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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATHAN SESSING,
Plaintiff,
v.
STU SHERMAN, et al.,
Defendants.

Case No. 1:13-cv-01684-LJO-MJS (PC)

ORDER:

- 1) CLARIFYING PROCEDURAL MATTERS; AND**
- 2) DENYING PLAINTIFF’S MOTION TO SUBSTITUTE UNNAMED DEFENDANTS**

(ECF No. 80)

ORDER DIRECTING PLAINTIFF TO FILE AN OPPOSITION OR STATEMENT OF NON-OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS FOR LACK OF JURISDICTION

(ECF No. 87)

TWENTY-ONE (21) DAY DEADLINE

Plaintiff Nathan Sessing is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The case proceeds on Plaintiff’s June 19, 2015 fourth amended complaint against Defendants Sherman, Stainer, and Braggs in their official capacities for violating the Equal Protection Clause of the Fourteenth Amendment. (ECF No. 34.) The parties have declined Magistrate Judge jurisdiction.

Pending before the Court is Plaintiff’s “Motion for Clarification” in which he seeks

1 clarification on three separate procedural issues. (ECF No. 80.) Defendants have filed
2 an opposition. (ECF No. 87.) Therein, Defendants ask this Court to dismiss Plaintiff's
3 lawsuit for lack of subject matter jurisdiction. Plaintiff has not replied and the time to do
4 so has passed.

5 **I. Background**

6 On September 26, 2016, Plaintiff filed his "Motion for Clarification" of three
7 matters. (ECF No. 80.) Plaintiff first asks whether he must seek a certificate of
8 appealability prior to appealing a "collateral order" to the Ninth Circuit. He next asks how
9 best to obtain a "speedy" Court ruling on a time-sensitive or emergency motion. Finally,
10 Plaintiff recently learned that Defendants Braggs and Stainer were no longer employed
11 in their former positions at SATF. He would like to know the proper procedure for adding
12 their successors to this lawsuit.

13 Defendants' opposition addresses Plaintiff's third request only. Defendants argue
14 that Plaintiff's request to substitute new defendants for Defendants Braggs and Stainer
15 should be denied as futile and Plaintiff's case should be dismissed in its entirety for lack
16 of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3).

17 **II. Motion for Clarification**

18 The Court cannot and will not give legal advice to a litigant beyond pointing out
19 deficiencies in his pleading on screening.

20 In this regard, Plaintiff was previously advised (see ECF No. 24 at 2-3) that
21 having sued Defendants in their official capacities, departure of a Defendant causes his
22 or her successor to be automatically substituted in the lawsuit. Hafer v. Melo, 502 U.S.
23 21, 25 (1991) Because a suit against a state official in his or her official capacity is
24 treated as a suit against the state, in which the "real party in interest . . . is the
25 governmental entity and not the named official," when such named official leaves office,
26 "[his or her] successor automatically assumes [his or her] role in the litigation."); see
27 also Hartmann v. CDCR, 707 F.3d 1114, 1127 (9th Cir. 2013). Therefore, to the extent
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1 Plaintiff seeks to add Defendants Braggs and Stainer's successors to the lawsuit, his
2 motion is unnecessary and will be denied. Once the Court has been informed of the
3 names of the new Defendants, it will issue an order substituting them for Defendants
4 Braggs and Stainer. Fed. Rule Civ. P. 25(d); Nelson v. Heiss, 271 F.3d 891, 897 n. 8
5 (9th Cir. 2001).

6 As to Plaintiff's other questions, Plaintiff is referred to existing rules and law. The
7 procedures for filing an appeal of a district court order are outlined in Federal Rules of
8 Appellate Procedure 3 and 4. Local Rule 230(l) sets forth the briefing schedule for
9 motions in prisoner cases. The requirements for shortening time to hear a motion are
10 set forth in Local Rule 144(e).

11 **III. Defendants' Motion to Dismiss**

12 Defendants imbed in their opposition to Plaintiff's motion for clarification a
13 request that Plaintiff's lawsuit be dismissed pursuant to Federal Rule of Civil Procedure
14 12(h)(3). (ECF No. 87.) They contend that such a request may be made by informal
15 "suggestion" rather than by formal motion. See 5C Fed. Prac. & Proc. Civ. § 1393 (3d
16 ed.) ("no formal motion need be made in order to raise the subject matter jurisdiction
17 issue. Rule 12(h)(3) provides that the defense may be interposed by informal
18 "suggestion" rather than by motion."); see also Clissuras v. City Univ. of New York, 359
19 F.3d 79 (2d Cir. 2004) (suggestion in the form of a letter that court lacked subject matter
20 jurisdiction was sufficient).

