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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EARL D. SMITH,

Plaintiff,

No. 2:09-cv-0654 JAM EFB P

vs.

B. PRIOLO, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. This action proceeds on an Eighth Amendment excessive force claim against defendants Priolo and Delgado, and an Eighth Amendment failure to protect claim against defendant Dharlingue. Plaintiff moves for an emergency “restraining order,” because he believes that unidentified prison officials are poisoning his food and threatening him for filing this lawsuit. Dckt. No. 60. The court construes plaintiff’s motion as a motion for a preliminary injunction. So construed, plaintiff’s motion must be denied.

A preliminary injunction will not issue unless necessary to prevent threatened injury that would impair the court’s ability to grant effective relief in a pending action. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984); *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989). A preliminary injunction represents the exercise of a far reaching

1 power not to be indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter,*
2 *Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). In order to be entitled to preliminary injunctive relief, a
3 party must demonstrate “that he is likely to succeed on the merits, that he is likely to suffer
4 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
5 and that an injunction is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127
6 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). The Ninth
7 Circuit has also held that the “sliding scale” approach it applies to preliminary injunctions--that
8 is, balancing the elements of the preliminary injunction test, so that a stronger showing of one
9 element may offset a weaker showing of another--survives *Winter* and continues to be valid.
10 *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1050 (9th Cir. 2010). “In other words,
11 ‘serious questions going to the merits,’ and a hardship balance that tips sharply toward the
12 plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter*
13 test are also met.” *Id.* In cases brought by prisoners involving conditions of confinement, any
14 preliminary injunction “must be narrowly drawn, extend no further than necessary to correct the
15 harm the court finds requires preliminary relief, and be the least intrusive means necessary to
16 correct the harm.” 18 U.S.C. § 3626(a)(2).

17 Here, plaintiff has not shown a likelihood of success on the merits, nor has he shown any
18 relationship between the preliminary relief sought and the subject matter of this lawsuit. Apart
19 from plaintiff’s unsupported allegations, there is no evidence establishing that plaintiff is likely
20 to prevail on his Eighth Amendment claims, or that the injunction sought is necessary to preserve
21 the court’s ability to grant effective relief on those claims and that it is the least intrusive means
22 for doing so. Moreover, the allegations on which plaintiff bases his motion for preliminary
23 injunctive relief are properly the subject of another lawsuit and cannot be adjudicated
24 in this action, where they cannot be properly exhausted through the administrative appeals
25 process. See *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per curiam) and
26 *Rhodes v. Robinson*, 621 F.3d 1002, 1004-07 (9th Cir. 2010) (together holding that claims must

1 be exhausted prior to the filing of the original or supplemental complaint); *Jones v. Felker*, No.
2 CIV S-08-0096 KJM EFB P, 2011 U.S. Dist. LEXIS 13730, at *11-15 (E.D. Cal. Feb. 11, 2011);
3 Fed. R. Civ. P. 20(a)(2) (multiple defendants may be joined in an action only where the suit
4 regards “the same transaction, occurrence, or series of transactions or occurrences” or “any
5 question of law or fact common to all defendants”). Accordingly, plaintiff’s motion for
6 preliminary injunctive relief must be denied.

7 Accordingly, IT IS HEREBY RECOMMENDED that plaintiff’s November 8, 2012
8 motion (Dckt. No. 60), construed as a motion for a preliminary injunction, be denied.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
14 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
15 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: November 15, 2012.

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18 EDMUND F. BRENNAN
19 UNITED STATES MAGISTRATE JUDGE
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