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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESS RICHARD SMITH,

Plaintiff,

v.

TONY GONZALEZ, S. BUTTICE, S.
SUNDBERG, ROY GONZALEZ,
LISA MORROW, R. HERZOG, J.
AIYEKU, and WASHINGTON
DEPARTMENT OF
CORRECTIONS,

Defendant.

NO: 4:17-CV-5082-RMP

ORDER DENYING RULE 60(b)
MOTION, AFFIRMING ORDER TO
AMEND OR VOLUNTARILY
DISMISS, ADOPTING REPORT
AND RECOMMENDATION,
DENYING MOTION FOR
TEMPORARY RESTRAINING
ORDER, AND RE-NOTING
DEADLINE

BEFORE THE COURT is Magistrate Judge Dimke’s Report and
Recommendation to deny Plaintiff’s Motion for Temporary Restraining Order.
ECF No. 14. Plaintiff, Jess Richard Smith, a prisoner at the Washington State
Penitentiary, is proceeding *pro se* and *in forma pauperis*; Defendants have not
been served.

ORDER DENYING RULE 60(b) MOTION, AFFIRMING ORDER TO AMEND
OR VOLUNTARILY DISMISS, ADOPTING REPORT AND
RECOMMENDATION, DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER, AND RE-NOTING DEADLINE -- 1

1 Mr. Smith did not file objections to the Report and Recommendation and his
2 deadline for doing so was August 29, 2017. Rather, Mr. Smith filed a document
3 titled, "Motion for Relief from Order CR 60," ECF No. 16, in which he challenges
4 the Order directing him to amend or voluntarily dismiss, ECF NO. 13. Mr.
5 Smith's Motion was noted for hearing on September 22, 2017, but considered
6 without oral argument on the date signed below.

7 Mr. Smith seeks relief under Fed. R. Civ. P. 60 from the Court's screening
8 Order, claiming the Magistrate Judge is "acting as an opposing party by raising
9 Rule 12 defenses for the defendants." ECF No. 16 at 2. Mr. Smith's argument
10 lacks merit. A federal court is statutorily obligated to screen complaints brought
11 by prisoners. 28 U.S.C. §1915A(a). Although Mr. Smith was advised of the
12 deficiencies of his complaint, he has not amended or dismissed it.

13 Rule 60(b) provides that "[o]n motion and upon such terms as are just, the
14 court may relieve a party . . . from a final judgment, order, or proceeding for the
15 following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)
16 newly discovered evidence that, with reasonable diligence could not have been
17 discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other
18 reason that justifies relief." Relief under Rule 60 "is to be used sparingly as an
19 equitable remedy to prevent manifest injustice and is to be utilized only where
20 extraordinary circumstances exist." *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir.

21 ORDER DENYING RULE 60(b) MOTION, AFFIRMING ORDER TO AMEND
OR VOLUNTARILY DISMISS, ADOPTING REPORT AND
RECOMMENDATION, DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER, AND RE-NOTING DEADLINE -- 2

1 2008) (internal quotation marks and citation omitted). No final judgment or order
2 has been entered in this action. Therefore, Rule 60(b) is not applicable.

3 To the extent Mr. Smith is challenging Magistrate Judge Dimke's Order to
4 Amend or Voluntarily Dismiss under 28 U.S.C. § 636(A), he has failed to show
5 that this Order is clearly erroneous or contrary to law. Therefore, **IT IS**
6 **ORDERED** Plaintiff's Motion, ECF No. 16, will be **DENIED** and the Order to
7 Amend or Voluntarily Dismiss, ECF No. 13, will be **AFFIRMED**.

8 On August 15, 2017, Magistrate Judge Dimke recommended denying
9 Plaintiff's Motion for Temporary Restraining Order, ECF No. 5, as Mr. Smith had
10 not yet presented a legally sufficient complaint and the Court was without
11 jurisdiction to grant the Motion. There being no objections, **IT IS ORDERED** the
12 Report and Recommendation, ECF No. 14, will be **ADOPTED in its entirety** and
13 the Motion for Temporary Restraining Order, ECF No. 5, will be **DENIED**.

14 Accordingly, **IT IS HEREBY ORDERED:**

15 1. Plaintiff's Motion for Relief from Order CR 60, ECF No. 16, is

16 **DENIED.**

17 2. The Order to Amend or Voluntarily Dismiss, ECF No. 13, is

18 **AFFIRMED.**

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21 ORDER DENYING RULE 60(b) MOTION, AFFIRMING ORDER TO AMEND
OR VOLUNTARILY DISMISS, ADOPTING REPORT AND
RECOMMENDATION, DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER, AND RE-NOTING DEADLINE -- 3

1 3. Magistrate Judge Dimke's Report and Recommendation to Deny Motion
2 for Temporary Restraining Order, ECF No. 14, is **ADOPTED in its**
3 **entirety.**

4 4. Plaintiff's Motion for Temporary Restraining Order, ECF No. 5, is
5 **DENIED.**

6 5. The Clerk of Court shall **RE-NOTE** the deadline to Amend or
7 Voluntarily Dismiss to **thirty (30) days** after the date of this Order.

8 The District Court Clerk is directed to enter this Order and provide a copy to
9 Plaintiff, along with a form Motion to Voluntarily Dismiss Complaint **and a civil**
10 **rights complaint form.**

11 **DATED** October 12, 2017.

12
13 *s/ Rosanna Malouf Peterson*
14 ROSANNA MALOUF PETERSON
15 United States District Judge
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21 ORDER DENYING RULE 60(b) MOTION, AFFIRMING ORDER TO AMEND
OR VOLUNTARILY DISMISS, ADOPTING REPORT AND
RECOMMENDATION, DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER, AND RE-NOTING DEADLINE -- 4

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JESS RICHARD SMITH,

Plaintiff,

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TONY GONZALEZ, S. BUTTICE, S.
SUNDBERG, ROY GONZALEZ,
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DEPARTMENT OF CORRECTIONS,

Defendants.

NO: 4:17-CV-5082-RMP

MOTION TO VOLUNTARILY
DISMISS COMPLAINT

Plaintiff JESS RICHARD SMITH requests the Court grant his Motion to Voluntarily Dismiss the Complaint pursuant to Rule 41(a), Federal Rules of Civil Procedure. Plaintiff is proceeding *pro se*; Defendants have not been served in this action.

DATED this ____ day of _____ 2017.

JESS RICHARD SMITH