21 While it is true that a court must dismiss, at any time, an action over which it
22 lacks subject matter jurisdiction, and may indeed do so *sua sponte* and without the filing
23 of formal motion, Franklin v. State of Or., State Welfare Div., 662 F.2d 1337, 1342 (9th
24 Cir. 1981), fairness dictates Plaintiff be given an opportunity to respond to Defendants'
25 arguments. Woods v. Carey, 684 F.3d 934 (9th Cir. 2012). Thus, pursuant to Rand v.
26 Rowland, 154 F.3d 952 (9th Cir. 1998), and Klinge v. Eikenberry, 849 F.2d 409 (9th
27 Cir. 1988), the Court hereby notifies Plaintiff of the following rights and requirements for
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1 opposing the motion:

2 1. Unless otherwise ordered, motions are briefed pursuant to Local Rule
3 230(l).

4 2. Plaintiff must file an opposition or a statement of non-opposition to
5 Defendants' motion to dismiss. Local Rule 230(l). If Plaintiff fails to file an opposition or
6 a statement of non-opposition to the motion, the undersigned may recommend this
7 action be dismissed, with prejudice, for failure to prosecute. The opposition or statement
8 of non-opposition must be filed not more than twenty-one (21) days after the date of this
9 Court's order. Id. No extensions of time will be granted absent a showing of good
10 cause.

11 3. Defendants have moved to dismiss Plaintiff's case for lack of subject
12 matter jurisdiction pursuant to Rule 12(h)(3). "It is a fundamental precept that federal
13 courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether
14 imposed by the Constitution or by Congress, must not be disregarded nor evaded."
15 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). A challenge to
16 jurisdiction "can be either facial, confining the inquiry to allegations in the complaint, or
17 factual, permitting the court to look beyond the complaint." Savage v. Glendale Union
18 High Sch., Dist. No. 205, Maricopa Cnty., 343 F.3d 1036, 1039 n. 2 (9th Cir.2003).
19 Where an attack on jurisdiction is a "facial" attack on the allegations of the complaint,
20 the factual allegations of the complaint are taken as true and the non-moving party is
21 entitled to have those facts construed in the light most favorable to him. Fed'n of African
22 Am. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir.1996). If the
23 jurisdictional attack is "factual," a defendant may rely on affidavits or other evidence
24 properly before the Court, and the non-moving party is not entitled to any presumptions
25 of truthfulness with respect to the allegations in the complaint. Rather, he or she must
26 come forward with evidence establishing jurisdiction. Thornhill Publ'n. Co., Inc. v. Gen.
27 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Plaintiff bears the burden of
28 proving that the Court has jurisdiction to decide his claim. Id.

1 To oppose a factual attack on jurisdiction, Plaintiff may present evidence in the
2 form of declarations¹, written records, or portions of the record such as the complaint,
3 deposition transcripts, or interrogatory answers, admissions, or other documents
4 properly before the Court. If Plaintiff does not submit his own evidence in opposition,
5 Defendants' evidence will be taken as true, and the Court may conclude that it lacks
6 subject matter jurisdiction and recommend dismissing the case.

7 4. Unsigned declarations will be stricken, and declarations not signed under
8 penalty of perjury have no evidentiary value.

9 5. The failure to comply with this order, the Federal Rules of Civil Procedure,
10 or the Local Rules of the Eastern District of California may result in the imposition of
11 sanctions including but not limited to dismissal of the action or entry of default.

12 **V. Conclusion**

13 Accordingly, it is HEREBY ORDERED that:

- 14 1. Plaintiff's motion to substitute Defendants (ECF No. 80) is DENIED as
15 unnecessary;
- 16 2. Plaintiff must file an opposition or statement of non-opposition to Defendants'
17 motion to dismiss for lack of subject matter jurisdiction (ECF No. 87) within
18 twenty-one (21) days of this order; and
- 19 3. Failure to file an opposition or statement of non-opposition may result in the
20 undersigned recommending this action be dismissed, with prejudice, for
21 failure to prosecute.

22 IT IS SO ORDERED.

23 Dated: October 31, 2016

24 /s/ Michael J. Seng
25 UNITED STATES MAGISTRATE JUDGE

26 ¹ A declaration is a written statement setting forth facts (1) which are admissible in evidence, (2)
27 which are based on the personal knowledge of the person giving the statement, and (3) to which the
28 person giving the statement is competent to testify. 28 U.S.C. § 1746; Fed. R. Civ. P. 56(c)(4). A
declaration must be dated and signed under penalty of perjury as follows: "I declare (or certify, verify or
state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." 28
U.S.C. § 1746.