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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAJORGE ALBERTO FARIAS,
Plaintiff,

v.

MATTHEW ATCHLEY, et al.,
Defendants.

Case No. 21-04167 BLF (PR)

**ORDER DISMISSING NON-
COGNIZABLE CLAIMS AND OF
SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

Plaintiff, a state inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against prison staff at the Salinas Valley State Prison (“SVSP”). Dkt. No. 1. On September 24, 2021, the Court screened the complaint and found it stated cognizable claims of excessive force, denial of his right to access to the courts, and an ADA claim. Dkt. No. 11 at 10. The Court granted leave to amend with respect to the remaining claims or, in the alternative, to file notice that he wishes to proceed on the cognizable claims and strike all other claims from the complaint. *Id.* Plaintiff was advised that if he did not file an amended complaint in the time provided, i.e., twenty-eight days from the date the order was filed, the action would proceed on the cognizable claims. *Id.* at 11.

The deadline has passed, and Plaintiff has filed no response. Accordingly, this matter shall proceed solely on the cognizable claims and the deficient claims shall be

1 dismissed for failure to state a claim. *Id.*

2
3 **DISCUSSION**

4 **A. Standard of Review**

5 A federal court must conduct a preliminary screening in any case in which a
6 prisoner seeks redress from a governmental entity or officer or employee of a
7 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any
8 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
9 upon which relief may be granted or seek monetary relief from a defendant who is immune
10 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
11 construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

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

16 **B. Plaintiff's Claims**

17 In an initial screening order, the Court found the complaint set forth the following
18 cognizable claims: (1) excessive force against Defendants Lopez, Gutierrez-Aparicio, and
19 Barrera-Negrete; (2) denial of his right of access to the courts against Defendants Cortina
20 and Ear; and (3) ADA claims against Defendants Lopez, Gutierrez-Aparicio, Barrera-
21 Negrete, Cortina, and Ear. Dkt. No. 11 at 4, 7-8, 9.

22 The Court dismissed Plaintiff's due process claim for failure to state a claim. *Id.* at
23 6-7, 10. Plaintiff was given leave to amend with respect to the deficient claims, but he has
24 failed to do so. *Id.* at 10/ Accordingly, the following claims are DISMISSED with
25 prejudice for failure to state a claim: (1) Eighth Amendment claim based on the denial of
26 Plaintiff's asthma inhaler; (2) all claims against Defendant Atchley; and (3) Eighth
27 Amendment claims based on what transpired in the yard against Defendants Larraux,
28

1 Cervantes, Clavijo, and Soto. *Id.* at 4-5, 6, 9.

2
3 **CONCLUSION**

4 For the foregoing reasons, the Court orders as follows:

5 1. This action shall proceed on the cognizable claims described above. *See*
6 *supra* at 2. All other claims and Defendants are **DISMISSED with prejudice** from this
7 action for failure to state a claim. Accordingly, the Clerk shall terminate the following
8 defendants from this action: Matthew Atchley, H. Clavijo, F. Soto, M. Cervantes, and J.
9 Larraux.

10 2. The following defendants shall be served at SVSP:

- 11 a. **Correctional Officer C. Lopez**
12 b. **Correctional Officer Jose Gutierrez-Aparicio**
13 c. **Correctional Officer P. Barrera-Negrete**
14 d. **Correctional Officer A. Cortina**
15 e. **Correctional Officer D. C. Ear**

16 Service on the listed defendant(s) shall proceed under the California Department of
17 Corrections and Rehabilitation’s (CDCR) e-service program for civil rights cases from
18 prisoners in CDCR custody. In accordance with the program, the clerk is directed to serve
19 on CDCR via email the following documents: the operative complaint, and any
20 attachments thereto, Dkt. No.1, a copy of the court’s “Order of Dismissal with Leave to
21 Amend,” Dkt. No. 11, this order of service, a CDCR Report of E-Service Waiver form and
22 a summons. The clerk also shall serve a copy of this order on the plaintiff.

23 No later than 40 days after service of this order via email on CDCR, CDCR shall
24 provide the court a completed CDCR Report of E-Service Waiver advising the court which
25 defendant(s) listed in this order will be waiving service of process without the need for
26 service by the United States Marshal Service (USMS) and which defendant(s) decline to
27 waive service or could not be reached. CDCR also shall provide a copy of the CDCR
28

1 Report of E-Service Waiver to the California Attorney General’s Office which, within 21
2 days, shall file with the court a waiver of service of process for the defendant(s) who are
3 waiving service.

4 Upon receipt of the CDCR Report of E-Service Waiver, the clerk shall prepare for
5 each defendant who has not waived service according to the CDCR Report of E-Service
6 Waiver a USM-205 Form. The clerk shall provide to the USMS the completed USM-205
7 forms and copies of this order, the summons and the operative complaint for service upon
8 each defendant who has not waived service. The clerk also shall provide to the USMS a
9 copy of the CDCR Report of E-Service Waiver.

10 3. No later than **ninety-one (91) days** from the date this order is filed,
11 Defendants shall file a motion for summary judgment or other dispositive motion with
12 respect to the claims in the complaint found to be cognizable above.

13 a. Any motion for summary judgment shall be supported by adequate
14 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
15 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
16 qualified immunity found, if material facts are in dispute. If any Defendant is of the
17 opinion that this case cannot be resolved by summary judgment, he shall so inform the
18 Court prior to the date the summary judgment motion is due.

19 b. **In the event Defendants file a motion for summary judgment, the**
20 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
21 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
22 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

23 4. Plaintiff’s opposition to the dispositive motion shall be filed with the Court
24 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants’
25 motion is filed.

26 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
27 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment

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

7 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
8 Plaintiff's opposition is filed.

9 6. The motion shall be deemed submitted as of the date the reply brief is due.
10 No 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 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
13 copy of the document to Defendants or Defendants' 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 Local
16 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 10. Extensions of time must be filed no later than the deadline sought to be
22 extended and must be accompanied by a showing of good cause.

23 **IT IS SO ORDERED.**

24 **Dated: _November 17, 2021_**


BETH LABSON FREEMAN
United States District Judge