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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:  DEPUTY

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

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

Plaintiff,

vs.

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.

Civil No. 11cv1579 WQH (JMA)

**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 July 15, 2011, Arthur Ray Deere, Jr. ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California, and proceeding pro se, submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a). On August 15, 2011, this

1 Court granted Plaintiff's Motion to Proceed IFP but sua sponte dismissed his Complaint for
2 failing to state a claim upon which relief could be granted. *See* Aug. 15, 2011 Order at 6-7.
3 Plaintiff was granted forty five (45) days leave to file an Amended Complaint in order to correct
4 the deficiencies of pleading identified by the Court. *Id.* at 7. On February 23, 2012, well after
5 the deadline to submit an Amended Complaint passed, Plaintiff submitted his First Amended
6 Complaint which the Court permitted to be filed.

7 **II.**

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

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

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

26 "[W]hen determining whether a complaint states a claim, a court must accept as true all
27 allegations of material fact and must construe those facts in the light most favorable to the
28 plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194

1 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);
2 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s
3 pleadings, see *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),
4 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
5 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the
6 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
7 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

8 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
9 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
10 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
11 United States. See 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122
12 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

13 While not entirely clear, Plaintiff appears to allege that he is not able to make telephone
14 calls to his mother due to a contract the prison has with a telephone company called “Global Tel
15 Link.” (See FAC at 5.) Plaintiff claims that there is a “State sponsored extortion attempt aimed
16 at forcing inmates families who don’t have Global Tel Link service to switch to Global and/or
17 pay in advance a deposit.” (*Id.*) “Although prisoners have a First Amendment right to telephone
18 access, this right is subject to reasonable limitations arising from the legitimate penological and
19 administrative interests of the prison system.” *Johnson v. State of California*, 207 F.3d 650, 656
20 (9th Cir. 2000) (citation omitted.) Plaintiff claims that the “illegal contract” between the CDCR
21 and Global Tel and the high rates charged by Global Tel is what has led to inmates creating a
22 “black market for cellphones.” (FAC at 5.) As the Court stated in *Johnson*, “there is no authority
23 for the proposition that prisoners are entitled to a specific rate for their telephone calls.” *Id.*
24 Accordingly, the Court dismisses Plaintiff’s allegations for failing to state a claim upon which
25 relief may be granted.

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III.

CONCLUSION AND ORDER

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

1. 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** sixty (60) 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).

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

IT IS SO ORDERED.

DATED: 4/10/12



HON. WILLIAM Q. HAYES
United States District Judge