail at the Solano County Jail. The
11 court informed plaintiff in its prior screening order that his allegations did not state a cognizable
12 First Amendment claim. See ECF No. 29 at 6-7. Unfortunately, the second amended complaint
13 contains no new allegations that cure the deficiencies noted in the court's prior screening order.

14 The court will provide plaintiff one final opportunity to amend this cause of action. In
15 amending, he must allege facts to demonstrate that he was denied telephone access and/or access
16 to correspondence by mail and that any denial of such access was not related to any penological
17 or administrative interests of the jail. See Turner v. Safley, 482 U.S. 78, 89-91 (1987); Valdez v.
18 Rosenbaum, 302 F.3d at 1039, 1048-49 (9th Cir. 2002); see also Johnson v. California, 543 U.S.
19 499, 510 (2005) (noting that prison regulations that restrict a prisoner's First Amendment rights
20 are not unconstitutional if they are reasonably related to legitimate penological interests).

21 V. Due Process

22 Plaintiff claims that his due process rights were violated when he was unable to contact
23 his family in Belize by phone or mail at the Solano County Jail. The court informed plaintiff in
24 its prior screening order that his allegations did not state a cognizable due process claim. See
25 ECF No. 29 at 7-8. In his third amended complaint, plaintiff adds a new allegation that the
26 "phones will not make international calls at my own expense." ECF No. 30 at 5. Even assuming
27 that plaintiff was denied the right to make international phone calls at his own expense, plaintiff
28 was not deprived of all telephone access, but was permitted to make collect-only phone calls. See

1 ECF No. 29 at 8. Therefore, plaintiff was not held “incommunicado” in violation of his
2 constitutional rights. Cf. Carlo v. City of Chino, 105 F.3d 493, 496 (9th Cir. 1997) (“While the
3 right to use a telephone may not per se rise to the level of a liberty interest protected by the
4 procedural mandate of the Fourteenth Amendment, the right of an arrestee not to be held
5 incommunicado involves a substantial liberty interest.”).

6 Furthermore, plaintiff’s allegation that the phone or mail system interfered with his
7 communications with his family does not, without more, state a cognizable claim under the due
8 process clause. “Certain restrictions on telephone access, including collect-call-only telephone
9 systems, can amount to a denial of an inmate’s rights under the due process clause of the
10 Fourteenth Amendment, but only if they interfere with an inmate’s access to the courts.” Clark v.
11 Plummer, No. C 95-0046 CAL, 1995 WL 317015, at *1, 1995 U.S. Dist. LEXIS 7048, at *3
12 (N.D. Cal. May 18, 1995) (citing Tuggle v. Barksdale, 641 F. Supp. 34, 37 (W.D. Tenn. 1985); In
13 re Grimes, 208 Cal. App. 3d 1175, 1182-83 (1989)); see also Wilkins v. Alameda Cnty., No. C
14 14-2516 LHK (PR), 2014 WL 5035445, at *2, 2014 U.S. Dist. LEXIS 142840, at *4 (N.D. Cal.
15 Oct. 7, 2014) (a right to telephone calls may arise from the right of access to the courts under the
16 Fourteenth Amendment). As noted above in Section III, plaintiff’s allegations fail to state a
17 cognizable claim that the phone or mail system at the Solano County Jail denied him access to the
18 courts. Thus, plaintiff allegations in his third amended complaint are not cognizable under the
19 due process clause.

20 The court will provide plaintiff one final opportunity to amend this cause of action. In
21 amending, he must allege facts to demonstrate that restrictions on phone or mail access interfered
22 with his access to the courts.

23 VI. Equal Protection

24 To the extent plaintiff alleges that the deficiencies in the Solano County Jail phone and
25 mail systems violated his equal protection rights, he does not allege that he has been treated
26 differently from a similarly situated class. The Fourteenth Amendment’s Equal Protection Clause
27 “is essentially a direction that all persons similarly situated should be treated alike.” City of
28 Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985); see also Hartmann v. California

1 Dep't of Corr. & Rehab., 707 F.3d 1114, 1123 (9th Cir. 2013). To bring a successful equal
2 protection claim, a plaintiff must show differential treatment from a similarly situated class. See
3 Washington v. Davis, 426 U.S. 229, 239 (1976). For this differential treatment to give rise to a
4 claim under 42 U.S.C. § 1983, “one must show intentional or purposeful discrimination.” Draper
5 v. Rhay, 315 F.2d 193, 198 (9th Cir. 1963) (inmate failed to show § 1983 violation in absence of
6 “intentional or purposeful discrimination”).

7 VII. Prison Grievance Procedure

8 Plaintiff included a prison grievance claim in his second amended complaint, but did not
9 include the claim in the third amended complaint. Therefore, this claim is deemed abandoned,
10 and plaintiff may not include the claim in any amended complaint he chooses to file. See Forsyth
11 v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997) (“[An] amended complaint supersedes the
12 original, the latter being treated thereafter as non-existent.”).

13 VIII. Leave to Amend

14 The court will provide plaintiff with one **FINAL** opportunity to file an amended
15 complaint, if he believes in good faith he can cure the deficiencies identified above. Lopez v.
16 Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir.
17 1987). Plaintiff may not change the nature of this suit by adding new, unrelated claims in his
18 amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot”
19 complaints). Plaintiff is further cautioned that he may not include any claims that have been
20 abandoned.

21 If plaintiff chooses to amend the complaint, he must demonstrate how the conditions
22 complained of have resulted in a deprivation of his constitutional rights. See Ellis v. Cassidy, 625
23 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms how each named
24 defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there is some
25 affirmative link or connection between a defendant’s actions and the claimed deprivation. Rizzo
26 v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.
27 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory allegations of

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1 official participation in civil rights violations are not sufficient. See Ivey v. Bd. of Regents, 673
2 F.2d 266, 268 (9th Cir. 1982).

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

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. The third amended complaint (ECF No. 30) is dismissed for the reasons discussed above,
12 with leave to file an amended complaint within twenty-eight days from the date of service
13 of this order; and
- 14 2. Failure to file an amended complaint will result in a recommendation that the action be
15 dismissed.

16 DATED: March 22, 2017

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18 ALLISON CLAIRE
19 UNITED STATES MAGISTRATE JUDGE
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