

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 7 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PATRICIA L. WOODS,

Plaintiff-Appellant,

v.

ROBERT STORMS, Staff Services
Manager II; et al.,

Defendants-Appellees.

No. 18-16816

D.C. No.2:17-cv-00793-TLN-AC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted February 4, 2020**

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

Patricia L. Woods appeals pro se from the district court's judgment dismissing as untimely her action alleging violations of 42 U.S.C. §§ 1981, 1985(3), and 1986 arising out of her termination from her employment with defendant California Department of Corrections and Rehabilitation. We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's dismissal on the basis of the applicable statute of limitations grounds. *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003). We affirm.

The district court properly dismissed Woods's § 1981 claims as untimely because Woods failed to file these claims within the applicable four-year statute of limitations. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-84 (2004) (because § 1981(a) does not contain a statute of limitations, the four-year "catch all" statute limitations articulated by Congress applies (citing 28 U.S.C. § 1658(a)); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008) (under federal law, a claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action" (citation and internal quotation marks omitted))).

The district court did not abuse its discretion in finding that equitable tolling did not apply to Woods's § 1981 claims because, contrary to Woods's contentions, § 1981 does not require that a plaintiff exhaust administrative remedies before filing a federal lawsuit. *See Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1009 (9th Cir. 2011) (setting forth standard of review); *see also Del. State Coll. v. Ricks*, 449 U.S. 250, 261 (1980) (explaining that "the pendency of a grievance or some other method of collateral review" does not toll the limitations period for a § 1981 claim (internal citations omitted)); *Surrell v. Cal. Water Ser. Co.*, 518 F.3d

1097, 1103 (9th Cir. 2008) (noting that “§ 1981 has no . . . requirement” that a plaintiff exhaust administrative remedies “before seeking a private action for damages”).

The district court properly dismissed Woods’s §§ 1985(3) and 1986 claims as untimely because Woods failed to file these claims within the applicable two-year statute of limitations. *See* Cal. Civ. Proc. Code § 335.1 (California’s two-year statute of limitations for personal injury actions); *Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 711 (9th Cir. 1993) (claims under § 1985(3) are governed by the state personal injury statute of limitations); *see also Trerice v. Pederson*, 769 F.2d 1398, 1403 (9th Cir. 1985) (a claim under § 1986 can only be stated if there is a valid claim under § 1985).

The district court did not abuse its discretion in finding that equitable tolling did not apply to Woods’s § 1985(3) claims because Woods’s new evidence regarding defendant California Public Employment Relations Board’s alleged conflict of interest did not form the basis of her § 1985(3) conspiracy claims. *See Johnson*, 653 F.3d at 1009 (standard of review); *Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983) (“When federal courts borrow a state statute of limitations, they also apply the state’s tolling law if it is not inconsistent with federal law.”); *Lukovsky*, 535 F.3d at 1051 (equitable tolling focuses on “whether there was excusable delay by the plaintiff:

[i]f a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period,” then equitable tolling applies (citation and internal quotation marks omitted)). Equitable estoppel also does not apply to these claims. *See Lukovsky*, 535 F.3d at 1051-52 (explaining doctrine of equitable estoppel under California and federal law).

The district court did not abuse its discretion in denying Woods leave to amend because amendment would have been futile. *See Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004) (setting forth standard of review); *see also Hoang v. Bank for Am., N.A.*, 910 F.3d 1096, 1103 (9th Cir. 2018) (explaining that “amendment would be an exercise in futility . . . when the claims are barred by the applicable statute of limitations” (citation and internal quotation marks omitted)).

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Woods’s request for oral argument, set forth in the reply brief, is denied.

AFFIRMED.

APPENDIX 2

**UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT**

RECONSIDERATION ORDER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 11 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PATRICIA L. WOODS,

Plaintiff-Appellant,

v.

ROBERT STORMS, Staff Services
Manager II; et al.,

Defendants-Appellees.

No. 18-16816

D.C. No. 2:17-cv-00793-TLN-AC
Eastern District of California,
Sacramento

ORDER

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Woods's petition for panel rehearing and petition for rehearing en banc (Docket Entry Nos. 43, 47, 48, and 49) are denied.

Woods's request for oral argument, set forth in the petitions, is denied.

No further filings will be entertained in this closed case.

APPENDIX 3

**UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT**

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 19 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PATRICIA L. WOODS,

Plaintiff - Appellant,

v.

ROBERT STORMS, Staff Services
Manager II; et al.,

Defendants - Appellees.

No. 18-16816

D.C. No. 2:17-cv-00793-TLN-AC
U.S. District Court for Eastern
California, Sacramento

MANDATE

The judgment of this Court, entered February 07, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX 4

**UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF CALIFORNIA**

JUDGMENT ORDER

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

PATRICIA L. WOODS,

CASE NO: 2:17-CV-00793-TLN-AC

v.

ROBERT STORMS, ET AL.,

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 8/27/18**

Marianne Matherly
Clerk of Court

ENTERED: August 27, 2018

by: /s/ L. Mena-Sanchez
Deputy Clerk

APPENDIX 5

**UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF CALIFORNIA**

ORDER

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICIA L. WOODS,

Plaintiff,

v.

STATE OF CALIFORNIA, CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION (CDCR), et al.,

Defendants.

No. 2:17-cv-0793-TLN-AC PS

ORDER

Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On February 27, 2018, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within twenty-one days. (ECF No. 63.) Plaintiff filed objections to the findings and recommendations. (ECF No. 66.) Defendants filed responses to the objections. (ECF Nos. 67 & 68.)¹

The Court has reviewed the file and finds the findings and recommendations to be

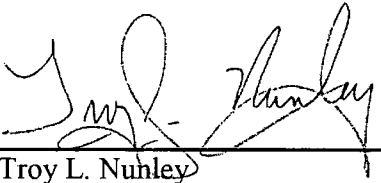
¹ Plaintiff objects to Defendants Eileen Potter, Wendi L. Ross and State of California Public Employment Relations Board's response (ECF No. 68) to Plaintiff's objections. (ECF No. 69.) Plaintiff argues the response was filed outside the fourteen days allotted by Local Rule 304, and therefore, should be stricken and not considered. The Court agrees that the response was untimely, but declines to strike the response as the contents of the response do not affect the Court's decision in this matter.

1 supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY
2 ORDERED that:

- 3 1. The findings and recommendations filed February 27, 2018, are adopted in full; and
4 2. Defendants' Motion to Dismiss (ECF Nos. 21 & 23) are GRANTED and the First
5 Amended Complaint is DISMISSED with prejudice as untimely.

6 Dated: August 23, 2018

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Troy L. Nunley
United States District Judge

APPENDIX 6

**UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF CALIFORNIA**

**MAGISTRATE JUDGE'S ORDER AND FINDINGS AND
RECOMMENDATIONS**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICIA L. WOODS,

Plaintiff,

v.

STATE OF CALIFORNIA, CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION (CDCR), et al.,

Defendants.

No. 2:17-cv-0793 TLN AC PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

This matter is before the undersigned pursuant to Local Rule 302(c)(21). On October 24, 2017, the court held a hearing on defendants' Motions to Dismiss, ECF Nos. 21, 23, and plaintiff's Motion to Disqualify, ECF No. 34. Patricia L. Woods appeared on behalf of herself. William Downer appeared on behalf of defendants California Department of Corrections and Rehabilitations, Robert Storms, and Larry Norris (collectively "CDCR") and J. Felix De La Torre appeared on behalf of defendants Public Employment Relations Board, Eileen Potter, and Wendi Ross (collectively "PERB"). For the reasons that follow, the plaintiff's motion to disqualify is DENIED and the undersigned recommends defendants' motions to dismiss be GRANTED.

