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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIKEAL GLENN STINE,
Plaintiff,
v.
BUREAU OF PRISONS, et al.,
Defendants.

No. 2:18-cv-0684 TLN KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a federal prisoner housed in the Florence ADMAX U.S. Penitentiary (“ADMAX”), proceeding in forma pauperis and without counsel. Various matters are presently pending.

Plaintiff’s Pleading

On June 21, 2018, the undersigned found that plaintiff’s second amended complaint stated a potentially cognizable due process claim for relief against defendants Mitchell and Inch, but recommended that defendant Revell be dismissed from this action without prejudice. Plaintiff filed objections, stating that defendant Revell, Regional Director, was involved in the gang validation because she agreed with the decision, and if she had not agreed, plaintiff now claims he would not be validated as an Aryan Brotherhood (“AB”) gang member. Since then, plaintiff has filed a motion for temporary restraining order, in which he concedes that on July 10, 2018, he was

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1 downgraded to an AB associate, although he contends this label “mirrors membership-criteria”
2 and is different in name only. (ECF No. 28 at 2.)

3 While not entirely clear, it appears such downgrade may moot plaintiff’s claims,
4 particularly if he is no longer validated as an AB gang member because plaintiff claims such gang
5 validation causes his indefinite incarceration in ADMAX, a punitive facility which deprives him
6 of various work and programming opportunities.¹ (ECF No. 18 at 5.) In any event, in light of his
7 objections to the recommended dismissal of defendant Revell, as well as the possibility his claims
8 may now be moot, the undersigned vacates the June 21, 2018 findings and recommendations and
9 screening order, and grants plaintiff thirty days leave to file a third amended complaint that more
10 clearly sets forth his allegations as to defendant Revell, as well as addresses the current status of
11 his alleged gang validation.

12 Plaintiff is not granted leave to name new defendants or add new claims. In addition to
13 defendant Revell, plaintiff’s third amended complaint may name John Doe, an unknown
14 individual with the SIU/Sacramento office, who allegedly wrongfully validated plaintiff as an
15 Aryan Brotherhood gang member without notice or a hearing in violation of plaintiff’s due
16 process rights, and defendants Mitchell and Inch reviewed and approved the validation. Plaintiff
17 is cautioned that he should include a brief recitation of his claim that he faces imminent danger,
18 but he is not required to provide exhibits. The amended complaint should not exceed 10 pages.

19 Defendants’ Motion for Reconsideration

20 In response to the order screening plaintiff’s second amended complaint, defendants, by
21 special appearance, filed a motion for reconsideration, asking the court to revoke plaintiff’s in
22 forma pauperis status, and objecting to the findings and recommendations. Defendants correctly
23 point out that plaintiff has sustained three strikes under 28 U.S.C. § 1915(g), and argue that the
24 complaint fails to make a plausible allegation that plaintiff is under imminent danger of serious

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26 ¹ In addition, plaintiff alleges that he would remain at ADMAX indefinitely or until transferred to
27 a state facility. (ECF No. 18 at 3.) But in his recent motion for emergency injunctive relief,
28 plaintiff claims he is being transferred to a federal penitentiary in Indiana, not a state facility.
(ECF No. 28 at 2.)

1 physical injury.² Defendants also point to numerous other cases in which district courts have
2 routinely rejected plaintiff's allegations of imminent danger of serious physical injury. (ECF No.
3 21 at 5.)

