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

CARLOS RIOS,
CDCR #E-52249,

Plaintiff,

vs.

MATTHEW CATE; GEORGE NEOTTI;
DOE 1; REX GREGORY; JUNIOR
TOGURAO; J. CABRERA; J. KEEMA,

Defendants.

Civil No. 10cv1064 MMA (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)**

I.

PROCEDURAL HISTORY

On May 14, 2010, Carlos Rios (“Plaintiff”), a state inmate currently incarcerated at the R. J. Donovan Correctional Facility located in San Diego, California, and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. In addition, Plaintiff filed a “Motion to Proceed *in forma pauperis*” (“IFP”). On May 20, 2010, this Court granted Plaintiff’s Motion to Proceed IFP, but sua sponte dismissed his Complaint for failing to state a claim upon which relief could be granted pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). See May 20, 2010 Order at 5-6. On June 2, 2010, Plaintiff filed his First Amended Complaint (“FAC”).

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II.

SCREENING PURSUANT TO 28 U.S.C. §§ 1915(E)(2) & 1915A(B)

As previously discussed in the May 20, 2010 Order, because Plaintiff is proceeding IFP and is a “prisoner” as defined by 28 U.S.C. § 1915(h), the Court must also review his Amended Complaint sua sponte before service, and dismiss the entire action, or any part of his Amended Complaint, if it is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that fails to state a claim); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

Before amendment by the Prison Litigation Reform Act (“PLRA”), the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). However, 28 U.S.C. § 1915(e)(2) and § 1915A mandate that the court reviewing an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(3). *See Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of process is made on the opposing parties”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”); *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005). In addition, the Court has a duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the

1 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
2 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

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

13 III.

14 CONCLUSION AND ORDER

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

16 1. The Clerk shall issue a summons as to Plaintiff’s First Amended Complaint [Doc.
17 No. 5] upon Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form
18 285 for each of these Defendants. In addition, the Clerk shall provide Plaintiff with a certified
19 copy of this Order, the Court’s May 20, 2010 Order granting Plaintiff leave to proceed IFP [Doc.
20 No. 3], and certified copies of his First Amended Complaint and the summons for purposes of
21 serving each Defendant. Upon receipt of this “IFP Package,” Plaintiff is directed to complete
22 the Form 285s as completely and accurately as possible, and to return them to the United States
23 Marshal according to the instructions provided by the Clerk in the letter accompanying his IFP
24 package. Thereafter, the U.S. Marshal shall serve a copy of the First Amended Complaint and
25 summons upon each Defendant as directed by Plaintiff on each Form 285. All costs of service
26 shall be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).


27 2. Defendants are thereafter **ORDERED** to reply to Plaintiff’s First Amended
28 Complaint within the time provided by the applicable provisions of Federal Rule of Civil

1 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted
2 to “waive the right to reply to any action brought by a prisoner confined in any jail, prison, or
3 other correctional facility under section 1983,” once the Court has conducted its sua sponte
4 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
5 determination based on the face on the pleading alone that Plaintiff has a “reasonable
6 opportunity to prevail on the merits,” Defendants are required to respond).

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

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DATED: June 9, 2010


Hon. Michael M. Anello
United States District Judge