APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 17 2021

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

PATRICIA A. McCOLM,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; et al.,

Defendants-Appellees.

No. 20-16817

D.C. No.
1:14-cv-00580-LJO-JDP
Eastern District of California,
Fresno

ORDER

Before: CANBY, GRABER, and FRIEDLAND, Circuit Judges.

This court has reviewed the notice of appeal filed September 17, 2020 in the above-referenced district court docket pursuant to the pre-filing review order entered in docket No. 01-80189. Because the appeal is so insubstantial as to not warrant further review, it shall not be permitted to proceed. *See In re Thomas*, 508 F.3d 1225 (9th Cir. 2007). Appeal No. 20-16817 is therefore dismissed.

All pending motions are denied as moot.

This order, served on the district court for the Eastern District of California, shall constitute the mandate of this court.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained.

DISMISSED.

APPENDIX A

DA/Pro Se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 24. Motion for Appointment of Counsel

Instructions for this form: http://www.ca9.uscourts.gov/forms/form24instructions.pdf

9th Cir. Case Number(s) 20 – 16817

Case Name MCCOLM v STATE OF CALIFORNIA, ETAL.

Lower Court or Agency Case Number 1:14-cv-00580-LJO-JDP

1. My name is PATRICIA A. MCCOLM
2. I am asking the court to appoint an attorney to help me with this case.
3. My fee status is as follows *(select one)*:
   - (•) The district court or this court granted my motion to proceed in forma pauperis.
   - ( ) I filed a motion to proceed in forma pauperis but the court has not yet ruled on the motion.
   - ( ) This motion is accompanied by a motion to proceed in forma pauperis.
   - ( ) I paid the filing fees for this case. However, I cannot afford an attorney for the following reasons:
4. Is this a civil appeal or petition for review? (•) Yes ( ) No
   If yes, attach an additional page(s) describing the issues on appeal.

My current mailing address

P.O. BOX 113

City LEWISTON State CA Zip Code 96052

Prisoner Inmate or A Number (if applicable)

Signature [signature] **Date** 9-28-20

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

New 12/01/2018

Case No. 20-16817: ATTACHMENT TO FORM 24. Motion for Appointment of Counsel

In support of Motion for Appointment of Counsel re *permission* and appeal, it is hereby respectfully requested that this Court take Judicial Notice of:

1) the Notice of Appeal in this action with attachments re facts/issues on appeal showing discriminatory prejudice from acute injury/illness and limitations of permanent disability constituting extraordinary circumstances/inability to perform as expected, requiring appointment of counsel and "disregard" of merit re causes of action and good cause for appeal; that in contravention of Magistrate Judge contention, the Second Amended Complaint states a cause of action and should not have been *dismissed with prejudice* under 28 U.S.C. 1915; but given leave to amend with appointment of counsel to ensure that medically limited persons with disability are not denied due process and access to the Court by reason thereof; as would appear to have taken place in this action;

2) A. all medical verifications/requests for accommodation documents filed under seal in the U.S. District Court, Eastern District in instant case 1:14-CV-00580; in particular, the August 23, **2018** statement of M.S. specialist, Dr. Apperson, M.D., PhD re progressive cognitive decline necessitating appointment of counsel (See below for subsequent diagnosis of earlier injuries requiring urgent need for back surgery to abate significant pain and potential for paralysis.) and **B. all requests for appointment of counsel**.

3) the Magistrate Judge Order (ECF) and plaintiff's timely motion under FRCP 59e/60b (ECF) from dismissal/judgment on the Second Amended Complaint; regarding which, the **Magistrate Judge questionably determined that where appointment of counsel is not warranted that dismissal must follow** (ECF 74, page 2, lines 18-19) the adoption of which, is apparent discriminatory error/abuse of discretion, a due process violation and manifest injustice.

4) the SECOND AMENDED COMPLAINT, showing merit of the causes presented.

Appellant seeks appointment of counsel on 1) the motion for appointment of counsel, 2) on application to proceed on appeal and 3) on appeal; in that medical verification shows that assistance is needed to determine and satisfy the requirements of the Court, to avoid prejudice and achieve a favorable result.

Additional *newly diagnosed extraordinary circumstances* arising from prior injuries which affected plaintiff's ability to meet court expectations in this action and which support acute necessity for appointment of counsel are verified by the attached EXHIBITS 1-5 . Exhibits 1 and 2 were filed with the Notice of Appeal as Exhibits 11 and 12.

Unanticipated results from medical evaluations related to the severely limiting medical circumstances, upon which the prior extensions of time and appointment of counsel were based, show previously undiagnosed conditions which *require surgery to avoid acute potential for paralysis*; thus, presenting good cause/extraordinary circumstances for appeal and appointment

of counsel in this matter; in particular, because the first of three surgeries is scheduled for November. There is a heavy emotional impact from the new diagnosis and need for surgery; among other potential life threatening new diagnoses; e.g. serious sleep oxygen deprivation. To date, there has been a lot of time expended in trying to obtain timely resolution of insurance coverage for prescribed medically necessary treatment and durable medical equipment to enable quality sleep, avoid risk of death and hopefully improve daytime cognitive function; a continuing effort.

The District Court was on notice of serious injury trauma incidents/medical and other unanticipated detriment outside control of this appellant over the past several years related to a fall through rotted board on deck at residence, a tip-over in mobility scooter, sleep deprivation, heat pump failure, break-in damage/theft, four year efforts to obtain compliance by Medi-Cal insurer with Administrative Law Judge Order to provide the medically necessary power wheelchair, Covid risk re compromised immune system and respiratory illness preventing timely access to medical care and related stress/anxiety aggravation of M.S. symptoms with vision impairment and broken glasses. Staying alive has become a primary issue compromising competent accomplishment of any written project in such fashion as to have a fair opportunity with able-bodied persons to achieve a favorable result. Not having timely access to a law library has not helped the anxiety from limitations in ability to accomplish effective documents in this case under the unanticipated extraordinary circumstances. Appointment of counsel was sought to meet the expectations of the court.

The April 2019 deep laceration left leg injury with *continuing numbing pain, swelling and limitation on mobility with knee/hip pain* has now been diagnosed as abnormal (See Exhibit

3); in part, as arising from serious back injury damage complicated by degenerative disc disease with recommendation for urgent surgery (See Exhibit 4 and 5, two locations/two surgeries) to avoid potential for paralysis. The left leg swelling with knee and hip pain limiting standing and use thereof has not subsided and remains under evaluation scheduled in September and October. In preparation for surgery, multiple additional out-of-town studies have been ordered to include further studies of the neck to determine cause of numbing/pins & needles inflicting periodic loss of right arm/hand use; symptoms aggravating pre-existing painful, crippled, swollen, arthritic hands; thus, severely limiting ability to sit / keyboarding. (See Exhibit 1 and 2 hereto.) The hip injury has been identified by MRI as a ham string tear, split piriformis muscle fibers, sciatic nerve/piraformis syndrome and osteoarthosis of left hip joint; which makes it painful to ambulate or sit properly. Back pain/spasm also limits concentration and ability to keyboard with focus. Pain, stress is a factor limiting recall for persons with M.S.

With advanced mobility limitations and surgery anticipated, obtaining Medi-Cal insurer compliance with the California State Hearing Division ALJ Order for receipt of the power chair became an urgent priority; supported by the State Hearing Division Presiding Judge Miller. Near daily effort has been and is required to work with the new vendor to obtain the proper durable medical equipment and ramp installation. These efforts continue and are scheduled throughout the next few weeks to deal with unanticipated complications with safety re programming and other equipment errors and need for instruction on use of the highly specialized equipment. Even the medical transportation driver was stumped when the chair locked and would not move.

The multiple medical related crises stated above, have contributed to the inability to timely "download" the cognitive function necessary to competently complete matters in this case.

Loss of sleep/cognitive function from oxygen deprivation, the stress of surgery or be paralyzed, the threat/limitations of Covid and the overwhelming harm reflected in the statement of facts on appeal, are worthy of such time as necessary to allow for processing of this appeal/appointment of counsel that will meet the needs of both this appellant and the court in telling wrongful defendants that *all* citizens have equal rights unobstructed by "stigma" under the Constitution of the United States.

In consideration of the debilitating effects of acute medical related matters stated above; in concert with other permanent disability limitations, appointment of counsel is respectfully requested to avoid potential for inadvertent errors and omissions from the unanticipated time invasive medical detriment.

This Court is respectfully requested to ensure, that misunderstood effects of illness/injury, treatment and progressive disability from disease (M.S. which has no cure); do not become a discriminatory measure for a District Court to deny a plaintiff with disability the constitutional right to due process and access to the court in this Country. **If "stigma," limitations of disability and requests to afford appropriate time and other accommodation, cause problems for the Court precipitating DISMISSAL WITH PREJUDICE; then appointment of counsel appears to be constitutionally required, to ensure fair and impartial access to the Court regarding this important question.**

Your kind consideration is appreciated.

UCSF Health

UCSF General Medicine at 1545 Divisadero
1545 DIVISADERO ST Fl. 1
SAN FRANCISCO CA 94115-3010
Phone: 415-353-7900 | Fax: 415-353-2583

Clinical Programs:
General Medicine/Primary Care
Weight Management
Behavioral Health

August 31, 2020

Patient: **Patricia McColm**
Date of Birth: **6/5/1946**
Date of Visit: **8/31/2020**

To Whom It May Concern:

It is my medical opinion that Patricia McColm has persistent medical issues that do not allow her to sit for more than 20 minutes at a time due to a persistent leg injury and newly diagnosed spinal disorder which may require impending surgery. This has interfered with her ability to prepare court documentation in a timely fashion. Please consider granting her the requested extension to help deal with these new and unresolved medical issues.

Sincerely,

Meghana Dipti Gadgil, MD

Electronically signed by Meghana Dipti Gadgil, MD on 8/31/2020, 10:19 AM

CC:

EXHIBIT 1

UC Davis Medical Center
MIDTOWN NEUROLOGY
3160 FOLSOM BLVD, SUITE 2100
SACRAMENTO CA 95816-5266

PATIENT: Patricia McColm
DOB: 6/5/1946

DATE: 8/20/2020

To Whom It May Concern:

Patricia McColm is a patient of mine who was evaluated on 8/18/2020 for follow-up for multiple sclerosis. I am writing this letter to support her petition for a court appointed lawyer to represent her in a civil lawsuit. She has difficulty with her memory and executive function as a result of multiple sclerosis. She also has physical limitations with back pain and leg weakness after sitting for prolonged periods of time. Please approve her petition for representation given her cognitive and physical disabilities.

Sincerely,

Michelle L. Apperson

Michelle L Apperson, MD, PHD
MS Clinic Director
HS Associate Clinical Professor of Neurology
(916) 734-3588

EXHIBIT 2

Giovorukhin, Alex, Technician
OTHER ANCILLARY STAFF

Procedures
Addendum

Encounter Date: 7/15/2020

University of California, Davis
Department of Neurology
EMG Laboratory

Full Name: Patricia McColm [redacted]

Gender: Female
Date of Birth: 6/5/1946

Visit Date: 7/15/2020 09:12
Age: 74 Years 1 Months Old

Patient History: 74-year-old female presenting with secondary progressive MS with no treatment. Reports of a fall resulting with a laceration of the left leg a year ago. Since the accident, patient has been referring pain and numbness of 3 lateral toes of the left foot and radiation to the leg and thigh. Patient takes aspirin occasionally, but no anticoagulation.

Examination:
Cranial nerves 2 thru 12 are intact. Full strength upper extremities except for the right triceps 4/5. Strength is full in all muscle groups in the lower extremities. DTRs absent in the lower extremities. DTRs 1+ upper extremities symmetric.

ELECTRODIAGNOSTIC FINDINGS:

1. Normal motor conduction velocity in the bilateral tibial and peroneal nerves with borderline reduction of compound muscle action potential amplitudes in part related to the habitus of the patient.
2. Normal F- wave latencies in the right tibial and borderline prolonged in the left tibial.
3. Normal sensory conduction velocity in the bilateral sural and superficial peroneal nerves with low amplitudes in the bilateral sural nerves and right superficial peroneal nerve.
4. Needle EMG showed signs of chronic denervation in the left tibialis anterior muscle and denervation (fibrillation and positive waves) (see attached figure) in the left paraspinal muscles at the L5-S1 level. The examination of paraspinal muscles was restricted to only one level due to the limited tolerance of the patient.

CLINICAL IMPRESSION:

Abnormal study. The findings are consistent with a lumbar radiculopathy, predominantly involving the L5-S1 level on the left side. Consider obtaining a lumbar MRI as part of the diagnostic work up. In addition, the low amplitudes of compound muscle and sensory nerve action potentials suggests an underlying axonal neuropathy.

Ricardo A. Maselli, MD
Clinical Neurophysiology

EXHIBIT 3

UCDAVIS HEALTH | UC Davis Spine Center

UNIVERSITY POST ACUTE

Surgery Scheduling Information and Patient Checklist:

Surgeon: Dr. Jandial

Procedure: L4-L5 Lateral Fusion

☐ **Obtain Medical Clearance:** Please schedule a pre-operative appointment with your primary care provider (PCP) to ensure you are medically optimized for surgery. You will need an updated EKG if one has not been performed within the last year. You will also need to schedule an appointment with any specialists for additional workup and/or recommendations prior to surgery:

☐ Cardiology ☐ Oncology ☐ Pulmonology ☐ Rheumatology ☐ Other:_____

Once necessary appointments are made, please contact the clinic at (916)-734-7463 and ask for Micah or Kimberlee. We will schedule a surgical date at that time and arrange all other care requirements

☐ **Pre-operative Spine Center Appointment:** You will be scheduled to see our Nurse Practitioner and surgical team approximately 2-3 weeks prior to your surgery date. Anticipate being at the Spine Center for two hours. ***Please bring updated medication list to this appointment***

☐ **Pre-operative Labs:** Mandatory lab work should be completed around the time of your pre-op appointment with the Spine Center. This needs to be done at a UCD clinic. These include: CBC, BMP, INR, PTT, Type & Screen, UA & Culture (possible pregnancy/nicotine/tox screen)

☐ **Diabetes:** Hgb A1C will need to be less than 7.5 to proceed. Please see your PCP/endocrinologist for management

☐ **Osteoporosis:** Fusion patients may need a DEXA scan and Forteo therapy prior to surgery for bone health optimization

It is recommended all surgical patients take a daily dose of 1000 - 2000 IU of Vitamin D3. Calcium supplementation of 1000-1200 mg/day should be discussed with your surgeon/providers

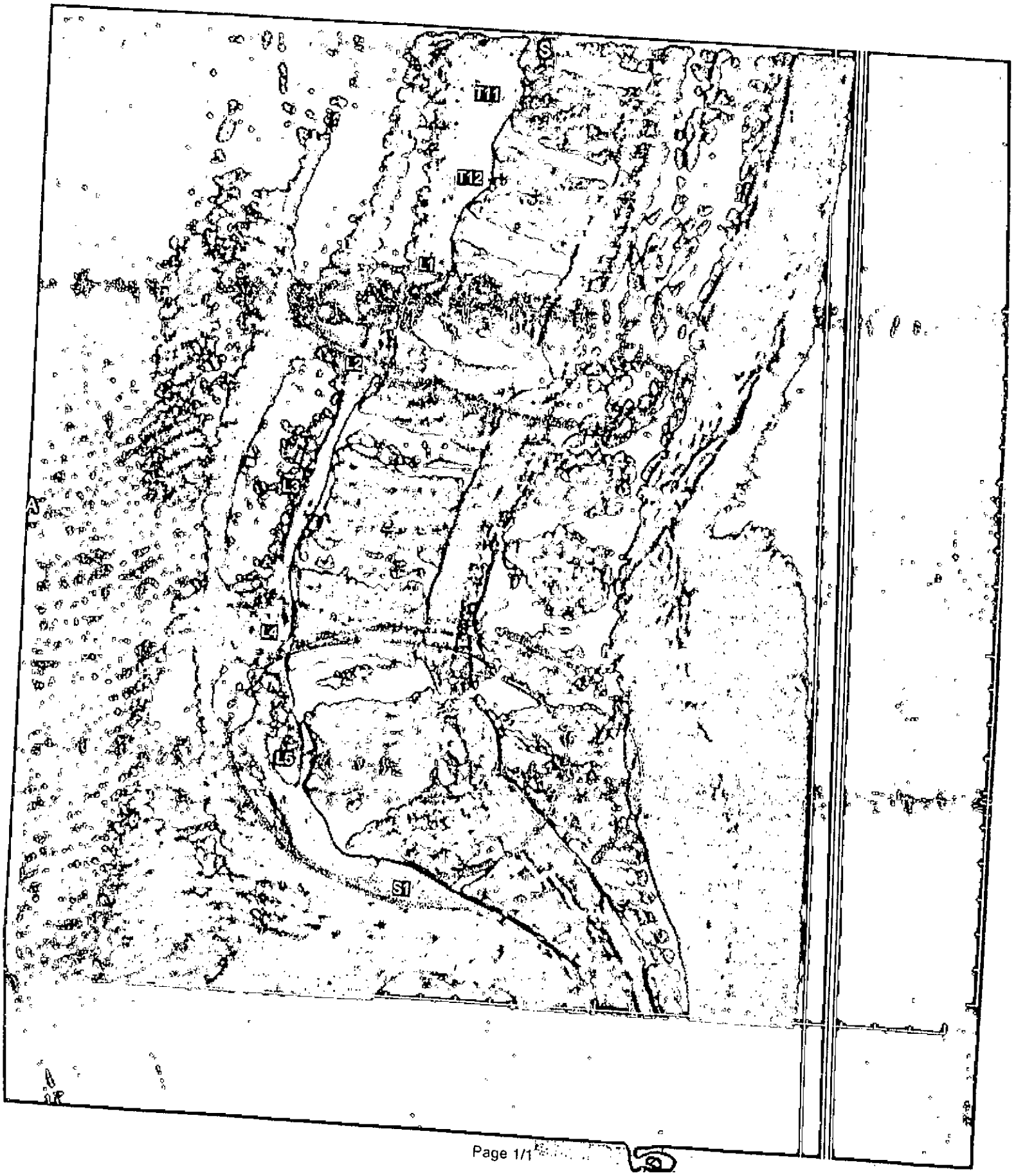
☐ **Nicotine:** You will need to discontinue all nicotine products completely for at least 6 weeks prior to surgery, and one year following. A urine nicotine screen is required with pre-op labs

All elective surgeries are subject to postponement/cancellation if the above criteria are not met. Your safety during the procedure and ability to recovery/heal properly are our main concerns

Additionally, please be aware UCDMC is a Level 1 Trauma Center. Although it does not happen often, unexpected emergent cases may take precedent over scheduled elective cases. We appreciate your understanding

Questions? **Please contact the Spine Center at 916-734-7463**

Micah Hoffman, RN Case Manager Colleen Wagner, NP Kimberlee Sierra, Practice Manager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UC Davis Medical Center
MIDTOWN NEUROLOGY
3160 Folsom Blvd, Suite 2100
Sacramento CA 95816-7759

August 23, 2018

Patricia McColm
DOB: 6/5/1946

To Whom It May Concern,

My patient, Patricia McColm, has multiple sclerosis that has resulted in significant cognitive problems, weakness and mobility issues. She has been unable to complete paperwork properly for her ongoing for the court regarding a complaint filed against the state for a civil rights violation. Her cognitive problems make it very difficult for her to communicate in a linear manner. She is not willfully ignoring the court's orders, but her medical condition has made her unable to comply with the time constraints due to disorganized thinking, memory problems, lack of executive function, and poor attention / focus. She also has hand weakness and coordination problems that makes it difficult for her to type. Ms. McColm is profoundly cognitively impaired and needs to have a court appointed counsel to help prepare a more logical, concise, and complete document according to the the court's instructions.

