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

GUY T. STRINGHAM,

Plaintiff,

No. CIV S-09-0286 MCE DAD P

vs.

J. BICK, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with a civil rights action seeking relief under 42 U.S.C. § 1983. Plaintiff has paid the filing fee in full. This matter is before the court on a motion to declare plaintiff a vexatious litigant brought on behalf of defendants Andreason, Bick, Khoury, and Thomas. Plaintiff has filed an opposition to the motion and defendants have filed a reply.

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1 **BACKGROUND**

2 Plaintiff is proceeding on an amended complaint against defendants Bick,  
3 Donahue, Andreason, Khoury, Thomas, and Moreno.<sup>1</sup> Therein, he alleges that the defendants  
4 have violated his rights under the Eighth Amendment and the Americans with Disabilities Act in  
5 connection with his transfer from a cell with tinted windows on the first floor of his institution of  
6 incarceration to a dorm on the third floor of that institution without tinted windows. According  
7 to plaintiff, he is not able to tolerate light for prolonged periods, he suffers from a bowel and  
8 bladder condition requiring immediate access to a toilet at all times, and he is mobility impaired.  
9 In terms of relief, plaintiff requests monetary damages. (Am. Compl. at 1-22.)

10 **DEFENDANTS’ MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT**

11 I. Defendants’ Motion

12 Defense counsel argues that plaintiff is a vexatious litigant and is not likely to  
13 succeed on the merits of this case, so the court should require him to post security before  
14 allowing him to proceed with this action. Specifically, counsel argues that plaintiff has  
15 commenced, prosecuted, or maintained more than five unsuccessful lawsuits in the past seven  
16 years and has wasted the time and resources of the federal courts. Counsel lists seven causes of  
17 action that plaintiff has unsuccessfully pursued.<sup>2</sup> Defense counsel also argues that, based on  
18 plaintiff’s conclusory allegations and the exhibits attached to his amended complaint, he is  
19 unlikely to prevail in this lawsuit because his claims fail on the merits and are likely time-barred.

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21 <sup>1</sup> At screening, the court also found that plaintiff’s amended complaint appeared to state  
22 cognizable claims against defendant Murray. However, defendant Murray is deceased.  
23 Accordingly plaintiff has been attempting to obtain information on the executor of defendant  
Murray’s estate for purposes of service.

24 <sup>2</sup> Defendants request judicial notice be taken of the seven causes of action previously  
25 pursued by plaintiff. Judicial notice of adjudicative facts is appropriate with respect to matters  
26 that are beyond reasonable dispute in that they are either generally known or capable of accurate  
and ready determination by resort to a source whose accuracy cannot reasonably be questioned.  
See Fed. R. Evid. 201 and advisory committee notes. Here, the court will grant defendants’  
request for judicial notice.

1 Finally, defense counsel argues that the court should require plaintiff to post security in an  
2 amount not less than \$2,550.00, and if he fails to do so the court should dismiss this action.  
3 (Defs.' Mot. to Declare Pl. a Vexatious Litigant at 4-11.)

4 II. Plaintiff's Opposition

5 In opposition to defendants' motion, plaintiff argues that his litigation history is  
6 not of a "frivolous or harassing nature." Being a constant litigator without more, plaintiff  
7 contends, is not proof that he has abused the judicial system. Rather, plaintiff argues that such  
8 actions merely proves he is active in seeking redress of his grievances in federal court. In  
9 addition, plaintiff argues that he is likely to prevail on the merits of this action because he did not  
10 diagnose himself but received his diagnoses from his attending physicians. According to  
11 plaintiff, defendants placed themselves between his proper and effective treatment and the  
12 administrative needs of California Medical Facility ("CMF"). Moreover, plaintiff notes that  
13 when he first pursued this claim by filing a civil action, the court dismissed it without prejudice  
14 due to his failure to exhaust administrative remedies. Since that dismissal, plaintiff contends, he  
15 has been exhausting his claims. In this regard, plaintiff contends that he should not be deemed in  
16 violation of the applicable statute of limitations. Finally, plaintiff argues that the court should  
17 not order him to post security because that would effectively result in dismissal of this action  
18 because he cannot afford to pay such an amount at this time. (Pl.'s Opp'n to Defs.' Mot. to  
19 Declare Pl. a Vexatious Litigant at 1-18.)

20 III. Defendants' Reply

21 In reply, defense counsel argues that it is undisputed that plaintiff has maintained  
22 more than five unsuccessful lawsuits within the last seven years. Counsel also reiterates that  
23 plaintiff is not likely to succeed on his claims against any of the defendants, and his claims are  
24 time-barred. Finally, counsel notes that there is precedent in this district for finding that a  
25 prisoner is a vexatious litigant and requiring him to post security or face dismissal of his action.  
26 (Defs.' Reply at 2-8.)

1 ANALYSIS

2 I. Vexatious Litigants & Posting Security

3 Rule 151 of the Local Rules of Court for the Eastern District of California

4 provides:

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

13 In turn, Section 391(b) of the California Code of Civil Procedure provides:

14 (b) "Vexatious litigant" means a person who does any of the  
15 following:

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

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

(3) In any litigation while acting 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.

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1 Finally, Section 391.1 of the California Code of Civil Procedure provides:

2 In any litigation pending in any court of this state, at any time until  
3 final judgment is entered, a defendant may move the court, upon  
4 notice and hearing, for an order requiring the plaintiff to furnish  
5 security. The motion must be based upon the ground, and  
supported by a showing, that the plaintiff is a vexatious litigant and  
that there is not a reasonable probability that he will prevail in the  
litigation against the moving defendant.

