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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSE TIMOTEO GUEVARA,

Plaintiff,

v.

SUPERIOR COURT COUNTY OF SAN
MATEO, et al.,

Defendants.

Case No. 1:18-cv-00871-DAD-BAM (PC)

ORDER VACATING FINDINGS AND
RECOMMENDATIONS
(ECF No. 12)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING PLAINTIFF’S MOTION
FOR LEAVE TO PROCEED *IN FORMA*
PAUPERIS BE DENIED

(ECF No. 13)

FOURTEEN (14) DAY DEADLINE

Plaintiff Jose Timoteo Guevara (“Plaintiff”) is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action on June 11, 2018, in the United States District Court for the Northern District of California. (ECF No. 1.) That same date, the Northern District issued an order directing Plaintiff to submit an application to proceed in forma pauperis or pay the filing fee within twenty-eight days. (ECF No. 3.) On June 21, 2018, the case was transferred to the Eastern District. (ECF No. 6.)

On July 19, 2018, the Court ordered Plaintiff, within twenty-one (21) days, to submit a completed application to proceed *in forma pauperis*, pay the \$400.00 filing fee, or show cause in writing why this action should not be dismissed for failure to prosecute and failure to obey a court order. (ECF No. 10.) On August 20, 2018, after Plaintiff failed to comply with the Court’s orders, the Court issued findings and recommendations recommending that this action be dismissed, without prejudice, for Plaintiff’s failure to pay the filing fee or file an application to

1 proceed *in forma pauperis*, failure to obey Court orders, and failure to prosecute. (ECF No. 12.)

2 On August 29, 2018, Plaintiff filed a motion to proceed *in forma pauperis*. (ECF No. 13.)

3 Although Plaintiff did not characterize the filing as an objection to the Court's findings and
4 recommendations, nor did he explain his failure to submit his application prior to this date, the
5 Court finds it appropriate to vacate the August 20, 2018 findings and recommendations.

6 However, examination of Plaintiff's application and the included certified trust account
7 statement reveals that Plaintiff is able to afford the costs of this action. Specifically, during the
8 prior six months, Plaintiff has held an average monthly balance of \$1,400.65 in his account and
9 received average monthly deposits of \$171.12. Plaintiff's current balance is \$978.27. (ECF No.
10 13.)

11 Accordingly, the Court HEREBY ORDERS that the findings and recommendations issued
12 on August 20, 2018, (ECF No. 12), are VACATED.

13 Further, for the reasons stated, the Court HEREBY RECOMMENDS that the motion to
14 proceed *in forma pauperis* (ECF No. 13) be DENIED, pursuant to 28 U.S.C. § 1915; and Plaintiff
15 be ORDERED to pay the \$400.00 initial filing fee for this action.

16 These Findings and Recommendation will be submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
18 **(14) days** after being served with these Findings and Recommendation, the parties may file
19 written objections with the court. The document should be captioned "Objections to Magistrate
20 Judge's Findings and Recommendation." Plaintiff is advised that failure to file objections within
21 the specified time may result in the waiver of the "right to challenge the magistrate's factual
22 findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
23 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

24
25 IT IS SO ORDERED.

26 Dated: August 30, 2018

27 /s/ Barbara A. McAuliffe
28 UNITED STATES MAGISTRATE JUDGE