Sincerely,

Michelle L Apperson, MD, PhD
HS Associate Clinical Professor of Neurology
(916) 734-3588

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

PATRICIA A. MCCOLM,

CASE NO: **1:14-CV-00580-LJO-JDP**

V.

STATE OF CALIFORNIA, 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 9/11/19

Marianne Matherly
Clerk of Court

ENTERED: **September 11, 2019**

by: /s/ R. Gonzalez
Deputy Clerk

APPENDIX C

XXXXXXXXXX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PATRICIA A. McCOLM,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

Case No. 1:14-cv-00580-LJO-JDP

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS DISMISSING CASE

(ECF No. 75)

Plaintiff Patricia A. McColm ("plaintiff") is a former prisoner proceeding in this civil rights action under 42 U.S.C. § 1983, the Americans with Disabilities Act ("ADA"), and § 504 of the Rehabilitation Act ("RA"). The matter was referred to a United States magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 12, 2019, Magistrate Judge Jeremy D. Peterson entered findings and recommendations, recommending that plaintiff's case be dismissed with prejudice for repeated failure to cure serious pleading deficiencies and comply with court orders. (ECF No. 75.) Plaintiff was given an opportunity to object to the findings and recommendations and objected on August 19, 2019. (ECF No. 80.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 304, this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, the Court finds the findings and recommendations to be supported by the record and proper analysis.

APPENDIX D

EXHIBIT 2

Plaintiff's objections, which contain many of the same deficiencies contained in her original pleadings, do not change this result. A district court may dismiss a complaint for its length and lack of clarity under Rule 8. *See, e.g., Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058-59 (9th Cir. 2011) (collecting authorities). Here, plaintiff's complaint should be dismissed.

Accordingly, IT IS ORDERED that:

1. The findings and recommendations issued by the magistrate judge on June 12, 2019, (ECF No. 75), are ADOPTED IN FULL; and
2. The case is dismissed with prejudice.

IT IS SO ORDERED.

Dated: **September 11, 2019**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICIA A. MCCOLM,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

Case No. 1:14-cv-00580-LJO-JDP

FINDINGS AND RECOMMENDATIONS TO DISMISS CASE FOR FAILURE TO STATE CLAIM, FAILURE TO COMPLY WITH COURT ORDERS, AND FAILURE TO PROSECUTE

OBJECTIONS, IF ANY, DUE WITHIN 14 DAYS

ECF No. 63

I. Introduction

Plaintiff Patricia A. McColm is a former prisoner proceeding in this civil rights action under 42 U.S.C. § 1983, the Americans with Disabilities Act ("ADA"), and § 504 of the Rehabilitation Act ("RA"). This case arises from alleged discriminatory and retaliatory conduct by the defendants based on plaintiff's race, age, and disability while confined at Central California Women's Facility in Chowchilla, California ("Chowchilla"). Plaintiff has since been released from prison and is pursuing this case without the assistance of counsel.

Plaintiff has filed a second amended complaint. ECF No. 63. We will recommend that this case be dismissed with prejudice based on plaintiff's repeated failure to cure pleading deficiencies and to comply with court orders.

APPENDIX E (1)

EXHIBIT 3

II. Background

a. Original Complaint

Plaintiff filed the complaint initiating this action on April 22, 2014, while she was a state prisoner at Chowchilla. ECF No. 1. The complaint was: (1) 27-pages long, (2) written in narrative form, and (3) brought against 69 named defendants and Does 1-250 in their official and individual capacities. *Id.*

The court screened the original complaint and identified several pleading deficiencies:

First, the court stated that the complaint reads in narrative form and that under Federal Rule of Civil Procedure 8, "a plaintiff need only plead sufficient allegations of underlying facts to give fair notice and enable the opposing party to defend itself effectively." *Id.* at 4 (quoting *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1033 (9th Cir. 2014)). The court noted that it was "extremely difficult, if at all possible, to determine from [plaintiff's complaint] which act or acts of each [d]efendant violated which of [p]laintiff's rights" because plaintiff had alleged "a multitude of different acts without clearly specifying which Defendant(s) committed which act." *Id.*

Second, plaintiff appeared to have named certain defendants solely in their supervisory capacities without alleging that they participated in, directed, or knowingly failed to prevent the deprivation of plaintiff's rights. *Id.* at 6-7. The court explained that claims against supervisors based upon vicarious liability were not supported in civil rights cases brought under 42 U.S.C. § 1983. *Id.*

Third, plaintiff named Doe defendants 1-250 in the caption of her complaint. The court explained that the use of Doe defendants is disfavored, but plaintiff could be permitted to proceed with the Doe defendants if discovery revealed the identities of the unknown defendants. *Id.* at 8. It was unclear whether plaintiff's complaint met that standard. *Id.*

Finally, the court concluded that it would not exercise supplemental jurisdiction over plaintiff's state law claims unless the same act alleged in the state claim also gave rise to a cognizable federal claim. *Id.* at 8-9.

The claims against the defendants in their individual capacities were dismissed with

leave to amend, and plaintiff was ordered to file a First Amended Complaint curing the deficiencies by April 3, 2015. *Id.* at 9-10. Plaintiff received numerous extensions of time to file her First Amended Complaint. ECF Nos. 14-41. Over two years elapsed from the time plaintiff's complaint was dismissed until March 13, 2017, when plaintiff filed her First Amended Complaint.

b. First Amended Complaint

Plaintiff's First Amended Complaint ("FAC") was: (1) 80-pages long; (2) 387 numbered paragraphs in length; and (3) brought against 72 named defendants and Does 1-100 in their individual and official capacities. ECF No. 42.

The court screened the FAC and dismissed it for failure to state a claim on which relief may be granted. ECF No. 47. The screening order noted that the FAC suffered from the same pleading deficiencies as the original complaint in that it was "so disjointed, littered with irrelevant information, and, quite simply, so broad and confusing as to leave the Court unable to address individually each of its allegations." *Id.* at 6. The court concluded that plaintiff failed to cure issues with improper linkage—the FAC referred to "defendants" or "Does" in the collective and rarely ascribed conduct to a particular defendant as required by 42 U.S.C. § 1983. *Id.* at 3, 6 ("[Plaintiff] may not simply provide a list of bad things that happened to her and say that all Defendants or a group of them did or enabled those bad things as she has done in her earlier pleadings."). Finally, the court again identified pleading issues concerning the Doe defendants. *Id.* at 7-8. The court noted that plaintiff had not described how each Doe defendant personally participated in a violation of her rights, and also noted that plaintiff "must link each individual Doe, identified as Doe 1, Doe 2, and so on, to a specific constitutional violation." *Id.*

The court thoroughly analyzed the FAC and recommended dismissal with prejudice of all claims except for the following claims: (1) Americans with Disabilities Act, (2) First Amendment retaliation, (3) Fourteenth Amendment access to courts, (4) Eighth Amendment excessive force, and (5) Eighth Amendment failure to protect. *Id.* at 18. These five claims

were dismissed with leave to amend.[1]

Plaintiff was directed to file a Second Amended Complaint curing the deficiencies in the five claims identified by the screening order within 30 days. *Id.* at 19. The court warned plaintiff that failure to file a Second Amended Complaint comporting with the limits identified in the screening order would result in dismissal of the action with prejudice for failure to comply with a court order, failure to state a claim, and failure to prosecute. *Id.* Plaintiff was specifically instructed to review the screening order thoroughly and "file an amended complaint only with regard to the five claims analyzed in the screening order." *Id.* at 17-18. The court further advised plaintiff to "be brief" and attempt to file an amended complaint of "twenty pages or less." *Id.* at 18.

The court ordered plaintiff to file the Second Amended Complaint by September 15, 2017. *Id.* at 19. However, plaintiff again requested and received numerous extensions of time. ECF Nos. 48-62. Plaintiff ultimately filed a Second Amended Complaint on July 2, 2018.

c. Second Amended Complaint

Plaintiff's Second Amended Complaint ("SAC") tracks the content of the FAC, and significantly adds to it—with 41 additional pages and approximately 100 paragraphs of new allegations. ECF No. 63. Specifically, the SAC (1) is 121 pages long; (2) contains 485 numbered paragraphs; and (3) is brought against 72 named defendants and Does 1-100 in their individual and official capacities. *Id.* Plaintiff attempts to restate the claims that were previously dismissed with prejudice.

III. Discussion

a. Failure to Comply with Federal Pleading Standards

The SAC should be dismissed primarily for the same reason as the original complaint and the FAC: failure to state a claim for relief under Rule 8 of the Federal Rules of Civil Procedure. Under Rule 8, a complaint must contain "a short and plain statement of the claim

[1] The presiding district judge adopted the findings and recommendations in full. ECF No. 53.

showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint need only provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555 (internal quotation marks omitted)). However, where the allegations "do not permit the court to infer more than the mere possibility of misconduct," the complaint does not state a plausible claim for relief and dismissal is appropriate. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting Fed. Rule Civ. Proc. 8(a)(2)).

A district court may dismiss a complaint for its length and lack of clarity under Rule 8. *See, e.g., Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058-59 (9th Cir. 2011) (collecting authorities). The law does not specify the proper length or the level of clarity that satisfies Rule 8, but allegations that violate Rule 8 include those that are argumentative, needlessly lengthy, ambiguous, confusing, conclusory, repetitive, irrelevant, or incomprehensible. *See id.* at 1059.

Here, the allegations in the SAC are violative of Rule 8 in several ways. The allegations of the SAC are needlessly lengthy, overly confusing, unnecessarily repetitive, and mostly irrelevant. Due to the perplexing manner in which the SAC is pleaded, the court is again unable to ascribe specific conduct to particular defendants as required by 42 U.S.C. § 1983. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 915 (9th Cir. 2012) (explaining that claim brought under 42 U.S.C. § 1983 has a causation requirement with liability extending to those state officials who subject, or cause to be subjected, an individual to a deprivation of his federal rights). If the court is unable to decipher the nature of the allegations against the defendants, each of the 72 named defendants and 100 Doe defendants will likely encounter the same difficulty and would, therefore, be unable to defend themselves effectively. The SAC thus fails to give fair notice of the claims against the defendants and should be dismissed. *See Merritt*, 759 F.3d at 1033 (under federal pleading standards, a plaintiff need only plead sufficient allegations of underlying facts to give fair notice and to enable the

opposing party to defend itself effectively).

b. Leave to Amend Should Be Denied

Rule 15(a)(2) instructs courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. Pro. 15(a)(2); *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 871 (9th Cir. 2016). "This policy is to be applied with extreme liberality." *C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir. 2011). The court may decline to grant leave to amend only where there is a strong showing of: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of amendment, etc. *See Sonoma Cty. Ass'n of Retired Employees v. Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013).

Leave to amend should be denied in this case because plaintiff has repeatedly and willfully refused to cure pleading deficiencies identified by the court. None of the three complaints filed by plaintiff have come close to satisfying the federal pleading standard. When the court screened the original complaint, it stated that it was "extremely difficult, if at all possible, to determine from [plaintiff's complaint] which act or acts of each [d]efendant violated which of [p]laintiff's rights" because plaintiff had alleged "a multitude of different acts without clearly specifying which Defendant(s) committed which act." ECF No. 13 at 4. The court encountered the same problem with the FAC. ECF No. 47 at 6 (concluding that the FAC "so disjointed, littered with irrelevant information, and, quite simply, so broad and confusing as to leave the [c]ourt unable to address individually each of its allegations"). In both prior screening orders, the court provided plaintiff with a detailed overview of federal pleading requirements. The court specifically instructed to "be brief" and attempt to file an amended complaint of "twenty pages or less." *Id.* at 18. Plaintiff ignored these instructions, filing an amended complaint that added 41 pages and approximately 100 paragraphs of new allegations. As discussed above, we are now recommending dismissal of the SAC for the same reason as the previous two iterations: failure to state a claim for relief under Rule 8.

Plaintiff has repeatedly refused to comply with the court's prior screening orders in

several additional ways. The presiding district judge has dismissed all but five claims from this case with prejudice. ECF No. 53. Plaintiff was directed to file a SAC curing the deficiencies identified as to only the five remaining claims. ECF Nos. 53; 47. Plaintiff was warned that failure to file a SAC comporting with the limits identified in the screening order would result in dismissal of the action with prejudice "for failure to comply with a court order, failure to state a claim, and failure to prosecute." ECF No. 47 at 19. In disregard of these instructions, plaintiff did not limit the SAC to the five remaining claims. Instead, she filed an amended complaint reasserting all the claims previously dismissed with prejudice.

Although the court acknowledges that plaintiff has made some incremental progress ascribing conduct to particular defendants and Does, the SAC remains woefully inadequate in this area despite the court's repeated instructions. The SAC also attempts to assert claims against supervisors relying on vicarious liability despite our having advised plaintiff that this is not permitted. These repeated failures warrant denial of leave to amend in this case. *See Integrated Storage Consulting Servs., Inc. v. Netapp, Inc.*, No. 5:12-cv-06209, 2016 WL 3648716, at *5 (N.D. Cal. July 7, 2016) (denying leave to amend as to a fraud claim in light of the plaintiff's repeated failure to cure deficiencies by amendments previously allowed).

c. Dismissal with Prejudice

The undersigned also recommends that the court dismiss this case for plaintiff's failure to prosecute and failure to comply with a court order. *See* Fed. R. Civ. P. 41(b); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005). Dismissal for a plaintiff's failure to prosecute or failure to comply with a court order operates as an adjudication on the merits unless the court orders otherwise. *See* Fed. R. Civ. P. 41(b). Deciding whether to dismiss a case with prejudice for failure to prosecute is a matter committed to the court's discretion. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002). Involuntary dismissal is a harsh penalty, but a district court has duties to resolve disputes expeditiously and to avoid needless burden for the parties. *See* Fed. R. Civ. P. 1; *Pagtalunan*, 291 F.3d at 642. "In determining whether to dismiss a claim for failure to prosecute or failure to comply with a court order, the Court must weigh the following factors:

(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits." *Id.* at 642-43.

The original complaint was filed in 2014, and this case has not proceeded past the screening stage. Long delays between the court's screening orders resulted from plaintiff's repeated requests for extensions. *See* ECF No. 55 (observing that plaintiff has "routinely requested, and generally received, extensions of Court deadlines, delaying the proceedings in this case in excess of two years"). The court is now issuing its third screening order under 28 U.S.C. § 1915A, and plaintiff has yet to file a pleading that has come close to satisfying federal pleading standards despite the repeated expenditure of court resources providing instruction. This excessive and unnecessary delay weighs in favor of dismissal. *See Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir.1999) ("The public's interest in expeditious resolution of litigation always favors dismissal."). Although the defendants have not yet been served with process, the potential for substantial prejudice to them exists as the case grows older. *See Pagtalunan*, 291 F.3d at 643 ("Unnecessary delay inherently increases the risk that witnesses' memories will fade and evidence will become stale.").

We will recommend that the court dismiss the case with prejudice. Although this is a harsh sanction, plaintiff has been warned that the failure to comply with the court's prior screening order would result in dismissal of the action with prejudice "for failure to comply with a court order, failure to state a claim, and failure to prosecute." ECF No. 47 at 19. Despite this warning, plaintiff refused to comply with the prior order. The public's interest in expeditious resolution of litigation and this court's need to manage its docket weigh in favor of dismissal with prejudice. The court has considered as a possible alternative a lesser sanction—dismissal without prejudice. However, if the court dismissed without prejudice, the court might again be in the same situation it finds itself in now if plaintiff refiled her case. Significant judicial resources have been expended screening plaintiff's pleadings and instructing her on filing an appropriate amended complaint.

