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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLIFTON Z. FREEMAN, JR.,
Plaintiff
v.
CRESIE LYONS et al.,
Defendants.

Case No. 5:14-cv-2350-DSF (GJS)

**ORDER ACCEPTING FINDINGS
AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Complaint and all pleadings, motions, and other documents filed in this action, the Report and Recommendation of United States Magistrate Judge (“Report”), and the parties’ respective Objections to the Report. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions of the Report to which objections have been stated.

Plaintiff’s Objections—like his First Amended Complaint—do not articulate a single viable theory of liability against Defendants Toney, Lejeune, Tate, Webber, Brown, Mashimo, Patterson, or Milusnic, for whom the Magistrate Judge recommends dismissal. Furthermore, Plaintiff’s Objections fail to explain how discovery would be fruitful for purposes of alleging a viable claim against these Defendants, particularly after the Court gave Plaintiff a generous chance to amend

1 the original Complaint under a new legal theory. In addition, Plaintiff's baseless
2 belief that Defendant Santa waived service of process is not convincing. On March
3 31, 2016, the Court advised Plaintiff that he would have to pursue his available
4 discovery remedies, including under Fed.R. Civ. P. 45, to effect service of process
5 on Santa. Plaintiff did not contact the Court again regarding service of process on
6 Santa until eight months later, when these Objections were filed. Plaintiff has failed
7 to meet his burden of showing good cause for his failure to effect service of process
8 on Santa.

9 Defendants Lyons' and Parker's Objections are an attempt to salvage their
10 Motion to Dismiss by arguing an entirely new theory for qualified immunity that
11 was not presented in connection with that Motion. Defendants proffer no
12 explanation for their failure to raise this theory in their Motion to Dismiss.
13 "[A]llowing parties to litigate fully their case before the Magistrate and, if
14 unsuccessful, to change their strategy and present a different theory to the district
15 court would frustrate the purpose of the Magistrate Act." *See Greenhow v.*
16 *Secretary of Health & Human Services*, 863 F.2d 633, 638-39 (9th Cir. 1988),
17 *overruled on other grounds, United States v. Hardesty*, 977 F.2d 1347, 1348 (9th
18 Cir. 1992) (en banc). The Court declines to consider this belatedly asserted theory.

19 Accordingly, the Court accepts the findings and recommendations set forth in
20 the Report. **IT IS ORDERED** that:

- 21 (1) Defendants' Motion to Dismiss ("Motion") [Dkt. 85] is GRANTED in part
22 and DENIED in part, pursuant to Fed. R. Civ. P. 12(b)(6), as follows:
- 23 a) the Motion is GRANTED with respect to Plaintiff's claims against
24 Defendants Toney, Lejeune, Tate, Webber, Brown, Mashimo,
25 Patterson, and Milusnic, and these claims are dismissed without leave
26 to amend and with prejudice;
 - 27 b) the Motion is DENIED with respect to Plaintiff's First Amendment
28 retaliation claim against Defendant Lyons; and

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c) the Motion is DENIED with respect to Plaintiff's First Amendment retaliation claims against Defendant Parker;
(2) Plaintiff's claims against Defendant Santa are dismissed without prejudice pursuant to Fed. R. Civ. P. 4(m); and
(3) Defendants Lyons and Parker are directed to file and serve an Answer to the First Amended Complaint, as so amended, within 21 days of this Order.

IT IS SO ORDERED.

12/16/16



DATE: _____

DALE S. FISCHER
UNITED STATES DISTRICT JUDGE