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| 8  | UNITED STAT                                      | TES DISTRICT COURT                                    |
| 9  | FOR THE EASTERN DISTRICT OF CALIFORNIA           |   |
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| 11 | JERRY CLOUD,                                     | No. 2:17-cv-00339 GGH                                 |
| 12 | Plaintiff,                                       |   |
| 13 | v.   | ORDER   |
| 14 | SAN DIEGO COUNTY JAIL                            |   |
| 15 | EMPLOYEE JOHN DOEL,<br>CALIFORNIA DEPARTMENT OF  |   |
| 16 | CORRECTIONS AND<br>REHABILITATION, EMPLOYEE JOHN |   |
| 17 | DOE 2, JOHN DOE 2,                               |   |
| 18 | Defendants.                                      |   |
| 19 |  |   |
| 20 | Plaintiff is a state prisoner proceeding         | g without counsel in an action presently brought      |
| 21 | under 42 U.S.C. § 1983. On April 3, 2017, E      | ECF No. 17, the court dismissed plaintiff's complaint |
| 22 | with leave to amend. On May 31, 2017 plair       | ntiff filed a first-amended complaint. ECF No. 22.    |
| 23 | The federal in forma pauperis statute            | authorizes federal courts to dismiss a case if the    |
| 24 | action is legally "frivolous or malicious," fail | ls to state a claim upon which relief may be granted, |
| 25 | or seeks monetary relief from a defendant wh     | no is immune from such relief. 28 U.S.C. §            |
| 26 | 1915(e)(2).                                      |   |
| 27 | A claim is legally frivolous when it la          | acks an arguable basis either in law or in fact.      |
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| 1  | <u>Neitzke v. Williams</u> , 490 U.S. 319, 325 (1989); <u>Franklin v. Murphy</u> , 745 F.2d 1221, 1227–1228  |
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| 2  | (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  |
| 3  | indisputably meritless legal theory or where the factual contentions are "clearly baseless."   |
| 4  | <u>Neitzke</u> , 490 U.S. at 327.  |
| 5  | DISCUSSION   |
| 6  | Here plaintiff has filed an amended complaint which again names the California   |
| 7  | Department of Corrections and Rehabilitation [CRDC].   |
| 8  | The United States Supreme Court has held that State governmental agencies, of which the  |
| 9  | CDCR is one, are immune from actions brought under 28 U.S.C. section 1983 pursuant to the  |
| 10 | Eleventh Amendment to the federal Constitution. <u>Quern v. Jordan</u> , 440 U.S. 332, 338-339 (1979)  |
| 11 | citing, inter alia, Alabama v. Pugh, 438 U.S. 781 (1978); Hutto v. Finney, 437 U.S. 678 (1978);  |
| 12 | Milliken v. Bradley, 433 U.S. 267 (1977); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). This   |
| 13 | defendant will be dismissed and plaintiff shall not name this defendant again in any subsequent  |
| 14 | amended complaint.   |
| 15 | Plaintiff may, however, name in his amended complaint individual defendants of CDCR  |
| 16 | and/or San Diego County Jail. In some cases, the naming of Doe defendants would be   |
| 17 | appropriate if discovery of a properly named defendant could later disclose the identities of the  |
| 18 | Doe defendants. However, this case cannot proceed where the only remaining defendants are  |
| 19 | unidentified Doe defendants, i.e., there are no identifiable defendants against whom discovery   |
| 20 | could be taken. Moreover, although this district might be appropriate for venue purposes, if a   |
| 21 | defendant or defendants were found to be residing in this district, see 28 U.S.C. section 1391   |
| 22 | (b)(1) and (2), the court cannot ascertain that fact, or whether a substantial part of the tortious  |
| 23 | activities occurred in this district, by a listing of fictitiously named Doe defendants.   |
| 24 | Accordingly, IT IS HEREBY ORDERED that :   |
| 25 | 1. The CDCR is dismissed as a defendant; <sup>1</sup>  |
| 26 | ////   |
| 27 | <sup>1</sup> Distatiff has concentred to the understand to more idiation independent of the total of total |
| 28 | <sup>1</sup> Plaintiff has consented to the undersigned as presiding judge. ECF No. 14. As no defendants have made an appearance in this action, the undersigned proceeds by way of order.   |

| 1  | 2. Claims against defendants Does 1, 2 and 3 are dismissed with leave to amend to              |
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| 2  | name specific parties. Within thirty days of service of this order, plaintiff may amend his    |
| 3  | complaint to attempt to state cognizable claims against these defendants and any others he has |
| 4  | since identified.  |
| 5  | 3. Failure to comply with this order will result in a dismissal of this action.                |
| 6  | IT IS SO ORDERED.  |
| 7  | Dated: June 29, 2017   |
| 8  | <u>/s/ Gregory G. Hollows</u><br>UNITED STATES MAGISTRATE JUDGE                                |
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