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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ISRRAEL ESPINOZA,

 Plaintiff,

 v.

DIAZ,

 Defendant.

Case No. 1:14-cv-00872-JLT (PC)

**ORDER WITHDRAWING FINDINGS AND
RECOMMENDATION TO GRANT
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

(Doc. 22)

SEVEN DAY DEFENSE DEADLINE

Plaintiff is proceeding against Defendant Diaz for excessive force in violation of the Eighth Amendment. On October 7, 2014, Defendant filed a motion to dismiss which was converted to a motion for summary judgment since it raised the issue of whether this action is barred under *Heck v. Humphrey*, 512 U.S. 477, 487-88 (1994), which may only be considered under Federal Rule of Civil Procedure 56. (Doc. 18.) Plaintiff was given notice of the requirements to oppose a motion for summary judgment and, while his request to postpone/continue the motion for summary judgment was denied, he was granted an extension of time to September 20, 2015 to file his opposition. (Doc. 21.)

On September 29, 2015, a Findings and Recommendation to grant Defendant’s motion issued. (Doc. 22.) Later that same day, Plaintiff’s opposition was filed which reflects that Plaintiff gave it to prison staff for mailing to this Court on September 9, 2015. (Doc. 23.)

1 A document is deemed filed on the date a prisoner delivers it “to prison authorities for
2 forwarding to the [d]istrict [c]ourt.” *Houston v. Lack*, 487 U.S. 266, 270 (1988). The Ninth
3 Circuit has held that the *Houston* rule applies whenever the prisoner has utilized an internal prison
4 mail system and the record allows the court to determine the date on which the filing was turned
5 over to prison authorities. *Caldwell v. Amend*, 30 F.3d 1199, 1202 (9th Cir. 1994).

6 The proof of service attached to Plaintiff’s opposition reflects that he gave it to prison
7 staff for mailing on September 9, 2015. (Doc. 23, p. 14.) Thus, even though it was not received
8 and filed on the docket for another sixteen days, it is deemed filed as of September 9, 2015, and
9 so is timely. The September 25, 2015 Findings and Recommendations issued without having
10 considered Plaintiff’s opposition, nor any reply thereto.

11 Accordingly, it is HEREBY ORDERED, that:

- 12 (1) the Findings and Recommendation that issued on September 25, 2015 (Doc. 22) is
13 WITHDRAWN; and
14 (2) within seven days of the date of service of this order, Defendant may file a reply to
15 Plaintiff’s opposition if he so desires.

16
17 IT IS SO ORDERED.

18 Dated: November 10, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE