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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LAMONT SHEPARD,

Plaintiff,

v.

M. FORUM, et al.,

Defendants.

Case No. 1:18-cv-00277-MJS (PC)

**FINDINGS AND RECOMMENDATIONS
TO DENY MOTION TO PROCEED IN
FORMA PAUPERIS**

(ECF No. 7)

**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE**

**FOURTEEN-DAY OBJECTIONS
DEADLINE**

Plaintiff is a state prisoner proceeding pro se in this civil rights action filed on February 26, 2018. (ECF No. 1.) Plaintiff has not prepaid the filing fee as required by Local Rule 121(c). He did however file a request for the Clerk of Court to tell him how to submit funds to the Court. (Id.) In response, on March 2, 2018, the Court directed Plaintiff to consult the Local Rules as to how to pay the filing fee. (ECF No. 5.) Plaintiff was, nonetheless, directed to, within thirty days, pay the appropriate filing fee or file a motion to proceed in forma pauperis. (Id.)

On March 14, 2018, Plaintiff filed a motion to proceed in forma pauperis. (ECF No. 7.) For the reasons set forth below, the motion should be denied.

1 **I. Motion to Proceed In Forma Pauperis**

2 Plaintiff is subject to 28 U.S.C. 1915(g), which provides that “[i]n no event shall a
3 prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior
4 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
5 court of the United States that was dismissed on the grounds that it is frivolous,
6 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner
7 is under imminent danger of serious physical injury.”

8 **A. Three Actions Dismissed for Failure to State Claim**

9 Plaintiff has brought three actions that were dismissed for failing to state a claim.
10 See Shepard v. Cannolly, No. 2:11-cv-0126-UA-MAN (C.D. Cal. Feb. 17, 2011);
11 Shepard v. Johnson, et al., No. 1:11-cv-01726-SKO PC (E.D. Cal. Aug. 7, 2012);
12 Shepard v. Munoz, et al., No. 1:12-cv-01470-GSA-PC (E.D. Cal. Oct. 8, 2013).

13 Two of these actions were dismissed by a Magistrate Judge based upon
14 Plaintiff’s consent under 28 U.S.C. §636(c)(1).. See Shepard v. Johnson, et al., No.
15 1:11-cv-01726-SKO PC (E.D. Cal. Aug. 7, 2012); Shepard v. Munoz, et al., No. 1:12-cv-
16 01470-GSA-PC (E.D. Cal. Oct. 8, 2013).

17 The Ninth Circuit recently held that Magistrate Judges do not have jurisdiction
18 over a case until all parties (both served and unserved) have consented to Magistrate
19 Judge jurisdiction. Williams v. King, 875 F.3d. 501 (9th Cir. 2017). “An error in
20 interpreting a statutory grant of jurisdiction is not, however, equivalent to acting with
21 total want of jurisdiction and does not render the judgment a complete nullity.” Jones v.
22 Giles, 741 F.2d 245, 248 (9th Cir. 1984) (citing Chicot County Drainage Dist. v. Baxter
23 State Bank, 308 U.S. 371, 376-77 (1940)). The dismissal of Plaintiff’s prior cases by a
24 Magistrate Judge may still be properly counted as a strike for purposes of the PLRA
25 since those decisions have become final. See Chicot, at 375 (holding parties who had
26 the opportunity to raise the question of invalidity of jurisdiction are bound by rulings
27 thereunder because they failed to raise it), 376-77 (holding that decision errantly
28 entertained under jurisdiction conferred by statute that was subsequently declared

1 invalid could “not be assailed collaterally”) (citing Cromwell v. County of Sac, 94 U.S.
2 351, 352 (1876); Case v. Beaugard, 101 U.S. 688, 692 (1879); Baltimore Steamship
3 Co. v. Phillips, 274 U.S. 316, 319, 325 (1927); Grubb v. Public Utilities Commission, 281
4 U.S. 470, 479 (1930))).

5 All of Plaintiff’s actions noted above were dismissed before Plaintiff filed the
6 present action on February 26, 2018. Thus, Plaintiff is subject to 28 U.S.C. § 1915(g)
7 and is precluded from proceeding in forma pauperis in this action unless at the time the
8 complaint was filed, he was under imminent danger of serious physical injury.

9 **B. Imminent Danger Exception**

10 The imminent danger exception applies if “the complaint makes a plausible
11 allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the time
12 of filing.” Andrews v. Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007). The Ninth Circuit
13 interprets “imminent danger” to mean “ongoing danger,” meaning the prisoner must
14 allege that prison officials have continued with a practice that has injured him or others
15 similarly situated in the past. Id. at 1056-57.

16 A prisoner seeking to invoke the imminent danger exception in § 1915(g) must
17 make specific, credible allegations of imminent danger of serious physical harm. McNeil
18 v. U.S., 2006 WL 581081 (W.D. Wash. Mar. 8, 2006) (citing Kinnell v. Graves, 265 F.3d
19 1125, 1127-28 (10th Cir. 2001), and White v. Colorado, 157 F.3d 1226, 1232 (10th Cir.
20 1998)). Vague, speculative, and non-specific allegations are insufficient. See Pauline v.
21 Mishner, 2009 WL 1505672 (D. Haw. May 28, 2009) (plaintiff's vague and conclusory
22 allegations of possible future harm to himself or others are insufficient to trigger the
23 “imminent danger of serious physical injury” exception to dismissal under § 1915(g));
24 Cooper v. Bush, 2006 WL 2054090 (M.D. Fla. July 21, 2006) (plaintiff’s allegations that
25 he will commit suicide, or that he has already attempted suicide and will do so again,
26 are insufficient to show imminent danger); Luedtke v. Bertrand, 32 F.Supp.2d 1074,
27 1077 (E.D. Wis. 1999) (“[p]laintiff's vague allegation of a conspiracy among the
28 defendants to beat, assault, injure, harass and retaliate against him are not enough.

1 These allegations are insufficient and lack the specificity necessary to show an
2 imminent threat of serious physical injury.”).

3 Here, the Court has reviewed Plaintiff’s complaint, and finds that Plaintiff is not at
4 imminent risk of suffering “serious physical injury.” He alleges that Defendants
5 conspired to restrict his ability to file administrative grievances in retaliation for filing past
6 complaints. (ECF No. 1.) The complained of action does not expose him to risk of
7 physical injury.

8 **II. Conclusion**

9 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court assign a District
10 Judge to this action to address the below recommendations.

11 Furthermore, IT IS HEREBY RECOMMENED that Plaintiff’s motion to proceed in
12 forma pauperis (ECF No. 7) be denied and that Plaintiff be required to submit the filing
13 fee within 14 days of the Order adopting these recommendations.

14 These Findings and Recommendations will be submitted to the United States
15 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
16 636(b)(1). Within **fourteen (14) days** after being served with these Findings and
17 Recommendations, the parties may file written objections with the Court. The document
18 should be captioned “Objections to Magistrate Judge’s Findings and
19 Recommendations.” 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
21 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
22 1991)).

23
24 IT IS SO ORDERED.

25 Dated: March 20, 2018

26 /s/ Michael J. Seng
27 UNITED STATES MAGISTRATE JUDGE
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