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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ROBERT GONZALES SAENZ,

CASE NO. 1:09-cv-00557-SMS PC

Plaintiff,

ORDER DENYING PLAINTIFF’S MOTION FOR  
ENTRY OF DEFAULT

v.

(ECF Nos. 29, 31)

SGT. D. REEVES,

Defendant.

Plaintiff Robert Gonzales Saenz (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on the second amended complaint, filed January 14, 2010, against Defendant Reeves for violation of the First and Eighth Amendments. (ECF No. 14.) On October 22, 2010, the Court issued an order directing the United States Marshal to serve the second amended complaint. (ECF No. 19.) Plaintiff filed a motion for entry of default on January 24, 2011, and Defendant filed an answer to the complaint and an opposition on February 18, 2011. (ECF Nos. 29, 30, 31.)

Entry of default is appropriate as to any party against whom a judgment for affirmative relief is sought that has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure and where that fact is made to appear by affidavit or otherwise. Fed. R. Civ. P. 55(a). The order issued on October 22, 2010, directed the Marshal to *initiate* service on Defendant. Until Defendant has either waived service and failed to respond within sixty days or been personally served and failed to respond within twenty days, he is not in default and Plaintiff is not entitled to entry of default. At the time Plaintiff filed his motion there was no indication that service had been

1 effected on Defendant.

2 Defendant has filed an answer to the complaint and an objection to the entry of default.

3 Accordingly, it is HEREBY ORDERED that Plaintiff's motion for entry of default is DENIED.

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7 IT IS SO ORDERED.

8 **Dated:** May 3, 2011

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE

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