IV. Recommendation

We recommend that:

1. plaintiff's Second Amended Complaint, ECF No. 63, be dismissed for failure to state a claim for relief;
2. leave to amend be denied for plaintiff's repeated failure to cure deficiencies by amendments previously allowed; and
3. this case be dismissed with prejudice for failure to comply with court orders and failure to prosecute.

The undersigned submits the findings and recommendations to the district judge presiding over this case under 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within 14 days of the service of the findings and recommendations, plaintiff may file written objections to the findings and recommendations with the court and serve a copy on all parties. That document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the findings and recommendations under 28 U.S.C. § 636(b)(1)(C). Plaintiff's failure to file objections within the specified time may result in the waiver of rights on appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: June 12, 2019

UNITED STATES MAGISTRATE JUDGE

PATRICIA A. MCCOLM
P.O. Box 113
Lewiston, CA 96052
(415) 333-8000

Plaintiff, pro se

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ORIGINAL

PATRICIA A. MCCOLM

Plaintiff,

vs.

STATE OF CALIFORNIA et al.

Defendants.

_____/

NO. 1:14-CV-00580-LJO-JDP

OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS, *TO ORDER DENYING RENEWED MOTION TO APPOINT COUNSEL*, TO FAILURE TO RULE ON OR CONSIDER MEDICAL EVIDENCE SET FORTH IN REQUEST FOR JUDICIAL NOTICE AND TO FAILURE TO CONSIDER AND APPLY EVIDENCE SET FORTH IN UNCONSTITUTIONAL CONDITION REQUIRED DECLARATION OF PLAINTIFF; REQUEST TO VACATE REFERRAL FOR GOOD CAUSE/EXTRAORDINARY CIRCUMSTANCES.

REQUEST FOR HEARING

[FRCP 72(b)(1-3); FRCP 73(b)(3)]

TO HONORABLE LAWRENCE J. O'NEILL, CHIEF UNITED STATES DISTRICT JUDGE:

Pursuant to Federal Rules of Civil Procedure 72(b), Local Rules 304, Plaintiff PATRICIA A. MCCOLM (Plaintiff) does hereby respectfully OBJECT, in its *entirety and each contention therein,* to Magistrate Judge's **1) FINDINGS AND RECOMMENDATIONS TO DISMISS**

APPENDIX E(2)

CASE FOR FAILURE TO STATE CLAIM, FAILURE TO COMPLY WITH COURT ORDERS AND FAILURE TO PROSECUTE (R&R); issued by Magistrate Judge Jeremy Peterson (Magistrate Judge) on June 12, 2019 (DOC 75); to Magistrate Judge's **2) ORDER DENYING RENEWED MOTION TO APPOINT COUNSEL** (AC) issued by Magistrate Judge Jeremy Peterson on June 12, 2019 (DOC 74); to Magistrate Judge's **3) FAILURE TO RULE on, consider or apply medical evidence set forth in REQUEST FOR JUDICIAL NOTICE in support of Renewed Application for Appointment of Counsel and in Support of Objections to Order Vacating Findings and Recommendations et al (DOC 73)**; to Magistrate Judge's **4) failure to consider or apply evidence set forth in unconstitutional condition REQUIRED declaration (DOC 72)** (Judicial Notice requested and incorporated herein by reference); and to Magistrate Judge's **5) failure to fully modify R&R (Doc 75) pursuant to prior OBJECTIONS to Findings and Recommendations (Doc 67)**; all, as specifically stated below; and further objects to Magistrate Judge's failure to recuse for preconceived opinion, bias and hostility toward plaintiff individually and/or to class of persons of which plaintiff is a member and moves to vacate referral pursuant to FRCP 73(b)(3) and 28 U.S.C. section 636(c)(4); for further good cause/extraordinary circumstances as more fully set forth and implicated below:

I. OBJECTIONS RE ORDER DENYING RENEWED MOTION TO APPOINT COUNSEL *ERRONEOUSLY INTERTWINED* WITH FINDINGS AND RECOMMENDATIONS; THE GRANTING THEREOF, BEING AN UNCONSTITUTIONAL PRECONDITION TO LEAVE TO AMENDMENT AND TO AVOID DISMISSAL:

A. ERROR OF LAW RE OMISSION OF ADA TO CHANGE PRIOR MISTAKEN CLAIM OF DEFICIENCIES AND RECOMMENDATIONS.

The Magistrate Judge issued an Order on 10/11/18 (Doc 71) vacating his Findings and Recommendations to Dismiss entered 8/9/18 **after Plaintiff filed substantial OBJECTIONS**

on 9/13/18 (Doc 67) (incorporated herein by reference and Request for Judicial Notice), **showing error of law by prior judge who issued findings and recommendations based solely on 28 U.S.C. 1983, HAVING ERRED IN FAILING TO APPLY THE LAW CORRECTLY UNDER THE ADA, which error the Court reversed (Doc. 19). Thus, the reversal of said error should also have been acknowledged as good cause to also vacate conclusions arising from the error which formed essential facts and grounds for assertion of failure to state a claim, failure to cure deficiencies, failure to comply with court orders and failure to prosecute that argued grounds for dismissal. However, assigned Magistrate Judges; including, Magistrate Judge Peterson, failed to acknowledge the error; thus, making the same mistake of law and failure to correct erroneous conclusions arising from same; merely REPEATING in subsequent Findings and Recommendations, without facts or authority, THE SAME OBJECTED TO VAGUE, AMBIGUOUS, ERRONEOUS ARGUMENTS RE DEFICIENCIES AND GROUNDS FOR DISMISSAL UNDER 28 U.S.C. 1983; AGAIN IGNORING APPLICATION OF LAW CORRECTLY TO PLAINTIFF'S SUBSTANTIAL CLAIMS RE VIOLATION OF HER ADA RIGHTS AND OTHER RELATED CONSTITUTIONAL RIGHTS.** ADA and Constitutional claims are deemed complex, deserving of learned counsel thereof before the court.

Judicial Notice is hereby requested of the Objections to Magistrate Judge's Findings and Recommendations (Doc 67) filed 9/13/18 and to Order Vacating Findings and Recommendations (Doc 71); which added the ADA to what was essentially the same objected to findings and recommendations under 28 U.S.C. 1983; but without the references to the dismissals erroneously ordered re State actors "immune from liability" et al upon which the alleged pleading deficiencies and failure to comply with court orders was erroneously based. Thus, in spite of the identified errors, there has essentially been NO CHANGE in the objected to Findings and Recommendations currently before the Court, falsely alleging "repeated failure to cure pleading deficiencies and to comply with court orders," found to be in error under the ADA. Thus, **Plaintiff was NOT required to comply with a void/reversed Order nor cure non-existent deficiencies.** Noticeably, the Magistrate Judge makes no finding of fact or law that

identifies any specific alleged "pleading deficiency" that goes to the *merit* of any cause of action pled by Plaintiff; other than the erroneous references to 28 U.S.C. 1983. And even the merit of that cause is essentially ignored on facts that State a Cause of Action; in particular, false retaliatory infraction claims, which authority recognizes as stating a claim under 28 U.S.C. 1983. Noticeably, NO OTHER CAUSE OF ACTION IS ANALYZED ON THE MERITS IN EITHER THE ORDER DENYING APPOINTMENT OF COUNSEL OR THE R&R. Thus, there has been no analysis of "likelihood of success on the merits" and on this factor, the motion for appointment of counsel should have been granted.

B. NO AUTHORITY TO PREDICATE LEAVE TO AMEND OR DISMISSAL WITH PREJUDICE ON WHETHER OR NOT APPOINTMENT OF COUNSEL IS GRANTED; AN APPARENT UNCONSTITUTIONAL CONDITION.

The objected to Order Vacating Findings and Recommendations to Dismiss Case for Failure to State a Claim, Failure to Comply with Court Orders and Failure to Prosecute; Order Permitting Plaintiff to Submit Renewed Motion for Recruitment of Counsel (Doc 71); made NO CHANGE IN THE ERRONEOUS ARGUMENT FOR DISMISSAL, stating: ***"If recruitment of counsel is warranted, the court will grant leave to file an amended complaint with the assistance of counsel. If it is not, the court will recommend dismissal and will consider whether dismissal with or without prejudice is appropriate."***(Doc 71, p.2 lines 5-7) The Order further stated: ***"The court will REQUIRE plaintiff to submit a declaration in support of her request to recruit counsel."*** The Order includes an objected to demand that "supporting documents must be filed on the public docket..." Such requirement is not only without authority; but is a violation of constitutional right of privacy in medical information, giving a strong appearance of the bias that forms the basis of good cause for recusal and/or vacatur of the referral and of overall unconstitutional condition precedent to leave to amend and to avoid dismissal. The Magistrate Judge appears to believe that he has given "permission" to request appointment of counsel; when in fact, he has **REQUIRED** such under onerous conditions or have the Second Amended Complaint dismissed. Yet, it neither the criteria mandated nor

Plaintiff's declaration evidence in response was acknowledged and appears to have NOT been considered for the Order Denying Appointment of Counsel; precipitating, the R&R to DISMISS WITH PREJUDICE.

There is nothing in the Order that shows how Plaintiff has met each of the stated criteria for either granting or denying the motion to appoint. Plaintiff clearly made a substantial showing of good cause for appointment of counsel. THE RESULTING DISMISSAL; AND WORSE, DISMISSAL WITH PREJUDICE, UPON DENIAL OF APPOINTMENT IS WRONG, WITHOUT AUTHORITY AND APPEARS TO BE AN UNCONSTITUTIONAL CONDITION PRECEDENT TO LEAVE TO AMEND AND TO AVOID DISMISSAL. No authority was cited to support a dismissal or dismissal with prejudice as a consequence of a denial of appointment of counsel. It would appear there is NO DISCRETION to act in such a hostile biased manner.

Plaintiff strongly OBJECTS to the requirement of a Declaration, which is then entirely IGNORED AND EVIDENCE THEREIN NOT MENTIONED OR CONSIDERED FOR **GRANTING** APPOINTMENT OF COUNSEL AND/OR MODIFYING THE R&R.

It appears the only reason the Magistrate Judge vacated the prior R&R, was to reissue the SAME FINDINGS AND RECOMMENDATIONS WITHOUT THE CLEARLY ERRONEOUS REFERENCES TO THE REVERSED ERROR RE FAILURE TO RECOGNIZE RIGHTS UNDER THE ADA IN CONTRAVENTION OF LIMITATIONS UNDER 1983. However, he did NOT change the conclusions of failure to cure deficiencies alleged arising from the court error. That error remains and is objected to here. Remarkably, **the "edited"Findings and Recommendations do NOT MENTION THE ERRONEOUS DEMANDS for appointment of counsel under threat of denial of leave to amend and dismissal if he does NOT grant appointment of counsel. This is clear error of law and abuse of discretion!**

The objected to Order Denying Renewed Motion to Appoint Counsel does admit the wrongful nexus imposed: *"that is recruitment of counsel was warranted, we would grant leave to file an amended complaint with the assistance of counsel. Id. at 10, If we found that appointment was not warranted, we explained that we would recommend dismissal of this case.*,

Id." NO AUTHORITY IS CITED FOR THE CONTENTION THAT LEAVE TO AMEND AND/OR DISMISSAL OF THE CASE, IS BASED ON A DENIAL OF MOTION FOR RECRUITMENT OF COUNSEL, as questionably imposed in this case. The cases cited are of limited relevance in instant matter; in particular, as there is no summary judgement motion pending and the criteria listed for granting is misleading; in particular, as apparently limited to *"the most serious and exceptional cases..."* There is no authority or meaningful explanation for said essentially over-exacting erroneous assertion.

ADA and Constitutional claims are recognized in authorities as being "complex" warranting counsel with particular expertise in these areas of law, that will require factual investigation, substantial difficult discovery, potential experts, and most importantly, will involve *credibility determinations*; all of which will place Plaintiff at an extreme disadvantage, attempting to address these concerns pro se; in particular, as a "stigmatized" individual. Even so, such does NOT warrant dismissal with prejudice, where counsel is not appointed or otherwise.

C. SECOND AMENDED COMPLAINT DEEMED CAPABLE OF AMENDMENT.

The Magistrate Judge appears to deem the second amended complaint capable of amendment to cure alleged deficiencies and would allow an amendment of the entire complaint upon appointment of counsel; with no restrictions/limitations stated. If finding that the second amended complaint is appropriate for amendment by counsel, then it is also sufficient to state a claim and avoid dismissal for either counsel or pro se plaintiff. To say otherwise, is to **allow** amendment by **able-bodied counsel** and to **deny** amendment by **disabled pro se** to obtain a discriminatory dismissal; in particular, "dismissal with prejudice," a clear embodiment of hostile discriminatory bias and good cause to recuse and/or vacate the referral. It is just plain wrong, a manifest injustice; if not also, a constitutional violation.

D. APPOINTMENT OF COUNSEL APPROPRIATE IN THIS CASE.

The Magistrate Judge contends that only two criteria exist for determining whether to

appoint counsel: 1) likelihood of success on the merits and 2) ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. [Substantial authority recognizes that ADA and Constitutional claims are complex and have prompted appointment of counsel.] The Magistrate Judge gives an objected to omnibus, vague and ambiguous, conclusory assertion, without fact in support; that he did not find "exceptional circumstances" and without citation to any fact or claim, asserts an equally vague and ambiguous "cannot find that there is a likelihood of success on the merits."

Accordingly, there is no viable factual reason given for the determination. Merely saying no prior complaint survived a section 1915A screening with an assumption that the "latest complaint tracks the same content of a previous complaint that failed to state a claim," is specious and does not "track" the reversal of error. The content of the prior complaints are not limited to the same form and content. But for the judicial error re overlooking the ADA claim as the basis for the complaint and the on-going detriment such error has caused; it is likely that an unbiased learned judge would have found and can still find a viable ADA claim and/or grant leave to amend with or without counsel. Yet, no evaluation of the ADA claims has been made. No fact or law has been cited for the proposition that there is not a claim stated. No prior complaint is identified, no claim is identified and NO FACTS OR LAW PERTAINING TO ANY CLAIM IN THE SECOND AMENDED COMPLAINT ARE EVER MENTIONED; even though the directions for amendment were followed! Accordingly, it appears the second amended complaint has not even had a first reading; as there is no basis in fact or law for the vague and ambiguous assertions of failure to state a claim or failure to follow orders. The SAC actually cites to authority that supports the facts as stating a claim, which is not referenced in any of the objected to unfounded Findings and Recommendations. In fact, there is no showing in fact or law of any alleged *lack of merit* attributed to ANY claim pled. There appears to be no willingness to make a good faith effort to even read the claims in the SAC.

How can any Court in good conscience, say that Plaintiff has failed to state a claim, where she suffered a broken nose and multiple injuries from other inmates known to be violent by correctional officers, officers who were on notice of the threats against Plaintiff, the repeated

battery upon plaintiff and officers who left her exposed to such continued battery injury and harassment, failing to act to protect Plaintiff from such inmates; officers who not only failed in adequate placement to ADA unit and low risk facility mandated by Title XV; but who themselves engaged in harassment and used excessive force inflicting injury; where as to Officer Magdaleno, Plaintiff suffered injury by merely attempting to give the officer a medical record in support of her accommodation request? Failure to send legal mail is a constitutional violation alleged in the complaint; yet, this Court appears to ignore this claim, even where the mail was addressed to the Supreme Court of California causing prejudice to plaintiff regarding her incarceration! How can this Court ignore the fact that even though Plaintiff is a prescribed wheelchair user; of which CCWF was on notice from her physician, she was denied this durable equipment and made to suffer repeated fall injury, pain, surgery, and repeated hours long nose bleeds attempting to traverse long distance to meals, programs and medical facilities and where even her prescribed shoes were taken away from her! False retaliatory infractions are actionable under 1983; yet, this Court appears not to have read that claim in the complaints. The claims in the SAC are meritorious; but appear NOT to have been read.

Likelihood of Prejudice re Credibility Determinations. It appears that what has been read and/or of influence disclosed from sources outside this case, is the false and defamatory media comment, the "fake news" from over 20 years ago, when plaintiff suffered from undiagnosed Hashimoto's Disease and was nearing myxedema coma; and thereby, could not competently defend an insurer's bad-faith misuse of the new vexatious litigant statute, in defense of its client thief; a thief, who was arrested for causing Plaintiff injury while stealing her carpets. Even though a determination imposing the stigma and imposition of a bond could not issue on the facts and law as it stands today, Plaintiff was also erroneously denied an appeal of the decision by a single judge who mistakenly dismissed the appeal by reason that the bond was not paid.

The State hearing judge in1995, was more interested in having cameras in the courtroom to promote the insurance industry's campaign in support of said statute; which would increase industry profit margins by denying claims of self-represented persons, than in providing a fair

and impartial adjudication to pro per parties and persons with disabilities. Plaintiff has suffered enough prejudice from such "ancient" stigma; a potential for prejudice if acting pro se in instant action. Perhaps this Court has acted on the wrongful stigma, which inflicted false and defamatory media comment; for an operative belief, that Plaintiff is NOT DESERVING of due process and a remedy for violation of her constitutional rights through appointment of counsel. That would be wrong. The potential for prejudice in credibility determinations exists here. Plaintiff does not want to defend against the stigma pro se in a civil rights case. Pursuant to *Tabor v Grace* 6 F3d 147 (3rd Cir. 1993), the Court stated that "**when a case is likely to turn on credibility determinations, appointment of counsel may be justified.** See Maclin, 650 F2d at 888 ("[C]ounsel may be warranted where the only evidence presented to the fact finder consists of conflicting testimony.") (emphasis added)." The case here would likely raise fact issue re witness credibility by reason that the "stigma" would be used to inflict prejudice. Said reason warrants appointment of counsel in this case as an "exceptional circumstance;" in addition to other good cause presented in support of the application for appointment of counsel.

