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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Ernest Guardado,

Plaintiff

v.

State of Nevada *ex rel*, et al.,

Defendants

Case No.: 2:17-cv-01072-JAD-VCF

**Order Adopting Reports &
Recommendations, Resolving Pending
Motions, and Sending this Case Back to the
Inmate Mediation Program**

[ECF Nos. 17, 18, 19, 33, 40,
46, 47, 51, 52, 54, 58, 60, 61]

10 Pro se prisoner Ernest Guardado brings this civil-rights action to redress events that he
11 claims occurred during his incarceration at Nevada's High Desert State Prison.¹ Guardado's
12 complaint was screened under 28 U.S.C. § 1915A, and I found that he stated a colorable First
13 Amendment retaliation claim against Defendants Guice and Byrant, and a colorable supervisory
14 liability claim against Defendants Neven, Williams, Tristan, Dzurenda, Filson, Plumlee, and
15 Thompson.² But I erroneously summarized that only the First Amendment retaliation claim
16 could proceed. Guardado now moves for clarification and a host of other relief. I take this
17 opportunity to consider all pending motions; correct the omission in my screening order that
18 caused this case to proceed without Defendants Neven, Williams, Tristan, Dzurenda, Filson,
19 Plumlee, and Thompson; and send this case back to the inmate-mediation program before it
20 returns to the litigation track.

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23 ¹ ECF No. 6.

² ECF No. 5.

1 **A. The magistrate judge’s reports and recommendations**

2 Magistrate Judge Ferenbach has reviewed several of Guardado’s pending motions and
3 recommends³ that I grant Guardado’s motion for clarification/alternative motion for notice of
4 service⁴ along with his motion for a ruling on the motion for clarification.⁵ But the magistrate
5 judge recommends over two separate reports and recommendations⁶ that I deny Guardado’s
6 requests for injunctive relief⁷ and his motion to join this case with that of Guardado’s cell mate,
7 Curtis Brady.⁸ The deadline for objections to those recommendations were April 16, 2019, and
8 April 29, 2019, respectively, and no party has filed an objection to those rulings or moved to
9 extend the deadline to do so. “[N]o review is required of a magistrate judge’s report and
10 recommendation unless objections are filed.”⁹ Accordingly, I adopt the magistrate judge’s
11 reports and recommendations in full, grant the motions for clarification and for ruling on the
12 motion for clarification, vacate the erroneous portion of the screening order, deny all of
13 Guardado’s requests for injunctive relief, and deny his motion to join this case with Brady’s.

14 **B. Guardado’s appeal of the magistrate judge’s denial of his motion to compel**

15 The magistrate judge also denied Guardado’s motion to compel better responses to his
16 requests for production of documents.¹⁰ The magistrate judge reasoned that the defendant’s
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18 ³ ECF No. 51 (report and recommendation).

19 ⁴ ECF No. 17.

20 ⁵ ECF No. 40.

21 ⁶ ECF Nos. 51 (regarding motions at 17, 18, 19, 33 & 40), 54 (regarding motions at 41, 45, 47).

22 ⁷ ECF Nos. 18, 19, 47.

⁸ ECF Nos. 18, 19, 33.

⁹ *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

¹⁰ ECF Nos. 51 (motion to compel); 54 (order).

1 objections to Guardado’s discovery requests were timely and “Plaintiff’s motion to compel [did]
2 not address the substance of” those objections—he only challenged their timeliness.¹¹ Guardado
3 challenges that ruling.¹² In urging reconsideration, he “incorporates his reply” in support of his
4 motion to compel and the much more specific objections he raised in that reply.¹³

5 “A district judge may reconsider” a discovery ruling by a magistrate judge “when it has
6 been shown the magistrate judge’s order is clearly erroneous or contrary to law.”¹⁴ Guardado
7 has not made that showing here. The magistrate judge accurately summarized the position that
8 Guardado advanced in his motion to compel: the defendants’ objections were untimely. And it
9 was not until the reply brief that Guardado first asserted additional bases to compel better
10 responses. But that effort was too little, too late. Guardado’s reply brief was a full week late,
11 and he made no effort to seek an extension of his filing deadline.¹⁵ The court didn’t receive
12 Guardado’s reply brief until the day after the magistrate judge denied the motion to compel.¹⁶
13 The tardiness of the reply brief alone supported the magistrate’s disregard of it.

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15 Even if the brief had been dispatched on time, the magistrate judge still would have been
16 right to ignore the new points that Guardado raised in it. The Ninth Circuit has expressly

18 ¹¹ ECF No. 54 at 2.

19 ¹² ECF No. 60.

20 ¹³ *Id.* at 1; *see also* reply at ECF No. 55.

21 ¹⁴ L.R. IB 3-1(a); 28 U.S.C. § 636(b)(1)(A).

