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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ESTER BURNETT,	)	Civil No. 08cv1324 L(WVG)
	)	
Plaintiff,	)	<b>ORDER DENYING AS</b>
	)	<b>PREMATURE AND WITHOUT</b>
v.	)	<b>PREJUDICE PLAINTIFF’S EX</b>
	)	<b>PARTE MOTION FOR REQUEST</b>
DR. DUGAN, <i>et al.</i> ,	)	<b>OF WAIVER OF SERVICE [doc.</b>
	)	<b>#109]</b>
Defendants.	)	
	)	
_____	)	

Plaintiff has filed an *ex parte* motion<sup>1</sup> requesting an extension of time to serve newly named defendants in his amended complaint or supplemental complaint and waiver of service of process. On November 10, 2009, plaintiff filed a second amended complaint (“SAC”) [doc. #83] that defendants moved to dismiss.<sup>2</sup> While the motions to dismiss the SAC were pending, plaintiff filed a motion for leave to file a supplemental complaint. [doc. #89] The motions were referred to the assigned magistrate judge for a report and recommendation (“Report”) which was filed on July 23, 2010. [doc. #102] On August 30, 2010, plaintiff filed objections to the Report,

<sup>1</sup> Although plaintiff’s filing is entitled “motion of notice of request of a waiver of service pursuant [to] Rule 4(d),” the Court construes the filing as an motion.

<sup>2</sup> Defendants filed an “Unenumerated 12(b) Motion for Failure to Exhaust Administrative Remedies [doc. #87], and a Motion to Dismiss the SAC under Rule 12(b)(6) [doc. #88].

1 the present motion for a waiver of service and a motion for leave to file an opposition to the  
2 motions to dismiss.

3 The Court adopted in part the Report and granted the motion to dismiss the unexhausted  
4 claims and the motion to dismiss the SAC on September 30, 2010.<sup>3</sup> [doc. #115] But the Court  
5 again referred plaintiff's motion for leave to file a supplemental complaint to the magistrate  
6 judge based on a change in the law, *i.e.*, *Rhodes v. Robinson*, 2010 WL 3489777 (9th Cir. 2010).

7 The magistrate judge filed a supplemental report and recommendation on February 23,  
8 2011. Objections to the supplemental report are due on March 9, 2011.

9 In returning to plaintiff's pending motion for an extension of time to serve newly named  
10 defendants in his amended complaint or supplemental complaint and waiver of service of  
11 process, the Court finds that the motion is premature and will be denied on that basis. After  
12 reviewing the supplemental Report, the issue of service of process may become relevant and  
13 timely. In such a situation, plaintiff may renew his motion.

14 Based on the foregoing, **IT IS ORDERED** denying as premature and without prejudice  
15 plaintiff's *ex parte* motion for an extension of time to serve newly named defendants in his  
16 amended complaint or supplemental complaint and waiver of service of process.

17 **IT IS SO ORDERED.**

18 DATED: March 8, 2011

19   
20 M. James Lorenz  
United States District Court Judge

21 COPY TO:

22 HON. WILLIAM V. GALLO  
23 UNITED STATES MAGISTRATE JUDGE

24 ALL PARTIES/COUNSEL  
25 \_\_\_\_\_

26 <sup>3</sup> The Court granted defendants' motion to dismiss unexhausted claim without  
27 prejudice, and granted defendants' motion to dismiss the SAC with prejudice as to Warden  
28 Almager, Dr. Barreras, Dr. Dugan and Dr. Hawthorne, and without prejudice as to defendants  
Dr. Frazee, Dr. Khatri, G.J. Guirbino and Jane Doe, R.N. and denied the motion for leave to file a  
late opposition to defendants' motions to dismiss.