Reference to list of disabilities in the SAC, WITHOUT TAKING **JUDICIAL NOTICE** OF THE **ACUTE** MEDICAL CONDITIONS AND ADVANCING LIMITATIONS of permanent disabling medical conditions filed under seal and facts by declaration, not even mentioned in the Order, is not good cause to deny appointment of counsel by making reference to the SAC list of disabilities and then saying: "we do not find that plaintiff is inarticulate...plaintiff's intelligence is apparent." Plaintiff objects to this misleading statement. On its face, the comments appear to be disingenuous, since Magistrate Judges have repeatedly alleged just the opposite in objecting to extensions of time needed to accommodate unanticipated effects of disability, injury, surgery, medical treatment requirements, slowed manual function, defense in trial conflicts and cognitive dysfunction. Additional extensions of time have been necessary because the first requests are not fully granted; as occurred in instant matter, to which objection is hereby made. The physicians have stated that six month extension is appropriate; yet, only 45 days was given following acute disabling injury April 26, 2019, which has continued to have distracting concerning negative effects with substantial pain and swelling inflicted by

long period of sitting. Only morning hours are viable for intellectual work, and even that limited time is often abated by disease related cognitive dysfunction. **Lack of sufficient time is prejudicial and requests for time should not be construed by the court as wrongful delay by a person with disability.** All requests for time sought and orders of time given were with good cause. There is nothing wrongful about asking for the time needed for meaningful accomplishment of the task; more often than not, being prejudiced by lack of the time requested as needed by medical necessity.

Plaintiff's medical experts have stated that Plaintiff: "***is not willfully ignoring the court's orders, but her medical condition has made her unable to comply with the time constrains due to ... and needs to have a court appointed counsel to help prepare a more logical, concise, and complete document according to the court's instructions***." (See August 23, 2018 statement from Michelle L. Apperson, MD, PhD. Thus the alleged failures erroneously characterized as "refusals" are NOT WILLFUL; but due to progressive disease based cognitive dysfunction; which cannot improve; but can only get worse, warranting appointment of counsel. Stress from insufficient time, difficulty organizing and lack of focus aggravates effects of disability.

It is truly shocking that because of the apparent unwillingness of the Magistrate Judge to accommodate disability, "*appointment of counsel is not warranted, we will recommend dismissal of this case in a separate order.*" A DISMISSAL WITH PREJUDICE! Thus a complete denial of constitutional right of access to the court! This is wrong and a manifest injustice; if not also a constitutional violation. It is not the court's case completion time lines that should determine the result here; but the actual good faith merit of the claims without the prejudice of "disbelief" from stigma.

E. STRONG OBJECTION TO MAGISTRATE JUDGE FAILURE TO TAKE JUDICIAL NOTICE OF MEDICAL EVIDENCE IN SUPPORT OF APPOINTMENT OF COUNSEL The Magistrate Judge made no ruling on request to take Judicial Notice of Medical evidence filed under seal in support of the appointment of counsel and objections to the Findings and Recommendations of the Magistrate Judge. Such medical

evidence should negate any claim of "refusal," "willful failure to comply with a court order," and any alleged "failure to prosecute;" if not also a "failure to state a claim," if not in the format that would be best known to the Court in complex claims, as in this case. A plaintiff can only do what the court allows in the time it presents and/or the time the Court takes to act within its own necessity. Time is the enemy and should not be used to inflict prejudice on a Plaintiff with disability. Absent sufficient time, no person with disability can hope to protect his/her constitutional right of access to the court. Appointment of counsel is properly granted, where time is in issue; as appears to exist in present case. The factors for appointment of counsel have been met in this case.

The Order Denying Renewed Motion to Appoint Counsel and the recommendation of dismissal based on said denial should not be adopted by this Court, but declined with direction that the motion for recruitment of counsel be granted with leave to amend.

II. OBJECTIONS TO R&R.

Without regard to Plaintiff's objections and notice of reversal of the prior error upon which the argument for dismissal was substantially based, Magistrate Judge Peterson, has failed to change/reverse the argument arising from the error set forth by prior judges; and instead, has erroneously REPEATED them! There is essentially NO CHANGE in the apparent "rubber stamping" of the factual and legal error objected to previously in this action. The Findings and Recommendations by Magistrate Judge Peterson have not changed; and thus, the objections also remain essentially the same and must be reiterated below, without elimination of comment on the prior errors; in order to show what came before, upon which alleged deficiencies and failure to comply with orders were based and why such continues to be wrong in repetition without actual citation to any cause of action in support of the vague and ambiguous false assertions. There is no basis in fact or law for dismissal of any particular claim set forth in the complaint.

A. Plaintiff objects to the lack of factual findings and prejudicial omissions in the R&R; as well as, to the misstatements/false assumptions in R&R as follows:

A major general objection to recommendations of the Magistrate Judge, applicable to all points below, is that the R&R fails to provide a statement/finding of fact or provide analysis on the MERITS of any one of the causes set forth in the SAC and/or mention the compliance changes pertaining thereto or any claim/cause from its predecessor complaints; a SAC, which DID COMPLY RE FIVE CAUSES FOUND APPROPRIATE FOR AMENDMENT and did state a claim/cause upon which relief may be granted. Accordingly, on this basis alone, there can be no valid assertion of failure to state a claim et al. (Please see citations within the SAC and also see: Medical Exhibits/Requests for Judicial Notice, filed under seal.) Any allegations asserted as alleged "fact" in the R&R are subject to this objection and objection to being vague, ambiguous and irrelevant innuendo/false assumption as more fully set forth below.

1. In the objected to: "I. Introduction" to the R&R, the Magistrate Judge continues the mistaken misleading assertion that the plaintiff is *"proceeding in this civil action under 42 U.S.C. section 1983."* (Doc. 64) [Note: Doc. 75 adds "the American's with Disability Act ("ADA"), and section 504 of the Rehabilitation Act ("RA") at page 1 line 19-20; but fails to correct the misrepresentations in the body of the Doc. 75 Findings and Recommendations arising out of the error and "rubber stamps" the remainder of Doc. 64 without substantial change. Thus, the objection remains to the initial failure to acknowledge the ADA and resulting error therefrom as follows.] This substantially erroneous statement has led to prejudicial error and manifest injustice in apparent denial of relief against relevant defendants to which plaintiff is entitled under the American's With Disability Act/Rehabilitation Act; as well as, under related/included ADA State law claims. The original complaint cover sheet, clearly identifies the case as one under the ADA; as does the original complaint with facts showing defendants wrongful acts arising out of discrimination/retaliation for her ADA complaints / failure to accommodate. Although reversed upon Plaintiff's motion to alter et al. (Doc 14), the original error was made by Hon. Ralph Beistline in his Order (Doc 13) referencing dismissal of the State of California, its agencies and individual defendants in their official capacity, an error which has been wrongfully repeated by subsequent judicial officers, without apparent awareness of and/or in disregard of the

fact that His Honor reversed his error as set forth in (Doc 19) Order Regarding Motion at Docket 14: ***"Plaintiff suggests that the Court erred in dismissing her complaint without leave to amend as against the State, the State entities, and the individuals acting in their official capacities. The Court agrees. In re-reviewing the Complaint filed, it appears that Plaintiff is suing under Title II of the American's With Disability Act ("ADA") (footnote 1, 42 U.S.C. section 12131 et seq.) The Eleventh Amendment does not bar suits brought against the States under Title II of the ADA. (footnote 3; United States v Georgia, 546 U.S. 151, 159 (2006)). Therefore, in amending her complaint, Plaintiff may allege violations of Title II of the ADA as against the State, its agencies, and the individuals acting in their official capacities."*** Thus, Plaintiff has relied in good faith on Judge Beistline's Order in bringing her amended complaints to include these allowed claims and a subsequent order/dismissal to the contrary is properly objected to as error; including but not limited to the Magistrate Judge's recommendation in the "Introduction" that the SAC "*be dismissed with prejudice based on plaintiff's repeated failure to cure pleading deficiencies and to comply with court orders.*"

[ALTHOUGH THE ADA HAS BEEN ADDED TO THE INTRODUCTION, THE REMAINDER OF THE R&R RELIES ON THE RESULTS OF THE ERROR. THERE IS ESSENTIALLY NO CHANGE IN THE REMAINDER OF THE R&R FROM THAT PREVIOUSLY ISSUED BY THE MAGISTRATE JUDGE WHICH WAS SUBJECT TO THESE AND OTHER OBJECTIONS JUDICIALLY NOTICED ABOVE. FURTHER, THERE IS NO CHANGED BASED ON THE PRIOR OBJECTIONS (DOC 67), ADDITIONAL DECLARATION (DOC 72)AND MEDICAL EVIDENCE (DOC 73) SUBMITTED UNDER SEAL IN SUPPORT OF APPOINTMENT OF COUNSEL WITH REQUEST FOR JUDICIAL NOTICE FOR WHICH NO RULING ISSUED. PLAINTIFF INCORPORATES DOC 72 AND DOC 73 BY REFERENCE HERE WITH REQUEST FOR JUDICIAL NOTICE.]

2. In the objected to: "II. Background subsection a. Original Complaint," (lines 7-13) the Magistrate Judge errs in deleting the above identified mistake in the Doc. 64 R&R WITHOUT DELETING THE NEGATIVE REPRESENTATIONS BASED ON THE FAILURE

TO CORRECT; thereby, continuing to rely on objected to mistaken reliance on Section 1983 without regard to rights under the ADA. The Magistrate Judge references (Doc. 13) in the Doc. 64 R&R specifically alleging that the court: "*screened the original complaint and dismissed (1) the State of California, (2) California Department of Corrections and Rehabilitation, (3) California Correctional Women's Facility, (45) California Correctional Health Care Services and (4) all individual defendants in their official capacity without leave to amend. (Doc, No. 13 at 7.) The court explained that the State of California and its agencies were immune from liability and that injunctive relief could not be granted against the defendants in their official capacities because plaintiff was no longer in custody at the time of screening.(Id.)*" [Note: Quote not in Doc 75; but still being used as operative for the inferences of alleged Plaintiff "failure" based thereon.] Thus, there is an objected to failure by the Magistrate Judge to acknowledge the Honorable Judge's admission of error and reversal of same and to abstain from all further application of Section 1983 error to the ADA causes and defendants. Whereupon, by failing to correctly report the reversal of the dismissals in the R&R and change the recommendations based thereon, the Magistrate Judge has either made an inadvertent error and/or intentionally **failed to report the reversal in order to prejudice Plaintiff with a continuing objected to wrongful inference therefrom of: "willful" failure to correct "pleading deficiencies" and/or failure to comply with an order; both of which are wrong and do NOT SUPPORT THE RECOMMENDED DISMISSAL OF THE SECOND AMENDED COMPLAINT. Plaintiff fully complied in good faith.**

Accordingly, the further references under "Original Complaint" re Section 1983 in Doc 13 as to "supervisory capacity" without regard to the ADA correction, are also wrong as set forth in the second of the alleged "pleading deficiencies," which is STILL ERRONEOUSLY STATED IN THE CURRENT R&R. What is remarkable, is that the Magistrate Judge does NOT acknowledge that "named certain defendants" in their "supervisory capacity" have been properly plead in the SAC as having "directed or knowingly failed to prevent deprivation of plaintiff's rights" and knowingly joined in the failure to protect/deprivation of Plaintiff's constitutional rights. So, the Magistrate Judge is WRONG, both under the ADA and 1983.

Plaintiff objects to the Magistrate Judge comments on the Original Complaint as being in narrative form and quotes a section of Doc 13 which "noted that it was 'extremely difficult, if at all possible to determine from [plaintiff's complaint] which act or acts of each defendant violated [p]laintiff's rights" because plaintiff had alleged "a multitude of different acts without clearly specifying which defendant(s) committed which act." Again, Plaintiff must object to an incomplete misleading reference which has a footnote 19 thereto, which states: "*The [ORIGINAL] Complaint consists of numerous unnumbered paragraphs, undivided into causes of action. In amending the Complaint Plaintiff should: (1) number the paragraphs sequentially; and (2) divide her Complaint into separate claims/causes of action to the extent that the claim is directed toward different defendants arising out of different acts or on different dates.*" Again, remarkably, the Magistrate Judge does NOT acknowledge that these instructions were met in the amended complaints. It appears that the subsequent corrected/improved amended complaints were NOT read. A "goose-step" repeat of alleged deficiencies from the original complaint that have been corrected and/or was judicial error, is itself wrong.

Plaintiff agrees that her original complaint was not the best, having been drafted in memory streaming chronological narrative form to state the *facts* upon which causes for relief could issue showing relationship between ADA complaints and resulting retaliatory herm; without ability to edit on a typewriter using her crippled painful swollen hands, severe back pain/spasm and frequently numb arm; all the while being screamed at, pelted with garbage, having water thrown on her and her typewriter, with loud music playing from annoyed inmates pushing/grabbing in effort to destroy her typewriter and stop her paperwork. Here again, custody officers took no action to protect Plaintiff from the harm inflicted by other inmates; in spite of reports and requests that they do so. Under the circumstances, it is a wonder that the original complaint was able to be filed in *any* form. Clearly the suggestions specified by Judge Beistline were followed to the best of Plaintiff's diminishing capacity in the time allowed for the amended complaints upon release. The unsupported with fact innuendo to the contrary by the Magistrate Judge in the R&R is wrong and objected to here.

Magistrate Judge also comments with mistaken innuendo that "the court concluded that it

would not exercise supplemental jurisdiction over plaintiff's state law claims unless the same act alleged in the state claim also gave rise to a cognizable federal claim." This comment from the R&R is not quite correct and is somewhat misleading in that what Judge Beistline actually said was that: "Accordingly, this Court **will exercise its supplemental jurisdiction over state law claims** solely to the extent that the same act also gives rise to a cognizable federal claim (emphasis added)." **Where the reference to Section 1983 was vacated, the references to ADA now apply under State law for the same acts; and thus, supplemental jurisdiction thereby DOES APPLY UNDER JUDGE BEISTLINE's corrected screening order.** Thereby, all assertions in the R&R that state law claims must be dismissed is objected to as error and an abuse of discretion in contravention of the intent of the corrected DOC 13, making the state discrimination laws application in this case under the ADA. Consequently, any contention in the R&R that by Plaintiff including State law ADA claims, she has in any way "chosen to ignore" or "refused to comply" is objected to as false and misleading; in particular, in light of other factors and diminishing medical capacity.

Importantly, even though denied without prejudice, the Plaintiff's prior request for appointment of counsel was also erroneously denied on the basis of the Section 1983 error (Doc 26) (See footnote 5 re citation under Section 1983). Appointment of counsel is available in an ADA case. Remarkably, the Magistrate Judge utterly FAILS TO MENTION HIS UNCONSTITUTIONAL CONDITIONAL ORDER DENYING APPOINTMENT OF COUNSEL PRECIPITATING THE DENIAL OF LEAVE TO AMEND ABSENT COUNSEL AND RESULTING RECOMMENDATION OF DISMISSAL WITH PREJUDICE BASED ON SAID DENIAL OF APPOINTMENT. The absence of this point, clearly does not meet the "smell test."

Since the screening order pertaining to the **original** complaint erroneously focused on Section 1983 in its analysis, without application of ADA and related law principles, and omits viable claims/causes, it should NOT be relied upon for any determination by the Magistrate Judge regarding a SECOND AMENDED COMPLAINT; in particular, because the pleading "form" aspects of the "original" complaint were corrected when a computer was available and

where not affected by time, medical limitations and the active "shooter" type behavior of abusive inmates.

3. The objected to: II. Background b. First Amended Complaint. The R&R confirms that the prior alleged defects in the original complaint re numbered paragraphs, separate causes of action, specified defendants and better form/organization, were presented in the amended complaint; but fails to credit Plaintiff with compliance in making these advances in the FAC. Since there was error in failing to mention the true and corrected scope of the original complaint as being one under the ADA et al, there is no mention of this correction or analysis from that perspective for each stated cause of action and defendant; in particular, as being sufficient notice pleading with facts/elements to state a cause of action.

There is reference to a screening order that alleges that the FAC failed to state a claim on which relief may be granted; but is objected to as making no reference to or analysis of ANY alleged claim/cause as it relates to the SAC. In referencing the screening order re FAC, it alleges same pleading deficiencies as in the original complaint, which per above were in fact NOT repeated and that the FAC did comply with understandable inability to meet the alleged "form" of complaint requirements. It is wrong to merely rubber-stamp a prior error as repeated, where no fact is stated that applies. The contentions in the screening order re FAC allegedly referencing the original complaint are not only erroneous; in that, the original complaint screening order does not quote such language; but in fact, the FAC is NOT in either the same format as the original and the requested formatting changes were corrected in the FAC as stated above.