22 ¹⁵ The reply was due on April 3, 2019, but Guardado signed it on April 10th. *See* ECF No. 55.

23 ¹⁶ Although Guardado complains that it takes many days to receive court mail in his facility, he acknowledges that he did receive the defendants’ opposition to his motion to compel on April 1, 2019. ECF No. 60 at 3. If Guardado needed more than the two days left to file his reply, the proper avenue for ensuring his brief would be considered was to file a motion to extend the reply deadline, not just to take an extra week without permission.

1 acknowledged that “[t]he district court need not consider arguments raised for the first time in a
2 reply brief.”¹⁷ So Guardado has not shown that the magistrate judge’s denial of his motion to
3 compel was clearly erroneous or contrary to law. I thus deny Guardado’s motion to reconsider it.

4 **C. Guardado’s motion for default judgment against Guice**

5 Guardado’s last pending motion is his request for a default judgment against Defendant
6 Guice. The Clerk entered default against Guice on March 21, 2019.¹⁸ Guardado now moves the
7 court to enter default judgment against Guice in the amount of \$50,000 in “declaratory damages”
8 plus \$200,000 in punitive damages. He offers no argument in support of these sums, and he does
9 not explain why a default judgment is proper using the factors developed by the Ninth Circuit in
10 *Eitel v. McCool*.¹⁹ The Attorney General’s office now appears on behalf of Guice and opposes
11 the motion. Counsel suggests that default may have been improperly entered against Guice but
12 does not move to set aside the default.²⁰

13 Guardado’s motion must be denied—but not for the reasons Guice’s counsel offers.
14 First, Guardado’s motion lacks the points and authorities necessary for this court to find that a
15 default judgment against Guice is now warranted. Guardado is cautioned that, in the future,
16 when moving for default judgment, he must cite to and analyze the seven factors outlined by the
17 Ninth Circuit in *Eitel*.

18 But even if Guardado had prepared a properly supported motion for default judgment
19 against Guice, I would deny it at this time under the *Frow* doctrine. This time-honored doctrine

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21 ¹⁷ *Zamani v. Carnes*, 491 F.3d at 990, 997 (9th Cir. 2007) (citation omitted). Guardado is
22 cautioned that he must raise all of his points in the motions he files because the court will
disregard arguments raised for the first time in reply briefs.

23 ¹⁸ ECF Nos. 43 (motion for default); 44 (entry of default).

¹⁹ ECF No. 52. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

²⁰ ECF No. 59.

1 recognizes that, “where a complaint alleges that defendants are jointly liable and one of them
2 defaults, judgment should not be entered against the defaulting defendant until the matter has
3 been adjudicated with regard to all defendants.”²¹ The Ninth Circuit extends this doctrine to
4 cases in which the co-defendants are “similarly situated” and defense of the claims will hinge on
5 the same legal theory because “it would be incongruous and unfair to allow a plaintiff to prevail
6 against defaulting defendants on a legal theory rejected by a court with regard to an answering
7 defendant in the same action.”²²

8 Here, Guardado pleads his claims using a joint-liability theory. He alleges that Guice and
9 Defendant Bryant jointly retaliated against him in violation of the First Amendment, and he has
10 pled a supervisory liability claim against Defendants Neven, Williams, Tristan, Dzurenda,
11 Filson, Plumlee, and Thompson for allegedly failing to protect him from Guice and Bryant’s
12 retaliatory actions.²³ The *Frow* doctrine thus cautions against entering a default judgment
13 against Guice while his co-defendants actively defend this case, and Bryant has appeared and is
14 actively defending this case. Accordingly, a default judgment against Guice would be premature
15 because of the real risk of inconsistent decisions against similarly situated defendants, and I deny
16 without prejudice Guardado’s request to enter one. And because nothing that Guardado could
17 provide in his reply brief would change my conclusion that this motion is premature based on the
18 nature of the claims alleged, I also deny Guardado’s request to extend time to file a reply brief.

19 I also caution Guice’s counsel that Guice may not actively participate in this case because
20 default has been entered against him. Counsel is flat wrong in stating that “because [counsel] is

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22 ²¹ *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) (citing *Frow v. De La Vega*, 82
U.S. 552 (1872)).

23 ²² *Geramendi v. Henin*, 683 F.3d 1069, 1082–83 (9th Cir. 2012) (quotation omitted).

²³ See ECF No. 5.

1 now appearing on behalf of Defendant Guice by way of [his] Opposition” to the motion for
2 default judgment, the court must deny the entry of default judgment “and decide this case on its
3 merits.”²⁴ Once the clerk has entered default, the defaulting defendant is “deemed to have
4 admitted all well-pleaded factual allegations contained in the complaint[.]”²⁵ So, before the
5 claim against Guice may be decided on its merits, Guice must successfully move to set aside the
6 entry of default.²⁶

7 **D. Brady’s motion for service**

8 Finally, I dispose of a motion improperly filed in this case by Guardado’s cellmate, Curtis
9 Brady.²⁷ Brady is prosecuting his own action against Guice and others in this district in a
10 separate case. In that case, he moved to have the U.S. Marshal serve documents on some of the
11 defendants. For reasons unknown to this court, Brady also filed that motion in Guardado’s case.
12 Because that motion was already ruled upon in Brady’s case and appears to have been
13 improperly filed in this one, I deny it here.