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I. BACKGROUND

This action was commenced on April 14, 2017. ECF No. 1. The case proceeds on the First Amended Complaint (“Complaint”), ECF No. 6. Plaintiff alleges she was wrongfully terminated from her employment with California Department of Corrections and Rehabilitation (“CDCR”) based on her race, and was subjected to a hostile work environment and retaliatory actions for obtaining union representation regarding her employment termination. ECF No. 1 at 5, ¶¶ 16-17. Plaintiff alleges the following causes of action: (1) violations of 42 U.S.C. § 1981; (2) violations of 42 U.S.C. §§ 1985(3), 1986; (3) breach of contract; and (4) violations under the Ralph C. Dills Act (Cal. Gov’t Code § 3512 et seq.).¹

According to plaintiff, she was appointed as an Associate Governmental Program Analyst in the Crisis Placement Unit of CDCR’s division of Adult Parole Operations on September 10, 2007. Id. at 9, ¶ 42. The new classification required plaintiff to serve a six-month probationary period. Id. at 10, ¶ 44. Plaintiff alleges she did not receive a periodic written performance or probationary reports before being terminated, as required by law. Id. She claims probationary reports were not issued by her immediate supervisors, defendants Norris and Storms, who are both white, due her being the only African-American female employee in the unit. Id. at ¶ 45. All white employees working in the same unit were issued their required probationary reports. Id. at 10-11, ¶ 46. Plaintiff contends her probation was rejected due to her race and because she involved union representatives in communications with her managers. Id. at 10, ¶ 44. Plaintiff alleges that defendant Norris reprimanded her for seeking assistance from her union representative regarding an increase, without prior notice, in her duties and functions. Id. at 11, ¶ 48; 34-37 (Exhibit 3). On November 27, 2007, plaintiff’s probation was rejected and her employment terminated. Id. at 11, ¶ 49. At the time, plaintiff had close to eleven years of employment service with the state of California. Id. at 10, ¶ 43.

On December 5, 2007, CDCR conducted a “Skelly Hearing” to determine whether

¹ The Complaint alludes to violations of the 14th Amendment guarantees of due process and equal protection, ECF No. 6 at 4, ¶ 14, but fails to specify such a cause of action. At the hearing, plaintiff sought leave to amend her complaint in order to state such a claim. The court addresses below whether leave to amend is appropriate.

1 plaintiff's termination was lawful. Id. at 12, ¶ 54. On December 6, 2007, a recommendation was
2 issued by the Skelly Hearing Officer to the Director of the Division of Adult Parole Operations
3 seeking clarification on various issues and withdrawal of the "rejection during probation" pending
4 clarification. Id. On December 27, 2007, plaintiff filed an unfair practice charge and complaint
5 with the California Public Employment Relations Board ("PERB") alleging a violation of the
6 Ralph C. Dills Act (Cal. Gov't Code § 3512 et seq.). Id. at 12, ¶ 57; 17, ¶ 83. On August 24,
7 2009, the Administrative Law Judge issued a proposed decision dismissing the complaint, and on
8 October 12, 2010, PERB issued its decision affirming the decision and dismissing plaintiff's
9 complaint. Id. at 17, ¶¶ 87, 89. On January 27, 2011, PERB issued its denial of plaintiff's
10 request for reconsideration of its decision. Id. at 18, ¶ 90.

11 Plaintiff appealed to the California Third District Court of Appeal on February 17, 2012,
12 which denied the petition for writ of review on September 20, 2012. ECF No. 43 (RJN), Exhs. 1-
13 2. Plaintiff sought review in the California Supreme Court, which was denied on November 12,
14 2012. ECF No. 6 at 17, ¶¶ 93-94. On February 19, 2013 plaintiff filed a petition for writ of
15 certiorari with the United States Supreme Court, which was denied on April 22, 2013. Id. at ¶¶
16 95, 97. A request for reconsideration was denied by the Supreme Court on June 17, 2013. ECF
17 No. 6, Exh. 8.

18 On October 24, 2016, plaintiff filed a notice with the California Department of General
19 Services, Government Claims Program. The claim was denied as untimely on December 30,
20 2016. ECF No. 6 at 3, ¶¶ 9-10.

21 II. MOTION TO DISQUALIFY

22 Plaintiff moves to disqualify attorney J. Felix De La Torre ("De La Torre"), counsel for
23 PERB defendants, based on an alleged conflict of interest. Plaintiff asserts that De La Torre is
24 serving as "both attorney-of-record at the SEIU Local 1000 ("SEIU") office before the State of
25 California and the PERB's Defendants', while at the same time serving as General Counsel and
26 the attorney-of-record for the PERB's Defendants' at his current employment with" PERB. ECF
27 No. 34 at 4. Plaintiff alleges this simultaneous representation disqualifies De La Torre from
28 representing PERB in the current proceedings.

1 A. Legal Standards

2 The Eastern District has adopted the State Bar of California's Rules of Professional
3 Conduct and applicable court decisions, as its own standard of professional conduct. See E.D.
4 Cal. L. R. 180(e). Accordingly, California law applies in this matter. In re Cty. of Los Angeles,
5 223 F.3d 990, 995 (9th Cir. 2000) (motions for disqualification apply state law). California Rule
6 of Professional Conduct 3-310² provides, in pertinent part, that:

7 (C) A member shall not, without the informed written consent of
8 each client:

9 (1) Accept representation of more than one client in a matter
10 in which the interests of the clients potentially conflict; or

11 (2) Accept or continue representation of more than one
12 client in a matter in which the interests of the clients actually
13 conflict; or

14 (3) Represent a client in a matter and at the same time in a
15 separate matter accept as a client a person or entity whose interest
16 in the first matter is adverse to the client in the first matter.

17 ...

18 (E) A member shall not, without the informed written consent of
19 the client or former client, accept employment adverse to the client
20 or former client where, by reason of the representation of the client
21 or former client, the member has obtained confidential information
22 material to the employment.

23 Cal. R. Prof'l Conduct 3-310(C), (E).

24 Disqualification of an attorney lies within the sound discretion of the district courts. Gas-
25 A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322, 1325 (9th Cir. 1976).

26 "Because disqualification is a drastic measure, it is generally disfavored and should only be
27 imposed when absolutely necessary." Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 814
28 (N.D. Cal. 2004) (citations omitted). Motions for disqualification "should be subjected to
 'particularly strict judicial scrutiny.'" Optyl Eyewear Fashion Int'l Corp. v. Style Companies,
 Ltd., 760 F.2d 1045, 1050 (9th Cir. 1985) (citations omitted).

29 ² Plaintiff cites to California Rule of Professional Conduct 5-102 which has been subsequently re-
30 numbered as Rule 3-310. See The State Bar of California, *Previous Rules of Professional*
31 *Conduct*, [http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-](http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Previous-Rules)
32 *Conduct/Previous-Rules* (last visited by the court Feb. 8, 2018).

1 B. Analysis

2 It is undisputed that attorney De La Torre worked for SEIU before he became the General
3 Counsel of PERB. Having considered the submissions of the parties and the representations
4 made at hearing on the motion,³ the court finds that De La Torre was never simultaneously
5 employed by SEIU and PERB, and that there is no conflict.

6 In the opposition and attached declaration, De La Torre declares he never met Woods during his
7 employment with SEIU and did not “represent her in any capacity.” See ECF Nos. 36 at 4; 36-1
8 at ¶ 3 (“De La Torre Decl.”). Moreover, during his employment with SEIU no information,
9 documents, or material concerning plaintiff was ever shared with him. De La Torre Decl. ¶ 4.

10 Further, De La Torre declares that he “has not provided any legal services or representation for
11 any person or entity on behalf” of SEIU since his resignation from employment at SEIU. Id. at ¶
12 7. His resignation from SEIU was effective on March 8, 2015, and he began work at PERB on
13 March 9, 2015. Defendants assert that plaintiff’s mistaken belief in a conflict arises from “an
14 error that was caused when De La Torre did not update his CM/ECF account” from SEIU’s
15 mailing address to PERB’s before filing the motion to dismiss. ECF No. 36 at 3-4, fn. 2. At
16 hearing, plaintiff confirmed that her allegation of simultaneous and conflicting representation was
17 based exclusively on the fact that the docket for this case initially provided an SEIU work address
18 for De La Torre.

19 Defendants have established that there was no simultaneous employment. Plaintiff has
20 failed to demonstrate any relationship between De La Torre’s previous employment at SEIU and
21 the current litigation. De La Torre’s declaration sufficiently establishes that his previous
22 employment does not create a conflict necessitating disqualification. Accordingly, plaintiff’s
23 motion to disqualify will be denied.

24
25 ³ The court takes judicial notice of the documents submitted by defendants in opposition. ECF
26 No. 36-1, Request for Judicial Notice (“RJN”), Exhs. 1, 2. See Fed. R. Evid. 201; United States
27 ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir.1992) (“
28 “we may take notice of proceedings in other courts, both within and without the federal judicial
system, if those proceedings have a direct relation to matters at issue”) (internal quotation marks
omitted).

2010) (citing Twombly, 550 U.S. 544), cert. denied, 131 S. Ct. 3055 (2011), and resolve all doubts in the plaintiffs' favor. Hebbe v. Pliler, 627 F.3d 338, 340 (9th Cir. 2010) (citing Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976)). The court need not accept as true, legal conclusions "cast in the form of factual allegations." Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle him to relief. See Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011).

