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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALLEN HAMMLER,

Plaintiff,

v.

HUDSON, et al.,

Defendants.

No. 2:16-cv-1153-JAM-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. On February 7, 2017, the court determined that plaintiff’s complaint was sufficient, for screening purposes, to state viable Fourteenth Amendment due process claims against defendants Hudson and Serna and a First Amendment retaliation claim against defendants Hudson, Serna, and Romero. ECF No. 14 at 9. Defendants, rather than filing a responsive pleading or a motion pursuant to Rule 12 of the Federal Rules of Civil Procedure, have filed a request for judicial notice/motion to require plaintiff to post security. ECF No. 25. Therein, they argue that plaintiff should be deemed a vexatious litigant and he lacks a probability of success in this action. *Id.* at 1. Defendants request that plaintiff be required to post security in the amount of \$8,590 in order to proceed with this action. *Id.* Plaintiff has filed an opposition to this motion (ECF No. 29), defendants have filed a reply (ECF No. 30), and plaintiff has sought leave to file a

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1 surreply (ECF Nos. 31 & 32). Plaintiff’s motion to file a surreply will be denied¹ and, for the
2 reasons stated hereafter, the court recommends that defendants’ motion be denied without
3 prejudice.

4 **I. Legal Standards**

5 Local Rule 151(b) adopts the provisions of the California Code of Civil Procedure relating
6 to vexatious litigants. E.D. Cal. L.R. 151(b). The rule provides:

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

12 *Id.* California Code of Civil Procedure Title 3A, part 2, includes the following relevant provision:

13 In any litigation pending . . . , at any time until final judgment is
14 entered, a defendant may move the court, upon notice and hearing,
15 for an order requiring the plaintiff to furnish security The
16 motion for an order requiring the plaintiff to furnish security shall
17 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 or she will prevail in the litigation against the
moving defendant.

18 Cal. Civ. Proc. Code § 391.1. California law defines a vexatious litigant as a person who, in the
19 seven years immediately preceding the motion, has commenced, prosecuted, or maintained *in*
20 *propria persona* at least five litigations other than in a small claims court that have been finally
21 determined adversely to the person. *Id.* § 391(b)(1). To order the posting of a security under
22 § 391.1, the court must additionally conclude, after hearing evidence, “that there is no reasonable
23 probability that the plaintiff will prevail in the litigation against the moving defendant.” *Id.*

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25 ¹ Plaintiff asserts that his surreply should be considered because, previously, he was under
26 the effect of psychiatric medication which inhibited his ability to respond to defendants’ motion
27 effectively. ECF No. 31 at 2. The local rules do not contemplate a surreply, however. If plaintiff
28 felt that he was unable to respond effectively to defendants’ motion, he could have sought an
extension of time. In any event, for the reasons stated hereafter, the court is recommending denial
defendants’ motion without prejudice. Plaintiff may include any pertinent argument in his
objections to this court’s recommendations, if he chooses to file any.

1 § 391.3(a). Notwithstanding the foregoing, the court notes that Local Rule 151(b) specifies that
2 “the power of the Court shall not be limited [by Title 3A, part 2, of the California Code of Civil
3 Procedure].” E.D. Cal. L.R. 151(b).

4 While the California Code of Civil Procedure provision relied upon by defendants is
5 informative, the court looks to federal law as to whether to grant the relief requested here. In *De*
6 *Long v. Hennessey*, the Ninth Circuit held that four factors must be proven before a plaintiff may
7 be declared a vexatious litigant. 912 F.2d 1144, 1147-49. These are: (1) plaintiff must be given
8 adequate notice and an opportunity to oppose a restrictive pre-filing order before it is entered; (2)
9 the court must present an adequate record for review by listing the case filings that support its
10 order; (3) the court must make substantive findings as to the frivolous or harassing nature of the
11 plaintiff’s actions; and (4) the order must be narrowly tailored to fit the specifics of the plaintiff’s
12 abuses. *Id.*