Known Defendants Specified and Doe Defendants Entitled to Discovery. The R&R mistakenly attempts to infer "dismissal" fault from reference back to prior screening orders which purportedly alleged "improper linkage;" where again, the contention is vague without fact and the analysis is faulty under 42 U.S.C. section 1983. The law allows Doe defendants to be identified through discovery with a fuller revealing of each thereof's identity and participation in the deprivation of rights. There is no authority cited for the contention that where discovery may

"fill in the gaps" that a dismissal must follow as to ALL CAUSES OF ACTION AGAINST IDENTIFIED DEFENDANTS AND DOE DEFENDANTS WHERE THEIR ACTIONS ARE LINKED TO SPECIFIC CONDUCT RE DEPRIVATION OF CIVIL RIGHTS. Where otherwise properly pled to provide notice to defendants; named and/or Doe defendants, there is no authority for a dismissal of the entire cause of action. A mere repeat of "words" and/or assumptions with innuendo in the R&R from objected to PRIOR SCREENING ORDERS does not itself "link" the disputed deficiency to either fact or the SAC.

The SAC does not merely provide a "list of bad things that happened and say that all Defendants or a group of them did or enabled those bad things as she has done in her earlier pleadings." That was cured and there is no factual reference in the SAC that it was not. Continuing the improper false and misleading reference to the screening order re FAC re having "not described how each Doe defendant personally participated in a violation of her rights," without specific reference to the SAC is specifically objected to as erroneous; because the SAC does in fact, make substantial "linkage" and places Doe defendants within the causes to which each applies. Importantly, **for each instance of failure to protect, each is listed with citation to the paragraphs of facts which name the defendants and what each did to violate Plaintiff's civil rights.**

Clearly, plaintiff ran out of time in making all intended edits where Does are named; but there is no fault in not having specific identity where the law allows same to be added through discovery. Thereby, the inference that Plaintiff has failed to comply and/or cure the "Doe"/ Defendant is false and where alleged to be incomplete, are property subject to further amendment; in particular, upon discovery as the law allows. Any alleged **failing is time based and failure of sufficient time accommodation is a discriminatory penalty against a person with disability and good cause to appoint counsel.**

In that the analysis in the screening order re FAC was substantially erroneous coming from Section 1983; the R&R wrongfully repeats the error from the original screening order without regard to the correction made pertaining thereto, directing analysis under the ADA and withdrawing dismissals of named defendants and related supplemental State claims thereby.

Thus, making references to prior screening orders without the correction for analysis of the SAC is not only factually defective, it is against law under the ADA applicable in the case and erroneous for dismissal of defendants and causes which were reversed by order of the court in correcting its error.

The R&R is also erroneous in that there is no reference to facts specific to the SAC in support of its contentions; in particular, where allegedly arising from prior screening orders. In an attentive reading of the SAC with the corrections in mind; in particular, the causes directed for amendment, there is found good cause to contradict the assertions made in the R&R. Thus, the R&R relying on the error in analysis from prior screening recommendations for dismissal, appears to be fundamentally erroneous and a deprivation of Plaintiff's constitutional rights. Plaintiff filed objections (Doc. 52) to the FAC screening order (Doc 47) and incorporates same as fully set forth herein.

Even if there was not error, the five claims/causes specified in the FAC screening order were amended in accordance therewith, within the time provided and Plaintiff's limited medical capacity; are meritorious, such that no such should be subject to the recommendations of the R&R for denial of leave to amend or dismissal with prejudice. Again, Plaintiff objects that there is NO FACT or authority specified as to the SAC in support of the recommendations in the R&R.

The R&R does not specifically state and/or misstates the alleged "deficiencies" to be "cured" in the SAC; as well as, the alleged "warning" purportedly from the FIRST AMENDED COMPLAINT screening order. The FAC screening order identifies the five claims to be amended as 1) Eighth Amendment Failure to Protect; 2) Eighth Amendment Excessive Force; 3) Americans with Disability Act and Rehabilitation Act; 4) Fourteenth Amendment Access to Court; and 5) First Amendment Retaliation. Although not quoted in the order set forth in Doc 47, the five claims/causes to be amended contained suggestions as to what organization / facts would assist the court in discerning the elements required for each cognizable claim/cause; and gave leave to amend to cure "deficiencies identified" for each.

The SAC amends/cures identified "deficiencies" in accordance with the court's suggestions with particularity and to the best of Plaintiff's abilities within the time

provided; yet, no such "cure" or lack thereof, is referenced on any point of fact or law in the R&R. It is as though the Second Amended Complaint was not read at all! Plaintiff strongly objects to such disregard in the R&R of actual reasonable compliance with the court's suggestions; in what appears to be, a concerted effort to put a senior disabled person out of court without regard to the **merits** of his/her claims/causes with the appearance that such persons are not entitled to justice/relief from constitutional harm under the law; because, persons with disability are just "too much trouble" for the court to accommodate. Where, as here, there is no reference to any specific cause pled with fact and authority that supports an alleged failure to state a claim and futile ability to amend, there is error and an appearance of actual failure to exercise discretion and/or an abuse thereof.

Plaintiff objects to the incomplete misquoted so-called "warning" apparently relied upon from the prior screening order referenced in the R&R on grounds that it is principally irrelevant re Plaintiff; as she is NOT a prisoner and the alleged conditions precedent to *not* having her case dismissed are overly broad appearing to cover all possible ways of putting someone out of court without specific application to this Plaintiff on fact or law as to the merit on any claim/cause in her SAC; in particular, where the so-called "limits" are substantially erroneous, not supported by the law on the facts of this case and cites no authority which limits an amended complaint to "twenty pages or less" or inflicts prejudicial punishment where "be brief" is not explained in fact or law and an "attempt" to file "twenty pages or less" is unsuccessful. Thus, there is an appearance for recusal, not dismissal; showing discriminatory bias against pro se prisoners and/or persons with disabilities, subjecting them - in fact- to hostility and higher standards than applied to able-bodied persons/attorneys. An R&R is objected to in its entirety, where as here; it appears that it is based on prior error and/or discriminatory bias, without fact or law in support regarding the merits of any claim/cause presented and where extensions of time **granted for good cause** shown are deemed accumulated grounds for dismissal. *Such position taken by a judicial officer(s) is not only wrong, it is a manifest injustice in contravention of fundamental principles of non-discrimination, fair play and justice in this Country and is in contravention of policy for hearing of cases on their merits.*

4. Objected to: II Background "c" Second Amended Complaint. Plaintiff objects that the R&R places "form" over "substance/merit" regarding the SAC, making comment solely on it's length and NOT THE MERIT of any amended claim/cause of action; in particular, failing to address the five claims/causes that were amended in conformity with the suggestions as understood by Plaintiff, which were set forth in the FAC screening order. The R&R references "numbers" of pages and paragraphs without any mention as to their necessity or viability for amendment in conformity with the suggestions put forth in the FAC screening order. The R&R is objected to as vague, ambiguous and misleading in not clarifying that the alleged "new allegations" are NOT "new" causes of action and it fails to identify what is allegedly attempted to be restated re dismissed claims; where by correction of original screening order and/or error, some unidentified claim in the R&R may in fact not have been dismissed and/or was wrongfully dismissed. The prior screening orders themselves appear to mandate additional information to clarify and meet pleading requirements. There is no comment whatsoever that any additional page or paragraph is *not* in conformity with necessity to meet the requirements for stating a cognizable claim with facts sufficient to meet the need for notice to defendants. In support of her facts and claims, Plaintiff included citations to authority in the SAC which show that the facts as presented in the amended claims each meet the pleading elements / requirements for each cause; and if anything is deemed to be inadvertently missing, that the SAC can be amended to include any such. ***There is nothing in the R&R section re SAC that is a challenge on the merit of Plaintiff's facts in conformity with the elements of each cause and/or the citation to fact and law in support of her claims/causes. The citations show that the same and/or similar facts upon which a cause has been stated in the cited published authority is on point with Plaintiff own facts and claims/causes.*** For example, Plaintiff presents facts re retaliatory disciplinary charges, names the defendants and links same to other causes re disability discrimination/retaliation and first amendment violations citing *Zilich v Longo* 34 F3d 359 (6th Cir. 1994). (Doc 63, page 99) The case holds that "**Retaliation for exercise of First Amendment Rights is itself a violation of the First Amendment.**" Thus, a cause under 42 U.S.C. 1983 in the SAC is stated as First and Fourteenth Amendment violations. Since the

retaliatory infractions arise from failure to accommodate disability and Plaintiff's complaints pertaining thereto, they are also retaliatory violations of the ADA and First Amendment. There should be no question that Plaintiff has stated a claim. The bigger disturbing question is why has the merit of her SAC not been recognized? Perhaps the complete failure to address even one of her amended claims is BECAUSE THEY ARE MERITORIOUS and there is some "game afoot" that instructs such NOT to be recognized. That again, is ground for recusal, not dismissal.

Plaintiff acknowledges that her complaint is lengthy and respectfully submits that it would have been of lesser length with sufficient time within the scope of her disabilities to edit the complaint more fully. The additional length grew out of an attempt to comply with the screening order to focus on each of the suggestions to be drafted into the merits of the five stated claims by placing them first (Doc 63 pages 77-102) along with the relevant facts from the broader general allegations and chronological statement of facts(Doc 63, pages 21-77) placed into each of the causes ensuring each element is stated, each defendant identified to the best of information available and that his/her action was specifically addressed; including Doe defendants. Plaintiff even put in BOLD lettering the names of the Defendants/Does to make sure no such was overlooked within each cause of action and was related to each of his/her conduct therein.

However, in doing so, it was borne in upon Plaintiff that the complaint was getting longer and would need additional time for editing; where there was insufficient time within the scope of limitations of disability to accomplish her intended purpose and make the edits to reduce the number of pages etc. and still meet the filing deadline. Accordingly, Plaintiff was left with the difficult "Catch-22" choice of not being able to file any proper SAC whatsoever within the time remaining and give up on her wish to improve circumstances for senior disability persons in the California prison system or pray for understanding of a gracious court by a good faith filing of a longer SAC with all its parts to be of best assistance to the court by a "wrap up" of what had been accomplished on the five specified causes and edit it within the existing amended complaint for fax filing; in order to meet the time deadline. Thereby, *something* was deemed better than *nothing* by necessity. Plaintiff wanted to send a letter explaining her circumstance with apology

for the inability to meet both the merits amendments and also make it shorter; but fell ill from the stress and was afraid of making a mistaken impression by doing so.

Stress from insufficient time aggravates the effects of disability rising to the level of complete cognitive dysfunction. Plaintiff presented medical verification of the need for specific time. The time granted as NOT sufficient and has and may continue to prove prejudicial. Constantly giving less time than that requested as medically necessary for a person with disability is inherently prejudicial and good cause to appoint counsel; as necessary for Plaintiff, verified by her physicians. It is not possible to predict the periods of complete exhaustion and inability to perform occasioned by disease detriment. The merits, not disability should rule in this matter; in particular, where the merits cannot be reached in manner expected by the Court without counsel. Counsel should be appointed, even sua sponte, as the law allows.

Objected to: "III. Discussion."

a. Plaintiff has complied with federal pleading standards within the best of her ability pro se delimited by disability.

Contrary to the objected to assertion of the Magistrate Judge, the SAC should *not* be dismissed for failure to state a claim for relief under Rule 8 of the Federal Rules of Civil Procedure. Under Rule 8, a complaint need only make a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) And, it need only provide "enough facts to state a claim to relief that is plausible on its face," *Bell Arl. Corp. v. Twombly,* 550 U.S. 544, 570(2007). **Thus, a complaint that may be sparse on the facts is permissible under Rule 8; and would appear to be equally so, that a complaint that may be generous on the facts with more complete notice of the claims against defendants is also permissible.** There appears to be no specified restriction on either the limit of being "sparse" or "generous" in fact presentation so long as a defendants gets even a "sparse" idea of the claim of harm/relief being alleged against them. If a defendant gets a "generous" idea of the claim, that would appear to be all the better, not a ground for dismissal.

Not all complaints are the same or filed by the same person. Cases may require a longer

rendition of chronological facts in order to understand the scope of the complaint and nexus between the causes and what each defendant did in violation of a plaintiff's civil right; as in instant case. Being "generous" of notice to defendants should not be a ground for dismissal.

The Magistrate Judge cites to *Ashcroft v Iqbal, 556 U.S. 662, 679* for the representation that allegations that *"do not permit the court to infer more than the mere possibility of misconduct"* does not state a plausible claim for relief and dismissal is appropriate. However, the Magistrate Judge makes no reference to any part of the SAC that is alleged to be subject to the contention of a "mere possibility of misconduct," and Plaintiff objects to any inference that such applies to instant case. On the contrary, Plaintiff states clear and unambiguous actual misconduct re assault and battery by custody officer causing injury to Plaintiff, multiple instances of custody officer failure to prevent harm to Plaintiff including but not limited to multiple assaults/battery, some with serious injury re broken nose by inmate and causation shown for wrongful infliction of right shoulder injury requiring surgery; as well as, specific multiple instance of failure to accommodate disability under the ADA, retaliation for her complaints with multiple instances of **false disciplinary charges arising out of complaints re failure to accommodate**; which is actual misconduct for which Plaintiff suffered harm/restrictions and denial of access to the court: retaliatory punishment, in contravention of any assertion that such was a "mere possibility." Again, the Magistrate Judge failed to state one page or paragraph in which the cause fails by reason of a "mere possibility of misconduct." As cited in the SAC, such conduct by defendants constitutes violations not only of the ADA; but specifically constitutional violations under 42 U.S.C. section 1983.

The R&R cites to *Cafasso, U.S. ex rel. v Gen. Dynamics* for the contention that a district court may dismiss a complaint for its length and lack of clarity under Rule 8; which essentially makes the same argument as that objected to above and objected to here; but admits that there is NO LEVEL of "clarity" or specified "length" that satisfies Rule 8; but contends that allegations that violate Rule 8 are ones that are "argumentative, *needlessly* lengthy, ambiguous, confusing, conclusory , repetitive, irrelevant or incomprehensible (emphasis added). *See id. At 1059.*" However, the **R&R makes NO SPECIFIC REFERENCE WHATSOEVER TO ANY PART**

OF THE SAC that is alleged to be any one of these purported "clarity" violations. Instead, Plaintiff objects that the R&R is itself conclusory, ambiguous, confusing, argumentative, repetitive, incomprehensible and clearly irrelevant for failure to state any fact/cite to any part of the SAC that evidences an alleged "clarity" violation.

Even where the R&R refers to the SAC, it is done in such conclusory generalities, without specifics from the SAC, as to be objected to on each ground stated above; but also to be entirely irrelevant for the assertions that any part of the *allegations* are "**needlessly** lengthy (emphasis added), overly confusing, unnecessarily repetitive and mostly irrelevant." **Plaintiff has stated above how the *overall* length of the complaint was *necessary*; in order to complete *any* filing within the time provided;** in particular, because Plaintiff made every effort to address the five claims for amendment with good faith "clarity." There is no allegation of or citation to fact that any "allegation" within the document was "needlessly lengthy." That is something new for Plaintiff and objected to thereby. Accordingly, there are no such alleged violations attributed to the SAC and the R&R has NOT given either this Plaintiff or the Court notice of any such with particularity and frequency, with opportunity to cure, as to be actionable for a dismissal.

Plaintiff objects to the contention that "the court is again unable to ascribe specific conduct to particular defendants as required by 42 U.S.C. section 1983 due to the perplexing manner in which the SAC is pleaded." This objected to generality, **without** citation to anything specific in the SAC, is *not* correct. The specific conduct with names in bold as to each actor and his/her wrong, is stated for each claim/cause pled as amended in the SAC. Again, it appears the SAC was NOT READ!

Whether a "manner" of pleading is "perplexing" has more to do with the mind set of the reader and his/her expectations for a "prisoner complaint" and/or perhaps, even whether or not the individual is willing to actually read the complete SAC; than whether or not it is *inherently* unable to be understood for the purpose intended by a reasonable reader/defendant. Defendants would likely have no preconceived "mind set" as to what a "prisoner complaint" should entail. After all, there is no MANDATORY pleading "form" imposed by statute, only what should be

included therein.

There is no contention by the Magistrate Judge that any one of the usual content is missing in Plaintiff's SAC; e.g. jurisdiction/venue, defendants, facts et al. Thus, it would appear to be improper for a specific mandatory "form" of pleading to be assumed by the Magistrate Judge, upon which a dismissal may be based, as appears to be the objected to position of the Magistrate Judge in this case. After all, well regarded established practice/form manuals used by attorneys contain MULTIPLE forms for even the same cause of action. Plaintiff has careful reviewed these successful forms of pleading and incorporated some into the SAC, where relevant to the claim/cause stated.

Clearly, again, Plaintiff must object that there is no reference to the SAC in support of the R&R's overly broad *general* assertions pertaining to the SAC and its objected to alleged failure to state a claim. And there is no reference or citation on the merits of any cause for the alleged failure to state a claim. Further, an analysis under Section 1983, does *not* apply as alleged for each claim; in particular, where as here, Plaintiff is proceeding under the American's With Disability Act, per reversal of **error re original complaint screening order, an objected to error also objected to as erroneously repeated in the R&R.** Plaintiff has properly relied on said reversal of judicial error and the "permission" to proceed against the State defendants as specifically set forth in the order correcting the error.

Further, the citation to *Lacey v Maricopa Cty.* 693 F3d 896 (9th Cir 2012) re application of section 1983 to Plaintiff's SAC is objected to as wrong; generally, where the ADA is applicable and is specifically in error re reference to a "causation" requirement under section 1983 erroneously inferring no liability extending to "those state officials who subject, or cause to be subjected, an individual to a deprivation of his federal rights;" where **there is no immunity under the ADA.** There is no fault against Plaintiff for following the law and what the original screening order correction allowed. Again, an R&R application of a previously reversed error, where the SAC runs to these defendants as ***not dismissed*** and ***are allowed under the ADA*** per prior screening order is error. Reliance on reversal of a prior court error is not ground for dismissal.

