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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

G. DANIEL WALKER,  
  
Plaintiff,  
  
v.  
  
DEPARTMENTAL REVIEW BOARD,  
et al.,  
  
Defendants.

No. 2:17-cv-2191 AC P

ORDER AND FINDINGS &  
RECOMMENDATIONS

By order issued October 24, 2017 (ECF No. 4), plaintiff was directed to submit an amended complaint<sup>1</sup> that complied with specified requirements.<sup>2</sup> He was given thirty days to do so. Id. at 6. At that time, plaintiff was cautioned that failure to comply with the order might result in dismissal of his complaint for failure to prosecute. Id. Over one hundred days have now passed, and plaintiff has not filed an amended complaint or otherwise substantively responded to the court’s order. Instead, plaintiff has filed the following six documents with the court: (1) a motion to vacate the court’s October 2017 order (ECF No. 7); (2) a request for accommodations

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<sup>1</sup> Plaintiff’s complaint is on the record as an attachment to a notice of removal. See ECF No. 2.  
<sup>2</sup> Specifically, a screening of the complaint determined that the filing attempted to bring five unrelated claims against multiple defendants in violation of Federal Rule of Civil Procedure 20(a)(2). See ECF No. 4 at 6; see also Fed. R. Civ. P. 20(a)(2) (stating right to relief against multiple defendants must arise out of common events and must contain common questions of law or fact).

1 asking the chief judge of this court to provide him with, amongst other things, a computer and eye  
2 surgery (ECF No. 8); (3) objections to alleged violations of Local Rule 305(a) (ECF No. 9); (4) a  
3 request that judicial notice be taken of a state civil code (ECF No. 11); (5) a reply to defendants'  
4 opposition to plaintiff's request for accommodations (ECF No. 12), and (6) a motion to compel  
5 production of documents (ECF No. 13).

6 These filings demonstrate plaintiff's ability to articulate his positions and to draft and file  
7 legal documents. Accordingly, it is clear that plaintiff is capable of drafting an amended  
8 complaint and that he has access to resources to do so. However, plaintiff's several filings provide  
9 no indication that he intends to do so. See generally ECF Nos. 7, 8, 9, 11, 12, 13. As a result, for  
10 the reasons listed below, in addition to denying plaintiff's motion to vacate (ECF No. 7), his  
11 request for accommodations (ECF No. 8), his request that the court take judicial notice of a civil  
12 code (ECF No. 11), and his motion to compel (ECF No. 13), the undersigned will also  
13 recommend that plaintiff's complaint be dismissed for failure to prosecute pursuant to Federal  
14 Rule of Civil Procedure 41(b).

15 I. Plaintiff's Motion to Vacate the Court's Order to Amend the Complaint

16 The only one of plaintiff's filings that even remotely responds to the court's October 24,  
17 2017 order is the motion to vacate it. See ECF No. 7. Plaintiff argues, inter alia,<sup>3</sup> that the court's  
18 order should be vacated due to lack of jurisdiction because: (1) all parties have not consented to  
19 the undersigned presiding over this case as required under 28 U.S.C. § 636(c), and (2) 28 U.S.C.  
20 § 1915(a) precludes the undersigned from screening this matter given that plaintiff has not filed  
21 an in forma pauperis application. ECF No. 7 at 1-2.

22 With respect to the matter of consent jurisdiction, plaintiff appears to misunderstand the  
23 application of 28 U.S.C. § 636. While a magistrate judge is precluded from involuntarily  
24 dismissing an action, see 28 U.S.C. § 636(b)(1)(A), she may recommend such a dismissal to a  
25 district judge via findings and recommendations, see 28 U.S.C. § 636(b)(1)(B)-(C). Thereafter,

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26 <sup>3</sup> Plaintiff also argues that because: (1) the complaint was not formally filed or docketed, and (2)  
27 the case was not properly removed to federal court, the undersigned lacks jurisdiction to preside  
28 over this case. See ECF No. 7 at 2-3. However, plaintiff provides no legal authority to support  
either of these claims. See id.

1 the district judge will review the findings and recommendations de novo and either accept, reject  
2 or modify them in whole or in part. See 28 U.S.C. § 636(b)(1)(C).