13 II. Analysis

14 The court, after review of the plaintiff’s litigative history, finds that he does not meet the
15 standards to be declared a vexatious litigant. Defendants contend that, in the past seven years,
16 plaintiff has brought numerous² unsuccessful pro se civil actions:

17 1. *Hammler v. Pita*, No. 2:16-cv-1684 (C.D. Cal.) – voluntarily dismissed on July 21,
18 2016;

19 2. *Hammler v. Montanez*, 1:14-cv-00383 (E.D. Cal.) – voluntarily dismissed on June 24,
20 2014;

21 3. *Hammler v. Macomber*, 2:15-cv1913 (E.D. Cal.) – voluntarily dismissed on December
22 16, 2015 prior to service of defendant;

23 4. *Hammler v. State of California LASD*, 2:10-cv-5229 (C.D. Cal.) – denial of application
24 to proceed *in forma pauperis*;

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27 ² Defendants request that the court take notice of the court records attached to their
28 motion. The court elects to do so. See *MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 505 (9th Cir.
1986); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 5. *Hammler v. Superior Court of Lassen County*, No. C082122 (California Court of
2 Appeals, Third Dist.) – denial of petition for writ of mandate;

3 6. *Hammler v. Superior Court of Kings County*, No. F061197 (California Court of
4 Appeals, Fifth Dist.) – denial of petition for writ of mandate;

5 7. *Hammler v. The Alternate Public Defenders*, No. BS 129159 (Los Angeles County
6 Superior Court) – dismissed after plaintiff failed to appear at a trial setting conference and a status
7 conference; and

8 8. *Hammler v. California*, No. 10A353 (United States Supreme Court) – plaintiff failed to
9 file a Writ of Certiorari within allotted time and the appeal remains open.

10 Defendants provide docket entries of fourteen state cases, all of which relate to
11 unsuccessful petitions for writ of habeas corpus. *See* ECF No. 25 at 14-56; ECF No. 25-2 at 4.

12 The state dockets attached to defendants’ motion demonstrate an obvious lack of success,
13 but they do not permit review of the specific content of plaintiff’s state habeas claims. As such,
14 this court cannot determine whether those filings were frivolous or harassing as required by *De*
15 *Long*. 912 F.2d at 1148 (“To make [a finding that a plaintiff has engaged in frivolous or
16 harassing litigation], the district court needs to look at both the number and *content of the filings*
17 as indicia of the frivolousness of the litigant’s claims.”) (emphasis added); *Moy v. United States*,
18 906 F.2d 467, 4709 (9th Cir. 1990) (“An injunction cannot issue merely upon a showing of
19 litigiousness. The plaintiff’s claims must not only be numerous, but also be patently without
20 merit.”); *see also Hardaway v. Franco*, No. C 12-5885 RMW (PR), 2014 U.S. Dist. LEXIS
21 117452, *3-4 (N.D. Cal. Aug. 20, 2014) (denying defendants’ motion to declare plaintiff a
22 vexatious litigant based, in part, on their failure to provide anything more than a docket sheet for
23 eleven of the relevant cases).

24 Additionally, defendants have not shown that plaintiff has filed other frivolous or
25 harassing claims based on the same operative facts as the instant case. Nor is there any indication
26 that plaintiff has a pattern of harassing litigation against any of the parties to this case. Instead, as
27 noted above, the bulk of his unsuccessful filings have been state habeas petitions. This counsels
28 against requiring plaintiff to post a substantial security which, for all practical purposes, would

1 put an immediate end to this unrelated and non-frivolous section 1983 case. *See Delong*, 912
2 F.2d at 1148 (holding that vexatious litigant orders “must be narrowly tailored to closely fit the
3 specific vice encountered.”).

4 **III. Conclusion**

5 Based on the foregoing, it is HEREBY ORDERED that plaintiff’s motion to submit a
6 surreply (ECF No. 31) is DENIED.

7 Further, it is RECOMMENDED that defendants’ motion to require plaintiff to post
8 security (ECF No. 25) be DENIED.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
14 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
15 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

16 DATED: March 13, 2018.

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18 EDMUND F. BRENNAN
19 UNITED STATES MAGISTRATE JUDGE
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