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2 UNITED STATES DISTRICT COURT  
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
4 OAKLAND DIVISION  
5

6 MAURICE P. OLIVER,

7 Plaintiff,

8 vs.

9 R. GROUNDS, et al.,

10 Defendants.  
11

Case No: C 12-00176 SBA (pr)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION REQUESTING COPY OF  
ORDER & ORDER RESCINDING  
ITS DATE FOR INTERLOCUTORY  
APPEAL**

Docket 23

12 On January 11, 2012, Plaintiff, a state prisoner, filed this pro se civil rights action,  
13 pursuant to 42 U.S.C. § 1983, against employees of the Correctional Training Facility  
14 (CTF) in Soledad, California, where he was previously incarcerated. Plaintiff alleges that  
15 Defendants were deliberately indifferent to his serious medical needs (i.e., fibromyalgia,  
16 pain, acid reflux, high blood pressure and constipation). (Dkt. 1.)

17 Along with his complaint, Plaintiff filed a motion for a temporary restraining order  
18 (TRO) and a preliminary injunction. (Dkt. 6.) In his motion papers, Plaintiff alleged that  
19 he has not received “proper treatment and daily exercise” due to prison overcrowding. Id.  
20 at 4. Plaintiff did not specify the nature of the “proper treatment” to which he was referring  
21 or make any showing that daily exercise is necessary to treat his conditions. In view of his  
22 deficient showing, coupled with the lack of notice to Defendants, see Fed. R. Civ. P. 65(b),  
23 the Court denied Plaintiff’s TRO request on September 28, 2012, without prejudice to  
24 renewal after the Court screened the complaint. (Dkt. 20.) The Clerk sent the Order to  
25 Plaintiff at the CTF.

26 On October 18, 2012, Plaintiff filed a notice of change of address, indicating that he  
27 had been transferred to Pleasant Valley State Prison (SVSP) in Coalinga, California. (Dkt.  
28 21.)

1 On November 21, 2012, Plaintiff submitted a letter stating that he had not heard  
2 from the Court, and requested confirmation that it had received his change of address  
3 notice. (Dkt. 22.) In response, the Clerk sent Plaintiff a copy of the docket on November  
4 26, 2012.

5 On December 5, 2012, Plaintiff filed the instant “Motion Requesting Copy [o]f  
6 Order & Order Rescinding Its Date For Interlocutory Appeal Pursuant to 28 U.S.C. [§]  
7 1292(b).” (Dkt. 23.) Plaintiff’s motion presents two requests. First, he seeks a copy of the  
8 Court’s September 28, 2012 Order. Second, he requests that the Court rescind the Order  
9 denying his TRO request and then immediately reissue it to enable him to file a notice of  
10 appeal. Plaintiff claims that he never received the Court’s Order, and that he did not realize  
11 that the Court had ruled on his TRO request until he reviewed the docket sheet provided by  
12 the Clerk. Though Plaintiff does not expressly state the reasons he cannot appeal the  
13 September 28 Order, the Court presumes that he is unable to do so because the thirty-day  
14 deadline to appeal has lapsed. See Fed. R. App. P. 4(a).

15 Plaintiff cites no authority for his request to rescind and then reissue an order to  
16 facilitate an otherwise untimely appeal. Thus, the Court liberally construes Plaintiff’s  
17 motion as one under Federal Rule of Appellate Procedure (“FRAP”) 4(a)(6). FRAP 4(a)(6)  
18 provides that a party who has not received notice of a ruling or judgment may request the  
19 district court to “reopen the time to file an appeal for a period of 14 days after the date  
20 when its order to reopen is entered[.]” A request under FRAP 4(a)(6) may be granted if the  
21 following conditions are satisfied:

22 (A) the court finds that the moving party did not receive notice  
23 under Federal Rule of Civil Procedure 77(d) of the entry of the  
24 judgment or order sought to be appealed within 21 days after  
entry;

25 (B) the motion is filed within 180 days after the judgment or  
26 order is entered or within 14 days after the moving party  
receives notice under Federal Rule of Civil Procedure 77(d) of  
the entry, whichever is earlier; and

27 (C) the court finds that no party would be prejudiced.

