

1 Defendant Mayhew filed a response to Plaintiff’s opposition to removal on March 23, 2015.
2 (ECF No. 8.)

3 On April 2, 2015, Plaintiff filed a subsequent motion objecting to the removal of the action
4 from state court. (ECF No. 13.)

5 On April 10, 2015, Defendants Curtice, Montoya, Roberts, and the California Department of
6 Corrections and Rehabilitation filed a joinder in Defendant Mayhew’s notice of removal. (ECF No.
7 14.)

8 On April 23, 2015, Defendant Mayhew filed an opposition to Plaintiff’s request for entry of
9 default. (ECF No. 17.)

10 **II.**
11 **DISCUSSION**

12 **A. Service of Defendant Curtice**

13 California law provides that proper service of a summons and complaint is effected by
14 “personal delivery of a copy of the summons and of the complaint to the person to be served. Service
15 of a summons in this manner is deemed complete at the time of such delivery.” Cal. Code Civ. Proc. §
16 415.10.

17 Defendant Mayhew’s counsel, Deputy Attorney General Andrea Sloan, submits that she was
18 diligent in attempting to ascertain if any Defendants in this matter, other than Defendant Mayhew, had
19 been served prior to filing the Notice of Removal. On February 17, 2015, Sloan spoke by telephone
20 with the Litigation Coordinator for Valley State Prison (VSP), Carrie Critchlow. (ECF No. 8, Decl. of
21 Andrea Sloan at ¶ 4.)

22 During the call, Sloan inquired as to whether the other Defendants were employed at VSP and
23 whether any of them had been served with the summons and complaint. (Id. at ¶ 5.) Ms. Critchlow
24 stated she was aware of the complaint and that all Defendants are presently employed at VSP. She
25 also stated none of the remaining Defendants had been served with the summons and complaint. (Id.
26 at ¶ 6.)

27 Defendant Curtice confirmed he was never personally served with the summons and complaint
28 in this matter. (ECF No. 8, Decl. of Curtice at ¶¶ 4 and 7.) On February 19, 2015, Defendant Curtice

1 received an opened envelope in his work mailbox located in the central control unit. (Id. at ¶ 5.) The
2 opened envelope was addressed from inmate Holt and contained the following documents:

- 3 1. Case Management Statement by Plaintiff Bird;
- 4 2. Request for Admissions of the Genuineness of Documents; and
- 5 3. Requests for Admissions of Truth of Facts

6 (Id. at ¶ 6.)

7 Sloan further called the Civil Department of the Superior Court of California, County of
8 Madera, to inquire if proofs of service of the summons and complaint had been filed with the court.
9 At approximately 8:30 a.m. on February 19, 2015, Sloan received verbal confirmation from the Clerk
10 of the court, Michelle, that no proofs of service for the complaint as to any of the defendants,
11 including Donald Mayhew, had been filed with the court. (Decl. of Andrea Sloan at ¶ 7.)

12 After counsel Sloan received Plaintiff's opposition and discovered Plaintiff's claim of service
13 of Defendant Curtice on January 26, 2015, Sloan contacted the Madera County Court again on March
14 17, 2015, and spoke with a clerk by the name of Denise. Denise informed Sloan that there had in fact
15 been two proofs of service filed in this matter on February 9, 2015, which stated that Defendants
16 Mayhew and Curtice had been personally served on January 26, 2015. (Id. at ¶ 11.)

17 On March 18, 2015, Sloan spoke with Ms. Critchlow, again. Ms. Critchlow informed Sloan
18 she discussed the matter at length with Defendant Curtice again. Ms. Critchlow stated Defendant
19 Curtice informed her again that he was never served with the summons and complaint in this matter by
20 inmate Tracy Holt or by any other means. (Id. at ¶ 13.) Ms. Critchlow did reiterate that on February
21 19, 2015, documents were placed in Defendant Curtice's mailbox located in the control room.

22 Defendant Curtice declares that to date he has not been personally served with a copy of the
23 summons and complaint. (Decl. of Curtice at ¶¶ 4 and 7.) However, in the event Plaintiff does
24 properly serve Defendant Curtice with the summons and complaint in this action, Curtice has
25 indicated he will join in Defendant Mayhew's Notice of Removal.

26 While there is a dispute as to whether Defendant Curtice had been served with a copy of the
27 summons and complaint prior to removal, such service does not defeat the notice of removal by
28 Defendant Mayhew. In any event, Defendants Curtice, Montoya, Roberts, and the California

1 Department of Corrections and Rehabilitation joined in Defendant Mayhew’s notice of removal. (ECF
2 No. 14.)

3 **B. Original Jurisdiction-Federal Question Jurisdiction**

4 Removal to federal court is proper where the federal court would have original subject matter
5 jurisdiction over the complaint. 28 U.S.C. § 1441. Federal courts have original jurisdiction over civil
6 actions “arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. A
7 claim “arises under” federal law if, based on the well-pleaded complaint rule, the plaintiff alleges a
8 federal claim for relief. Vaden v. Discover Bank, 556 U.S. 49 (2009).

9 In this instance, although Plaintiff’s complaint presents state law claims, it also presents facts
10 giving rise to a federal claim under 42 U.S.C. § 1983 for violations of the First and Eighth
11 Amendments of the United States Constitution. Removal is therefore permitted under 28 U.S.C. §
12 1441(a) based on federal question jurisdiction. In addition, this Court has supplemental jurisdiction
13 over of Plaintiff’s causes of action for assault and battery as well as his negligence and failure to train,
14 monitor and supervise causes of action as set forth in his first through sixth causes of action.

15 **C. Request for Entry of Default**

16 Plaintiff asserts that, pursuant to Rule 81(c) of the Federal Rules of Civil Procedure, Defendant
17 Mayhew was required to serve Plaintiff with an answer or otherwise respond to the complaint seven
18 days after removal. Defendant Mayhew filed a response to Plaintiff’s request on April 23, 2015.
19 Plaintiff’s request for entry of default is premature.

20 As Defendant points out, on February 25, 2015, shortly after Defendant Mathew removed this
21 action to this Court, a First Informational Order was issued in this case. (ECF No. 3.) At page three
22 of the order, the Court advised the parties:

23 A. The Court is required to screen complaints brought by prisoners seeking relief
24 against a governmental entity or officer or employee of a governmental entity. 28
25 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the
26 prisoner has raised claims that are legally “frivolous or malicious,” that fail to state
27 a claim upon which relief may be granted, or that seek monetary relief from an
28 individual who is immune from such relief. 28 U.S.C. § 1915A(b)(1)(2).

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B. A pro se plaintiff may not proceed with legal action against a governmental entity or individual in this Court until the Court screens the pro se plaintiff's complaint and finds that it states a cognizable claim against named defendants...

(ECF No. 3.) Although Defendant Mayhew did not expressly request the Court to issue a screening order, or request thirty days following a screening order to respond to the complaint, the Court's February 25, 2015, effectively advised the parties that the Court would screen the complaint, as required by 28 U.S.C. § 1915A. Accordingly, Plaintiff's request for entry of default must be DENIED, as the Court is required to screen the complaint, and the Court will do so in due course.

II.
ORDER

Based on the foregoing, it is HEREBY ORDERED that:

1. Plaintiff's motion to remand is DENIED; and
2. Plaintiff's request for entry of default as to Defendant Mayhew is DENIED.

IT IS SO ORDERED.

Dated: May 4, 2015


UNITED STATES MAGISTRATE JUDGE