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

10 MARVIN GLENN HOLLIS,

11 Plaintiff,

No. 2:08-cv-2810 KJN P

12 vs.

13 ROBIN DEZEMBER, et al.,

ORDER

14 Defendants.
15 _____/

16 Plaintiff is a state prisoner proceeding without counsel with a civil rights action
17 pursuant to 42 U.S.C. § 1983. Defendants have filed a motion to declare plaintiff a vexatious
18 litigant and require plaintiff to post security before this action may proceed. Plaintiff has filed an
19 opposition.

20 Pursuant to federal statute, a federal court may authorize a plaintiff to proceed
21 without prepayment of costs and fees where he provides an affidavit demonstrating he is unable
22 to afford the costs of suit. 28 U.S.C. § 1915. Any action brought under this statute may be
23 dismissed by the court if the action is frivolous or malicious. 28 U.S.C. § 1915(d); see also
24 Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984). The in forma pauperis (“IFP”) statute is
25 widely employed by state prison inmates who challenge the conditions of their confinement
26 under the Civil Rights Act, 42 U.S.C. § 1983. See Procup v. Strickland, 792 F.2d 1069 (11th

1 Cir. 1986). However,

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

10 28 U.S.C. § 1915(g). Moreover, plaintiff is cautioned that a litigant proceeding in forma
11 pauperis may suffer restricted access to the court where it is determined that he has filed an
12 excessive number of cases. See DeLong v. Hennessey, 912 F.2d 1144, 1149 (9th Cir. 1990); see
13 also Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir. 1989).

14 As a result of the number of civil rights cases brought by prisoners under the IFP
15 statute, federal courts have devised administrative and procedural methods for handling the
16 volume of cases brought by incarcerated pro se litigants. Procup, 792 F.2d at 1071. Prior to the
17 enactment of the Prison Litigation Reform Act of 1996, the lack of any financial disincentive for
18 filing lawsuits resulted in an increase in the number of prisoner litigants who individually filed
19 several or even dozens of lawsuits. Courts that spent excessive time and efforts on such suits
20 fashioned remedies to conserve their resources while maintaining the litigant's right of access to
21 the court. See Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984); West v. Proconier, 452 F.2d
22 645 (9th Cir. 1971).

23 In DeLong, the Ninth Circuit addressed the problem of maintaining the balance
24 between providing appropriate and sufficient access to the court, on the one hand, while at the
25 same time preventing court abuse by in forma pauperis litigants filing multiple actions. The
26 court held that "orders restricting a person's access to the courts must be based on adequate
justification supported in the record and narrowly tailored to address the abuse perceived."
DeLong, 912 F.2d at 1149.

As noted by defendants, the Eastern District has adopted California law relating to

1 vexatious litigants and the posting of security for costs:

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

10 Local Rule 151(b). “Vexatious litigant” is defined as:

11 (b) “Vexatious litigant” means a person who does any of the
12 following:

13 (1) In the immediately preceding seven-year period has
14 commenced, prosecuted, or maintained in propria persona at least
15 five litigations other than in a small claims court that have been (i)
16 finally determined adversely to the person or (ii) unjustifiably
17 permitted to remain pending at least two years without having been
18 brought to trial or hearing.

19 (2) After a litigation has been finally determined against the
20 person, repeatedly relitigates or attempts to relitigate, in propria
21 persona, either (i) the validity of the determination against the same
22 defendant or defendants as to whom the litigation was finally
23 determined or (ii) the cause of action, claim, controversy, or any of
24 the issues of fact or law, determined or concluded by the final
25 determination against the same defendant or defendants as to
26 whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files
unmeritorious motions, pleadings, or other papers, conducts
unnecessary discovery, or engages in other tactics that are frivolous
or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any
state or federal court of record in any action or proceeding based
upon the same or substantially similar facts, transaction, or
occurrence.

23 California Code of Civil Procedure § 391(b). Section 391.1 governs a motion for order requiring
24 security and sets forth the grounds required to obtain such an order:

25 In any litigation pending in any court of this state, at any time until
26 final judgment is entered, a defendant may move the court, upon
notice and hearing, for an order requiring the plaintiff to furnish

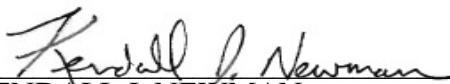
1 security. The motion must be based upon the ground, and
2 supported by a showing, that the plaintiff is a vexatious litigant and
3 that there is not a reasonable probability that he will prevail in the
4 litigation against the moving defendant.

5 California Code of Civil Procedure § 391.1.

6 By separate findings and recommendations, the court has recommended that
7 defendants' motion to dismiss plaintiff's claims as unexhausted be granted in part and denied in
8 part. At this juncture, the court cannot determine that there is no reasonable probability that
9 plaintiff will prevail in this action against any defendant. Accordingly, defendants' motion to
10 declare plaintiff a vexatious litigant will be denied without prejudice.

11 In accordance with the above, IT IS HEREBY ORDERED that defendants'
12 September 22, 2010 motion to declare plaintiff a vexatious litigant (dkt. no. 85) is denied without
13 prejudice.

14 DATED: October 19, 2010

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16 
17 KENDALL J. NEWMAN
18 UNITED STATES MAGISTRATE JUDGE

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