

1 On August 15, 2017, Defendants filed an answer to the third amended complaint. (ECF No.
2 102.) On August 17, 2017, the Court issued a second discovery and scheduling order. (ECF No. 103.)

3 As previously stated, on September 27, 2018, Defendants filed a motion to declare Plaintiff a
4 vexatious litigant and post security. As discussed *infra*, despite receiving several extensions of time,
5 Plaintiff has not filed an opposition, and the Defendants' motion has been deemed submitted for
6 review without oral argument. Local Rule 230(1).

7 **II.**

8 **DISCUSSION**

9 **A. Defendants' Motion**

10 Defendants seek to have Plaintiff declared a vexatious litigant, post security in the amount of
11 \$50,000, and issue a pre-filing order prohibiting him from filing any new litigation without first
12 obtaining leave of Court to do so. Local Rule 151(b) of the Eastern District of California, which
13 provides:

14 On its own motion or on motion of a party, the Court may at any time order a party to
15 give a security, bond, or undertaking in such amount as the Court may determine to be
16 appropriate. The provisions of Title 3A, part 2, of the California Code of Civil
17 Procedure, relating to vexatious litigants, are hereby adopted as a *procedural* Rule of
this Court on the basis of which the Court may order the giving of a security, bond, or
undertaking, although the power of the Court shall not be limited thereby.

18 Local Rule 151(b) (emphasis added). Defendants argue that Plaintiff is a vexatious litigant as defined
19 by California Civil Procedure Code § 391.1, which provides:

20 In any litigation pending in any court of this state, at any time until final judgment is
21 entered, a defendant may move the court, upon notice and hearing, for an order
22 requiring the plaintiff to furnish security or for an order dismissing the litigation
pursuant to subdivision (b) of Section 391.3. The motion for an order requiring the
23 plaintiff to furnish security shall be based upon the ground, and supported by a
24 showing, that the plaintiff is a vexatious litigant and that there is not a reasonable
probability that he or she will prevail in the litigation against the moving defendant.

25 Cal. Civ. Proc. Code § 391.1.

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1 **B. Plaintiff’s Failure to File an Opposition**

2 On October 31, 2018, the Court directed Plaintiff to file an opposition or statement of non-
3 opposition, and Plaintiff failed to respond to the Court’s order. Therefore, on November 27, 2018,
4 Findings and Recommendations were issued recommending dismissal of the action. Plaintiff filed
5 objections to the Findings and Recommendations on December 26, 2018, and the Court vacated the
6 Findings and Recommendations on December 27, 2018, and granted Plaintiff thirty days to file an
7 opposition. However, instead of focusing his attention on filing an opposition, Plaintiff again filed
8 objections to the Findings and Recommendations on January 11, 2019, which resulted in the Court
9 issuing an order on January 14, 2019, advising Plaintiff that the filing of objections was inappropriate
10 and advised him to focus his attention of filing an opposition which was due on. On January 16, 2019,
11 Plaintiff filed an extension of time because it was necessary for him to obtain a paper copy of
12 Defendants’ motion from the Court. On January 17, 2019, the Court granted Plaintiff until February 8,
13 2019, to file his opposition. However, the Court noted no further extension of time would be granted
14 because Defendants’ motion has been pending for several months, and he was able to litigate this
15 action and had been provided more than ample time to file an opposition.

16 Despite the Court’s order, on February 11, 2019, Plaintiff filed yet another extension of time to
17 file an opposition. The Court denied Plaintiff’s request because he has failed to demonstrate
18 extraordinary circumstances to justify a further extension, and the Court deemed Defendants’ motion
19 submitted for review. (ECF No. 139.) Nonetheless, on February 25, 2019, Plaintiff filed a belated and
20 unduly untimely opposition to Defendants’ present motion, which is probative of bad faith on the part
21 of Plaintiff in litigating this action and lack of regard of the court orders. Therefore, the Court will not
22 consider Plaintiff’s untimely opposition.