Plaintiff strongly objects to the implication that there is some unidentified defect that makes it "difficult" for the court and/or perhaps a newly appointed staff member to "decipher" the "nature of the allegations" against the defendants; where the nature of the SAC is clearly set forth on the cover page of the original complaint as one under the ADA and the original screening order even corrects it own mistaken application of 42 U.S.C. 1983, to make it clear that the **Plaintiff is proceeding under the ADA where the State defendants are NOT DISMISSED as liability runs to the defendant State actors under the ADA. Objection is proper where, as here, the Magistrate Judge goes back to pre-correction screening orders and use the judicial error to find fault with pleadings drafted by Plaintiff to be compliant with the ADA, is wrong. Dismissal is NOT warranted.**

There is no citation in the R&R to any part of the SAC alleged to be applicable on the objected to contention that it is not possible or would even be "difficult" for any reasonable defendant to "decipher/understand;" if they chose to actually read the SAC and follow its citation to facts and law in support. Clearly nothing has been cited that is unintelligible and/or can't be amended to further clarify for even the least educated defendant. The R&R fails to identify anything in the SAC that is perplexing or meets sufficient grounds for dismissal. Defendants will more likely than not be represented by learned counsel, who is familiar with many versions of an attorney form complaint; including forms of pleading deemed appropriate to the SAC, as incorporated by Plaintiff, for each of the causes of action, forms also referenced from expert's articles and internet cites putting forth acceptable forms of pleading, which should be easily recognized. Plaintiff objects to any inference of and/or requirement that she use a pre-printed pleading form provided by the court and to any dismissal based on failure to use such a limiting pre-printed form. Lawyers rarely use the pre-printed forms. Attorneys know that not all "prisoners complaints" need be put on "forms" provided by the court, which appear to limit causes to what is stated on the form; in particular, to 42 U.S.C 1983, a form which is easily subject to a "canned" screening order for dismissal; apparently, on any and all grounds; which should not be applicable here under the ADA.

Creativity in placing a complaint in the best light for the facts and law presented is proper

and is not a ground for dismissal. It is also not a ground for dismissal that a person with disability must address a complaint in such manner as time provided allows and is precipitated by his/her medical limitation needs; although such may properly be a ground for appointment of counsel.

There is no fact or authority that is presented in the R&R that makes a showing that the SAC fails to state a cause of action on the facts and law presented therein. The apparent "form over substance" approach taken by the Magistrate Judge; ignoring any fact or law on the "substance/merit" is inherently wrong. A dismissal is not warranted where, as here, the SAC shows substantial merit re facts and causes presented by Plaintiff.

b. Leave to amend should be granted. There is no contention in the R&R that Plaintiff with or without assistance of counsel and with time appropriate to the task and Plaintiff's medical limitations, cannot amend to meet reasonable expectations of the court re length and/or organization of the pleading; hopefully without creating a loss of operative facts presented for each claim/cause. The fact presentation does constitute most of pages in the SAC.

The argument in the R&R that leave to amend should not be granted is objected to on a number of grounds herein; in particular, because the argument shows a strong appearance of bias and intent to prejudice arising out of what is reasonable to conclude is extrajudicial sources and/or dictate from a source that has determined that Plaintiffs with disability should be put out of court by any means possible and/or that this Plaintiff by reason of "stigma," is not wanted or "deserving." In any event, such would be a manifest injustice and should shock the conscience of any distinguished, respectful judicial officer performing under the court's Code of Ethics.

The apparent implied "personal" attacks in the R&R without regard to the merit of the facts and causes in the SAC are painful for Plaintiff to read; in particular, where some of the injuries inflicted at CCWF contribute to apparent inability to fully meet the requirements of this court in presenting her claims; e.g. multiple head trauma, assault/battery, broken nose, life threatening many hours long nose bleeds, shoulder injury requiring surgery, multiple instances of brutal assault and battery pain and injury, "frozen" extremities and emotional injury; and the unconscionable "do not believe" attitude re failure to accommodate, where M.S. with Plaintiff

having all the symptoms; was not diagnosed or accommodated inflicting multiple fall injuries with severe pain from unconscionable requirement to use a "walker" she could not break/stop with her crippled painful hands or walk behind without falling; rather than being given the physician prescribed wheelchair, required by law to be provided by defendants, a wheelchair unlawfully denied to Plaintiff.

How can there be no claim here; in particular, when Plaintiff clearly gave notice of her ADA needs and was ignored inflicting actual physical and emotional injury. How can there be no claim here where her complaints resulted in more harm from false retaliatory disciplinary charges which inflicted restrictions preventing access to the court regarding her wrongful incarceration and defense of constitutional real and personal property interests? Here, justice requires and the merit of the causes warrant leave to amend; *not* the "form" dismissal with prejudice urged by the R&R in contravention of meritorious claims and constitutional rights.

The R&R lists grounds upon which a court may decline to allow amendment. There is insufficient fact and law to support a denial of leave to amend in this case; in particular, where there is a complete disregard of any fact from the SAC on the merit of any cause therein. **Because of the continuing negative progression of Plaintiff's limitations of disability; appointment of counsel is urged for assistance in meeting any court requirements found wanting by Plaintiff's efforts.**

In a prior order denying the amount of time extension sought by Plaintiff (Doc. 60), the Magistrate Judge stated that the court had: "*already provided plaintiff with sufficient time to accommodate her medical conditions*;" and then without regard to verified medical necessity for additional time, blames Plaintiff for delay. This is medically incorrect and just plain wrong. Plaintiff's principle disabling "medical condition" is NOT one that can be "cured" by time or any other treatment. The *effects* from said "medical condition" are going to be present even with a good cause time extension to accommodate limitations of physical function; but it is the limitation re brain function that will not change, that Plaintiff fears is misunderstood by the court and may be the basis for the painful "personal attacks" against Plaintiff in the R&R; attacks not on the merit of her claims; but by reason of effects of disability, for which liberal construction of

the pleadings would be appropriate and the law allows. Without sufficient time accommodation, there is no hope that any portion of that time can be used effectively by Plaintiff to function well enough to accomplish tasks requiring Plaintiff to meet court time constraints to avoid prejudice from the time denial. Plaintiff has come to the painful realization that the inherent effects of the progressive brain disorder may not allow her to fully meet the court's expectation; but may be manipulated to inflict further prejudice from being penalized by false inferences regarding the merit of her claims.

Although Plaintiff previously sought appointment of counsel to assist with the FAC, it was denied in error by reason that the court was wrong in assuming the case was limited to one under 42 U.S.C. 1983, where appointment of counsel was alleged not to be available under said statute. The denial was without prejudice. Appointment of counsel is available under the ADA. Plaintiff presented the mandated renewal application in hopes that counsel can assist to ensure that her civil rights are administered in the best form possible to be of assistance to the Court without prejudice arising from her limitations of disability; as appears to be happening in the R&R. Plaintiff did not expect and objects to the Order denying the request to appoint counsel as precipitating denial of leave to amend and dismissal with prejudice. Appointment is appropriate in this case.

Plaintiff objects to the argument in the R&R, that Plaintiff has "repeatedly and willfully refused to cure pleading deficiencies identified by the court." This is manifestly *not* correct as verified by medical verification in the REQUEST FOR JUDICIAL NOTICE (Doc 73). Plaintiff "willfully" wants to "cure" any prejudicial pleading defect; but may not be medically capable of doing so within specified time constraints; and could not even try to successfully "cure," where there is a failure of the R&R to identify what alleged deficiency in the SAC Plaintiff has "willfully" failed to cure; in particular, on the merit of any claim/cause - where no such is even mentioned. The generality is objected to as just too vague and ambiguous to support a denial of leave to amend recommendation and dismissal with prejudice. Many Plaintiffs with and without counsel are given at least three opportunities to amend and many are allowed even more. Plaintiff is currently without counsel and is struggling to produce any document within the time

allowed and does need attorney assistance to overcome limitations from her medical conditions. **(Please see Doc. 73 and other Medical Verification in Support of time extensions, Appointment of Counsel and Objections here; filed under seal.)** Accordingly, Plaintiff has not "**willfully** refused" to comply with lawful instruction of the court.

Plaintiff has at all times believed that she has in fact complied in good faith to the best of her ability as necessity mandated with expectations of the court within the time provided. As set forth above in reference to correcting the original complaint drafted under extremely difficult circumstances; Plaintiff has included the requested paragraph numbers, separate causes and other drafting instructions in the FAC. The Magistrate Judge however, alleges a failure of meeting the "pleading standard" without specification of how there was such a "failure;" and instead, harkens back in a vague and ambiguous manner to the "original complaint;" contending that the problems with the original, were not corrected and then "bootstraps" the erroneous contention as allegedly applicable also to the FAC and SAC. This is wrong. As stated above and more fully in response to each complaint addressed above, Plaintiff acted to the best of her ability to conform the FAC complaint as appropriate; in particular, in light of the judicial error correction to allow ADA State defendants. Plaintiff should not be prejudiced by a false contention that she "refused" to comply in failing to **amend in conformity with judicial error.**

It is of note that the R&R does NOT state how the amended complaints actually did comply with instructions to the best of Plaintiff's ability and good cause for form of FAC and SAC submitted in the time allowed without assistance of counsel. The general suggestion that there was a mere repeat of the original complaint is objected to as false and misleading. Plaintiff addressed the actual corrections made and the alleged instruction to "be brief" and what should be attempted as to length, in the specific complaint discussion sections above. There is neither sufficient cause to dismiss for failure to state a claim or to deny leave to amend. There is good cause to grant leave to amend and to appoint counsel to ensure that this case with meritorious claims/causes can proceed in such fashion as to have a fair opportunity with able-bodied plaintiffs to achieve a favorable result.

Plaintiff has addressed the issues with regard to the FAC in its discussion section above

and objects to the characterization of having "refused" to comply; in particular, where the five claims were the focus of the FAC; where in good faith belief, they were properly amended to state a claim. It is notable that the Magistrate Judge failed to find any fault as to the five amended claims as pled in the SAC. There is no citation to any part of the SAC. There is no fact or authority alleging that any of the five causes as pled in the SAC contained any alleged error and/or failure to comply with the screening order or otherwise failed to state a claim/cause. Thereby, there is no fact or authority that is noticed of any defect in said causes as presented in the SAC. Leave to amend is appropriate. Dismissal is not. As set forth above, amendment to the extent possible within the ability of Plaintiff was effectuated as to the SAC and as set forth above, it is capable of and Plaintiff is willing to make further amendment to the document as may be of best assistance to the Court.

The R&R is strongly objected to - again, where the Magistrate Judge repeatedly attempts to find fault with Plaintiff for COMPLIANCE WITH A PRIOR COURT ORDER which allowed her to proceed against defendants that were dismissed in error and order issued reversing dismissal of State defendants under the ADA. (See discussion above under original complaint.) Plaintiff is informed and believes that "vacated," or "void"orders have no compliance requirement. The erroneous attempt to find fault with Plaintiff by making the false statement that she has "repeatedly failed to omit entity defendants and official capacity claims from her amended complaints despite these defendants having been dismissed from the case," is not only wrong; but raises the question as to why a learned judge would repeatedly ignore a prior court order vacating this alleged requirement; thereby also raising the issue of whether or not the Magistrate Judge and/or his assistant is acting on discriminatory bias and hostility against persons with disabilities or just against the "stigmatized" Plaintiff in instant case; perhaps, under direction of other judicial officers and/or influence from extrajudicial sources to issue false and misleading basis for recommendations to prejudice Plaintiff in proceedings before the District Court. Here too, there is good cause for appointment of counsel to avoid the impact of extrajudicial sources and/or inherent bias and hostility toward persons with disability acting pro se within the judicial system.

The objected to omissions of fact and authority in the R&R work against the argument/recommendation that leave to amend should be denied and dismissal with prejudice issue. There is no authority cited for this false inference re lack of merit. The mistaken argument re failings; failings that do not actually exist, where Plaintiff has substantially complied with court orders; in particular, court orders and facts the Magistrate Judge ignores, work against the argument/recommendation that leave to amend should be denied. Disregard of fact re good cause for extensions of time, disregard of and error of law with disregard of legal standard used to determine merit in contravention of dismissal, not determining with analysis the facts and harm inflicted for sustaining a cause of action, disregard of the merits for each cause as amended in the SAC, disregard of citation of fact and law related to the SAC showing cognizable causes of action; as well as, disregarding the actual court order reversing dismissal of State defendants and disregarding facts of medical limitations/illness warrant good cause to sustain claims/causes and grant leave to amend and to reject dismissal.

c. Dismissal should Not be granted. The Magistrate Judge erroneously recommends that the case be dismissed for alleged failure to prosecute and failure to comply with a court order under Fed.R. Civ. P. 41(b); to questionably, effectuate a dismissal on the merits unless the court orders otherwise. Plaintiff is without notice as to fact and authority for alleged "failure to prosecute," where the case is remains in the screening stage pursuant to court process and it is impossible for the Plaintiff to proceed where the court has not opened the door for "prosecution" of her case. The proceedings have been dictated by the court and any alleged delay in addressing same is necessary for good cause shown in requests for extension of time; e.g. accommodation re unanticipated circumstances, surgery, trial and effects of disability. Further, there is no showing of prejudice/actual prejudice to the defendants. The defendants have been continuously on notice of the facts and claims against them through administrative procedures and State tort claims; as well as, the substantial fact detail set forth in the complaints filed in this Court; pages of facts it appears, the court appears to find "unnecessary," even though there is enough said to avoid prejudice; thereby, such may be deemed actually necessary to fully state the claims and each instance of abuse constituting the claim as to each defendant as requested upon

amendment by the court as shown in the SAC.

As stated above, the alleged failure to comply with court order is tainted by substantial prejudicial error re mistaken and/or intentional erroneous reliance on an order re dismissal of State defendants; an order, that was reversed. The Magistrate Judge's repeated reliance on the erroneous order while ignoring its reversal for the principal contention of "failure to comply." is wrong and such error should not support dismissal.

The R&R identifies without specific facts in support, factors for determining whether to dismiss for failure to prosecute or failure to comply with a court order; but only addresses those factors that can be misstated and/or exaggerated for reliance on error (reversed court order) and/or on erroneous abusive "attacks" on Plaintiff and not those that work against the recommendation; e.g. availability of less drastic alternatives and public policy favoring disposition of cases on their merits; as well as, effects of disability. The selective negative approach in the R&R appears to show that said purveyor of the prejudicial recommendations cannot be fair and impartial; in particular, where it appears the Magistrate Judge himself, has NOT ACTUALLY READ most, if any, of the SAC or the good cause medical evidence (sealed and otherwise) presented for extensions of time and/or where he is unwilling to accept the truth thereof; even where other more experienced judicial officers have not acted with such hostility and discriminatory bias. Accordingly, there is an appearance of something else at play here.

The Magistrate Judge alleges "long delays" between screening orders and blames Plaintiff's requests for extensions of time of approximately two years for the delay; without addressing any factor of good cause for any one or more of the requested extensions. The court granted the extensions for good cause shown; and thus, there is NOT cause for dismissal thereby. Alleging otherwise is objected to as blatant disability discrimination, indicia of hostile bias and/or cruel disregard of the law which allows **"illness" as a defense to dismissal** erroneously recommended by the Magistrate Judge. See *Scarver v Allen* (7th Cir. 1972) 457 F2d 308, 310-311. Thus, there is nothing "unusual," "unnecessary," or "excessive," about delay found acceptable for good cause by the court. **If the court cannot accommodate a party with disability who requires more time to provide a full, complete, competent and meaningful**

response to court processes such as to accomplish same in a fashion with equal opportunity to achieve a favorable result with able-bodies parties/attorneys and/or will not accept the limitations brought about by disability for a party making compliance impossible thereby; then it should favorably consider appointment of counsel, not dismissal.

Of course, patience with granting time as required for accommodation to provide for completion of a good faith effort with liberal evaluation regarding a less perfect result, is also available; as even the most stigmatized of citizens is entitled to due process. Plaintiff is a person with disability as is clearly set forth in the SAC and sealed verifications of medical necessity; which disability has already been the cause of substantial false and defamatory representations, physical and emotional harm and misunderstanding. Examples of such are clearly as set forth in the SAC. It is to the courts that citizens must turn for redress of grievances with implied fair and equal justice for all; and if it cannot be patiently found in that forum - for the most vulnerable - then the courts do not fulfill their constitutional promise and our democracy is in real trouble.

Plaintiff strongly objects to the R&R mis-characterization that Plaintiff has been willful, "refused to comply,""chosen to ignore the court's screening orders" and "has not even shown a minimal willingness to follow the court's instruction." This characterization is not only wrong and indicia of bias on the facts and authority set forth above; but because Plaintiff has at all times acted in good faith to meet requirements of the court within the diminishing capacity brought about by her progressive illness for which there is no effective treatment or reversal. Thus, any failings are inadvertent and neither willful nor without good cause. (Please see all medical exhibits set for in filings under seal.)

Plaintiff objects to dismissal as stated above and most particularly objects to the recommendation that a dismissal *with prejudice* issue; because the remarkably harsh discriminatory recommendation is NOT a first choice "sanction," is NOT based on fact, is NOT based on actual prejudice, is NOT based on citation to fact or law showing a lack of merit re any claim/cause in the SAC or any other actually identified just or substantial cause; but because as the Magistrate Judge questionably put it:

"However, if the court dismissed without prejudice, the court might

again be in the same situation it finds itself in now if plaintiff refiled her case."