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1 Fed. R.App. P. Rule 4(a)(6). Based on the Court’s review of the record, it appears, at least  
2 facially, that the prerequisites for reopening the time to appeal under FRAP 4(a)(6) are  
3 satisfied.

4 Notwithstanding the above, Plaintiff’s ability to appeal in forma pauperis is  
5 dependent on the Court’s finding under 28 U.S.C. § 1915(a)(3). Section 1915(a)(3)  
6 provides that “[a]n appeal may not be taken in forma pauperis if the trial court certifies in  
7 writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). An appeal is frivolous  
8 “where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490 U.S.  
9 319, 325 (1989).

10 Here, the Court finds that an appeal of the Court’s Order denying his TRO request  
11 would be frivolous. First, a district court’s denial of an application for a TRO is not an  
12 appealable final order. See Religious Tech. Ctr. Church of Scientology Int’l, Inc. v. Scott,  
13 869 F.2d 1306, 1308 (9th Cir. 1989).<sup>1</sup> Second, Plaintiff’s request for a TRO is moot  
14 because Plaintiff is no longer housed at CTF. See Dilley v. Gunn, 64 F.3d 1365, 1368-69  
15 (9th Cir. 1995) (holding that prisoner’s transfer from the facility where he was denied  
16 access to legal materials rendered his claim for injunctive relief moot). Finally, Plaintiff’s  
17 motion failed to satisfy the requirements of a TRO under Winter v. Natural Res. Def.  
18 Council, Inc., 555 U.S. 7, 20 (2008) and otherwise failed to meet the requirements for a  
19 TRO without notice, see Fed. R. Civ. P. 65(b).

20 The Court hereby certifies that any appeal from the Court’s Order denying Plaintiff’s  
21 TRO request would not be taken in good faith, within the meaning of 28 U.S.C.  
22 § 1915(a)(3). Because Plaintiff cannot proceed in forma pauperis on appeal, his request to  
23 reopen the period to appeal under FRAP 4(a)(6) is moot. Plaintiff may renew his request to

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25 <sup>1</sup> Although an “order denominated a TRO that possesses qualities of a preliminary  
26 injunction is a reviewable interlocutory order,” SEIU v. Nat’l Union of Healthcare  
27 Workers, 598 F.3d 1061, 1067 (9th Cir. 2010) (finding a TRO akin to a preliminary  
28 injunction where the district court held an adversarial hearing and where the duration of the  
TRO exceeded the ordinary duration for TROs), the Court’s Order denying the TRO is not  
akin to the denial of a preliminary injunction and is therefore not reviewable under 28  
U.S.C. § 1292(a)(1). Indeed, the Court expressly stated that Plaintiff could renew his  
motion following the initial screening of his complaint.

1 proceed in forma pauperis on appeal before the Ninth Circuit. If the Ninth Circuit grants  
2 such request, Plaintiff may renew his request to reopen the time to appeal. Accordingly,

3 IT IS HEREBY ORDERED THAT:

4 1. Plaintiff's Motion Requesting Copy of Order & Order Rescinding its Date for  
5 Interlocutory Appeal is GRANTED IN PART and DENIED IN PART.

6 2. Plaintiff's request for a copy of the Court's Order denying his TRO request is  
7 GRANTED. The Clerk shall send Plaintiff a copy of Docket 20.

8 3. Plaintiff's request to rescind and reissue the Court's Order denying his TRO  
9 request, which has been liberally construed as motion to reopen under FRAP 4(a)(6), is  
10 DENIED without prejudice.

11 4. This Order terminates Docket 23.

12 IT IS SO ORDERED.

13 Dated: February 6, 2013

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

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Case Number: CV12-00176 SBA

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**CERTIFICATE OF SERVICE**

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

16

17 That on February 7, 2013, I SERVED a true and correct copy(ies) of the attached, by placing said  
18 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
19 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
20 located in the Clerk's office.

18

19

20 Maurice P. Olivier F83603  
21 Pleasant Valley State Prison  
22 P.O. Box 8500  
23 Coalinga, CA 93210

24 Dated: February 7, 2013

25

Richard W. Wieking, Clerk  
By: Lisa Clark, Deputy Clerk

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