6 II. Discussion

7 The Ninth Circuit has counseled caution in declaring plaintiffs vexatious litigants.  
8 That court has explained that “orders restricting a persons’s access to the courts must be based on  
9 adequate justification supported in the record and narrowly tailored to address the abuse  
10 perceived.” DeLong v. Hennessey, 912 F.2d 1144, 1149 (9th Cir. 1990). Strictly speaking,  
11 plaintiff has brought more than five unsuccessful lawsuits in the past seven years. However,  
12 based on defendants’ motion, this court cannot say that plaintiff’s filings have been so “numerous  
13 or abusive” or “inordinate” to warrant a vexatious litigant order. Id. at 1147-48 (examples of  
14 “numerous or abusive” filings include plaintiffs who have filed 35 related complaints, more than  
15 50 frivolous cases, or more than 600 complaints). Nor can this court say that plaintiff’s litigation  
16 activity reflects a “pattern of harassment.” Id. at 1140.<sup>3</sup>

17 Moreover, based on defendants’ motion, it is not at all clear that plaintiff has no  
18 reasonable probability of succeeding on the merits of this case. In fact, in screening plaintiff’s  
19 amended complaint, the court determined that it appeared to state cognizable claims for relief  
20 pursuant to 42 U.S.C. § 1983. In that screening order the court also noted that if plaintiff proved  
21 the allegations in his amended complaint, he had a reasonable opportunity to prevail on the

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22 <sup>3</sup> Because this is a fee paid action, 28 U.S.C. § 1915(g) (barring a prisoner bringing a  
23 civil action to proceed in forma pauperis “if the prisoner has, on 3 or more prior occasions, while  
24 incarcerated or detained in any facility, brought an action or appeal in a court of the United States  
25 that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon  
26 which relief may be granted, unless the prisoner is under imminent danger of serious physical  
injury”) does not apply. It is this rule that was specifically intended to further “the congressional  
goal of reducing frivolous prisoner litigation in federal court.” Tierney v. Kupers, 128 F.3d  
1310, 1312 (9th Cir. 1997).

1 merits of this action. See Screening Order, Apr. 26, 2010 (Doc. No. 11). See also Hollis v.  
2 Dezember, No. CIV S-08-2810 KJN P, 2010 WL 4220535 (E.D. Cal. Oct. 20, 2010) (denying  
3 defendants' motion to declare plaintiff a vexatious litigant because the court could not determine  
4 at that juncture that there was no reasonable probability that plaintiff would not prevail against  
5 any defendant). Accordingly, the court will deny defendants' motion to declare plaintiff a  
6 vexatious litigant.

### 7 **OTHER MATTERS**

8 Also pending before the court are two motions from plaintiff. First, plaintiff has  
9 filed a motion to strike defendants' reply in support of their motion to declare him a vexatious  
10 litigant as untimely. Defendants have filed an opposition to the motion. After reviewing the  
11 docket in this case, the court finds that defendants timely filed their reply within seven days of  
12 receiving electronic notice that plaintiff had filed an opposition to their motion. See Local Rule  
13 230(l). Accordingly, the court will deny plaintiff's motion to strike.

14 Plaintiff has also filed a motion for a court order requiring B.C. Williams, the  
15 Litigation Coordinator at CMF, to supply him with information necessary to serve his amended  
16 complaint on the executor of defendant Murray's estate. According to plaintiff, the Litigation  
17 Coordinator will not provide him with information about defendant Murray's executor or family  
18 without a court order.

19 Plaintiff is advised that this court is unable to issue an order against individuals  
20 who are not parties to a suit pending before it. See Zenith Radio Corp. v. Hazeltine Research,  
21 Inc., 395 U.S. 100, 112 (1969). Moreover, as plaintiff acknowledges, the court previously  
22 informed him that if he wished to proceed with his claims against defendant Murray, he would  
23 have to provide the court with additional information that would enable the United States  
24 Marshal to serve the estate of this deceased defendant. The court instructed plaintiff to promptly  
25 seek such information through any means available to him and cautioned him that if service of  
26 the complaint was not made within 120 days of the filing of his complaint the court may be

1 required to dismiss his claims. Here, plaintiff has not shown good cause for the failure to effect  
2 service on the estate of defendant Murray. Although plaintiff has had more than sufficient time  
3 to provide the court with the additional information necessary to effect service, he has failed to  
4 do so. Accordingly, the court concludes that defendant Murray should be dismissed from this  
5 action. See Fed. R. Civ. P. 4(m).

6 **CONCLUSION**

7 IT IS HEREBY ORDERED that:

- 8 1. Defendants' motion to declare plaintiff a vexatious litigant and require security  
9 (Doc. No. 17) is denied;
- 10 2. Defendants' request for judicial notice (Doc. No. 18) is granted;
- 11 3. Plaintiff's motion to strike (Doc. No. 24) is denied; and
- 12 4. Plaintiff's motion for a court order (Doc. No. 28) is denied.

13 IT IS HEREBY RECOMMENDED that defendant Murray be dismissed from this  
14 action without prejudice. See Fed. R. Civ. P. 4(m) and 41(b).

15 These findings and recommendations are submitted to the United States District  
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
17 days after being served with these findings and recommendations, plaintiff may file written  
18 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
19 Findings and Recommendations." Plaintiff is advised that failure to file objections within the  
20 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
21 F.2d 1153 (9th Cir. 1991).

22 DATED: February 25, 2011.

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26 DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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