These same standards apply where, as here, defendant moves to dismiss based upon an affirmative defense of untimeliness.⁵

Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint. If, from the allegations of the complaint as well as any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper.

ASARCO, LLC v. Union Pacific R. Co., 765 F.3d 999, 1004 (9th Cir. 2014) (citations omitted); see also, Jones v. Bock, 549 U.S. 199, 215 (2007) ("[w]hether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground"). A complaint may not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206-07 (9th Cir. 1995).

B. Requests For Judicial Notice

1. Defendants' Requests

The CDCR defendants seek judicial notice of PERB's Decision No. 2136 and Proposed Decision, PERB Case No. SA-CE-1640-S (PERB Decision). ECF No. 23-1, Request for Judicial

⁵ See Fed. R. Civ. P. 8(c)(1) (identifying affirmative defenses, including statute of limitations).

1 Notice (“RJN”), Exh. 1. The court finds the documents suitable for judicial notice as matters of
2 public record outside the pleadings. See Fed. R. Evid. 201(b); see also United States ex rel.
3 Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir.1992). The
4 request for judicial notice of these documents will therefore be granted.

5 2. Plaintiff’s Requests

6 Plaintiff seeks judicial notice of a total of 26 exhibits, contained in four volumes. ECF
7 Nos. 40-43. The majority of these documents have arguable relevance to the merits of the
8 employment dispute, but are irrelevant to the timeliness and other procedural issues presented by
9 defendant’s motions. Other exhibits consist of judicial opinions, regulations, and statutes, judicial
10 notice of which is unnecessary. The court will take judicial notice only of those materials
11 documenting the course of formal administrative and judicial review of plaintiff’s discrimination
12 claims: Vol. II (ECF No. 41), Exh. 8 & 9; and Vol. IV (ECF No. 43), Exh. 1-4. Plaintiff’s
13 requests for judicial notice are otherwise denied.

14 C. Analysis

15 1. Timeliness Of Plaintiff’s Federal Claims

16 Plaintiff filed this lawsuit almost 9½ years after she was fired by the CDCR defendants
17 and 6½ years after PERB upheld her termination. Under any of the statutes of limitations
18 applicable to plaintiff’s various claims, her case is brought too late to be considered by this court.

19 a. Contract Claim under 42 U.S.C. § 1981

20 42 U.S.C. § 1981 provides that “[a]ll persons within the jurisdiction of the United States
21 shall have the same right in every State and Territory to make and enforce contracts ... as is
22 enjoyed by white citizens.” 42 U.S.C. § 1981(a). Section 1981 prohibits discrimination based on
23 race only. Manatt v. Bank of America, 339 F.3d 792, 798 (9th Cir.2003). It does not prohibit
24 discrimination based on sex. See id. The statute of limitations for a § 1981 claim of hostile work
25 environment and wrongful termination is governed by the federal “catch all” four year statute of
26 limitations. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382-384 (2004) (citing 28 U.S.C.
27 § 1658(a)).

28 Plaintiff alleges that PERB’s Administrative Law Judge erred in her decision by failing to

1 adhere to plaintiff's collective bargaining agreement and "failed to protect, and violated,
2 plaintiff's rights to enter into contracts, and to maintain employment, to the same extent as a
3 White citizen." ECF No. 6 at 13-14, ¶¶ 58-68. Assuming arguendo that this claim accrued as to
4 all defendants when the termination became final, upon PERB's October 12, 2010 decision
5 affirming it,⁶ plaintiff had until October 12, 2014 to bring a timely cause of action pursuant to §
6 1981. This lawsuit was filed approximately 2½ years after expiration of that deadline.

7 Plaintiff seeks equitable tolling on grounds she was required to exhaust her administrative
8 remedies prior to pursuing a claim in this court, and then "forced to appeal her administrative
9 decisions directly to the California Third Appellate Court, California Supreme Court, and then on
10 to the U.S. Supreme Court." ECF No. 6 at 7, ¶ 27. However, "the pendency of a grievance or
11 some other method of collateral review" does not toll the statute of limitations period for a § 1981
12 claim. Delaware State Coll. v. Ricks, 449 U.S. 250, 261 (1980) (citing Electrical Workers v.
13 Robbins & Myers, Inc., 429 U.S. 229 (1976)).

14 The accrual date adopted here by the court fully accounts for administrative review.
15 Plaintiff's further efforts to obtain relief in the California Court of Appeal and U.S. Supreme
16 Court were not prerequisites to a federal suit. Plaintiff has identified no authority for the
17 proposition that her initial choice of a state forum for judicial review extends the limitations
18 period for subsequently-brought federal claims. Accordingly, plaintiffs' § 1981 claim is barred
19 by the statute of limitations and should be dismissed.

20 b. Conspiracy Claim under 42 U.S.C. § 1985(3)

21 42 U.S.C. § 1985(3) prohibits conspiracies to deprive "any person or class of persons of
22 the equal protection of the laws, or of equal privileges and immunities under the laws[.]" [T]here
23 must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind
24 the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Claims under §
25 1985(3) are governed by the state personal injury statute of limitations. Taylor v. Regents of
26

27 ⁶ The CDCR defendants argue that the claim against them accrued when plaintiff's employment
28 was terminated on November 27, 2007. Even giving plaintiff the benefit of a later accrual date,
the claim is untimely.

1 University of California, 993 F.2d 710, 711 (9th Cir. 1993). Accordingly, plaintiff's § 1985(3)
2 claim is subject to the two year statute of limitations prescribed by Cal. Civ. Proc. Code § 335.1.
3 "When federal courts borrow a state statute of limitations, they also apply the state's tolling law if
4 it is not inconsistent with federal law." Retail Clerks Union Local 648, AFL-CIO v. Hub
5 Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983) (citing Board of Regents v. Tomanio, 446
6 U.S. 478, 485-86 (1980)). However, federal law determines when a claim accrues. Lukovsky v.
7 City & Cty. of San Francisco, 535 F.3d 1044, 1048 (9th Cir. 2008) (citing Olsen v. Idaho State
8 Bd. of Med., 363 F.3d 916, 926 (9th Cir. 2004)). In the employment context, "the claim accrues
9 upon awareness of the actual injury, i.e., the adverse employment action, and not when the
10 plaintiff suspects a legal wrong." Lukovsky, 535 F.3d at 1049 (citing various sister circuits for
11 the proposition that notice of the employer's adverse action, not notice of a discriminatory effect
12 or motivation, triggers the statute of limitation period).

13 Plaintiff alleges that defendants "formed a meeting of the minds and entered just such
14 conspiracies against Plaintiff; with an intent to deprive her of equal protection of the laws or of
15 equal privileges under the laws, on the insidious basis of Plaintiff's race, causing her injury."
16 ECF No. 6 at 20, ¶ 106. Plaintiff contends the conspiracies occurred when defendants Norris and
17 Storms "terminat[ed] Plaintiff's probationary employment without prior deliverance of the legally
18 mandated written performance evaluations and in contravention to her collective bargaining
19 rights," and when defendants Ross and Potter conspired "to cause PERB administrative decisions
20 adverse to Plaintiff to be made, by means of Plaintiff's case being reviewed at PERB by a staff
21 attorney who had previously as a staff attorney at DPA[.]" Id. at 20-21, ¶ 106.

22 Because the aims of the alleged conspiracies were plaintiff's termination by CDCR on
23 November 27, 2007 and the final PERB denial on January 27, 2011, the claims accrued on those
24 dates. Plaintiff thus had until November 27, 2009 to bring a timely cause of action against the
25 CDCR defendants and until January 27, 2013 to bring a timely cause of action against the PERB
26 defendants. Even if plaintiff had clearly alleged a single conspiracy between the CDCR and
27 PERB defendants, the accrual date could not be later than January 27, 2011. The conspiracy
28 claims are therefore untimely.

1 The FAC alleges that plaintiff first discovered facts related to the existence of the
2 conspiracy, which had been previously concealed from her, on or about August 30, 2012. Id. at
3 16, ¶ 77. Even if plaintiff made a showing sufficient to establish this “discovery” as the accrual
4 date for a conspiracy claim, the two-year limitations period would have elapsed years before the
5 federal complaint was filed.

