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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RUBEN DARIO GARCIA, JR.,
CDCR #J-73373,

Plaintiff,

vs.

SMITH, et al.;

Defendants.

Civil No. 10cv1187 BEN (RBB)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILURE TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) AND 1915A(b);**

I.

PROCEDURAL HISTORY

On June 1, 2010, Ruben Dario Garcia (“Plaintiff”) and Lenin Garcia, state prisoners currently incarcerated at Richard J. Donovan Correctional Facility located in San Diego, California, and proceeding pro se, submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff Ruben Garcia filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. On August 9, 2010, the Court issued an Order granting Plaintiff Ruben Garcia’s Motion to Proceed IFP, dismissing Plaintiff Lenin Garcia and dismissing the entire Complaint for failing to state a claim upon which relief could be granted. See Aug. 9, 2010 Order at 7-8.

1 On October 5, 2010, former Plaintiff Lenin Garcia filed a “Motion to File a Joint
2 Extended Complaint,” along with a First Amended Complaint. The Court denied Lenin Garcia’s
3 Motion and he is not currently a party to this action.

4 **II.**

5 **INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

6 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
7 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening
8 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a
9 claim upon which relief may be granted, or seeking monetary relief from a defendant immune
10 from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.
11 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v.*
12 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not
13 only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that
14 fails to state a claim).

15 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
16 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as
17 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to
18 the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing
19 the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(3). *See Calhoun*, 254 F.3d at
20 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir.
21 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of
22 process is made on the opposing parties”).

23 “[W]hen determining whether a complaint states a claim, a court must accept as true all
24 allegations of material fact and must construe those facts in the light most favorable to the
25 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194
26 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);
27 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s
28 pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),

1 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
2 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the
3 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
4 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

5 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
6 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
7 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
8 United States. See 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122
9 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

10 **A. Rule 8**

11 As a preliminary matter, the Court finds that Plaintiff’s First Amended Complaint fails
12 to comply with Rule 8. Specifically, Rule 8 provides that in order to state a claim for relief in
13 a pleading it must contain “a short and plain statement of the grounds for the court’s jurisdiction”
14 and “a short and plain statement of the claim showing that the pleader is entitled to relief.”
15 FED.R.CIV.P. 8(a)(1) & (2). In addition, despite the fact that the Court had previously dismissed
16 Lenin Garcia from this action, there are many allegations pertaining to this former party.
17 Moreover, the term “Plaintiff” is used interchangeably between Plaintiff and Lenin Garcia
18 making it impossible to determine the nature of the claims being made by Plaintiff Ruben Garcia.
19 If Plaintiff chooses to file an Amended Complaint, he must comply with Rule 8. He is further
20 cautioned that he must also comply with Local Rule 8.2 which provides, in part, that prisoners
21 must use the Court’s form complaints and any additional pages are “not to exceed fifteen (15)
22 in number.” S.D. CIVLR 8.2. Plaintiff must only refer to factual allegations as it pertains to
23 himself and he may not refer to Lenin Garcia as “Plaintiff.”

24 **B. Fourteenth Amendment Due Process Claims**

25 Plaintiff alleges that his due process rights were violated during his disciplinary hearing
26 because several correctional officers falsified rules violation reports which led to Plaintiff being
27 sentenced to Administrative Segregation (“Ad-Seg”). “The requirements of procedural due
28 process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s

1 protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). State
2 statutes and prison regulations may grant prisoners liberty interests sufficient to invoke due
3 process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). However, the Supreme
4 Court has significantly limited the instances in which due process can be invoked. Pursuant to
5 *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner can show a liberty interest under the
6 Due Process Clause of the Fourteenth Amendment only if he alleges a change in confinement
7 that imposes an “atypical and significant hardship . . . in relation to the ordinary incidents of
8 prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir.
9 1997).