23 **C. Vexatiousness Under Federal Law**

24 The Court finds that Local Rule 151(b) is a procedural rule which allows courts in this district
25 to impose payment of a security if the plaintiff is found to be vexatious. Because Local Rule 151(b) is
26 a procedural rule, the Court must look to federal substantive law, not California law, for the definition
27 of vexatiousness and whether posting of security should be required. See, e.g., Smith v. Officer
28 Sergeant, Case No. 2:15-cv-0979 GEB DB P, 2016 WL 6875892, at *2 (E.D. Cal. Nov. 21, 2016) (the

1 court looks to federal law, not state law, to define a vexatious litigant.”); Cranford v. Crawford, Case
2 No. 1:14-cv-00055-AWI-MJS (PC), 2016 WL 4536199, at *3 (E.D. Cal. Aug. 31, 2016 (“... the state
3 statutory definition of vexatiousness is not enough to find a litigant vexatious in federal court.”);
4 Goolsby v. Gonzales, Case No. 1:11-cv-00394-LJO-GSA-PC, 2014 WL 2330108, at *1-2 (E.D. Cal.
5 May 29, 2014) (“Under federal law, however, the criteria under which a litigant may be found
6 vexatious is much narrower. While Local Rule 151(b) directs the Court to look to state law for the
7 procedure in which a litigant may be ordered to furnish security, this Court looks to federal law for the
8 definition of vexatiousness, and under federal law, the standard for declaring a litigant vexatious is
9 more stringent.... [T]he mere fact that a plaintiff has had numerous suits dismissed against him is an
10 insufficient ground upon which to make a finding of vexatiousness.”); Stringham v. Bick, Case No.
11 CIV S-09-0286 MCE DAD P, 2011 WL 773442, at *3 (E.D. Cal. Feb. 28, 2011) (although more than
12 five unsuccessful lawsuit had been filed in the preceding seven years, the court could not find that the
13 filings were so “numerous or abusive” or “inordinate” to warrant a vexatious order).

14 The Court has inherent power under the All Writs Act, 28 U.S.C. § 1651(a), to enter a pre-
15 filing order against a vexatious litigant, but a pre-filing order is “an extreme remedy that should rarely
16 be used.” Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007). A pre-filing
17 order “can tread on a litigant’s due process right of access to the courts” and it should not be entered
18 “with undue haste” or without “a cautious review of the pertinent circumstances.” Molski, 500 F.3d at
19 1057 (citation omitted). The focus under federal law is on the number of suits that were frivolous or
20 harassing in nature rather than on the number of suits that were simply adversely decided. Molski,
21 500 F.3d at 1061; De Long v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir. 1990). Prior to entering a
22 pre-filing order against a litigant, (1) the litigant must be given notice and an opportunity to be heard,
23 (2) the Court must compile an adequate record, (3) the Court must make substantive findings about the
24 frivolous or harassing nature of Plaintiff’s litigation, and (4) the pre-filing order must be narrowly
25 tailored to closely fit the specific vice encountered. Molski, 500 F.3d at 1057 (citing De Long, 912
26 F.2d at 1147-48) (quotation marks omitted).

27 In order to sanction a litigant pursuant to the court’s inherent powers, the Court must make a
28 specific finding of “bad faith or conduct tantamount to bad faith.” Fink v. Gomez, 239 F.3d 989, 994

1 (9th Cir. 2001). “Bad faith” mean a party or counsel acted vexatiously, wantonly or for oppressive
2 reasons.” Chambers v. Nasco, Inc., 501 U.S. 32, 45-46 (1991). Under federal law, litigiousness alone
3 is insufficient to support a finding of vexatiousness. See Moy v. United States, 906 F.2d 467, 470 (9th
4 Cir. 1990) (the plaintiff’s claims must not only be numerous, but also be patently without merit). The
5 Ninth Circuit has defined vexatious litigant as “without reasonable or probable cause or excuse,
6 harassing, or annoying.” Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 886 (9th Cir. 2012).

7 Defendants argue that Plaintiff has commenced or maintained eighteen unsuccessful lawsuits
8 in the past seven years, which were all finally determined adversely to him, and in which he repeatedly
9 filed unmeritorious motions and pleadings.¹ Defendants have cited the following eighteen cases in
10 support of their motion:

11 1. Shehee v. Beuster, Case No. 1:14-cv-00122-LJO-BAM (PC) (E.D. Cal.), dismissed on
12 February 27, 2015, after Shehee failed to file an amended complaint. When Shehee filed an appeal of
13 the judgment, the court certified that the appeal was not taken in good faith, and revoked Shehee’s in
14 forma pauperis status. (RJN Ex. A.)

