

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF CALIFORNIA  
6

7 CECIL JAMES MESSER,

8 Plaintiff,

9 vs.

10 UNITED STATES PENITENTIARY-  
11 ATWATER FOOD SERVICE  
DEPARTMENT, et al.,

12 Defendants.  
13

1:13-cv-01300-GSA-PC

ORDER DENYING PLAINTIFF'S  
MOTION TO COMPEL DEFENDANTS TO  
FILE ANSWER  
(Doc. 20.)

14 **I. BACKGROUND**

15 Cecil James Messer ("Plaintiff") is a federal prisoner proceeding pro se and in forma  
16 pauperis with this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388  
17 (1971). Plaintiff filed the Complaint commencing this action on August 16, 2013. (Doc. 1.)  
18 On October 15, 2013, Plaintiff consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C.  
19 § 636(c), and no other parties have made an appearance. (Doc. 7.) Therefore, pursuant to  
20 Appendix A(k)(4) of the Local Rules of the Eastern District of California, the undersigned shall  
21 conduct any and all proceedings in the case until such time as reassignment to a District Judge  
22 is required. Local Rule Appendix A(k)(3).

23 On June 24, 2014, Plaintiff filed a motion for the court to compel the defendants to file  
24 an answer to the Second Amended Complaint. (Doc. 20.)

25 **II. ANSWER TO COMPLAINT – RULE 12**

26 Rule 12 of the Federal Rules of Civil Procedure provides, "[A] defendant must serve an  
27 answer within 21 days after being served with the summons and complaint; or if it has timely  
28 waived service under Rule 4(d), within 60 days after the request for a waiver was sent." Fed.

1 R. Civ. P. 12(a)(1)(A). Under Rule 4(d), a defendant may waive service of a summons by  
2 signing and returning a waiver of service. Fed. R. Civ. P. 4(d).

3 Plaintiff requests a court order compelling the defendants to file an answer to the  
4 Second Amended Complaint. Plaintiff argues that under Rule 12 of the Federal Rules of Civil  
5 Procedure, defendants are required to serve an answer because more than sixty days have  
6 passed since Plaintiff filed the Second Amended Complaint and service was perfected upon the  
7 defendants at USP-Atwater.

8 **Discussion**

9 The court finds no evidence on the record that any of the defendants have been served  
10 with process. The court has not directed the U.S. Marshal to serve process, and no defendant  
11 has made an appearance. Until defendants have been served or waived service, they are not  
12 required to file an answer to the complaint under Rule 12.

13 Plaintiff's Second Amended Complaint was filed on April 21, 2014 and awaits the  
14 court's requisite screening under 28 U.S.C. § 1915A. (Doc. 18.) The court will not order  
15 service of process until after the court has screened the complaint and determined that Plaintiff  
16 states cognizable claims against the defendants. Thus, at this stage of the proceedings,  
17 defendants are not required to file an answer. Therefore, Plaintiff's motion shall be denied.

18 **III. CONCLUSION**

19 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's motion to compel  
20 defendants to file an answer, filed on June 24, 2014, is DENIED.

21 IT IS SO ORDERED.

22  
23 Dated: June 26, 2014

/s/ Gary S. Austin  
24 UNITED STATES MAGISTRATE JUDGE