6 Plaintiff seeks equitable tolling on grounds of other “new evidence” that previously had
7 been concealed from her. Specifically, plaintiff alleges that the PERB Administrative law judge
8 was “married to a certain attorney” who represented “union clients whose contract matters are
9 subject to adjudication before the ALJ” and who also “sits on PERB’s mediation panels.” The
10 FAC asserts this relationship resulted in a conflict of interest and caused the adverse outcome of
11 her administrative proceedings with PERB. Id. at 21, ¶ 107. In opposition to the motions to
12 dismiss, plaintiff explains that she learned the details of this purported conflict in July of 2016.
13 ECF No. 38 at 27-28.

14 “Equitable tolling focuses on whether there was excusable delay by the plaintiff: If a
15 reasonable plaintiff would not have known of the existence of a possible claim within the
16 limitations period, then equitable tolling will serve to extend the statute of limitations for filing
17 suit until the plaintiff can gather what information he needs.” Lukovsky, 535 F.3d at 1051
18 (quoting Johnson v. Henderson, 314 F.3d 409 (9th Cir. 2002)) (internal quotation marks omitted).
19 To establish excusable delay, “a plaintiff must prove the following elements: fraudulent conduct
20 by the defendant resulting in concealment of the operative facts, failure of the plaintiff to discover
21 the operative facts that are the basis of its cause of action within the limitations period, and due
22 diligence by the plaintiff until discovery of those facts.” Federal Election Com’n v. Williams,
23 104 F.3d 237, 240–41 (9th Cir. 1996).

24 Plaintiff’s proffered “new evidence” regarding an alleged conflict of interest does not
25 constitute the basis of her conspiracy claim or any other cognizable claim, so it cannot support
26 equitable tolling. Even if the evidence were relevant to the existence of a conspiracy, which the
27 undersigned doubts, it would be evidence of a claim that was already known to plaintiff at the
28 time it was discovered. Plaintiff’s litigation of her termination in the California Court of Appeal

1 establishes beyond debate that she was aware in 2011 and 2012 of the existence of her claims
2 involving “PERB’s wrongdoings” and alleged collusion among various defendants. See ECF No.
3 6 at 18, ¶ 92. She has acknowledged discovering the alleged collusion between CDCR and PERB
4 defendants in August of 2012. Id. at 16, ¶ 77. Because the essential facts underlying plaintiff’s
5 conspiracy claim were known to her during the limitations period, and tolling is not applicable.

6 c. Conspiracy Claims under 42 U.S.C. § 1986

7 “Section 1986 authorizes a remedy against state actors who have negligently failed to
8 prevent a conspiracy that would be actionable under § 1985.” Cerrato v. San Francisco Cmty.
9 Coll. Dist., 26 F.3d 968, 971 n.7 (9th Cir. 1994); Karim-Panahi v. Los Angeles Police Dep’t, 839
10 F.2d 621, 626 (9th Cir. 1988). Section 1986 provides an express statute of limitations, providing
11 a commencement period of “one year after the cause of action has accrued.” “A claim can be
12 stated under section 1986 only if the complaint contains a valid claim under section 1985.” Id. at
13 626 (citing Trerice v. Pedersen, 769 F.2d 1398, 1403 (9th Cir. 1985)). Because plaintiff is barred
14 from bringing a claim under § 1985, her § 1986 claim should be dismissed as well.

15 2. State Law Claims Barred Pursuant to California Tort Claims Act

16 Before a person may seek money damages against a public entity for personal injury, the
17 California Tort Claims Act requires presentation of a timely written claim for damages to the
18 entity. See Mangold v. Cal. Pub. Utils. Comm’n, 67 F.3d 1470, 1477 (9th Cir. 1995). When
19 defendants are public employees, the plaintiff must also submit a written claim to the public
20 entity that employs them. Cal. Gov. Code §§ 945.4, 950.2. The claim must be filed within six
21 months of the accrual of the cause of action. Cal. Gov. Code § 911.2(a). Presentation of a
22 written claim, and action on the claim, are conditions precedent to suit. State v. Superior Court
23 (Bodde), 32 Cal. 4th 1234, 1239 (2004); Shirk v. Vista Unified Sch. Dist., 42 Cal.4th 201, 209
24 (2007). Compliance with the Tort Claims Act is an element of the cause of action, Bodde, 32
25 Cal. 4th at 1240, and therefore “failure to file a claim is fatal to a cause of action,” Hacienda La
26 Puente Unified Sch. Dist. of Los Angeles v. Honig, 976 F.2d 487, 495 (9th Cir. 1992); City of
27 Stockton v. Super. Ct., 42 Cal.4th 730,738 (2007).

28 Plaintiff’s state law claims include breach of contract and a violation of the Ralph C. Dills

1 Act, arising from her termination and the consideration of her case by the PERB. She filed her
2 claim with the Government Claims Program on October 24, 2016, and it was denied as untimely
3 pursuant to Cal. Gov. Code § 911.2. ECF No. 6, Exh. 2. Because plaintiff failed to satisfy the
4 mandatory six month filing deadline for compliance with the California Tort Claims Act, her
5 breach of contract and Dills Act claims should be dismissed. Alternatively, the court should
6 decline to exercise supplemental jurisdiction over the state law claims in light of the untimeliness
7 of plaintiff's federal claims. Defendants' several other grounds for dismissal need not be
8 addressed.

9 IV. LEAVE TO AMEND

10 Rule 15 of the Federal Rules of Civil Procedure provides that "leave [to amend] shall be
11 freely given when justice so requires." The undersigned has carefully considered whether
12 plaintiff should be permitted an opportunity to amend the claims asserted in her complaint.
13 Despite the Ninth Circuit's general policy of extreme liberality regarding amendment, district
14 courts are only required to grant leave to amend if a complaint can possibly be saved. Lopez v.
15 Smith, 203 F.3d 1122, 1129 (9th Cir. 2000). "Courts are not required to grant leave to amend if a
16 complaint lacks merit entirely." Id. Where a pleading cannot be cured by the allegation of
17 additional facts, leave to amend need not be provided. Doe v. United States, 58 F.3d 494, 497
18 (9th Cir. 1995). Amendment in this case could not affect application of the statute of limitations
19 or the California Tort Claims Act requirements.

20 At hearing on the motions to dismiss, plaintiff requested an opportunity to amend in order
21 to present a cause of action under 42 U.S.C § 1983 for violation of her equal protection rights.
22 Such a claim, like plaintiff's other claims, arises from her termination and the ensuing PERB
23 proceedings. Accordingly, it would be time-barred for the same reasons that plaintiff's other
24 federal claims are time-barred. See Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004) (§
25 1983 claims are subject to California's two year statute of limitations for personal injury actions).
26 "Because any amendment would be futile, there [is] no need to prolong the litigation by
27 permitting further amendment." Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir.
28 2002). Accordingly, the undersigned concludes that the complaint in its entirety should be

1 dismissed without leave to amend.

2 **V. CONCLUSION**

3 For the reasons explained above, IT IS HEREBY ORDERED that Plaintiff's Motion to
4 Disqualify (ECF No. 34) is DENIED.

5 IT IS HEREBY RECOMMENDED that defendants' Motions to Dismiss (ECF Nos. 21,
6 23) be GRANTED and the First Amended Complaint be DISMISSED with prejudice as untimely.

7 These findings and recommendations are submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty one days
9 after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a
11 document should be captioned "Objections to Magistrate Judge's Findings and
12 Recommendations." Any response to the objections shall be filed with the court and served on all
13 parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file
14 objections within the specified time may waive the right to appeal the District Court's order.
15 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57
16 (9th Cir. 1991).

17 DATED: February 26, 2018

18 
19 ALLISON CLAIRE
20 UNITED STATES MAGISTRATE JUDGE.
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24
25
26
27
28

APPENDIX 7

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

**PETITIONER REQUESTING THE COURT TO TAKE
JUDICIAL NOTICE UNDER LOCAL RULE, 8.252**

Volume II, Dk. 41, pp. 1-3; pp.60-69

Patricia L. Woods
P.O. Box 93896
Las Vegas, Nevada 89193
Phone No: 702-552-0207
Plaintiff in Pro Per

FILED

SEP 28 2017

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY mm
DEPUTY CLERK

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

PATRICIA L. WOODS,

Plaintiff,

vs.

STATE OF CALIFORNIA, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION (CDCR), AND NAMED
DEFENDANTS ROBERT STORMS, STAFF
SERVICES MANAGER II AND LARRY NORRIS,
STAFF SERVICES MANAGER III (CDCR),
STATE OF CALIFORNIA,
PUBLIC EMPLOYMENT RELATIONS BOARD, (PERB),
AND NAMED DEFENDANTS EILEEN POTTER, AS
FORMER CHIEF ADMINISTRATIVE OFFICER OF PERB; WENDI L.
ROSS, FORMER ACTING GENERAL COUNSEL AND CURRENT
DEPUTY GENERAL COUNSEL AT (PERB).

