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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS JOSEPH MELGER,
Plaintiff,
v.
COLON, JR., et al.,
Defendants.

No. 2:18-cv-0019-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983, has filed a request for leave to proceed in forma pauperis. His application is granted and the court herein screens his complaint pursuant to 28 U.S.C. § 1915(e)(2).¹ Pursuant to § 1915(e)(2), the court is directed to dismiss a case at any time if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

The complaint (ECF No. 1), filed January 4, 2018, and amended on April 30, 2018 (ECF No. 3), alleges the following. On the morning of May 29, 2016, defendant Prevostini ignored plaintiff’s plea for a cell move on the grounds that he and his cellmate were not getting along. ECF No. 3 at 8. On the May 30, 2016, defendant Esculera informed plaintiff that the person

¹ Plaintiff was not a prisoner when he commenced this action on January 4, 2018. See ECF No. 1.

1 responsible for bed moves would not be in until the next day. *Id.* at 9. On May 31, 2016,
2 defendant Esculera told plaintiff, “I’ll see what I can do.” *Id.* Later that day, plaintiff’s cellmate
3 assaulted him with a food tray and threatened him with a razor blade. *Id.* at 10. Plaintiff got the
4 attention of defendants Shelton, Esculera, Colon Jr., and Bach, but they failed to help him. *Id.* at
5 10.

6 Examination of the court’s records reveals that plaintiff has already commenced an action
7 with a complaint concerning these same allegations. *See Melger v. Colon*, No. 2:16-cv-1452-DB
8 (E.D. Cal.), ECF No. 27 (Oct. 25, 2017 Screening Order). Therefore, this action must be
9 dismissed as duplicative and plaintiff should proceed on the action he initially commenced.² *See*
10 *Barapind v. Reno*, 72 F. Supp. 2d 1132, 1144 (E.D. Cal. 1999) (when a complaint involving the
11 same parties and issues has already been filed in another federal district court, the court has
12 discretion to abate or dismiss the second action).

13 Accordingly, IT IS ORDERED that:

- 14 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 2) is granted.
- 15 2. The Clerk is directed to randomly assign a United States District Judge to this
16 action.

17 Further, it is hereby RECOMMENDED that this action be dismissed as duplicative.

18 These findings and recommendations are submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
20 after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

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26 ² “Federal comity and judicial economy give rise to rules which allow a district court to
27 transfer, stay, or dismiss an action when a similar complaint has already been filed in another
28 federal court.” *Id.* at 1145 (citation omitted). “[I]ncreasing calendar congestion in the federal
courts makes it imperative to avoid concurrent litigation in more than one forum whenever
consistent with the right of the parties.” *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979).

1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: May 3, 2018.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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