4 Although plaintiff did not reiterate his threats of imminent danger in his second amended
5 complaint, he alleged in his original complaint that defendants knew plaintiff is not a current
6 member of the AB, and that the AB has attacked, stabbed and tried to kill plaintiff. (ECF No. 1
7 at 5, 6-7.) Plaintiff further alleged that he was number one on the transfer list, and now that he is
8 validated as an AB gang member, he would be transferred with AB members and associates,
9 putting his safety at risk. (ECF No. 1 at 8.) Plaintiff contends the validation will ensure he
10 remains incarcerated around and housed with AB members, placing plaintiff's safety in danger
11 ("imminent danger"). (ECF No. 1 at 9.) In his first amended complaint, plaintiff declares that
12 prison officials have told plaintiff that he was validated so they can transport and house plaintiff
13 with other AB gang members who will kill him. (ECF No. 6 at 7.) Plaintiff reiterated his safety
14 concerns when transported with other AB members, alleging "imminent danger." (ECF No. 6 at
15 8.)

16 In response to defendants' request to revoke plaintiff's in forma pauperis status, plaintiff
17 argues that many of the cases cited by defendants were filed by other gang members so that
18 plaintiff would accumulate strikes and make it impossible to gain assistance from federal courts.

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20 ² **Error! Main Document Only.** Title 28 U.S.C. § 1915(g) provides:

21 In no event shall a prisoner bring a civil action or appeal a judgment
22 in a civil action or proceeding under this section if the prisoner has,
23 on 3 or more prior occasions, while incarcerated or detained in any
24 facility, brought an action or appeal in a court of the United States
25 that was dismissed on the grounds that it is frivolous, malicious, or
fails to state a claim upon which relief may be granted, unless the
prisoner is under imminent danger of serious physical injury.

26 Id. The imminent danger "exception applies if the danger existed at the time the prisoner filed the
27 complaint." Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007), citing United States v.
28 Jackson, 480 F.3d 1014, 1018-19 (9th Cir. 2007). "[T]he issue [under § 1915(g)] is whether the
complaint, as a whole, alleges imminent danger of serious physical injury." Andrews, 493 F.3d at
1053 (citation omitted).

1 (ECF No. 25 at 3.) Plaintiff argues that the exhibits appended to his first amended complaint
2 demonstrate that he is under imminent danger. (Id.) Plaintiff points out that the United States
3 Court of Appeals for the D.C. Circuit reversed the district court’s finding that being housed in the
4 ADMAX could not demonstrate a risk of imminent danger. Pinson v. United States Dept. of
5 Justice, No. 14-5294 (D.C. Cir. 2014); see also Cuevas v. United States of America, No. 1:16-cv-
6 0299 MSK KMT (Dist. Colorado March 19, 2018). (ECF No. 25 at 4.) In his accompanying
7 declaration, plaintiff declares that: (1) he is not a member of the AB, the AB has ordered plaintiff
8 be killed at the first opportunity, and plaintiff has been stabbed twice requiring hospitalization; (2)
9 ADMAX staff mistakenly yet regularly open two or more doors, allowing inmate attacks;
10 plaintiff has been attacked by AB members and associates no less than 10 times since 2008; (3)
11 on June 27, 2018, staff threatened to allow AB’s access to kill plaintiff unless he dismissed this
12 case; (4) inmates are targeted by AB members and associates during transfer while on buses and
13 planes; (5) AB members and associates have thrown urine, feces and other foreign substances at
14 plaintiff while getting exercise that caused infected sores and almost caused him to lose an eye;
15 and (6) AB and Mexican Mafia members cut recreation pens to attack, stab and kill inmates.
16 (ECF No. 25 at 11-12.)

17 Further, plaintiff contends that the danger is imminent because the requested transfer to a
18 state facility has been approved and could take place at any moment, reiterating the dangers his
19 transport with other AB members poses. (ECF No. 25 at 5-6.)

20 Moreover, plaintiff submitted a kite from an inmate named “Woodstock,” who warned
21 plaintiff that “the A/B want[s] you dead bad.” (ECF No. 26 at 4.) Plaintiff declares he was given
22 this kite on March 15, 2018, six days before he signed his original complaint on March 21, 2018.
23 (ECF No. 26 at 2.)³

24 On this current record, the undersigned finds plaintiff has demonstrated a risk of imminent
25 danger, sufficient to deny defendants’ motion for reconsideration at this time. However,

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27 ³ On August 3, 2018, plaintiff filed a “supplement.” (ECF No. 27.) However, Local Rule 230(l)
28 contemplates the filing of a motion, an opposition and a reply. Plaintiff has filed an opposition
and an exhibit. Plaintiff’s supplement is improperly-filed, is redundant, and is disregarded.

