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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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|--------------------------|---|------------------------------------|
| RONNIE LEE MOODY, |) | No. C 09-2259 JSW (PR) |
| |) | |
| Plaintiff, |) | ORDER OF SERVICE AND |
| |) | PARTIAL DISMISSAL; |
| |) | DIRECTING DEFENDANT TO FILE |
| |) | DISPOSITIVE MOTION OR |
| v. |) | NOTICE THAT SUCH MOTION IS |
| |) | NOT WARRANTED |
| OFFICER SANCHEZ, et al., |) | |
| |) | |
| Defendants. |) | (Docket Nos. 2, 4) |

INTRODUCTION

Plaintiff, a prisoner of the State of California currently incarcerated at Deuel Vocational Institution, filed this pro se civil rights complaint under 42 U.S.C § 1983 alleging that Defendant Officer Salazar used excessive force against him while he was an inmate at the San Francisco County Jail. Plaintiff has also filed two applications to proceed *in forma pauperis* which are GRANTED in a separate order filed simultaneously. This Court now reviews the Complaint pursuant to 28 U.S.C. § 1915A and serves certain claims as set forth below.

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a

1 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
2 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
3 1990).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:
5 (1) that a right secured by the Constitution or laws of the United States was violated, and
6 (2) that the alleged violation was committed by a person acting under the color of state
7 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

8 Having reviewed the complaint, the Court finds Plaintiff’s allegations, when
9 liberally construed, state a cognizable claim that Defendant Sheriff’s Department Officer
10 Salazar violated his constitutional rights by using excessive force against him.

11 Plaintiff also names as Defendants Officers Kelly Scott and Glenn Graves of the
12 Modesto Sheriff’s Department with regard to a 2004 arrest for parole absconding that
13 resulted in a conviction for assaulting these officers. However, these Defendants and
14 claims are not properly joined with Plaintiff’s claim against Officer Salazar.

15 To join together in one action, plaintiffs must meet two specific requirements: (1)
16 the right to relief asserted by each plaintiff must arise out of or relate to the same
17 transaction or occurrence, or series of transactions or occurrences; and (2) a question of
18 law or fact common to all parties must arise in the action. *See* Fed. R. Civ. P. 20(a);
19 *Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997). Rule 21 provides that
20 where parties are misjoined, they may be "dropped or added by order of the
21 court . . . on such terms as are just. F. R. Civ. P. 21; *Coughlin*, 130 F.3d at 1351. The
22 claims against Scott and Graves do not arise out of the same transaction or occurrence.
23 Accordingly, the claims against Defendants Scott and Graves will be dismissed without
24 prejudice to Plaintiff bringing his claims against them in a separate action.

25 CONCLUSION

26 For the foregoing reasons, the Court orders as follows:
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1 1. Plaintiff's claims against Defendants Scott and Graves are DISMISSED as
2 improperly joined. The Clerk shall TERMINATE these Defendants from this action.

3 2. The Clerk of the Court shall issue summons and the United States Marshal
4 shall Clerk of the Court shall issue summons and the United States Marshal shall serve,
5 without prepayment of fees, a copy of the Complaint and all attachments thereto, and a
6 copy of this order upon: **San Francisco Sheriff's Department Officer Salazar at the**
7 **San Francisco County Jail.** The Clerk shall also mail a courtesy copy of the
8 Complaint, all attachments thereto, and this order to the San Francisco City Attorney's
9 Office and serve a copy of this order on Plaintiff.

10 3. No later than **sixty (60) days** from the date of this order, Defendant shall either
11 file a motion for summary judgment or other dispositive motion, or a notice to the Court
12 that he/she is of the opinion that this matter cannot be resolved by dispositive motion.
13 The motion shall be supported by adequate factual documentation and shall conform in
14 all respects to Federal Rule of Civil Procedure 56.

15 a. If Defendant elects to file a motion to dismiss on the grounds that
16 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
17 § 1997e(a), Defendant **shall** do so in an unenumerated Rule 12(b) motion pursuant to
18 *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003).