10 In this case, Plaintiff has failed to establish a liberty interest protected by the Constitution
11 because he has not alleged, as he must under *Sandin*, facts related to the conditions or
12 consequences of his placement in Ad-Seg which show “the type of atypical, significant
13 deprivation [that] might conceivably create a liberty interest.” *Id.* at 486. For example, in
14 *Sandin*, the Supreme Court considered three factors in determining whether the plaintiff
15 possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary versus
16 discretionary nature of the segregation; (2) the restricted conditions of the prisoner’s
17 confinement and whether they amounted to a “major disruption in his environment” when
18 compared to those shared by prisoners in the general population; and (3) the possibility of
19 whether the prisoner’s sentence was lengthened by his restricted custody. *Id.* at 486-87.

20 Therefore, to establish a due process violation, Plaintiff must first show the deprivation
21 imposed an atypical and significant hardship on him in relation to the ordinary incidents of
22 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the
23 Court could find there were atypical and significant hardships imposed upon him as a result of
24 the Defendants’ actions. Plaintiff must allege “a dramatic departure from the basic conditions”
25 of his confinement that would give rise to a liberty interest before he can claim a violation of due
26 process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended*
27 *by* 135 F.3d 1318 (9th Cir. 1998). He has not; therefore the Court finds that Plaintiff has failed
28 to allege a liberty interest in remaining free of Ad-seg, and thus, has failed to state a due process

1 claim. *See May*, 109 F.3d at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486 (holding that
2 placing an inmate in administrative segregation for thirty days “did not present the type of
3 atypical, significant deprivation in which a state might conceivably create a liberty interest.”).

4 C. Conspiracy Claims

5 Throughout Plaintiff’s First Amended Complaint, he alleges that several correctional
6 officers acted in a conspiracy to violate his constitutional rights pursuant to 42 U.S.C. § 1985(3).
7 “To state a cause of action under § 1985(3), a complaint must allege (1) a conspiracy, (2) to
8 deprive any person or a class of persons the equal protection of the laws, or of equal privileges
9 and immunities under the laws, (3) an act by one of the conspirators in furtherance of the
10 conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege
11 of a citizen of the United States.” *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980); *see*
12 *also Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Sever v. Alaska Pulp Corp.*, 978 F.2d
13 1529, 1536 (9th Cir. 1992). “[T]he language requiring intent to deprive *equal* protection . . .
14 means that there must be some racial, or perhaps otherwise class-based, invidiously
15 discriminatory animus behind the conspirators’ action.” *Griffin*, 403 U.S. at 102; *see also Sever*,
16 978 F.2d at 1536.

17 Here, Plaintiff fails to allege membership in a protected class and fails to allege that any
18 Defendant acted with class-based animus, both of which are essential elements of a cause of
19 action under 42 U.S.C. § 1985(3). *See Griffin*, 403 U.S. at 101-02; *Schultz v. Sundberg*, 759
20 F.2d 714, 718 (9th Cir. 1985) (holding that conspiracy plaintiff must show membership in a
21 judicially-designated suspect or quasi-suspect class); *Portman v. County of Santa Clara*, 995
22 F.2d 898, 909 (9th Cir. 1993).

23 Accordingly, the Court finds that Plaintiff’s First Amended Complaint fails to state a
24 section 1983 claim upon which relief may be granted, and is therefore subject to dismissal
25 pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an
26 opportunity to amend his pleading to cure the defects set forth above. Plaintiff is warned that
27 if his amended complaint fails to address the deficiencies of pleading noted above, it may be
28 dismissed with prejudice and without leave to amend.

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III.

CONCLUSION AND ORDER

Good cause appearing, **IT IS HEREBY ORDERED** that:

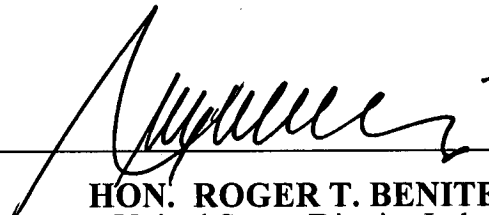
Plaintiff's First Amended Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a Second Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

The Clerk of Court is directed to mail a court approved form § 1983 complaint to Plaintiff.

IT IS SO ORDERED.

DATED: _____

11/05/2010



HON. ROGER T. BENITEZ
United States District Judge