Defendants

**CASE ACTION NO:
2:17-CV-00793-GEB
AC PS**

**PLAINTIFF'S
REQUEST FOR
JUDICIAL NOTICE
IN OPPOSITION TO
DISMISS THE FIRST
AMENDED
COMPLAINT**

**Date: October 11, 2017
Time: 10:00AM
Courtroom: 26
Judges: Honorable
Allison Claire
Courtroom: 10
Honorable Garland E.
Burrell, Jr.
Trial Date: None Set
Action Filed: April 14,
20017**

**JUDICIAL NOTICE
VOLUME II, CDCR**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The PLAINTFF HEREBY REQUEST THAT COURT TO TAKE JUDICIAL NOTICE OF THE FOLLOWING DOCUMENTS:

(JUDICIAL NOTICE (VOLUMES I-IV))

The Plaintiff has attached several public documents and asks the Court to take Judicial Notice of the substance and content of those documents. Additionally, Plaintiff requests the Court take special notice of (Exhibits 1-7), filed with the Amended Complaint on June 12, 2017.¹

Plaintiff has attached to this Motion in Opposition Four Volumes of documents that are State of California Public Records taken from the State Personnel Board's website and its case decisions sections. The documents are not in reasonable dispute and therefore constitute documents suitable for judicial notice.

Volume I consists of documents related to CDRC issues in support the Plaintiff's Opposition.

Volume II consists of documents that are related to issues in support of the Plaintiff's Opposition to the Public Employment Relations Board, (PERB) Motion to Dismiss.

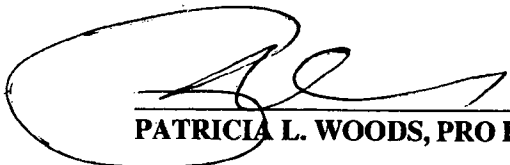
Volume III consists of the public documents containing a partial copy of the Plaintiff's Service Employees International Union's Collective Bargaining Agreement, as exercised between (CDCR) and SEIU. Additionally, **Volume III** includes a public record copy of PERB's regulations.

¹ Judicial Notice is allowed by the Court in support of a party's claims, See Disabled Rights Action Comm. Vs. Las Vegas Events, Inc., 375 F.3d 861, 866, n.1 (9th Cir. 2004) Lee vs. City of Los Angeles, 250 F. 3d 668, 689 (9th Cir. 2001) and Mack vs. S. Bay Beer Distributors, Inc, 708 F. 2d 1279, 1282 (9th Cir. 1986).

Volume IV consists of the legal briefs filed by the Plaintiff (contained in the public record) indicating she raised federal and state constitutional and due process issues with PERB; the California Third District Court; California Supreme Court and with the U.S. Supreme Court. This supports the Plaintiff's arguments in her motion, that she raised legal arguments before all courts related to her federal and state constitutional due process rights, as well as requesting that they enforce the terms, conditions and provisions of her SEIU/CDCR union contract agreement.

Dated: September 25, 2017

Respectfully Submitted by



PATRICIA L. WOODS, PRO PER

BEFORE THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ORIGINAL

In the Matter of)

PATRICIA L. WOODS)

Charging Party,)

v.)

STATE OF CALIFORNIA (DEPARTMENT
OF CORRECTIONS & REHABILITATION),)

Respondent.)

Case Number: SA-CE-1640-S

VOLUME I

MAY 19, 2008

CHRISTINE BOLOGNA

Administrative Law Judge

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street

Sacramento, California

Official Transcriber: Gina Lavoie

A P P E A R A N C E SOn Behalf of the Charging Party:

PATRICIA L. WOODS, In Pro Per
P.O. Box 660171
Sacramento, CA 95866-0171

On Behalf of the Respondent:

CASEY L. CHAPANIAN, Attorney
LINDA KELLY, Attorney
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, CA 95811

BEFORE THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ORIGINAL

In the Matter of)	
)	
PATRICIA L. WOODS)	Case Number: SA-CE-1640-S
)	
Charging Party,)	
)	
v.)	
)	
STATE OF CALIFORNIA (DEPARTMENT)	
OF CORRECTIONS & REHABILITATION),)	
)	
Respondent.)	

VOLUME II

MAY 20, 2008

CHRISTINE BOLOGNA

Administrative Law Judge

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street

Sacramento, California

Official Transcriber: Gina Lavoie

A P P E A R A N C E SOn Behalf of the Charging Party:

PATRICIA L. WOODS, In Pro Per
P.O. Box 660171
Sacramento, CA 95866-0171

On Behalf of the Respondent:

CASEY L. CHAPANIAN, Attorney
LINDA KELLY, Attorney
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, CA 95811

ORIGINAL

BEFORE THE

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)

PATRICIA L. WOODS,)

Charging Party,)

v.)

STATE OF CALIFORNIA (DEPARTMENT
OF CORRECTIONS & REHABILITATION),)

Respondent.)

Case Number: SA-CE-1640-S

VOLUME III

OCTOBER 20, 2008

CHRISTINE BOLOGNA

Administrative Law Judge

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street

Sacramento, California

Official Transcriber: Rose E. Williams

A P P E A R A N C E SOn Behalf of the Charging Party:

PATRICIA L. WOODS, in pro per
P.O. Box 660171
Sacramento, California 95866-0171

On Behalf of the Respondent:

CASEY L. CHAPANIAN TICHY, Attorney
LINDA KELLY, Attorney
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, California 95811

BEFORE THE

ORIGINAL

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)

PATRICIA L. WOODS,)

Charging Party,)

v.)

STATE OF CALIFORNIA (DEPARTMENT)
OF CORRECTIONS & REHABILITATION),)

Respondent.)

Case Number: SA-CE-1640-S

VOLUME IV

OCTOBER 21, 2008

CHRISTINE BOLOGNA

Administrative Law Judge

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street

Sacramento, California

Official Transcriber: Sarah M. Collins

A P P E A R A N C E SOn Behalf of the Charging Party:

PATRICIA L. WOODS, in pro per
P.O. Box 660171
Sacramento, California 95866-0171

On Behalf of the Respondent:

CASEY L. CHAPANIAN TICHY, Attorney
LINDA KELLY, Attorney
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, California 95811

ORIGINAL

BEFORE THE

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)

PATRICIA L. WOODS,)

Charging Party,)

v.)

STATE OF CALIFORNIA (DEPARTMENT)
OF CORRECTIONS & REHABILITATION),)

Respondent.)

Case Number: SA-CE-1640-S

VOLUME V

OCTOBER 22, 2008

CHRISTINE BOLOGNA

Administrative Law Judge

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street

Sacramento, California

Official Transcriber: Sarah M. Collins / Rose E. Williams

A P P E A R A N C E S

On Behalf of the Charging Party:

PATRICIA L. WOODS, in pro per
P.O. Box 660171
Sacramento, California 95866-0171

On Behalf of the Respondent:

CASEY L. CHAPANIAN TICHY, Attorney
LINDA KELLY, Attorney
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, California 95811

APPENDIX 8

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

**PETITIONER REQUESTING THE COURT TO TAKE
JUDICIAL NOTICE UNDER LOCAL RULE, 8.252**

Volume II, Dk. 41, pp. 1-3; pp.70-89

Patricia L. Woods
P.O. Box 93896
Las Vegas, Nevada 89193
Phone No: 702-552-0207
Plaintiff in Pro Per

FILED

SEP 28 2017

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY mm
DEPUTY CLERK

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

PATRICIA L. WOODS,

Plaintiff,

vs.

STATE OF CALIFORNIA, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION (CDCR), AND NAMED
DEFENDANTS ROBERT STORMS, STAFF
SERVICES MANAGER II AND LARRY NORRIS,
STAFF SERVICES MANAGER III (CDCR),
STATE OF CALIFORNIA,
PUBLIC EMPLOYMENT RELATIONS BOARD, (PERB),
AND NAMED DEFENDANTS EILEEN POTTER, AS
FORMER CHIEF ADMINISTRATIVE OFFICER OF PERB; WENDI L.
ROSS, FORMER ACTING GENERAL COUNSEL AND CURRENT
DEPUTY GENERAL COUNSEL AT (PERB).

