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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TIMOTHY THOMAS,
CDCR #E-91948,

Plaintiff,

vs.

R. HERNANDEZ; ROBERTS
NELSON; IRRAZUSTA;

Defendants.

Civil No. 09-1336 LAB (PCL)

**ORDER DIRECTING
U.S. MARSHAL TO EFFECT
SERVICE OF AMENDED
COMPLAINT PURSUANT
TO FED.R.CIV.P. 4(c)(3)
& 28 U.S.C. § 1915(d)**

PROCEDURAL HISTORY

I.

On June 19, 2009, Timothy Thomas, a state prisoner proceeding pro se, filed a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion for Leave to Amend [Doc. No. 3]. The Court granted Plaintiff’s Motion to Proceed IFP and granted Plaintiff’s Motion for Leave to File a First Amended Complaint. *See* July 29, 2009 Order at 3-4. On August 24, 2009, Plaintiff filed his First Amended Complaint (“FAC”).

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1 **II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) and § 1915A**

2 The Prison Litigation Reform Act (“PLRA”) obligates the Court to review complaints
3 filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained
4 in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
5 criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary
6 program,” “as soon as practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b).
7 Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any
8 portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages
9 from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*,
10 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d
11 443, 446 (9th Cir. 2000) (§ 1915A).

12 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
13 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
14 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
15 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
16 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of
17 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection
18 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
19 that fails to state a claim.”); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
20 (discussing 28 U.S.C. § 1915A).

21 “[W]hen determining whether a complaint states a claim, a court must accept as true all
22 allegations of material fact and must construe those facts in the light most favorable to the
23 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
24 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
25 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
26 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
27 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

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1 The Court finds that Plaintiff's Eighth Amendment claims are sufficiently pleaded to
2 survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore,
3 Plaintiff is entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28
4 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all
5 duties in [IFP] cases."); FED.R.CIV.P. 4(c)(3) ("[T]he court may order that service be made by
6 a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma*
7 *pauperis* under 28 U.S.C. § 1915."). Plaintiff is cautioned, however, that "the sua sponte
8 screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule
9 12(b)(6) motion that [a defendant] may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d
10 1115, 1119 (S.D. Cal. 2007).

11 **III. CONCLUSION AND ORDER**

12 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

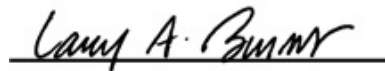
13 1. The Clerk shall issue a summons as to Plaintiff's First Amended Complaint [Doc.
14 No. 8] upon Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form
15 285 for each of these Defendants. In addition, the Clerk shall provide Plaintiff with a certified
16 copy of this Order, the Court's July 29, 2009 Order granting Plaintiff leave to proceed IFP [Doc.
17 No. 6], and certified copies of his First Amended Complaint and the summons for purposes of
18 serving each Defendant. Upon receipt of this "IFP Package," Plaintiff is directed to complete
19 the Form 285s as completely and accurately as possible, and to return them to the United States
20 Marshal according to the instructions provided by the Clerk in the letter accompanying his IFP
21 package. Thereafter, the U.S. Marshal shall serve a copy of the First Amended Complaint and
22 summons upon each Defendant as directed by Plaintiff on each Form 285. All costs of service
23 shall be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

24 2. Defendants are thereafter **ORDERED** to reply to Plaintiff's First Amended
25 Complaint within the time provided by the applicable provisions of Federal Rule of Civil
26 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted
27 to "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or
28 other correctional facility under section 1983," once the Court has conducted its sua sponte

1 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
2 determination based on the face on the pleading alone that Plaintiff has a “reasonable
3 opportunity to prevail on the merits,” Defendants are required to respond).

4 3. Plaintiff shall serve upon Defendants or, if appearance has been entered by
5 counsel, upon Defendants’ counsel, a copy of every further pleading or other document
6 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
7 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
8 of any document was served on Defendants, or counsel for Defendants, and the date of service.
9 Any paper received by the Court which has not been filed with the Clerk or which fails to
10 include a Certificate of Service will be disregarded.

11 DATED: November 9, 2009



HONORABLE LARRY ALAN BURNS
United States District Judge

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