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5 **UNITED STATES DISTRICT COURT**

6 EASTERN DISTRICT OF CALIFORNIA

7 JAMES MILLNER,

8 Plaintiff,

9 v.

10 DR. DILEO, et al.,

11 Defendants.

Case No. 1:17-cv-00507-SAB (PC)

ORDER GRANTING PLAINTIFF'S
REQUEST FOR ASSISTANCE BY THE
UNITED STATES MARSHAL FOR
SERVICE OF PROCESS ON DEFENDANT
DR. DILEO

(ECF No. 11)

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14 Plaintiff James Millner is a state prisoner appearing pro se in this civil rights action
15 pursuant to 42 U.S.C. § 1983. Plaintiff has consented to magistrate judge jurisdiction pursuant to
16 28 U.S.C. § 636(c). (ECF No. 6.)

17 On September 28, 2017, Plaintiff filed a motion requesting that the Court direct the
18 United States Marshal to service Defendant Dileo in this action. Plaintiff requests that the Court
19 take judicial notice of the proceedings in Millner v. Biter, No. 1:13-cv-02029-AWI-SAB. In that
20 case, Plaintiff made a request to have the Marshal serve Defendant Dileo after he made repeated
21 attempts to serve the summons and complaint on Defendant Dileo in that action, to no avail.

22 Federal Rule of Civil Procedure 4(c)(3) provides that “[a]t the plaintiff’s request, the
23 court may order that service be made by a United States marshal or deputy marshal or by a
24 person specially appointed by the court. The court must so order if the plaintiff is authorized to
25 proceed in forma pauperis under 28 U.S.C. § 1915....” Fed. R. Civ. P. 4(c)(3).

26 Plaintiff is not proceeding in forma pauperis in this action, and therefore is not
27 automatically entitled to service by the Marshal here. Nonetheless, the Court has discretion, at
28 the Plaintiff’s request, to order that service be made by the Marshal.

1 The Court takes judicial notice of the proceedings in Millner v. Biter, and finds that
2 Plaintiff previously attempted to serve Defendant Dileo in a recent action, but was unable to do
3 so as Defendant Dileo is no longer employed at Kern Valley State Prison or Corcoran State
4 Prison, and Plaintiff was unable to obtain Dileo's present address. Thus, the Court finds good
5 cause to grant Plaintiff's request, and the Court will direct the United States Marshal to initiate
6 service of the complaint on Defendant Dr. Dileo.

7 Accordingly, pursuant to Federal Rule of Civil Procedure 4(c)(3), it is HEREBY
8 ORDERED that:

9 1. The Clerk of the Court is directed to forward the following documents to the United
10 States Marshals Service:

11 (1) One completed and issued summons, addressed to Dr. Larry Dileo, Kern Valley
12 State Prison, 3000 W. Cecil Avenue, Delano, CA 93216;

13 (2) One completed USM-285 form (same as above);

14 (3) One copy of the complaint filed on April 11, 2017 (ECF No. 1), plus an extra copy
15 for the Marshals Service; and

16 (4) One copy of this order, plus an extra copy for the Marshals Service.

17 2. Within ten days from the date of this order, the Marshals Service is directed to notify
18 the following defendant of the commencement of this action and to request a waiver of service in
19 accordance with the provisions of Fed. R. Civ. P. 4(d) and 28 U.S.C. § 566(c):

20 **DR. LARRY DILEO**

21 3. The Marshals Service shall file returned waivers of service as well as any requests for
22 waivers of service that are returned as undelivered as soon as they are received.

23 4. If a waiver of service is not returned by a defendant within sixty days of the date of
24 mailing the request for waiver, the Marshals Service shall:

25 a. Personally serve process and a copy of this order upon the defendant pursuant to Rule
26 4 of the Federal Rules of Civil Procedure and 28 U.S.C. § 566(c), and shall command all
27 necessary assistance from the California Department of Corrections and Rehabilitation
28 ("CDCR") to execute this order. The Marshals Service shall maintain the confidentiality of all

1 information provided by the CDCR pursuant to this order. In executing this order, the Marshals
2 Service shall contact the Legal Affairs Division of CDCR and request the assistance of a Special
3 Investigator if the Litigation Office at the institution is unable to assist in identifying and/or
4 locating defendants. The Litigation Coordinator (to the extent possible) is directed to assist the
5 Marshal in providing and/or obtaining the present address of Dr. Dileo if he is no longer
6 employed at Kern Valley State Prison.

7 b. Within ten days after personal service is effected, the Marshals Service shall file the
8 return of service for the defendant, along with evidence of any attempts to secure a waiver of
9 service of process and of the costs subsequently incurred in effecting service on said defendant.
10 Said costs shall be enumerated on the USM-285 form and shall include the costs incurred by the
11 Marshals Service for photocopying additional copies of the summons and complaint and for
12 preparing new USM-285 forms, if required. Costs of service will be taxed against the personally
13 served defendant in accordance with the provisions of Fed. R. Civ. P. 4(d)(2).

14 5. If defendant waives service, he is required to return the signed waivers to the
15 Marshals Service. The filing of an answer or a responsive motion does not relieve defendant of
16 this requirement, and the failure to return the signed waivers may subject defendant to an order
17 to pay the costs of service pursuant to Fed. R. Civ. P. 4(d)(2).

18 6. In the event that defendant either waives service or is personally served, defendant is
19 required to reply to the complaint. 42 U.S.C. § 1997e(g)(2).

20 IT IS SO ORDERED.

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22 Dated: October 3, 2017



UNITED STATES MAGISTRATE JUDGE

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