Defendants

**CASE ACTION NO:
2:17-CV-00793-GE
AC PS**

**PLAINTIFF'S
REQUEST FOR
JUDICIAL NOTICE
IN OPPOSITION TO
DISMISS THE FIRST
AMENDED
COMPLAINT**

**Date: October 11, 2017
Time: 10:00AM
Courtroom: 26
Judges: Honorable
Allison Claire
Courtroom: 10
Honorable Garland E.
Burrell, Jr.
Trial Date: None Set
Action Filed: April 14,
20017**

**JUDICIAL NOTICE
VOLUME II, CDCR**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The PLAINTIFF HEREBY REQUEST THAT COURT TO TAKE JUDICIAL NOTICE OF THE FOLLOWING DOCUMENTS:

(JUDICIAL NOTICE (VOLUMES I-IV))

The Plaintiff has attached several public documents and asks the Court to take Judicial Notice of the substance and content of those documents. Additionally, Plaintiff requests the Court take special notice of (Exhibits 1-7), filed with the Amended Complaint on June 12, 2017.¹

Plaintiff has attached to this Motion in Opposition Four Volumes of documents that are State of California Public Records taken from the State Personnel Board's website and its case decisions sections. The documents are not in reasonable dispute and therefore constitute documents suitable for judicial notice.

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Volume II consists of documents that are related to issues in support of the Plaintiff's Opposition to the Public Employment Relations Board, (PERB) Motion to Dismiss.


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Dated: September 25, 2017

Respectfully Submitted by



PATRICIA L. WOODS, PRO PER

C067447

PERB Nos. 1640S, 2136S

In The COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

PATRICIA L. WOODS

Petitioner

vs.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent

DEPARTMENT OF CORRECTION AND REHABILITATION

Real Party in Interest

Petitioner's Motion Requesting the Court to Take Judicial Notice

Under Local Rule, 8.252; and

**The Declaration of Petitioner Patricia Woods In Support of The Motion
Requesting Judicial Notice**

PATRICIA L. WOODS, Petitioner in Pro Per
Post Office Box 660171, Sacramento, CA 95866-0171

Telephone: (916) 640-7751

August 30, 2012

**PETITIONER'S REQUEST FOR JUDICIAL NOTICE AND
FINDING OF FACTS UNDER LOCAL RULE 8.252**

CASE NO: 067447

THE COURT'S AUTHORITY

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that pursuant to Rule 8.252 of the California Rules of Court and California Evidence Code Sections 450, 452, 453 and 459, the Petitioner hereby requests this Court to take judicial notice for review and taking of newly found evidence on appeal, allowing for the Declaration of Petitioner Patricia Woods (Petitioner), to be accepted by this Court into evidence, along with supporting documents attached to that Declaration, known as Exhibits 1, 2, 3, and to become part of the Court's Administrative Record, for the purposes of the Court to make a finding of fact under Code of Civil Procedure Section 909, and under any other relevant codes and procedures governing this Court's taking of newly found evidence while a case is on appeal before it.

The Petitioner requests that this Court take judicial notice of the following documents:

Exhibit 1, is comprised of true and correct copies of the portion of PERB's Annual Reports to the California State Senate for the year 2010-2011, including pages highlighting the resume and information of Linda M. Kelly, former co-counsel to the Respondent, the Department of Corrections and Rehabilitation (CDCR), and the two named Respondents, Robert Storms (Storms) and Larry Norris (Norris), in the above-mentioned case. The resume of the PERB's Board Member, Robin Wesley (Wesley), including the dates, years and time-frame that Ms. Kelly served as a Legal Advisor to the PERB's Board Member Wesley and any other relevant information establishing that Ms. Kelly was working at PERB during the critical time period, that Petitioner's PERB matters were being adjudicated by Board Member Wesley and rulings and decisions made on Petitioner's appeals and administrative hearings before PERB's ALJ.

Exhibit 2, is comprised of true and correct copies of the portion of PERB's Annual Reports to the California State Senate for the year 2009-2010, including pages highlighting the resume and information of Linda M. Kelly, former co-counsel to Respondent, the Department of Corrections and Rehabilitation (CDCR), and the two named Respondents, Robert Storms (Storms) and Larry Norris (Norris), in the above-mentioned case. The resume of the PERB's Board Member, Robin Wesley (Wesley), including the dates, years and time-frame that Ms. Kelly served as a Legal Advisor to the PERB's Wesley and any other relative information establishing that Ms. Kelly was working at PERB during the critical

time periods that the Petitioner's PERB matters were being adjudicated by Board Member Wesley and rulings and decisions made on the Petitioner's appeals and administrative hearings before PERB's ALJ.

Exhibit 3, is comprised of true and correct copies of the portion of PERB's Annual Reports to the California State Senate for the year 2008-2009, including pages highlighting the resume and information of Linda M. Kelly, former co-counsel to the Respondent, the Department of Corrections and Rehabilitation (CDCR), and the two named Respondents, Robert Storms (Storms) and Larry Norris (Norris), in the above-mentioned case and the resume of the PERB's Board Member Robin Wesley (Wesley), including the dates, years and time-frame that Ms. Kelly served as a Legal Advisor to the PERB's Wesley and any other relative information establishing that Ms. Kelly was working at PERB during the critical time periods that the Petitioner's PERB matters were being adjudicated by Board Member Wesley and rulings and decisions made on the Petitioner's appeals and administrative hearings before PERB's ALJ.

Documents listed under Exhibits 4, 5, 6, 7, 8, 9, 10, are already part of the Court's administrative record. However, for purposes of supporting the Petitioner's allegations made in her Declaration (attached), she asks the Court to allow for documents known as Exhibits 4-10, to remain as part of her motion before the Court as evidence for purposes of issuing a Judicial Notice for taking of newly found evidence in this case on appeal.

This newly found evidence, consisting of the resume of Linda M. Kelly, former co-counsel to Respondents Robert Storms, Larry Norris and the CDCR, only became available to the Petitioner, on or about August 28, 2012, when she visited the Public Employment Relations Board (PERB), website at: www.perb.ca.gov to review and check case citations for her Reply Brief.

The documents listed in Exhibit 1-3, have the most important relevance in supporting the Petitioner's request for a judicial notice for taking of newly discovered or found evidence on appeal, since for four years PERB knowingly hired and retained for employment the former co-counsel for the Respondents in this case, Ms. Linda M. Kelly. This information was concealed and kept from the Petitioner during and while her PERB's ALJ's Proposed Decision was still pending and while her case was on appeal before PERB's Board. Ms. Kelly became employed by PERB from November 2008 until December 2010 at the critical time period when Petitioner's ALJ's Proposed Decision was still pending at PERB.

In addition, within one month of Ms. Kelly's employment as the Respondents' legal Counsel in Petitioner's case, PERB hired Ms. Kelly to serve as Legal Advisor to one of its Board Members, Robin Wesley, while at the same time Board Member Wesley was assigned to rule on and decide the Petitioner's case. During the total period that Petitioner's case was on appeal at PERB, Board

Member Wesley ruled on and decided the Petitioner's case motions. PERB's website shows that Ms. Kelly was serving as Ms. Wesley's Legal Advisor during the same periods. These issues are further stated in the Petitioner's Declaration requesting Judicial Notice for this new evidence on appeal in this case. (See Declaration of Patricia Woods, dated August 30, 2012, attached).

ARGUMENTS

The Petitioner's Declaration alleges that from November 2008 until December 2010, the Respondents' former co-counsel, Linda M. Kelly, worked for the Public Employment Relations Board (PERB) in the position of Legal Advisor to one of its Board Member, Robin Wesley. Ms. Wesley is the same Board Member assigned by PERB to rule on and decide the Petitioner's Woods's case.

It is during that time that Petitioner's Proposed Decision from PERB's ALJ was still pending and Ms. Kelly was still being listed as an attorney of record for the Respondents in this case as well as working at PERB for Board Member Robin Wesley (Wesley), who was deciding and ruling on the Petitioner's case. (See the Petitioner's Declaration attached and Exhibits 5, 6 and 7.)

Petitioner believes she may have been the victim of prejudice by PERB's appeal proceedings since Ms. Wesley did not disqualify herself from deciding and ruling

on her case before PERB, knowing that she had hired and retained the former co-counsel, Linda M. Kelly to the named Respondents in the Petitioner's case.¹

Ms. Kelly was hired by PERB within one month of her arguing and representing the Respondents in the Petitioner's case and the PERB's ALJ's Proposed Decision was since pending in the case. PERB's own website confirms that Ms. Kelly, served as the Legal Advisor to Board Member Wesley during and throughout the Petitioner's appeal proceedings before PERB.