19 b. Any motion for summary judgment shall be supported by adequate
20 factual documentation and shall conform in all respects to Federal Rule of Civil
21 Procedure 56. **Defendant is advised that summary judgment cannot be granted, nor**
22 **qualified immunity found, if material facts are in dispute. If Defendant is of the**
23 **opinion that this case cannot be resolved by summary judgment, she/he shall so**
24 **inform the Court prior to the date the summary judgment motion is due.**

25 All papers filed with the Court shall be promptly served on the Plaintiff.

26 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
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1 served on Defendant no later than **thirty (30) days** from the date Defendant's motion is
2 filed.

3 a. In the event the Defendant files an unenumerated motion to dismiss
4 under Rule 12(b), Plaintiff is hereby cautioned pursuant to *Wyatt v. Terhune*, 315 F.3d
5 1108, 1119-20 & n.4 (9th Cir. 2003):

6 If defendants file an unenumerated motion to dismiss for failure to
7 exhaust, they are seeking to have your case dismissed. If the motion is
8 granted it will end your case.

9 You have the right to present any evidence you may have which
10 tends to show that you did exhaust your administrative remedies. Such
11 evidence may be in the form of declarations (statements signed under
12 penalty of perjury) or authenticated documents, that is, documents
13 accompanied by a declaration showing where they came from and why
14 they are authentic, or other sworn papers, such as answers to
15 interrogatories or depositions.

16 If defendants file a motion to dismiss and it is granted, your case
17 will be dismissed and there will be no trial.

18 b. In the event Defendant files a motion for summary judgment, the Ninth
19 Circuit has held that the following notice should be given to pro se Plaintiffs:

20 The defendants have made a motion for summary judgment by
21 which they seek to have your case dismissed. A motion for summary
22 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
23 granted, end your case.

24 Rule 56 tells you what you must do in order to oppose a motion for
25 summary judgment. Generally, summary judgment must be granted when
26 there is no genuine issue of material fact--that is, if there is no real dispute
27 about any fact that would affect the result of your case, the party who
28 asked for summary judgment is entitled to judgment as a matter of law,
which will end your case. When a party you are suing makes a motion for
summary judgment that is properly supported by declarations (or other
sworn testimony), you cannot simply rely on what your complaint says.
Instead, you must set out specific facts in declarations, depositions,
answers to interrogatories, or authenticated documents, as provided in Rule
56(e), that contradict the facts shown in the defendants' declarations and
documents and show that there is a genuine issue of material fact for trial.
If you do not submit your own evidence in opposition, summary judgment,
if appropriate, may be entered against you. If summary judgment is
granted in favor of defendants, your case will be dismissed and there will
be no trial.

25 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
26 read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477

1 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
2 evidence showing triable issues of material fact on every essential element of his claim).
3 Plaintiff is cautioned that failure to file an opposition to Defendant's motion for summary
4 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
5 granting of judgment against Plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,
6 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

7 5. Defendant shall file a reply brief no later than **fifteen (15) days** after Plaintiff's
8 opposition is filed.

9 6. The motion shall be deemed submitted as of the date the reply brief is due. No
10 hearing will be held on the motion unless the Court so orders at a later date.


11 7. All communications by the Plaintiff with the Court must be served on
12 Defendant, or Defendant's counsel once counsel has been designated, by mailing a true
13 copy of the document to Defendants or Defendant's counsel.

14 8. Discovery may be taken in accordance with the Federal Rules of Civil
15 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
16 Local Rule 16-1 is required before the parties may conduct discovery.

17 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
18 Court informed of any change of address and must comply with the court's orders in a
19 timely fashion. Failure to do so may result in the dismissal of this action for failure to
20 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

21 IT IS SO ORDERED.

22 DATED: October 14, 2009

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24 _____
25 JEFFREY S. WHITE
26 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 RONNIE LEE MOODY,
6 Plaintiff,
7

Case Number: CV09-02259 JSW

CERTIFICATE OF SERVICE

8 v.

9 SALAZAR et al,
10 Defendant.

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
12 Court, Northern District of California.

13 That on October 14, 2009, I SERVED a true and correct copy(ies) of the attached, by placing
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
16 delivery receptacle located in the Clerk's office.

17 Ronnie Lee Moody Prisoner Id T54036
18 Deuel Vocational Institution
19 P.O. Box 600
20 Tracey, CA 95378-0600

21 Dated: October 14, 2009



22 Richard W. Wieking, Clerk
23 By: Jennifer Ottolini, Deputy Clerk
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