3 As for the matter of jurisdiction as it purportedly relates to plaintiff’s failure to have filed  
4 an in forma pauperis application, the argument is somewhat convoluted. See generally ECF No.  
5 7 at 1-2. To the extent, however, that plaintiff is asserting that this action has not been properly  
6 commenced (and that jurisdiction, therefore, has not properly attached) because plaintiff has yet  
7 to file an in forma pauperis affidavit as required under 28 U.S.C § 1915(a), this argument is  
8 flawed. First, Section 1915(a) addresses the authorization of the commencement of an action in  
9 situations *where prepayment of fees has yet to occur*. See 28 U.S.C. § 1915(a) (“[A]ny court of  
10 the United States may authorize the commencement . . . of any suit, action or proceeding, civil or  
11 criminal . . . without prepayment of fees . . . by a person who submits an affidavit that includes a  
12 statement . . . that the person is unable to pay such fees.”). In the instant action, the record  
13 indicates that both the filing and administrative fees of \$400.00 were paid by the defendants  
14 pursuant to Section 1914(a) et seq. when the case was removed to federal court. Furthermore, it  
15 is well established that the payment of filing fees required under Section 1914 is not a  
16 jurisdictional requirement. Cintron v. Union Pac. R. Co., 813 F.2d 917, 920-21 (9th Cir. 1987)  
17 (“While [28 U.S.C. § 1914] is not merely a local rule, it should not be raised to the level of a  
18 jurisdictional requirement.”) (brackets added); see Klemm v. Astrue, 543 F.3d 1139, 1143 (9th  
19 Cir. 2008) (discussing relevance of Cintron).

20 In sum, the law is clear: “Notwithstanding any filing fee, or any portion thereof, that may  
21 have been paid, the court shall dismiss the case at any time if court determines that the action fails  
22 to state a claim on which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii). It has already  
23 been determined that plaintiff’s complaint, as currently filed, fails to state a claim. See ECF No.  
24 4 at 4 (“The court is unable to discern any common questions of law or fact between these five  
25 claims.”). This is why the court ordered plaintiff to file an amended complaint. See id. at 6. To  
26 date, plaintiff has failed to remedy the complaint’s deficiencies. Thus, the recommendation to  
27 dismiss this action complies with 28 U.S.C. § 636 and 28 U.S.C. § 1915, and the district court has  
28 jurisdiction to act on the recommendation.

1 II. Plaintiff's Additional Motions and Requests

2 Given the facts that: (1) plaintiff's original complaint fails to state a claim upon which  
3 relief can be granted (see ECF No. 4 at 4), and (2) plaintiff has refused to remedy the deficiencies  
4 in the complaint by amending it as ordered by the court, there is currently no viable action upon  
5 which plaintiff may proceed. Any motions or requests that plaintiff has filed after the original,  
6 deficient complaint are therefore premature. As such, they must be denied. See Flast v. Cohen,  
7 392 U.S. 83, 94 (1968) (stating federal courts' power is "constitutionally restricted to 'cases' and  
8 'controversies'"); see Rivera v. Freeman, 469 F.2d 1159, 1162-63 (9th Cir. 1972) (stating if court  
9 has no case or controversy before it, it has no power to hear the matter in question); see, e.g.,  
10 Jones v. California State Superior Courts, No. 1:17-cv-00232-DAD-BAM (PC) 2017 WL  
11 6550503, at \*2 (E.D. Cal. Oct. 6, 2017) ("Until such time as there is an operative complaint with  
12 cognizable claims for relief, any requests for preliminary injunctive relief are premature."); see  
13 also Thomas v. Davey, No. 1:16-cv-00925-AWI-BAM (PC), 2017 WL 2720526, at \*2 (E.D. Cal.  
14 June 23, 2017) (stating same); see also Blackwell v. California Dept. of Corrections, No. 1:05-  
15 CV-00856-AWI-SMS-P, 2006 WL 3703374, at \*1 (E.D. Cal. Dec. 14, 2016) (stating motion for  
16 injunctive relief is premature prior to amended complaint with cognizable claims being filed).

17 In light of the above, IT IS HEREBY ORDERED that:

- 18 1. Plaintiff's motion to vacate the court's October 24, 2017 order directing him to file  
19 an amended complaint (ECF No. 7) is DENIED;
- 20 2. Plaintiff's request for accommodations (ECF No. 8) is DENIED without prejudice  
21 as premature;
- 22 3. Plaintiff's request for judicial notice (ECF No. 11) is DENIED without prejudice  
23 as premature;
- 24 4. Plaintiff's motion to compel the production of documents (ECF No. 13) is  
25 DENIED without prejudice as premature, and
- 26 5. The Clerk of the Court is directed to assign a district judge to this case.

27 IT IS FURTHER RECOMMENDED that this action be dismissed for failure to prosecute.  
28 See Local Rule 110; Fed. R. Civ. P. 41(b).