1 depending on plaintiff's third amended complaint, as well as the resolution of plaintiff's motion
2 for emergency injunctive relief, the denial of defendants' motion for reconsideration should be
3 without prejudice to its renewal.

4 Motion for Emergency Temporary Restraining Order

5 On September 17, 2018, plaintiff filed an emergency motion, alleging that on or about
6 August 24, 2018, the Bureau of Prisons submitted a transfer packet to Regional Director Revell
7 and Chief O'Brien, requesting that plaintiff be transferred to the United States Penitentiary in
8 Terre Haute, Indiana, with other members of the AB. (ECF No. 28 at 2.) Plaintiff reiterates that
9 defendants are aware that the AB has ordered plaintiff killed on sight, and that the defendants
10 validated plaintiff as a current member of the AB gang so that plaintiff can be attacked and killed.
11 Plaintiff contends he is not permitted to obtain declarations from other inmates and therefore
12 requests an evidentiary hearing by video conference. Plaintiff seeks the testimony of four staff
13 witnesses, as well as ten inmate witnesses. (ECF No. 28 at 3.)

14 In light of plaintiff's allegation that he faces imminent danger, defendants are directed to
15 file a response to plaintiff's motion within fourteen days. Defendants shall address the status of
16 plaintiff's pending transfer, whether prison officials intend to transfer plaintiff with members or
17 associates of the Aryan Brotherhood, and, if so, what steps will be taken to ensure plaintiff's safe
18 transfer. In addition, defendants shall inform the court whether plaintiff is presently validated as
19 an Aryan Brotherhood gang member or as an Aryan Brotherhood Associate. If plaintiff is
20 identified as an Aryan Brotherhood Associate, defendants shall explain the difference between
21 such identification and being validated as an Aryan Brotherhood gang member.

22 Motion for Court Order

23 Finally, plaintiff filed a motion that court orders be labeled "Legal mail/open only in front
24 of inmate" because recent court mail was marked up with hostile comments by prison staff.
25 Court filings are a matter of public record and therefore are not technically legal mail. Plaintiff's
26 motion is denied without prejudice.

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1 Conclusion

2 IT IS HEREBY ORDERED that:

3 1. The June 21, 2018 order and findings and recommendations are vacated;

4 2. Plaintiff is granted leave to file a third amended complaint; within thirty days from the
5 date of this order, plaintiff shall file a third amended complaint that complies with this order;
6 failure to file a third amended complaint may result in the dismissal of this action;

7 3. The Clerk of the Court is directed to send plaintiff the form for filing a civil rights
8 complaint by a prisoner;

9 4. Counsel for defendants shall file a response to plaintiff's emergency motion (ECF No.
10 28) within fourteen days from the date of this order;

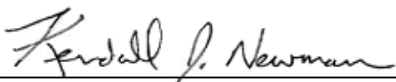
11 5. The Clerk of the Court shall serve a copy of this order on Edward A. Olsen, Assistant
12 United States Attorney, 501 I Street, Suite 10-100, Sacramento, CA 95814;

13 6. Plaintiff's motion for court order (ECF No. 22) is denied; and

14 IT IS RECOMMENDED that defendants' motion for reconsideration seeking revocation
15 of plaintiff's in forma pauperis status (ECF No. 21) be denied without prejudice.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
21 objections shall be filed and served within fourteen days after service of the objections. The
22 parties are advised that failure to file objections within the specified time may waive the right to
23 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 Dated: September 19, 2018

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27 KENDALL J. NEWMAN
28 UNITED STATES MAGISTRATE JUDGE

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