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

MALINKA TACUMA WADE MOYE,

No. C-09-03898 EDL

Plaintiff,

**ORDER GRANTING APPLICATION TO
PROCEED IN FORMA PAUPERIS AND
DISMISSING COMPLAINT**

v.

BIG NATES BARBEQUE,

Defendant.

Plaintiff Malinka Tacuma Wade Moye filed his complaint and Application to Proceed In Forma Pauperis on August 25, 2009.¹ Also on that day, Plaintiff consented to the jurisdiction of a Magistrate Judge pursuant to 28 U.S.C. § 636(c).² For the reasons set forth below, the Court grants Plaintiff's application to proceed in forma pauperis and dismisses Plaintiffs' complaint without

¹ This is one of ten cases filed by Plaintiff on August 25, 2009 (C-09-3892 WHA, C-09-3893 MHP, C-09-3895 WHA, C-09-3896 WHA, C-09-3897 WHA, C-09-3898 EDL, C-09-3899 WHA, C-09-3900 WHA, C-09-3901 JCS, C-09-3902 WHA). On October 6, 2009, Judge William Alsup related six of these cases to C-09-3892 WHA, and issued an Order to Show Cause as to why the cases should not be dismissed for failure to state a claim and why Plaintiff should not be declared a vexatious litigant and barred from filing further actions in the Northern District of California without pre-filing review. See Malinka Tacuma Wade Moye v. City & County of San Francisco, C-09-3892 WHA (Docket No. 11, 12). Plaintiff did not respond to the Order to Show Cause, and on October 16, 2009, Judge Alsup gave him another opportunity to do so. See Malinka Tacuma Wade Moye v. City & County of San Francisco, C-09-3892 WHA (Docket No. 13). Plaintiff has filed at least nine other actions in this district since April 2008 (C-08-2051 PJH, C-08-2053 WHA, C-08-2054 JL, C-08-2055 MEJ, C-08-2056 PJH, C-08-2057 VRW, C-08-2125 WHA, C-08-2124 SBA, C-08-2126 SBA).

² To the extent that this order is dispositive, the Court does not require the consent of Defendants because Defendants have not been served and therefore are not parties under the meaning of 28 U.S.C. § 636(c). See Ornelas v. De Frantz, 2000 WL 973684, *2, n.2 (N.D. Cal. 2000) (citing Neals v. Norwood, 59 F.3d 530, 532 (5th Cir. 1995) (magistrate judge had jurisdiction to dismiss prisoner's civil rights action without consent of the defendants because the defendants had not been served yet and therefore were not parties)).

1 prejudice.

2 Under 28 U.S.C. § 1915(a), “[a]ny court of the United States may authorize the
3 commencement . . . of any suit . . . without prepayment of fees and costs or security therefor, by a
4 person who makes affidavit that he is unable to pay such costs or give security therefor.” In
5 reviewing an application to proceed in forma pauperis, the court may dismiss a case sua sponte if the
6 court determines that the party applying for in forma pauperis status has filed a frivolous action. 28
7 U.S.C. § 1915(e)(2); Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989). Under 28 U.S.C.
8 § 1915, a frivolous claim is one that lacks an arguable basis in either law or fact. Neitzke v.
9 Williams, 490 U.S. 319, 325 (1989). Moreover, according to Neitze, a court may dismiss an in
10 forma pauperis complaint sua sponte under 28 U.S.C. § 1915(d) when the claim is “fantastic or
11 delusional. . . .” Neitze, 490 U.S. at 328. Dismissal on these grounds is often made sua sponte prior
12 to the issuance of process, so as to spare prospective defendants the inconvenience and expense of
13 answering such complaints. Id. at 324.

14 Plaintiff’s Application to Proceed In Forma Pauperis adequately alleges Plaintiff’s poverty.
15 Plaintiff states that he is not employed, that he receives \$543.00 per month in social security benefit
16 payments, that he contributes \$123.00 per month for the care of his minor child and that he has \$35
17 in the bank. Although Plaintiff states that he owns a home that is not encumbered by a mortgage
18 with an estimated market value of “\$2.1,” which the Court presumes to mean \$2.1 million, his
19 monthly expenses exceed his income according to his Application. Therefore, Plaintiff’s
20 Application to Proceed In Forma Pauperis is granted.

21 However, under 28 U.S.C. § 1915(e)(2)(B), the Court is required to dismiss an action that
22 appears to be frivolous or fails to state a claim upon which relief may be granted. Here, both
23 grounds are met. Plaintiff’s complaint consists of a conclusory statement of the Court’s jurisdiction
24 and a one paragraph description of the facts that contains many incomplete sentences and is
25 generally difficult to comprehend. Plaintiff appears to allege that Defendant Big Nate’s Barbeque is
26 responsible for a physical assault on Plaintiff. Plaintiff’s complaint does not provide a basis for
27 federal jurisdiction under 28 U.S.C. § 1331 or for diversity jurisdiction under 28 U.S.C. § 1332. To
28 the extent that Plaintiff’s claim arises under state law, he may seek to assert those claims in state

1 court. Moreover, Plaintiff's complaint is too conclusory to state a cognizable claim under federal or
2 state law against Defendant. In sum, Plaintiff's complaint fails to include a "short and plain
3 statement of the claim showing that the pleader is entitled to relief" as required by Federal Rule of
4 Civil Procedure 8(a)(2). Therefore, Plaintiff's complaint is dismissed.

5 Because Plaintiff is proceeding pro se, the Court will give him an opportunity to amend his
6 complaint to comply with the Federal Rules of Civil Procedure. Plaintiff is encouraged to obtain the
7 Handbook for Litigants Without a Lawyer, which is available in the clerk's office at 450 Golden
8 Gate Avenue, San Francisco, California, or on the Court's website (www.cand.uscourts.gov). Any
9 amended complaint shall be filed no later than November 6, 2009. Failure to file an amended
10 complaint by November 6, 2009 will result in dismissal of this case with prejudice.

11 **IT IS SO ORDERED.**

12 Dated: October 22, 2009

Elizabeth D. Laporte

ELIZABETH D. LAPORTE
United States Magistrate Judge