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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MELVIN JOSEPH SIMMONS,  
Plaintiff,  
v.  
DERAL G. ADAMS, et al.,  
Defendants.

Case No. 1:10-cv-01259-LJO-SKO PC  
ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS IN FULL,  
DENYING RULE 56(D) MOTION,  
DENYING SUMMARY JUDGMENT  
MOTION, AND DISMISSING  
DECLARATORY RELIEF CLAIM  
(Docs. 46, 52, and 66)

Plaintiff Melvin Joseph Simmons, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on July 14, 2010. This action is proceeding on Plaintiff’s amended complaint against Defendant T. Sanders for use of excessive physical force, in violation of the Eighth Amendment of the United States Constitution. Plaintiff’s claim arises out of an incident which allegedly occurred on November 18, 2009, after he arrived at California State Prison-Corcoran on a transportation bus. 28 U.S.C. § 1915A.

On June 14, 2013, the Magistrate Judge filed a Findings and Recommendations which was served on the parties and which contained notice to the parties that Objections to the Findings and Recommendations were to be filed within thirty days. Plaintiff filed a timely Objection on July 15, 2013, and Defendants filed a timely Response on July 22, 2013.<sup>1</sup> Local Rule 304(b), (d).

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<sup>1</sup> Objections were due or on before July 18, 2013. Plaintiff included objections to the Magistrate Judge’s separate order granting in part and denying in part Defendant’s motion to compel and denying Plaintiff’s motion for a protective order. Plaintiff may not “object” to the Magistrate Judge’s order, but he may seek reconsideration. In light

1 Plaintiff objects to the recommendation that his Fed. R. Civ. P. 56(d) motion be denied and  
2 the recommendation that his claim for declaratory relief be dismissed.

3 Plaintiff's bare objection concerning the denial of his Rule 56(d) motion lacks merit. With  
4 the limited exception of Defendant's renewed motion to compel, the deadline for the completion  
5 of all discovery was July 23, 2012, and the Magistrate Judge correctly determined that Plaintiff is  
6 precluded from claiming he needs further discovery to oppose Defendant's summary judgment  
7 motion, which was filed *after* the close of discovery.

8 Plaintiff's objection concerning the dismissal of his declaratory relief claim also lacks  
9 merit. "A case or controversy exists justifying declaratory relief only when the challenged  
10 government activity is not contingent, has not evaporated or disappeared, and, by its continuing  
11 and brooding presence, casts what may well be a substantial adverse effect on the interests of the  
12 petitioning parties." *Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 715 (9th Cir. 2011) (quoting  
13 *Headwaters, Inc. v. Bureau of Land Management, Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir.  
14 1989)). The Magistrate Judge correctly determined that Plaintiff is limited to seeking damages for  
15 the past violation of his rights at California State Prison-Corcoran. *Pinnacle Armor, Inc.*, 648 F.3d  
16 at 715; *Rhodes v. Robinson*, 408 F.3d 559, 565-66 n.8 (9th Cir. 2005).

17 Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of this  
18 case. Having carefully reviewed the entire file, the Court finds the Findings and  
19 Recommendations to be supported by the record and by proper analysis, and accordingly, IT IS  
20 HEREBY ORDERED that:

- 21 1. The Findings and Recommendations, filed on June 14, 2013, is adopted in full;
- 22 2. Plaintiff's Rule 56(d) motion, raised in his opposition filed on October 9, 2012, is  
23 denied;
- 24 3. Defendant's motion for summary judgment on Plaintiff's Eighth Amendment  
25 excessive force claim, filed on September 20, 2012, is denied;

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28 of Plaintiff's pro se status, the Court will construe Plaintiff's objections to the order as a motion for reconsideration  
and it will address the motion once it has been submitted under Local Rule 230(l). See *Akhtar v. Mesa*, 698 F.3d  
1202, 1208-09 (9th Cir. 2012).

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4. Plaintiff's declaratory relief claim is dismissed, with prejudice, for failure to state a claim; and

5. This matter is referred back to the Magistrate Judge to set for jury trial.

IT IS SO ORDERED.

Dated: July 23, 2013

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE