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

JIMMIE STEPHEN,

Plaintiff,

No. 2:10-cv-01678 KJM KJN P

vs.

FEDERAL RECEIVER J.C. KELSO,  
et al.,

Defendants.

ORDER and  
FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis,<sup>1</sup> in this action alleging deliberate indifference to plaintiff’s serious medical needs by defendants Hseith and Traquina. Plaintiff now moves for a preliminary injunction (Dkt. No. 25), wherein he seeks the following immediate relief: (1) that this court issue an order to show cause to the U.S. Marshal requiring an explanation why defendants Hseith and Traquina have not been served process; and (2) that this court issue a preliminary injunction “against defendants Hseith and

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<sup>1</sup> Plaintiff, a “three-strikes” litigant, proceeds in this action in forma pauperis, based on the court’s finding that plaintiff made a sufficient showing that he “under imminent danger of serious physical injury,” pursuant to the exception of 28 U.S.C. § 1915(g). (Dkt. No. 21.) The court based this finding on “plaintiff’s allegations that he was denied physician-recommended colon surgery premised on the confirmed finding of a polyp.” (Id. at 2).

1 Traquina . . . [precluding them] from regular duties or decisions as to regular care [with the  
2 exception of] emergency situations . . . until after this lawsuit is [adjudicated].” Dkt. No. 25 at 2  
3 (internal quotation marks omitted).

#### 4 Legal Standards

5 A preliminary injunction should not issue unless necessary to prevent threatened  
6 injury that would impair the court ’s ability to grant effective relief in a pending action. Fed. R.  
7 Civ. P. 65; Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984);  
8 Gon v. First State Ins. Co., 871 F.2d 863 (9th Cir. 1989). A preliminary injunction represents the  
9 exercise of a far-reaching power not to be indulged except in a case clearly warranting it. Dymo  
10 Indus. v. Tapeprinter, Inc., 326 F.2d 141, 143 (9th Cir. 1964). “The proper legal standard for  
11 preliminary injunctive relief requires a party to demonstrate ‘that he is likely to succeed on the  
12 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the  
13 balance of equities tips in his favor, and that an injunction is in the public interest.’” Stormans,  
14 Inc. v. Selecky , 586 F.3d 1109, 1127 (9th Cir. 2009), quoting Winter v. Natural Res. Def.  
15 Council, Inc., 555 U.S. 7, 129 S. Ct. 365, 375 (2008). A Ninth Circuit panel has found,  
16 post-Winter, that this circuit’s sliding scale approach, or “serious questions” test, survives “when  
17 applied as part of the four-element Winter test.” Alliance for Wild Rockies v. Cottrell, 632 F.3d  
18 1127, 1131-32 (9th Cir. 2011). “That is, ‘serious questions going to the merits’ and a balance of  
19 hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction,  
20 so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the  
21 injunction is in the public interest.” Id. In cases brought by prisoners involving conditions of  
22 confinement, any preliminary injunction “must be narrowly drawn, extend no further than  
23 necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive  
24 means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

25 The principal purpose of preliminary injunctive relief is to preserve the court’s  
26 power to render a meaningful decision pursuant to a trial on the merits. See 11A Charles Alan

1 Wright & Arthur R. Miller, Federal Practice and Procedure, § 2947 (2d ed. 2010). Implicit in  
2 this required showing is that the relief awarded is only temporary and there will be a full hearing  
3 on the merits of the claims raised in the injunction when the action is brought to trial. In  
4 addition, as a general rule, this court is unable to issue an order against individuals who are not  
5 parties to the suit pending before it. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S.  
6 100, 111-12 (1969).

7 Discussion

8           On April 22, 2011, the court found that service of process was appropriate for  
9 defendants Hsieh and Traquina, and directed plaintiff to submit, within thirty days, the  
10 information necessary for the United States Marshal to serve process. (Dkt. No. 23.) The court  
11 has not yet received the required information.<sup>2</sup> Therefore, the court will again send plaintiff the  
12 pertinent forms required by the United States Marshal and, upon the court's receipt of the  
13 completed forms, will direct the Marshal to serve process on defendants Hsieh and Traquina.  
14 Plaintiff's request for a preliminary injunction (or order to show cause) directed to the United  
15 States Marshal is without merit.