Further, PERB had concealed and kept this information from the Petitioner throughout her administrative hearing process, while PERB's ALJ's Proposed Decision was still pending, and most critical, during and while Ms. Wesley, was deciding and ruling on the Petitioner's motions on appeal, denying them, knowing that Ms. Kelly was on-board working for her as her Legal Advisor, and that Ms. Kelly had served as the co-counsel and one of the attorneys of record for the Respondents in the same case she was ruling on.

Petitioner believes that Ms. Kelly had first-hand knowledge of Petitioner's case prior to and while serving as Legal Advisor to one of PERB's Board Members

¹ PERB Regulations: 32155 (a)(4), no Board member, and no Board agent performing an adjudicatory function, shall decide or otherwise participate in any case or proceeding...when it is made to appear probable that, by reason of prejudice of such Board member or Board agent, a fair and impartial consideration of the case cannot be had before him or her.

(Wesley), placing herself in a position to influence the outcome of a PERB's Board Member decision.

REQUEST THE COURT TO MAKE FINDINGS OF FACT

Petitioner believes she has been the victim of prejudice by PERB's rulings and decisions made by PERB's Board Member Wesley, and that this Court needs to review and make a findings of fact for the appeals record on this newly found evidence being submitted by Petitioner. Further, the Petitioner has requested in her Declaration to the Court to rule on the following:

- (1) Decide whether or not PERB's decisions and rulings made by PERB's Board Member, Robin Wesley, which may include her Legal Advisor Linda Kelly, were prejudicial in nature to this case; (Exhibits 8, 9 and 10.)
- (2) Determine whether or not an automatic reversal of PERB's decision should be granted in Petitioner's favor (with all benefits and losses), due to PERB's failure to disclose this newly discovered evidence to her for well over four years and never disclosed to her during the PERB's administrative appeal proceedings and/or while the ALJ's Proposed Decision was still pending; (Exhibits 5, 6, 7, 8, 9 and 10.)

(3) Under the Court's Local Rules, 8.252, the Petitioner is asking the Court to take Judicial Notice of this matter and also determine whether this newly discovered evidence should become part of the Court's Administrative Record on appeal for a decision before this Court. (Exhibits 1, 2 and 3.)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITIONER'S REQUEST FOR A JUDICIAL NOTICE OF TAKING OF
NEWLY FOUND EVIDENCE**

The California Evidence Code Section 459 (a)(1) specifies that a reviewing court may take judicial notice of any matter properly noticed by the trial court and Section 459 (a) (2) specifies that a reviewing court may take judicial notice of any matter specified in the Evidence Code Section 452. Section (d) (1) in turn permits judicial notice of records of any court of this state.

The Petitioner asks this court to take such judicial notice of her request, since appellate courts have the same right and power to take judicial notice as the trial court. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 359; *People v. Connor* (2004, Sixth District) 115 Cal.App.4th 669, 681, fn.3.) Rule 8.252.

Under the California Rules of Court, Rule 8.252(a) implements Evidence Code 459, and requires a party seeking judicial notice to file a separate motion, stating why the matter to be noticed is relevant to the appeal; whether the matter was

presented to the trial court; and whether the matter relates to proceedings occurring after the judgment.

California Courts have held that taking of judicial notice from a party of factual information found on the Internet is acceptable. *See, Gentry v. eBay, Inc.* (Cal. App.4 Dist, 2002) 99 Cal.App.4th 816, 821, fn. 1 [court took judicial notice where eBay described its operations on its website under Evidence Code 459]; *Ampex Corp. v. Cargle* (Cal. App. 1 Dist., 2005) 128 Cal.App.4th 1569, 1573 [where documents were published on the Internet and excluded by trial court were deemed amenable to judicial notice to the extent the records were “. . . not reasonably subject to dispute and [were] capable of immediate and accurate determination by resort to source of reasonably indisputable accuracy”].

As in this case before this Court, the Petitioner is offering Exhibits 1, 2, 3, as factual information that she found on the website of Public Employment Relations Board (PERB's). PERB is advertising to the general public its “Annual Reports”, consisting of relative information related to its PERB's Board Members, Legal Advisors to the PERB's Board Members, Administrative Law Judges (ALJ), and its Executive staff.

1. Relevance of the Exhibits:

One of the main issues before this Court is whether the PERB prejudicially abused its discretion by not providing the Petitioner with due process and

statutory due process rights. The Petitioner claims as part of her PERB administrative hearings and the appeals process that PERB failed to apply the statewide standards governing Rejection During the Probationary Period. These rights are afforded to all other government state employees. There are other subsequent issues argued in the Petitioner's Petition, Opening Brief and/or in the Respondents' Reply Briefs relevant to the Exhibits. Further Petitioner's Reply Brief will raise some of the same or similar issues. The Exhibits 1, 2, and 3 are relevant to these issues before this Court.

2. Presentation to Lower Court:

The Exhibits 1, 2, and 3 were not presented to the trial court, but are being presented to the Court of Appeal, since the Petitioner had a direct appeal right to this court after receiving a final decision from PERB, dismissing her case before that Board.

3. Relation to Proceeding After Judgment:

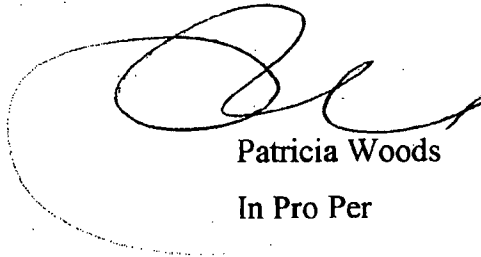
The Exhibits 1, 2, and 3 are relevant to matters occurring at and during the Petitioner's administrative hearings and appeal at PERB. Also, pertaining to the issues raised in the PERB's Reply Brief, p. 44, asserting the fact that "the Petitioner, Woods was not denied any due process rights at or by PERB".

THEREFORE, Petitioner requests that this Court take judicial notice of the materials, attached to this motion, as Exhibits 1, 2, and 3 and Exhibits 4-10, inclusive.

In addition, Petitioner requests this Court make a finding of facts to determine all of the issues raised by the Petitioner in this motion for a judicial notice.

Dated: August 30, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Patricia Woods", written over a large, faint circular stamp or watermark.

Patricia Woods

In Pro Per

Attached: Declaration of Patricia Woods in
Support of the Motion for Judicial Notice
Exhibits 1-10

**DECLARATION OF PETITIONER PATRICIA WOODS IN
SUPPORT OF THE MOTION AND REQUEST FOR JUDICIAL
NOTICE UNDER LOCAL RULES, 8.252**

I, Patricia Woods, declare:

1. I am the Petitioner in the above-captioned matter. I hereby request that the Court take judicial notice in the matters stated in my Motion attached to Petitioner's Declaration filed before this Court on August 30, 2012.

2. On or about August 28, 2012, and prior to filing my final Reply Brief with this Court due on September 6, 2012, I visited the Public Employment Relations Board (PERB), website at: www.perb.ca.gov to review and check case citations for my Reply Brief.

3. During the course of that search, I visited other sections of the PERB's website, including the sections entitled "PERB Information" and the "PERB's Annual Reports to the California State Senate". In doing so, I discovered resumes and other information pertaining to PERB's Board Members, Legal Advisors to the PERB's Board Members, Administrative Law Judges (ALJ), and its Executive staff.

4. Posted on the PERB's website under its Annual Reports to the California State Senate for the years 2010-2011, 2009-2010, 2008-2009, is the resume of Linda M. Kelly, former co-counsel to the Respondent, the Department of

Corrections and Rehabilitation (CDCR), and the two named Respondents, Robert Storms (Storms) and Larry Norris (Norris), in the above-mentioned case.

(Attached as Exhibits 1, 2, and 3.)

5. The resume information on PERB's website relays Ms. Kelly background very explicitly and provides a full description of her legal background and job experience prior to her being hired by PERB and serving on staff as one of the Legal Advisors to PERB's Board Member, Robin Wesley.

6. Ms. Kelly's resume further states that she served as a former Labor Relations Counsel III, for the Department of Personnel Administration (DPA) from 2006 to 2008. It is during that same time period that she served as co-counsel to the CDCR and named Respondents (Storms and Norris) to my case before PERB. (Exhibits 1, 2, and 3.)