The above objected to discriminatory statement showing extraordinary bias, belies all contentions upon which the previously objected to recommendations in the R&R are based. The objected to recommendations for dismissal without leave to amend re erroneously alleged failure to state a claim, failure to cure deficiencies by amendments previously allowed, failure to comply with court orders and failure to prosecute, are specious and should be rejected.

THE REAL REASON FOR THE OBJECTED TO RECOMMENDATIONS: APPEARS TO BE, THAT THE COURT WANTS TO KEEP PRO SE PLAINTIFF'S WITH DISABILITY OUT OF COURT, without regard to the merit of their claims/causes! And apparently, even with an attorney; who could file a third amended complaint. This appears to be a due process violation showing hostility and bias sufficient on the above statement alone for recusal by the Magistrate Judge under the Court's Code of Ethics and a showing of extraordinary circumstances to vacate the referral and to reject the recommendations.

There appears to be no question that the Magistrate Judge cannot be fair and impartial where this disabled plaintiff is concerned; in particular, where there appears to have been no consideration of the documentation under seal in support of good cause for extensions of time, medical necessity for appointment of counsel or otherwise in contravention of assertions made upon which dismissal is erroneously recommended; where there is improper reliance on an erroneous/vacated court order, there is no consideration of fact or law on the merits of the claims/causes in the SAC and where even appointment of counsel may have no effect on a "prescription" to deny persons with disability access to the U.S. District Court for redress of grievances.

Clearly, the questionable approach by the Magistrate Judge in this action with omission of operative fact and law to deny substantial procedural and substantive rights to Plaintiff is too harsh, evasive and discriminatory, to withstand scrutiny, showing that the referral should be vacated and recommendations rejected.

Conclusion

For the reasons outlined above, and as required by 28 U.S.C. section 636(b)(1)(C) and Rule 72.3(b) of the Rules of this Court, Plaintiff objects to the Magistrate Judge's Report and Recommendations.

The Court should decline to adopt the R&R. Instead, it should grant leave to amend and appoint counsel to assist in meeting the Court's requirements.

Dated: August 15, 2019

Respectfully submitted,

PATRICIA A. MCCOLM
Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PATRICIA A. MCCOLM,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

Case No. 1:14-cv-00580-LJO-JDP

ORDER DENYING RENEWED MOTION TO APPOINT COUNSEL

ECF No. 73

Plaintiff Patricia A. McColm is a former state prisoner proceeding without counsel in this civil rights action under 42 U.S.C. § 1983, the Americans with Disabilities Act ("ADA"), and § 504 of the Rehabilitation Act ("RA"). On October 11, 2018, the court issued an order permitting plaintiff to file a renewed motion for recruitment of counsel. ECF No. 71. We explained that if recruitment of counsel was warranted, we would grant leave to file an amended complaint with the assistance of counsel. *Id.* at 10. If we found that appointment was not warranted, we explained that we would recommend dismissal of this case. *Id.*

Plaintiff filed a renewed motion for appointment of counsel on November 15, 2018. ECF No. 72. Plaintiff does not have a constitutional right to appointed counsel in this action, *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require that an attorney

represent plaintiff under 28 U.S.C. § 1915(e)(1), *see Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 298 (1989). However, in certain exceptional circumstances the court may request the voluntary assistance of counsel under § 1915(e)(1). *Rand*, 113 F.3d at 1525.

Without a reasonable method of securing and compensating counsel, the court will seek volunteer counsel only in the most serious and exceptional cases. In determining whether exceptional circumstances exist, "a district court must evaluate both the likelihood of success on the merits [and] the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved." *Id.* (internal quotation marks and citations omitted).

Here, we do not find the requisite exceptional circumstances to appoint volunteer counsel. First, we cannot find that there is any likelihood of success on the merits. None of plaintiff's complaints have survived § 1915A screening, ECF Nos. 13 & 47, and plaintiff's latest complaint tracks the same content of a previous complaint that failed to state a claim, *see* ECF No. 63. Second, though we acknowledge plaintiff's disabilities, ECF No. 63 at 6, we do not find that plaintiff is inarticulate. Indeed, plaintiff's intelligence is apparent in her filings before this court.

ORDER

Accordingly, plaintiff's renewed motion for the appointment of counsel, ECF No. 72, is denied. Because we find that appointment of counsel is not warranted, we will recommend dismissal of this case in a separate order.

IT IS SO ORDERED.

Dated: June 11, 2019

UNITED STATES MAGISTRATE JUDGE

No. 203

PATRICIA A. MCCOLM
PO Box 113
Lewiston, CA 96052
(415) 333-8000
Fax by Appointment

Plaintiff, in pro se

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PATRICIA A. MCCOLM NO. 1:14-CV-00580-LLO-JDP

Plaintiff,

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEAL, NINTH CIRCUIT; *REQUEST FOR APPOINTMENT OF COUNSEL RE* ***PERMISSION*** *& APPEAL.*

vs.

TRINITY COUNTY et al.

Defendants.
_____/

Notice is hereby given that PATRICIA A. MCCOLM, the plaintiff in the above named case, **PROCEEDING IN FORMA PAUPERIS GRANTED IN THE DISTRICT COURT;** hereby appeals to the United States Court of Appeal for the Ninth Circuit ***requesting appointment of counsel*** for good cause re limitations of disability and impending surgery to assist with both the process for permission to proceed on appeal and the appeal from:

APPENDIX B

1) The **JUDGMENT IN A CIVIL CASE** (ECF 82) entered in this action on the **11th day of September 2019**; [The misleading "form" Judgment erroneously states: "This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered." There was neither a trial nor hearing. The Judgement further states that: "IT IS ORDERED AND ADJUDGED THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 9/11/2019."] A true and correct copy of the Judgement being appealed in this case is attached hereto as **EXHIBIT 1.**

2) The **ORDER** (ECF No. 81) entered in this action on the **11th day of September, 2019**; stating: "1. The findings and recommendations issued by the magistrate Judge on June 12, 2019 (ECF No. 75), are ADOPTED IN FULL; and 2. The case is dismisses with prejudice." A true and correct copy of the ORDER entered 9/11/19 being appealed in this case is attached hereto as **EXHIBIT 2.**

3) The magistrate judge's **FINDINGS AND RECOMMENDATIONS** (ECF 75) entered in this action on the **12th day of June, 2019** [recommending that the Second Amended Complaint be "***dismissed for failure to state a claim***"and "with prejudice" for alleged failure to comply with court orders /failure to prosecute, without regard to the facts or merit of any cause therein or substantial limitations of disability found by physician statements under seal to be not willful but by reason of disability recommending appointment of counsel.] A true and correct copy of the FINDINGS AND RECOMMENDATIONS being appealed in this case is attached hereto as **EXHIBIT 3**(ECF 75) with **OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS et al** appended thereto as **EXHIBIT 3A therein requesting JUDICIAL NOTICE OF MEDICAL EXHIBITS UNDER SEAL** throughout case showing medical necessity for appointment of counsel.

4) The **ORDER DENYING RENEWED MOTION TO APPOINT COUNSEL** (ECF 73) by Magistrate Judge, a true and correct copy attached hereto as **EXHIBIT 4** stating therein: ***"Because we find that appointment of counsel is not warranted, we will recommend dismissal of this case in a separate order."*** (ECF 75). The appealed Order is from Plaintiff's RENEWED APPLICATION FOR APPOINTMENT OF COUNSEL; DECLARATION OF PATRICIA A. MCCOLM AND OBJECTIONS TO MAGISTRATE JUDGE'S ORDER; MEMORANDUM, REQUEST FOR JUDICIAL NOTICE FILED SEPARATELY (ECF 72), a true and correct copy attached as **EXHIBIT 4A** and REQUEST FOR JUDICIAL NOTICE in support, attached as **EXHIBIT 4B.**

5) The **ORDER ADOPTING FINDINGS AND RECOMMENDATIONS TO DENY PLAINTIFF'S MOTION SEEKING RELIEF FROM, OR ALTERATIONS TO, THE JUDGMENT** (ECF 88) entered July 20, 2020 attached hereto as **EXHIBIT 5**, issued by a ***new and different judge***, essentially relying on prior objected to judicial error, much of which had been corrected (See ECF 19 attached hereto as **EXHIBIT 5A**); but which was repeatedly ignored in subsequent findings/recommendations and Orders and in disregard to medical necessity, medical justification and good cause for appointment of counsel.

6) The magistrate judge's **FINDINGS AND RECOMMENDATIONS** (ECF 85) entered **January 17, 2020** recommending that the "MOTION SEEKING RELIEF FROM, OR ALTERATIONS TO, THE JUDGMENT BE DENIED;" a true and correct copy of which is attached hereto as **EXHIBIT 6** with MOTION TO ALTER OR AMEND ORDER OF DISMISSAL AND FOR RELIEF FROM JUDGMENT DISMISSING ACTION **et al (ECF 83)** entered **October 8, 2019** appended thereto as **EXHIBIT 6A** and OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS THAT THE MOTION SEEKING RELIEF FROM OR ALTERATIONS TO, THE JUDGEMENT BE DENIED WITH

EXHIBIT A; REQUEST FOR JUDICIAL NOTICE (ECF 87) appended hereto as **EXHIBIT 6B.**

7) The **ORDER** entered **February 22, 2020** (ECF 53) " ORDER ADOPTING FINDINGS AND RECOMMENDATIONS TO: DISMISS et al, a true and correct copy of which is attached hereto as **EXHIBIT 7.**

8) The Magistrate Judge ORDER AND FINDINGS AND RECOMMENDATIONS (ECF 47) attached hereto as **EXHIBIT 8** with (partial exhibits) and with appended OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS et al., EXHIBIT 8A.

9) The **Dismissal Order** (ECF 13) entered March 4, 2015, **EXHIBIT 9**, with MOTION TO ALTER OR AMEND ORDER OF DISMISSAL et al (ECF 14) entered March 18, 2015 appended as EXHIBIT 9A and **correction ORDER** (ECF19) entered March 20, 2015 (See Exhibit 5A).

10) The first **ORDER** DENYING MOTION TO APPOINT COUNSEL (ECF 32) was entered **September 2, 2016**; a true and correct copy of which, is attached hereto as **EXHIBIT 10 with Application for Appointment of Counsel for Good Cause (ECF 31) entered September 15, 2016 appended thereto as EXHIBIT 10a.**

11) Prejudicial Limitations re Accommodation of Disability re Requests for Extension of Time and Appointment of Counsel; **JUDICIAL NOTICE REQUESTED** OF MEDICAL GOOD CAUSE FILED UNDER SEAL (ECF 14-15/17-18, 24-25/27-30, 34-36/37-38, 47-51, 54-55, 57-62, 65-66, 68-70, 76-79, 84-86, 89-90). Medically verified time delay needed to accommodate limitations of disability in order to accomplish any written project required by the court in such fashion as to have a fair opportunity with able bodied persons to achieve a

favorable result, was arbitrarily shortened; thereby, denying accommodation and inflicting prejudice from inability to meet the limited time imposed and/or inflicting prejudice from need to seek additional time in a good faith effort to meet the expectations of the court; where the deficits of disability negatively impacted achieving such a result without appointment of counsel. Thus, it appears that limitations of disability is the standard upon which leave to amend and denial of access to the Court is based, absent appointment of counsel. Extensions of time granted for good cause should not be a ground for dismissal with prejudice.

Copies of the Judgement and Orders being appealed are attached as Exhibits 1-10 hereto and where not attached, included by request for JUDICIAL NOTICE.

Plaintiff has not previously appealed the judgement and orders stated above or raised the issues pertaining thereto in a prior appeal or petition on review by this Court. THIS NOTICE OF APPEAL IS BEING FILED SUBJECT TO A NEAR 20 YEAR OLD PRE-FILING ORDER IN 01-80189; which Order is being respectfully requested vacated in a separate application; to be submitted hereafter when time and disability limitations and surgery allow; with showing of good cause to vacate by passage of time and discovery of the previously undiagnosed medical conditions which precipitated the older apparent ineffective filings; filings, which were a good faith effort, designed to overcome the targeted "stigma," the false and defamatory media comment ("fake news") plaintiff suffered as a person with disability; against which, defense was medically prejudiced. Regrettably, medical limitations inflicted futile filings; a good faith effort, plaintiff hoped would save home and reputation; such relief, essentially prevented by medical impossibility from cognitive/physical decline re undiagnosed Hashimoto's Disease, which ultimately inflicted black-outs nearing myxedema coma.

There are years of medical and financial detriment/bankruptcy filings, trying to overcome prejudice from disability arising from the missed diagnosis; regrettably, including those that have

only been discovered within the past several weeks. Plaintiff has neither been able to fully recover from on-going effects of auto-immune *Hashimoto's Disease*, nor the severely disabling continuing painful effects from traumatic injuries in 2019-20; or even begin to recover, from the overwhelming continuing prejudicial impact from the false and defamatory media comment and "stigma" arising therefrom, that appears to wrongfully govern decisions made by others painful to plaintiff, in all walks of life; decisions based on false assumptions from some 20 years ago; which has further effectuated a denial of Constitutional remedy by reason of medical impossibility; and which appears to have influenced the outcome in this case.

In addition, even the retired presiding judge of the Eastern District Court has publically recognized that with the judge shortage, that the guillotine of prejudice is more likely than not to fall on litigants. A due process violation? Does any court still care about Constitutional protections providing a remedy, where time consuming persons with disability are involved? It is not unreasonable to assume from the history of this case, that pro se plaintiffs with disability; in particular, those that have been stigmatized as "vexatious" because of misunderstood disability and/or through denial of appropriate accommodation thereof, are the most likely to be denied access to the court to resolve grievances under the present circumstances. Thus, it appears such individuals, like plaintiff, are subject to a preconceived opinion against merit exercised without an actual reading of any claim or taking the time to understand / determine the good cause and harm upon which the claim for relief is based. Must plaintiff's with disability suffer extreme harm from defendants without a remedy? Where is *that* in the law or good conscience?

This 74 year old, coping with age related decline; as well as, a refusal to heal serious painful swollen leg laceration injury and related newly diagnosed serious back injury requiring urgent surgery to avoid likely paralysis; has also to cope with a second debilitating disability from a second auto-immune diagnosis of Multiple Sclerosis; for which after FOUR YEARS of extreme time required effort to enforce a California Administrative Law Judge order, a power wheelchair has finally been provided by the MediCal insurer. It is likely M.S. was also *not*

diagnosed in the 1990s. Thus, there is progressive cognitive decline, continued interference with ability to accomplish daily activities of life; as well as, impossible court expectations; in particular, where sufficient time is not afforded for a good faith effort to overcome pain, confusion, lack of concentration/focus, memory loss of instant recall, words and much past learning, inability to be organized and focus being verbose and unable to "edit" effectively; all indicative of the progressive disease with declining cognitive and physical functioning; with inability to cope with the "shut-down" distress at being the subject of targeted abuse and deprivation of civil rights as occurred in the action at hand.

Plaintiff prays for relief from stigma and the guillotine and a fair opportunity to prevail; in particular, through appointment of counsel.

JUDICIAL NOTICE is respectfully requested of verification of medical conditions / limitations of disability and recommendation for appointment of counsel; as set forth by ***plaintiff's physicians under seal; in particular, medical statement of Michelle L. Apperson, M.D, PhD dated August 23, 2018, in this action showing that plaintiff's failings are not "willful;" but attendant to medical problems. The documents under seal give sufficient showing to vacate dismissal and appoint counsel; as well as, recent additional statement of acute diagnosis in support of application to appoint counsel for assistance with the herein permission and appeal process; in particular, in light of recent back injury diagnosis and recommended surgery to avoid potential for paralysis. Attached are two medical statements in support of application for appointment of counsel as EXHIBITS 11 and EXHIBIT 12, that will be with the application submitted directly to the Court of Appeal, along with Form 24 showing additional good cause therein.***

Instant case should have been allowed amendment and appointment of counsel. Absent permission to appeal and determination of this case in the District Court; the prejudicial

knowing denial of constitutional and civil rights by State prison employees, more likely than not, will continue; in violation of constitutional protections and statutory rights of persons with disability; in particular, with a "green light" to allow unrestrained physical battery by other prisoners and custodian officers alike. **Plaintiff's suffering a broken nose and repeated multiple injury from prisoner battery as set forth in the SAC; as well as, extreme pain and falls suffered from failure to provide plaintiff with the physician prescribed wheelchair; one fall which required shoulder surgery, should not be tolerated by prison officials against *any* prisoner and such violation of law should not be condoned by this Court for any procedural deficit alleged.**

Elder persons with disability are the most vulnerable and should receive enhanced protections; not denied the very accommodations and durable equipment required to avoid pain from effects of disability; as occurred in this case and then made to suffer false disciplinary charges and unlawfully denied legal mail to the Supreme Court of California in retaliation for her complaints. For this plaintiff, a dismissal with prejudice is a COMPLETE DENIAL OF CONSTITUTIONAL RIGHT OF ACCESS TO THE COURT TO RESOLVE GRIEVANCES; merely, by reason of misunderstood time requirements to accomplish any written project in such a manner as to have a fair and equal opportunity with able bodied persons to achieve a favorable result and/or to not accommodated limitations of disability causing dismissal with prejudice and/or by reason of bias from "stigma" related to this plaintiff with disability.