16           Plaintiff's further request that this court issue a preliminary injunction against  
17 defendants Hseith and Traquina to limit the scope of their professional duties is also without  
18 merit. Plaintiff contends that he was seen by Dr. Hsieh on June 7, 2011, who improperly denied  
19 plaintiff prescription medications and a bottom-bunk "chrono," and, acting in retaliation,  
20 summoned a guard to reinforce Dr. Hsieh's assessment that plaintiff had "just walked out" of his  
21 appointment. Plaintiff indicates that he has another colonoscopy scheduled for July 25, 2011.  
22 (Dkt. No. 25 at 2.)

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24           <sup>2</sup> Although plaintiff states, both in his motion (Dkt. No. 25 at 1), and in a separate  
25 document filed June 7, 2011 (Dkt. No. 24), that he submitted the required information to prison  
26 authorities on April 27 or 28, 2011, for the purpose of mailing, the court has not received this  
information. The court notes, however, that defendants have nonetheless "appeared" in this  
action, by filing their denial of consent to the jurisdiction of the magistrate judge for all purposes.  
(Dkt. No. 27.)

1 Plaintiff does not identify the matters requiring the court's immediate attention.  
2 Plaintiff does not articulate why he believes a preliminary injunction is required at this time in  
3 order to prevent an event or circumstance that would impair the court's ability to grant effective  
4 relief in this action. Fed. R. Civ. P. 65. In the absence of a specific allegation of irreparable  
5 harm, preliminary injunctive relief is unwarranted. Cottrell, 632 F.3d at 1131-32. Moreover,  
6 because defendants have not yet been served process in this action (but see n.2, supra), the court  
7 is technically without jurisdiction to render an injunctive order against them. Zenith Radio  
8 Corp., 395 U.S. at 111-12 .

9 Conclusion

10 For the foregoing reasons, IT IS HEREBY ORDERED that:

11 1. The Clerk of Court shall send plaintiff two USM-285 forms, one summons, an  
12 instruction sheet and a copy of the Second Amended Complaint filed December 6, 2010 (Dkt.  
13 No. 22).

14 2. Within fourteen days from the date of this order, plaintiff shall complete the  
15 attached Notice of Submission of Documents, and submit the following documents to the court:

- 16 a. The completed Notice of Submission of Documents;
- 17 b. One completed summons;
- 18 c. One completed USM-285 form for each of the two defendants (Hsieh and  
19 Traquina); and
- 20 d. Three copies of the endorsed Second Amended Complaint filed December 6,  
21 2010 (Dkt. No. 22).

22 3. Upon receipt of the above-described documents, the court will direct the United  
23 States Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure  
24 4, without payment of costs.

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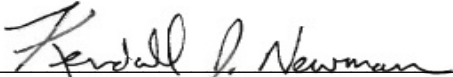
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1 In addition, IT IS HEREBY RECOMMENDED that:

2 1. Plaintiff’s motion for a preliminary injunction (Dkt. No. 25) be denied.

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

10 DATED: June 28, 2011

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14 KENDALL J. NEWMAN  
15 UNITED STATES MAGISTRATE JUDGE

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vs.

FEDERAL RECEIVER J.C. KELSO,  
et al.,

Defendants.

NOTICE OF SUBMISSION  
OF DOCUMENTS

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Plaintiff hereby submits the following documents in compliance with the court's  
order filed \_\_\_\_\_:

- \_\_\_\_\_ completed summons form
- \_\_\_\_\_ completed USM-285 forms
- \_\_\_\_\_ copies of the Amended Complaint

\_\_\_\_\_ Date

\_\_\_\_\_ Plaintiff