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

RICHARD JOSE DUPREE, JR.,

Plaintiff,

No. 2:12-cv-1295 KJM GGH P

vs.

EARVIN (MAGIC) JOHNSON et al.,

Defendants.

ORDER

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Plaintiff, a state prisoner proceeding pro se, has filed an undated civil rights action pursuant to 42 U.S.C. § 1983, alleging violation of his First, Fifth and Fourteenth Amendment rights by plaintiff's wife and Earvin Johnson, the defendants.

Plaintiff has not, however, paid the required filing fee. See 28 U.S.C. §§ 1914(a). Plaintiff will be provided the opportunity to submit the appropriate filing fee.

The court notes that plaintiff has not filed an application to proceed in forma pauperis. It appears that plaintiff may not be eligible to proceed under 28 U.S.C. § 1915 in any event, since court records, of which this court takes judicial notice,<sup>1</sup> indicate that plaintiff has

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<sup>1</sup> Judicial notice may be taken of court records. Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir.), cert. denied, 454 U.S. 1126 (1981).

1 three strikes, as that phrase is defined in 28 U.S.C. § 1915(g), and has not alleged that he is  
2 eligible for any statutory exceptions. See Dupree v. United States Copyright Office, 2:11-cv-  
3 1700 WBS KJN P, Doc. No. 11, Order filed July 28, 2011 (designating action as plaintiff’s “third  
4 strike” under 28 U.S.C. § 1915(g)). See also Rodriguez v. Cook, 169 F.3d 1176, 1178 (9th  
5 Cir.1999) (plain language of § 1915(g) makes clear that a prisoner is precluded from bringing a  
6 civil action or an appeal in forma pauperis if the prisoner has brought three frivolous actions  
7 and/or appeals (or any combination thereof totaling three)).

8           Moreover, the current action is frivolous and fails to state a claim upon which  
9 relief can be granted, because neither defendant is alleged to be acting under color of state law.  
10 See, e.g., Simmons v. Sacramento County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003);  
11 Price v. State of Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991) (private parties are generally not  
12 acting under state color of state law). Specifically, plaintiff alleges that his wife had an extra-  
13 marital affair with defendant Johnson, that the two are members of a satellite organization and  
14 have constantly monitored plaintiff in his cell, and that they have stolen plaintiff’s credit card  
15 protection trade secret. As damages, plaintiff seeks to be released from prison, and ten million  
16 dollars. Because plaintiff has not alleged that his wife or Johnson subjected plaintiff to a  
17 deprivation of his rights while acting “under color of any statute, ordinance, regulation, custom  
18 or usage, of any State of Territory....,” relief under 42 U.S.C. § 1983 is not available to plaintiff  
19 against these defendants.

20           In accordance with the above, IT IS HEREBY ORDERED that:

21           1. Plaintiff shall submit, within thirty days from the date of this order, the  
22 appropriate filing fee; or an affidavit in support of his request to proceed in forma pauperis on the  
23 form provided by the Clerk of Court, or the appropriate filing fee; plaintiff’s failure to comply  
24 with this order will result in the dismissal of this action; and

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2. The Clerk of the Court is directed to send plaintiff an Application to Proceed

In Forma Pauperis By a Prisoner.

DATED: July 9, 2012

/s/ Gregory G. Hollows  
UNITED STATES MAGISTRATE JUDGE

ggh:rb  
dupr1295.3a