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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL ROBERT HISCOX,

Plaintiff,

No. CIV S-10-0467 JAM CKD

vs.

MIKE MARTEL, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner, proceeding pro se and in forma pauperis, who seeks relief pursuant to 42 U.S.C. § 1983. On June 7, 2010, plaintiff’s original complaint was dismissed with leave to amend. (Dkt. No. 9.) On October 14, 2010, plaintiff filed the First Amended Complaint (FAC). (Dkt. No. 17.) On November 1, 2011, the court issued a screening order dismissing thirteen¹ of the twenty defendants named in the FAC with leave to amend. On November 22, 2011, plaintiff filed the Second Amended Complaint (SAC). (Dkt. No. 22.)

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¹ Mike Martel, Peter Vanni, Ray Garcia, B. Gascon, Kelly Martinez, E. Sapata, Heidi Lackner, T. Reece, Mr./Mrs. Kemp, S. Frisk, E. Lamb, E. Hyland, and Lonnie Jackson. (Dkt. No. 21 at 11.) The court also erroneously dismissed J. Armstrong after finding that the FAC stated a retaliation claim as to this defendant. (Id. at 10, 11.)

1 The court is required to screen complaints brought by prisoners seeking relief
2 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
3 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
4 claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be
5 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
6 U.S.C. § 1915A(b)(1),(2).

7 Plaintiff brings the SAC against fifteen named defendants at Mule Creek State
8 Prison. This number does not include Peter Vanni, E. Sapata, Mr./Mrs. Kemp, and S. Frisk,
9 defendants named in the FAC and subject to this court’s earlier dismissal with leave to amend.
10 Because plaintiff has not amended with respect to these defendants, he has effectively consented
11 to their dismissal with prejudice. (See Dkt. No. 21 at 10.)

12 The SAC substantially repeats the allegations of the FAC, discussed at length in
13 the November 1, 2011 screening order. Having reviewed the SAC, the undersigned concludes
14 that plaintiff has not cured the deficiencies of the FAC as to the following defendants, previously
15 dismissed with leave to amend: Mike Martel, Ray Garcia, B. Gascon, Kelly Martinez, Heidi
16 Lackner, T. Reece, and Lonnie Jackson. Thus the court will recommend that this action be
17 dismissed with prejudice as to these defendants for the reasons set forth in the November 1, 2011
18 screening order. (See Dkt. No. 21.)

19 The SAC states a cognizable claim for relief pursuant to 42 U.S.C. § 1983 that the
20 following defendants violated plaintiff’s Eighth Amendment right against deliberate indifference:
21 T. Wynn, C. Haven, S. Woods, and T. Dage. The SAC also states a cognizable claim that the
22 following defendants violated plaintiff’s First Amendment right against retaliation: K.E. Baker,
23 E. Lamb, E. Hyland, D. Thomason, J. Armstrong, and L. Olivas.² If these allegations of the SAC
24 are proven, plaintiff has a reasonable opportunity to prevail on the merits of this action.

25
26 ² Plaintiff does not list Armstrong and Olivas as defendants in the caption of his complaint
but states that he is suing them in the body of the SAC. (SAC at 21.)

1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. Service is appropriate for the following defendants: T. Wynn, C. Haven, S.
3 Woods, T. Dage, K.E. Baker, E. Lamb, E. Hyland, D. Thomason, J. Armstrong, and L. Olivas.

4 2. The Clerk of the Court shall send plaintiff ten USM-285 forms, one summons,
5 an instruction sheet and a copy of the Second Amended Complaint filed November 22, 2011.

6 3. Within thirty days from the date of this order, plaintiff shall complete the
7 attached Notice of Submission of Documents and submit the following documents to the court:

8 a. The completed Notice of Submission of Documents;

9 b. One completed summons;

10 c. One completed USM-285 form for each defendant listed in number 1
11 above; and

12 d. Eleven copies of the endorsed Second Amended Complaint filed
13 November 22, 2011.

14 4. Plaintiff need not attempt service on defendants and need not request waiver of
15 service. Upon receipt of the above-described documents, the court will direct the United States
16 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4
17 without payment of costs.

18 5. Per plaintiff's consent, the following defendants are dismissed from this action
19 with prejudice: Peter Vanni, E. Sapata, Mr./Mrs. Kemp, and S. Frisk.

20 IT IS HEREBY RECOMMENDED that:

21 1. The following defendants be dismissed from this action with prejudice: Mike
22 Martel, Ray Garcia, B. Gascon, Kelly Martinez, Heidi Lackner, T. Reece, and Lonnie Jackson.

23 2. The Clerk of Court be directed to amend the docket to reflect that the only
24 defendants remaining in this action are the ten listed above.

25 These findings and recommendations are submitted to the United States District
26 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen

1 days after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
4 shall be served and filed within fourteen days after service of the objections. The parties are
5 advised that failure to file objections within the specified time may waive the right to appeal the
6 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 Dated: May 7, 2012

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9 _____
10 CAROLYN K. DELANEY
11 UNITED STATES MAGISTRATE JUDGE

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