15 2. Shehee v. Beuster, Ninth Circuit Case No. 15-15450, appeal from Case No. 1:14-cv-00122-
16 LJO-BAM (PC). Shehee’s appeal was declared frivolous and not taken in good faith, and his in forma
17 pauperis status was revoked for the appeal. When Shehee failed to pay the filing fee, the appeal was
18 dismissed on July 30, 2013. (RJN Ex. B.)

19 3. Shehee v. Carter, Case No. 1:14-cv-00624-LJO-BAM (PC) (E.D. Cal.), dismissed on
20 February 6, 2015, for failure to comply with Rule 8 and failure to state a cognizable claim. (RJN Ex.
21 C.)

22 4. Shehee v. Cosby, Case No. 1:16-cv-00354-DAD-SAB (PC) (E.D. Cal.), dismissed on
23 March 9, 2017, as barred by the statute of limitations. (RJN Ex. D.)

24 5. Shehee v. Flores, Case No. 1:14-cv-00589-LJO-GSA (PC) (E.D. Cal.), dismissed on April
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27 ¹ Defendants’ request to take judicial notice (“RJN”) of the eighteen cases is granted. See Fed. R. Evid. 201; see also
28 United States v. Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004) (finding that the court may take judicial notice of court records in other cases); ECF No. 126-13.

1 2, 2015, for failure to state a cognizable claim for relief. (RJN Ex. E.) The district court found
2 Shehee's appeal to be frivolous and declined to extend in forma pauperis status on appeal. (Id.)

3 6. Shehee v. Flores, Ninth Circuit Case No. 15-15716, appeal from Case No. 14-cv-00589-
4 LJO-GSA (PC). Shehee's appeal was declared frivolous, and his in forma pauperis status was
5 revoked. On September 22, 2015, the appeal was dismissed by the Ninth Circuit for failure to pay.
6 (RJN Ex. F.)

7 7. Shehee v. Hill, Case No. 14-cv-00591-LJO-BAM (PC) (E.D. Cal.), dismissed on May 1,
8 2014, as duplicative of another action in same court. (RJN Ex. G.)

9 8. Shehee v. Hill, Case No. 1:13-cv-01936-AWI-DLB (PC) (E.D. Cal.), dismissed on
10 February 19, 2015, for failure to state a cognizable claim for relief.² (RJN Ex. H.)

11 9. Shehee v. King, Case No. 1:14-cv-00590-AWI-GSA (PC) (E.D. Cal.), dismissed on April
12 3, 2015, for failure to state a cognizable claim for relief. (RJN Ex. I.)

13 10. Shehee v. King, Case No. 1:14-cv-01412-LJO-BAM (PC), (E.D. Cal.), dismissed on
14 March 20, 2015, for failure to state a cognizable claim for relief. (RJN Ex. J.)

15 11. Shehee v. King, Ninth Circuit Case No. 15-15843, appeal of Case No. 1:14-cv-01412-
16 LJO-BAM (PC). The district court certified that the appeal was not taken in good faith and revoked
17 Shehee's in forma pauperis status. The Ninth Circuit found the appeal frivolous and confirmed that
18 Shehee was not entitled to in forma pauperis status. The appeal was dismissed after Shehee failed to
19 pay the filing fee. (RJN Ex. K.)

20 12. Shehee v. Mims, Case No. 1:15-cv-00428-AWI-DLB (PC) (E.D. Cal.), dismissed, without
21 prejudice, on April 1, 2015 for failure to pay the filing fee because Shehee had at least three prior
22 dismissals that qualified as strikes under 28 U.S.C. § 1915(g), and his complaint did not satisfy the
23 imminent danger exception. (RJN Ex. L.)

24 13. Shehee v. Mims, Ninth Circuit Case No. 15-15713, appeal of Case No. 1:15-cv-
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27 ² Defendants mistakenly reference this case as Case No. 2:13-cv-02424-CKD. However, the case was subsequently
28 transferred to the Fresno Division of the Eastern District of California and assigned Case No. 1:13-cv-01936-AWI-DLB
(PC), as reflected in the documents submitted by Defendants. (RJN Ex. H.)