7. Within "one month" prior to Ms. Kelly being appointed and hired by PERB's Board Member, Robin Wesley, (Wesley), she had just concluded representing the Respondents in my case before PERB, with the ALJ's Proposed Decision still pending. (Exhibit 4, 5, 6 and V: 01883-01884.)

8. During the Petitioner's administrative hearings at PERB, the Petitioner noticed that Ms. Kelly was advancing oral arguments for the Respondents (Storms and Norris), providing legal advice to her co-counsel and to the Respondents at the

hearings. (See the Court's Administrative Records Transcripts, (AR III: 001152-01882 and AR VI: 01883-02150.)

9. In addition, to serving as the co-counsel for the Respondents in the PERB's case, Ms. Kelly also served as the lead counsel for the Respondents in the State Personnel Board (SPB), appeal case against Petitioner Woods. This case was taken off calendar at SPB's request of Ms. Kelly and the Petitioner. (POB, ex.1 and AR00838.)

10. The SPB case was finally dismissed at the Petitioner's request, since she had a decision pending at PERB, addressing the same and similar set of facts. (See POB ex.1 and AR00838.)

11. Petitioner Woods learned from PERB's website that on or about November 2003, Ms. Kelly was hired by PERB as a Legal Advisor to Board Member, Robin Wesley (Wesley). (Exhibit 1, 2, and 3.)

12. October 22, 2008, Ms. Kelly had just concluded oral arguments and her appearance on the Petitioner's case before PERB. (Exhibit 4 and AR V: 01883-01884.)

13. On August 24, 2009, the PERB's ALJ issued her decision in the Petitioner's case, denying a Dills Act violation and dismissing the PERB's Unfair Practice Complaint. Ms. Kelly is noted on the ALJ's Proposed Decision as one of the attorneys of record for the Respondents and when the ALJ's decision was

issued Ms. Kelly was working on PERB's staff as a Legal Advisor to one of the Board Members. (AR V: 01883-01884 and Exhibits 1, 2, 3, 4, 5, 6 and 7.)

15. While Ms. Kelly was working on PERB's staff, she was still noted in PERB's administrative hearing records as one of the attorneys of record for Respondents. She never submitted to the Petitioner a substitution of attorney form (with proof of service), showing that she was no longer involved with the PERB's administrative case, prior to the ALJ ruling. (VII: AR00651-00653 and Exhibit 5 and 6.)

16. PERB's website shows that from the period of November 2008 to December 2010, Ms. Kelly actively served as Ms. Wesley's Legal Advisor at PERB. It was during this period that the ALJ issued her Proposed Decision on August 24, 2009, and the PERB's Board twice denied the Petitioner Woods's claim of a violation under the Dills Act.

(Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and VI:00127-00141, 00001-00006 and AR II: 00257-00263.)

14. On August 25, 2009, Petitioner Woods appealed the ALJ's Proposed Decision to PERB's Board for a review and from August 25, 2009 to January 27, 2011, Ms. Wesley was assigned to hear and decide the Petitioner's case. She issued her final ruling dismissing the Petitioner's case on January 27, 2011.

(Exhibits 8, 9, 10, and AR VI: 00001-00006, 00127-00141 and AR: II: 00257-00263.)

17. The Petitioner Woods believes that Ms. Kelly had first-hand knowledge of the Petitioner's case prior to and while serving as the Legal Advisor to one of PERB's Board Members (Wesley), placing herself in a position to influence the outcome of a PERB's Board Member decision.

18. While Petitioner's case was on appeal at PERB, she filed multiple motions to the PERB's Board and to Wesley as a member of that Board. Wesley did not disqualify herself from making rulings on the Petitioner's appeal motions. In fact, she ruled on each and every one of them. (ARV1: 00127-0014, V1: 00001-00006, VII: 00257-00263 and Exhibits 8, 9 and 10.)

19. Over a two-year period, PERB's Board Member Robin Wesley continued to rule on and decide Petitioner Woods's motions denying them in whole and/or part, and finally denying the Petitioner's appeal and dismissed her case in its entirety at PERB. (ARV1: 00127-0014, V1: 00001-00006, VII: 00257-00263 and Exhibits 8, 9 and 10.)

20. The Petitioner is asking this Court to decide whether or not PERB's decisions and rulings made by PERB's Member, Robin Wesley, which may have included her Legal Advisor Linda Kelly, were prejudicial in nature to this case.

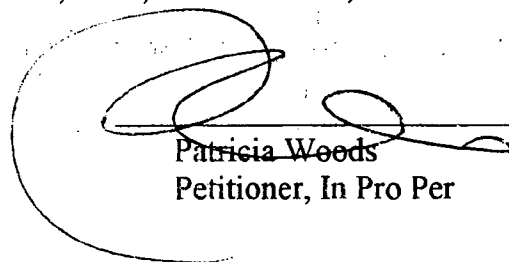
21. Further, Petitioner is asking the Court to determine whether or not an automatic reversal of the PERB's decision should be granted in the Petitioner's favor (with all benefits and losses), due to PERB's failure to disclose this newly

discovered evidence in Exhibits 1, 2 and 3, to her for well over four (4) years and never disclosed to her during the PERB's administrative appeal proceedings and/or while the ALJ's Proposed Decision was still pending.

22. Under the Court's Local Rules, 8. 252, the Petitioner is asking the Court to take judicial notice of this matter and also determine whether this newly discovered evidence should become a part of the Court's Administrative Record on appeal for a decision before this Court.

I declare under penalty of perjury the foregoing is true and correct and is within my personal knowledge, except for any matter stated on information and belief, which I believe to be true, and I could testify the same if called as a witness. This Declaration was executed on August 30, 2012, at Sacramento, California.

Dated: August 30, 2012



Patricia Woods
Petitioner, In Pro Per

Exhibits 1-10 (Attached)

PROOF OF MAILING

I declare that I am a resident in Clark County of Las Vegas, Nevada. I am over the age of 18 years and not a party to the within entitled cause. My name and the address of my residence is: Debra Brewster, 2125 Las Vegas Blvd, Unit 2040, Las Vegas, Nevada 89030.

On September 25, 2017, I mailed the Plaintiff's Motion in Opposition to the Defendants' Motion to Dismiss the First Amended Complaint, Memorandum of Points and Authorities, including Judicial Notice, Volumes I through IV, dated September 25, 2017, to the U.S. District Court for the Eastern District of California, Sacramento, California and to all other parties listed below by:

x placing a true copy thereof enclosed in a sealed envelope for collection and delivery by U.S. Priority Mail, United States Postal Service to the U.S. District Court, Clerk's Office and by regular U.S. mail delivery to the other parties.

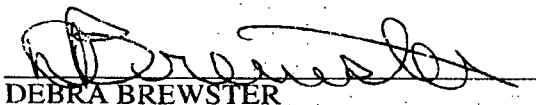
Clerk's Office
United States District Court
for the Eastern District of California
Sacramento Division
Room 4-200, 4th Floor
Robert T. Matsui United States Courthouse
501 "I" Street
Sacramento, CA 95814

William H. Downer, Esq. (Attorney for Storms and Norris)
State of California
California Department of Justice, (CDCR)
1300 "I" Street, Suite 1101
P.O. Box 944255
Sacramento, California 94244

Felix De La Torre (Attorney for PERB Defendants' Ross and Potter)
General Counsel
Public Employment Relations Board, (PERB)
1031 18th Street
Sacramento, California 95811-4174

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 25, 2017, at Las Vegas, Nevada.

DEBRA BREWSTER
(Type or print name)

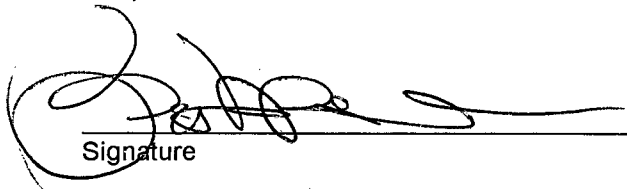

DEBRA BREWSTER

[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

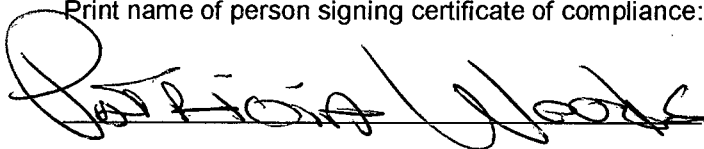
This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- ☒ this brief contains **8,451** words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- ☐ this brief uses a monospaced typeface having no more than 10½ characters per inch and contains *[state the number of]* lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).


Signature

Date: 10/17/20

Print name of person signing certificate of compliance:


Patricia Woods