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

ARTHUR RAY DEERE, SR,
CDCR #F-94040,

Plaintiff,

Civil No. 11cv1579 WQH (JMA)

ORDER:

vs.

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350.00
BALANCE FROM PRISONER'S
TRUST ACCOUNT [ECF No. 2];
AND**

EDMUND G. BROWN, Governor of
California; MATTHEW CATES, Secretary
of California Dep't of Corrections and
Rehabilitation; BRIAN OLIVER, CEO of
Global Tell Link;

Defendants.

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

Arthur Ray Deere, Jr. ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California, and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [ECF No. 2].

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I.

MOTION TO PROCEED IFP [ECF No. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds

1 available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion
2 to Proceed IFP [ECF No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
3 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
4 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
5 § 1915(b)(1).

6 II.

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

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

17 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
18 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as
19 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to
20 the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing
21 the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(3). *See Calhoun*, 254 F.3d at
22 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir.
23 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of
24 process is made on the opposing parties”).

25 “[W]hen determining whether a complaint states a claim, a court must accept as true all
26 allegations of material fact and must construe those facts in the light most favorable to the
27 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194
28 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);

1 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s
2 pleadings, see *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),
3 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
4 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the
5 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
6 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

7 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
8 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
9 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
10 United States. See 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122
11 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

12 A. Eighth Amendment Claims

13 Plaintiff claims that his Eighth Amendment rights have been violated due to
14 overcrowding at Calipatria State Prison. However, these claims are subject to sua sponte
15 dismissal pursuant to 28 U.S.C. § 1915A(b)(1) because they appear to be duplicative of claims
16 brought in another action Plaintiff is already litigating. Plaintiff’s Complaint contains identical
17 claims that are found in *Deere v. Calipatria State Prison Medical Staff, et al.*, S.D. Cal. Civil
18 Case No. 11cv0506 JLS (POR). A court “may take notice of proceedings in other courts, both
19 within and without the federal judicial system, if those proceedings have a direct relation to
20 matters at issue.” *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971
21 F.2d 244, 248 (9th Cir. 1992).

22 A prisoner’s complaint is considered frivolous under 28 U.S.C. § 1915A(b)(1) if it
23 “merely repeats pending or previously litigated claims.” *Cato v. United States*, 70 F.3d 1103,
24 1105 n.2 (9th Cir. 1995) (construing former 28 U.S.C. § 1915(d)) (citations and internal
25 quotations omitted). Because Plaintiff has already litigated the same claims presented in the
26 instant action in *Deere v. Calipatria State Prison Medical Staff, et al.*, S.D. Cal. Civil Case No.
27 11cv0506 JLS (POR), the Court hereby **DISMISSES** Plaintiff’s Eighth Amendment claims from
28 this action pursuant to 28 U.S.C. § 1915A(b)(1) without leave to amend. See *Cato*, 70 F.3d at

1 1105 n.2; *Resnick*, 213 F.3d at 446 n.1.

2 **B. Claims against Private Parties**

3 Plaintiff also seeks to hold liable the CEO of a telephone company because he claims that
4 he has been unable to call his mother since he has been incarcerated. However, Plaintiff fails
5 to allege any actions on the part of Defendant Oliver which were taken “under color of state
6 law.” *See* 42 U.S.C. § 1983, 28 U.S.C. § 1915(e)(2)(B)(ii). Private parties do not generally act
7 under color of state law; thus, “purely private conduct, no matter how wrongful, is not within
8 the protective orbit of section 1983.” *Ouzts v. Maryland Nat’l Ins. Co.*, 505 F.2d 547, 550 (9th
9 Cir. 1974); *see also Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). While a plaintiff
10 may seek to hold a private actor liable under section 1983, he must allege facts that show some
11 “state involvement which directly or indirectly promoted the challenged conduct.” *Ouzts*, 505
12 F.2d at 553; *West v. Atkins*, 457 U.S. 42, 49, 54 (1988); *Johnson v. Knowles*, 113 F.3d 1114,
13 1118-1120 (9th Cir. 1997). In other words, Plaintiff must show that the private actor’s conduct
14 is “fairly attributable” to the government. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *see*
15 *also Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 567 (9th Cir. 1987).

16 Here, Plaintiff’s Complaint fails to allege facts sufficient to show that this Defendant
17 acted on behalf of, or in any way attributable to, the state. Thus, without more, Plaintiff’s
18 allegations against this Defendant fails to satisfy the first prong of a § 1983 claim. *See Haygood*,
19 769 F.2d at 1354.

20 **C. Respondeat Superior claims**

21 Plaintiff names CDCR Matthew Cates and Governor Jerry Brown as Defendants in this
22 matter but fails to set forth any factual allegations with regard to these Defendants in the body
23 of Plaintiff’s Complaint. Thus, it appears that Plaintiff seeks to hold these Defendants liable in
24 their supervisory capacity. However, there is no respondeat superior liability under 42 U.S.C.
25 § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into
26 causation must be individualized and focus on the duties and responsibilities of each individual
27 defendant whose acts or omissions are alleged to have caused a constitutional deprivation.” *Leer*
28 *v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71

1 (1976)). In order to avoid the respondeat superior bar, Plaintiff must allege personal acts by each
2 individual Defendant which have a direct causal connection to the constitutional violation at
3 issue. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

4 Supervisory prison officials may only be held liable for the allegedly unconstitutional
5 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
6 extent they personally participated in or directed a subordinate's actions, and (2) in either acting
7 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff's
8 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,
9 however, Plaintiff's Complaint fails to set forth facts which might be liberally construed to
10 support an individualized constitutional claim against Defendants Cates or Brown.

11 Accordingly, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim
12 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.
13 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend
14 his pleading to cure the defects set forth above. Plaintiff is warned that if his amended complaint
15 fails to address the deficiencies of pleading noted above, it may be dismissed with prejudice and
16 without leave to amend.

17 III.

18 CONCLUSION AND ORDER

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

20 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is
21 **GRANTED**.

22 2. The Secretary of California Department of Corrections and Rehabilitation, or his
23 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
24 owed in this case by collecting monthly payments from the account in an amount equal to twenty
25 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
26 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).

27 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
28 **ASSIGNED TO THIS ACTION.**

1 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
2 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
3 Sacramento, California 95814.


4 **IT IS FURTHER ORDERED** that:

5 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
6 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
7 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all
8 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
9 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
10 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
11 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended
12 Complaint fails to state a claim upon which relief may be granted, it may be dismissed without
13 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g).
14 *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

15 5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

16 **IT IS SO ORDERED.**

17 DATED: August 15, 2011

18 
19 **WILLIAM Q. HAYES**
20 United States District Judge

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