1 00428-AWI-DLB (PC). The Ninth Circuit denied Shehee in forma pauperis status under 28 U.S.C. §
2 1915(g), and the appeal was dismissed for failure to pay the filing fee on September 21, 2015. (RJN
3 Ex. M.)

4 14. Shehee v. Ortega, Case No. 1:14-cv-00623-AWI-MJS (PC) (E.D. Cal.), dismissed, without
5 prejudice on November 26, 2014, as barred by Heck v. Humphrey, 512 U.S. 477 (1994). (RJN Ex. N.)

6 15. Shehee v. Peugh, Case No. 14-cv-00612-LJO-SKO (PC) (E.D. Cal.), dismissed on
7 December 17, 2014, for failure to state a cognizable claim for relief. (RJN Ex. O.)

8 16. Shehee v. State of California, Case No. 2:09-cv-02881-KJN (PC), (E.D. Cal.), dismissed on
9 April 18, 2011, for failure to comply with Rule 8 of the Federal Rules of Civil Procedure. (RJN Ex.
10 P.)

11 17. Shehee v. Villalobos, Case No. 1:14-cv-00622-LJO-DLB (PC) (E.D. Cal.), dismissed on
12 April 13, 2015, for failure to state a cognizable claim for relief. (RJN Ex. Q.)

13 18. Shehee v. Villalobos, Ninth Circuit Case No. 15-15844, appeal of Case No. 1:14-cv-
14 00622-LJO-DLB (PC). The district court certified the appeal was frivolous and revoked Shehee's in
15 forma pauperis status. The Ninth Circuit confirmed that Shehee was not entitled to in forma pauperis
16 status because the appeal was frivolous, and the appeal was dismissed for failure to pay the filing fee.
17 (RJN Ex. R.)

18 In sum, of the eighteen cases: seven were dismissed for failure to state a cognizable claim for
19 relief; one was dismissed for failure to comply with Federal Rule of Civil Procedure 8; four appeals
20 were dismissed as frivolous; one case was dismissed for failure to amend the complaint; one case was
21 dismissed as barred by the statute of limitations; one was dismissed as duplicative; two were dismissed
22 for failure to pay the filing fee; and one was dismissed, without prejudice, as barred by Heck v.
23 Humphrey, 512 U.S. 477 (1994).

24 Defendants contend that Plaintiff is a vexatious litigant as defined by California law, and
25 therefore this Court should require him to post security. Defendants, however, rely almost exclusively
26 on California law and do not address the federal substantive law requirements to show bad faith or
27 willful disobedience of a court's order by Plaintiff. Defendants merely cite the eighteen cases listed
28 above and argue that these cases were decided adversely against him in the past seven years, which is

1 the vexatious standard under California law. See Cal. Civ. Proc. Code § 391(b)(1) (A person who, “in
2 the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria
3 persona at least five litigations other than in small claims court that have been ... finally determined
4 adversely to the person ...” is a vexatious litigant.).

5 As previously stated, to sanction a litigant under the court’s inherent powers, the Court must
6 make a specific finding of “bad faith or conduct tantamount to bad faith.” Fink, 239 F.3d at 994.
7 Although Defendants set forth the numerous cases filed by Plaintiff, they have not applied and argued
8 the applicable federal law to determine that Plaintiff is a bad faith litigant under federal law, the Court
9 will not analyze the issue sua sponte. Accordingly, Defendants’ motion to declare Plaintiff a
10 vexatious litigant should be denied, without prejudice.

11 **III.**
12 **RECOMMENDATION**

13 Based on the foregoing, it is HEREBY RECOMMENDED that Defendants’ motion to declare
14 Plaintiff a vexatious litigant be denied, without prejudice.

15 This Findings and Recommendation will be submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-one (21)**
17 **days** after being served with this Findings and Recommendation, the parties may file written
18 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
19 Findings and Recommendation.” The parties are advised that failure to file objections within the
20 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-
21 39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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23 IT IS SO ORDERED.

24 Dated: **March 15, 2019**

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27 UNITED STATES MAGISTRATE JUDGE
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