14 **Conclusion**

15 Accordingly, IT IS HEREBY ORDERED THAT:

- 16 • The Reports and Recommendations [ECF Nos. 51, 54] are **ADOPTED** in full;
- 17 • The Motion for Clarification and/or in the Alternative Motion for Notice of Service
18 Motion to Amend Complaint [ECF No. 17] is **GRANTED**, and the Motion for Ruling
19 on Motion for Clarification [ECF No. 40] is **GRANTED**. **The court hereby**
20 **VACATES the portion of the screening order [ECF No. 5], page 13, lines 1-7, that**

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22 ²⁴ ECF No. 59 at 2.

23 ²⁵ *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 851 (9th Cir. 2007)

24 ²⁶ Fed. R. Civ. P. 55(c).

25 ²⁷ ECF No. 46.

1 **erroneously states that this case proceeds on Guardado's First Amendment**
2 **retaliation claim against only defendants Guice and Bryant and that all other**
3 **claims against all other defendants are dismissed without prejudice.** In fact, this
4 case proceeds on (1) Guardado's First Amendment retaliation claim against only
5 defendants Guice and Bryant; and (2) Guardado's supervisory liability claim against
6 Neven, Williams, Tristan, Dzurenda, Filson, Plumlee, and Thompson.

- 7 • The Requests for Injunctive Relief [ECF Nos. 18, 19, 47] are **DENIED**;
- 8 • Plaintiff's motion for joinder [ECF No. 33] is **DENIED**;
- 9 • Curtis Brady's Motion for Order of Service of Summons [ECF No. 46] is **DENIED** as
10 having been filed in the wrong case;
- 11 • Plaintiff's motion for default judgment against Defendant Guice [ECF No. 52] is
12 **DENIED** without prejudice to its refiled once the claims against the other defendants
13 have resolved;
- 14 • Plaintiff's motion for reconsideration of the magistrate judge's order denying his motion
15 to compel [ECF No. 60] is **DENIED**; and
- 16 • Plaintiff's motion to extend time to file a reply in support of the motion for default
17 judgment [ECF No. 61] is **DENIED**.

18 IT IS FURTHER ORDERED that because the early inmate mediation that occurred in this
19 case took place without defendants Neven, Williams, Tristan, Dzurenda, Filson, Plumlee, and
20 Thompson, **this action is STAYED for 90 days** to allow the plaintiff and these additional
21 defendants an opportunity to settle their dispute.²⁸ During this 90-day stay period, no other
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23 ²⁸ Settlement may or may not include payment of money damages. It also may or may not include an agreement to resolve plaintiff's issues differently. A compromise agreement is one in

1 pleadings or papers may be filed in this case, and the parties may not engage in any discovery. **I**
2 **refer this case to the Court’s Inmate Early Mediation Program and ask the magistrate**
3 **judge to enter an order scheduling the mediation conference.**

4 Regardless, **on or before July 30, 2019**, the Office of the Attorney General must file the
5 report form attached to this order regarding the results of the 90-day stay, even if a stipulation for
6 dismissal is entered before the end of the stay. If the parties proceed with this action, the Court
7 will then issue an order setting a date for these additional defendants to file an answer or other
8 response; the Court will then consider what additional discovery, if any, will be necessitated and
9 may issue a new scheduling order. So, **IT IS FURTHER ORDERED that Guardado’s**
10 **motion to extend the discovery deadline [ECF No. 58] is DENIED** without prejudice to his
11 ability to reurge his request after the 90-day stay is lifted.

12 If any party desires to have this case excluded from this second trip to the inmate
13 mediation program, that party must file a “motion to exclude case from mediation” by May 22,
14 2019. The responding party will have seven days to file a response, and no reply may be filed.
15 Thereafter, the Court will issue an order, set the matter for hearing, or both.

16 **IT IS FURTHER ORDERED that the Attorney General’s Office must advise the**
17 **Court by May 22, 2019, whether it will enter a limited notice of appearance on behalf of**

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which neither party is completely satisfied with the result, but both have given something up and
both have obtained something in return.

1 **defendants Neven, Williams, Tristan, Dzurenda, Filson, Plumlee, and Thompson** for the
2 purpose of settlement. The filing of the limited notice of appearance will not constitute waiver
3 of any defense or objection.

4 Dated: May 1, 2019

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8 U.S. District Judge Jennifer A. Dorsey
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