STATE PRISON EMPLOYEES ARE NOT IMMUNE FROM LIABILITY FOR KNOWING VIOLATIONS OF A PERSON'S CONSTITUTIONAL RIGHTS as occurred in this case. STATE ENTITIES INCLUDING PRISONS ARE NOT IMMUNE FROM LIABILITY FOR VIOLATIONS OF THE ADA AS OCCURRED IN THIS CASE. Thus, to dismiss this case with prejudice with implication that it is "frivolous" for wrongfully alleging failure to state a cause of action or other questionable non-accommodating reason, is just plan wrong! It gives the strong appearance that the magistrate judge and/or staff just didn't want to read a lengthy

complaint by a stigmatized plaintiff, is biased and unable to provide a fair and impartial evaluation of the action and/or that the District Court is trying to reduce its case load by keeping disabled plaintiffs out of court without regard to the merit of *any* cause of action.

The hard working legal assistant(s) need to help the Court by actually READING THE SECOND AMENDED COMPLAINT in relation to attorney practice manuals it tracks meeting the elements for each cause of action; as well as, the multiple pages of substantial FACT supporting the causes of action; where defendants knowingly acted in concert per retaliatory agreement to prejudice and cause physical pain/injury and emotional harm to plaintiff, a stigmatized person with disability! Intentional failure to provide physician prescribed wheelchair with pusher to move same and avoid pain/injury, is blatant intentional discrimination and retaliation actionable under the ADA; as well as, is officer and multiple prisoner battery with injury including a broken nose. Retaliatory false disciplinary charges and denial of due process at hearing for objecting to denial of access and accommodation is actionable; and even a violation of U.S.C section 1983; where the citation showing such to be a violation in the prison context, was apparently disregarded by the magistrate judge. The District Court's primary reliance on U.S.C. section 1983 to determine dismissal expecting amendments thereto without regard to viability under the ADA is wrong; as is the repetitive error in using said statute to prejudice plaintiff in contravention of the ADA; upon which she should prevail, on the same facts as drafted in the SAC.

Appeal is proper to correct the magistrate judge in this case, who acted against law from his erroneous belief that if counsel is not warranted, the case will be dismissed. (See Exhibit 4, page 2, lines 18-19) Plaintiff has found NO AUTHORITY and no such was cited by the magistrate judge, that allows a District Court to dismiss an action because counsel is not appointed. And to do so WITH PREJUDICE! Such judicial conduct shows discriminatory bias against persons with disability to proceed pro se and was good cause to withdraw the referral. The Second Amended Complaint fully states at

least one cause of action, which under 28 U.S.C. 1915 should not have been dismissed with prejudice.

THIS COURTS NEEDS TO ENSURE THAT EFFECTS OF ILLNESS AND LIMITATIONS OF PERMANENT AND ACUTE DISABILITY DO NOT BECOME THE MEASURE OF DENYING ACCESS TO THE COURT AND DUE PROCESS IN THIS COUNTRY; as occurred for plaintiff in this action. Plaintiff's physicians have stated that the inability to meet court time and other expectations is not willful; but a problem related to her medical condition and that counsel should be appointed (See Medical Statements under Seal; in particular, that of Dr. Apperson dated 8/23/18 and the most recent submission, Exhibit 12; in support of request for appointment of counsel on request for permission and appeal). This Court needs to tell District Courts, that failure to appoint counsel, is NOT a proper reason to dismiss an action with prejudice.

The statements of fact and law set forth above and as set forth in each of plaintiff's objections and motions filed in this case; as well as, medical good cause set forth in documents under seal are incorporated by reference into the Statement of Facts and Law on Appeal set forth below:

STATEMENT OF FACTS AND LAW ON APPEAL

ABUSE OF DISCRETION / ERROR OF LAW: DENIAL OF LEAVE TO AMEND AND DISMISSAL *WITH PREJUDICE* BASED ON UNFOUNDED FACTS/AUTHORITY RE "*FAILURE TO STATE A CLAIM*" UNDER 28 U.S.C. SECTION 1915; CONSTITUTIONAL VIOLATION / DENIAL OF ACCESS TO COURT / MANIFEST INJUSTICE RE APPEARANCE OF DISCRIMINATORY BIAS AGAINST PRO SE

PLAINTIFFS WITH DISABILITY AND/OR VEXATIOUS LITIGANT "STIGMA" IN CASE WITH MERITORIOUS FACTS/CAUSE(S) OF ACTION; AND, DENIAL OF MOTION TO APPOINTMENT COUNSEL.

The **SECOND** AMENDED COMPLAINT (SAC) (ECF) in this substantial in forma pauperis ADA/civil rights action was denied leave to amend and **DISMISSED WITH PREJUDICE** (ECF) and Judgment (ECF) entered thereon , 2019 for ***"FAILURE TO STATE A CLAIM et al;"*** at the screening stage under 28 U.S.C. 1915; in what appears to be abuse of discretion and error of law through prejudicial disregard of authority under said statute and in contravention of substantial pages of FACT supported by available documentary evidence; INCORPORATED INTO THE COMPLAINT as authorized by law, regarding each defendant relating directly to each of the causes of action set forth in the SAC upon which the action is based; which clearly show that the facts stated constitute good cause to amend and constitute at least *one* cause of action that would work against a dismissal of the action; in particular, "with prejudice."

The facts within each cause of action identifies with particularity the defendant(s) to which each applies. The facts and causes show acts by defendants in concert/agreement to knowingly violate plaintiff's constitutional and civil rights in retaliation for plaintiff's protected conduct; in particular, requests for accommodation of disability, the noticed right to use a physician prescribed wheelchair with pusher, to be free from harm from custodial officers and other prisoners and to file legal documents, subverted in this case.

A full and complete reading of the SAC tends to indicate that the magistrate judge findings and recommendations are not based on actual fact and authority; but appear to be based on ire related to plaintiff's request to vacate the referral (The District Judge failed to rule on the request to vacate the referral.) and/or discriminatory bias against pro se plaintiffs with disability and/or vexatious litigant "stigma" from over 20 years ago, related to this particular plaintiff with

an apparent agenda by the magistrate judge designed to keep said class of persons and/or plaintiff out of the District Court; as would tend to be indicated by an apparent failure to actually read the entire complaint and/or misconstruing "cherry-picked" sentences attributed to only one cause of action, Section 1983, to questionably precipitate the dismissal without regard to contra authority under the ADA. Even the causes under 1983 are not correctly identified on the facts and grounds upon which the statute is applied. Remarkably, the magistrate judge makes reference to Section 1983 comments regarding the original complaint, which are not applicable to the SAC; in particular, as the SAC clearly shows the reference is to only to Section 1983 for the "linkage" argument without regard to the fact that the comments were essentially erroneous in other parts by reason of failure to apply the law under the ADA. Thus, even the one claim out of which each defendant arises is satisfied; in particular, as related to "series of transactions or occurrences" and there is an ADA retaliation and constitutional "question of law or fact common to all defendants."

As set forth in the SAC under Jurisdiction, the SAC states: "Plaintiff brings this action under the American's with Disability Act, 42 U.S.C. section 12101 (Prohibition against discrimination based on disability), 12203 (Prohibition against retaliation and coercion) et seq. ("ADA"), Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. section 794 for discrimination based on plaintiff's disabilities; 42 U.S.C. section 1981 (Reverse Discrimination), 42 U.S.C. section 1985 (Conspiracy to Interfere with Rights) 1988; 42 U.S.C. section 1986 (Neglect to Prevent Interference with Rights); (42 U.S.C. 1983, deprivation of civil rights, retaliatory infractions et al, conspiracy/denial of plaintiff's rights secured by the United States Constitution under the First, Fourteenth, Eighth Amendments, civil conspiracy, denial of access to the courts/destruction of legal mail/records, cruel punishment/failure to protect; and related State claims including but not limited to causes for violation of Penal Code sections 2650-2652 (failure to protect, unauthorized punishment, lack of care inflicting injury/impair health of prisoner), 2652/2656 (lack of care inflicting injury/deprivation of medically prescribed

orthopedic appliances), California Civil Code sections 51, 51.7, 52.1 (discrimination/interference with exercise of civil rights) et al., Civil Conspiracy / Deprivation of Civil Rights, California Code of Regulations Title XV violations, medical negligence, personal injury/premises liability, personal injury/assault and battery, intentional/negligent injury/failure to protect from other inmates (violent injury/physical abuse, verbal harassment/bullying), retaliatory intimidation/treats to use "Ad Seg" to quelsh ADA complaints et al, sexual harassment/indecency, retaliatory infractions, fraud, intentional/negligent infliction of emotional distress, personal injury/infliction of sleep deprivation, intentional/negligent destruction/theft of personal property, intentional/negligent destruction of documents/evidence, defamation, elder abuse, intentional/negligent creation of false and defamatory documents, falsification/destruction of medical records, failure to inspect/produce and correct per statute upon request, failure to provide access to courts re failure to effectuate legal mail, interference with legal and U.S. Mails et al." Conspiracy touches all above stated causes.

Essentially, NONE of the above causes were actually subject to analysis by the magistrate judge on the facts and authority related thereto and even the Section 1983 causes are not stated correctly by the Magistrate Judge on the actual facts and causes to which the statute applies; as a full reading of the SAC would show and raise a viable issue for adjudication such as cause of Action re Conspiracy to Interfere with Rights with specified Constitutional violations and retaliatory false charges & Fourth Amendment violations).

In instant appeal, the constitutional violations running to the merits of the civil rights complaint in this case, are not in issue; the District Court having made no factual/legal determination on the merits of any claim therein. No specific defendant was identified or stricken on ground of immunity. Under the ADA, defendants are arguably liable under the facts of this case. No specific cause was identified or stricken as lacking arguable merit. Based on attorney practice manuals and authorities expressing requirements re fact and law, plaintiff is informed and believes that the facts and law support each of the claims stated. And if there is a

defect, that notice thereof from the Court with leave to amend should have been granted.

The denial of leave to amend and dismissal with prejudice appears to be more likely based on bias and/or limitations of disability; than any alleged "failure to state a claim." Ability to conform to expectations of the court are more disability based than any willful failure to comply as set forth in medical statements provided. Thus, appointment of counsel would appear to have been appropriate throughout the process of the case to avoid a dismissal.

Although no specific finding was made that any cause or the entire complaint was "frivolous," a dismissal with prejudice gives that erroneous impression; which should not have issued in instant case. It also wrongfully provides a court and/or defendant with unfounded cause to obtain a further DISCRIMINATORY restraining order; an apparent constitutional violation based on disability and/or "stigma." There is no basis in fact or law to support a dismissal with prejudice in this case.

Before a District Court may dismiss an in forma pauperis complaint with prejudice, the District Court must find that the plaintiff has engaged in "conscious or intentional acts or omissions." *Harris v Cuyler,* C.A.3 (Pa.) 1981, 664 F2d 388. There are no such findings in instant case. There is insufficient basis in fact or law to support a dismissal with prejudice in this case.

Pro se complaints must be liberally construed and can be dismissed only if face of complaint shows insuperable bar to relief. *Holt v Caspari,* C.A.8 (Mo.) 1992, 961 F2d 1370. There is no showing of "insuperable bar to relief" in this case. Is the U.S. District Court saying that limitation of disability and time to overcome same is such an "insuperable bar to relief?" Or is such a discriminatory due process or other Constitutional violation? There is no basis in fact or law to support a dismissal with prejudice in this case.

Under Section 1915 a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his/her claim which would entitle him/her to relief. *Montana v Commissioner Court,* C.A. 5(Tex) 1981,

659 F2d 19. Here plaintiff has substantial facts and available evidence in support of each cause of action to prove each fact stated in the second amended complaint that would entitle her to relief. There is no basis in fact or law to support a dismissal with prejudice in this case.

An in forma pauperis complaint can only be dismissed where there is indisputable meritless legal theory or on clear baseless factual contentions. *McClendon v Turner,* W.D. Pa. 1991, 765 F.Supp 251. Instant case presents solid cognizable legal theory and facts in support. There is no basis for dismissal with or without prejudice. There is no basis in fact or law to support a dismissal with prejudice in this case.

Nietzke, 490 U.S. 319 advises that a section 1915 dismissal is only proper if the legal theory or the factual contentions lack an arguable basis indicating that the purpose of the in forma pauperis statute is to ensure equality of consideration for all litigants. Plaintiff in instant case has not been provided with equal consideration for all litigants; having been treated differently by reason of her limitations of disability and "stigma." There is no basis in fact or law to support a dismissal with prejudice in this case.

The general provisions of law under Section 1915 were not afforded to plaintiff. Plaintiff's motion under 59e/60b, was NOT addressed properly as the following was argued:

"Although 28 U.S.C. section 1915 provides for dismissal of an action that is "frivolous," a district court may deem **an in forma pauperis complaint "frivolous" only if it lacks an arguable basis in either law or in fact;** in other words, dismissal is only appropriate for a claim based on an indisputable merit-less legal theory and the frivolousness determination cannot serve as a fact finding process for the resolution of disputed facts." *Fogle v Pierson,* CA10 (Colo.) 2006, 435 F3d 1252, *Milligan v Archuleta,* CA10(Colo.) 2011, 659 F3d 1294. Accordingly, where as in instant case, the Magistrate Judge made no determination on the facts/merits, adopting the recommendation of dismissal with prejudice is error.

A dismissal with prejudice deprives plaintiff of her constitutional right to seek redress from the court, which appears to be a biased Magistrate Judges' intention, not based on fact or

law; but improper preconceived opinion, based on extrajudicial sources and/or hostile bias and stigma against persons in plaintiff's protected class; and thus, a constitutional violation.

Were there anything the Court believed was in some way improper, then notice of intent to strike some specific part is available and/or to amend. However, nothing has been specified that would give notice of any defect subject to being stricken.

Attorney practice manuals, such as California Forms of Pleading and Practice and its equivalent Federal pleading forms, regularly repeat essential element language of causes with the different facts inserted. This does NOT make the claims/complaints "frivolous." It only helps practitioners evaluate the facts to insert them appropriately to meet the court's pleading requirements and jury instructions. On information and belief, plaintiff's causes meet both the general form pleading requirements and have the facts necessary to prevail per jury instructions.

Court's are in good faith, generally believed to protect citizens from harm, not give the "green light" to further biased retaliatory abuse and prejudicial harm through "dismissal" of citizen pleas for help; in order to allow the offenders to proceed with the intended abuse and destruction intended toward one who had the courage to "stand up" to the discrimination, false and defamatory representations/media comment, infliction of physical harm and emotional distress, saying "no more!" PLEASE!

Error re Application of "Frivolous" to Dismiss:

As stated above, although 28 U.S.C. section 1915 provides for dismissal of an action that is "frivolous," a district court may deem **an in forma pauperis complaint "frivolous" only if it lacks an arguable basis in either law or in fact**; in other words, dismissal is only appropriate for a claim based on an indisputable merit-less legal theory and the frivolousness determination cannot serve as a fact finding process for the resolution of disputed facts. *Fogle v Pierson,* CA10 (Colo.) 2006, 435 F3d 1252, *Milligan v Archuleta,* CA10(Colo.) 2011, 659 F3d 1294. Accordingly, where as in instant case, the Magistrate Judge findings do not present analysis of

any fact/law per cause, adopting the recommendation of dismissal is error and an apparent abuse of discretion.

Cornell Law School presents on line its Wex Legal Dictionary in which it defines "frivolous:" *In the legal context, a lawsuit, motion, or appeal that lacks any basis and is intended to harass, delay or embarrass the opposition... Judges are reluctant to find an action frivolous, based on the desire not to discourage people from using the courts to resolve disputes.* It is hoped this Court agrees and does not abide "stigma" or discrimination/retaliation implicating persons with disability as "frivolous." Fairness, impartiality, due process and equal protection should apply to all "persons" irrespective of "stigma" or disability as the Constitution mandates.

Error re Rendition by Magistrate Judge of Prior Complaint and Amended Complaints.

As stated above, Judicial Notice is hereby requested of each OBJECTION raised to the false and misleading representations of issues regarding Plaintiff's prior complaints therein. The Magistrate Judge appears not to have read the Objections and ignored the medical good cause NOT to make the findings alleged. No ruling on request for judicial notice issues.

Error/Abuse of Discretion Not to Appoint Counsel or Mention Good Cause Medical Limitations; e.g. exceptional circumstances.

Sua Sponte Appointment of Counsel for good cause. Plaintiff has requested appointment of counsel in this action with good cause appearing; yet, no such issued. Sua sponte appointment is available under the circumstances in this case and plaintiff's limitations.

The Magistrate Judge appears to have essentially ignored the analysis for appointment of counsel sua sponte and/or upon renewal of prior requests. If an attorney has leave to file a third amended complaint, it is an abuse of discretion to also not give a pro se Plaintiff the right to so amend in the same case! In fact, it is unusual that leave to amend complaint is not granted. THERE IS NOT EVEN THE MENTION OF THE MEDICAL VERIFICATION IN SUPPORT

OF LEAVE TO AMEND OR APPOINT COUNSEL, OR EVEN TO AVOID A DISMISSAL FOR MEDICAL CAUSE IN CONTRAVENTION OF THE ALLEGATIONS MADE FOR DISMISSAL! The medical circumstances in this case are exceptional circumstances for appointment of counsel, not for the frustration of the Court; so a dismissal must follow, where no such is even mentioned as having been filed. WHERE IT APPEARS THAT THE MEDICAL EVIDENCE FILED UNDER SEAL WAS NOT CONSIDERED BY THE MAGISTRATE JUDGE, ADOPTING THE FINDINGS IS FUNDAMENTALLY WRONG, ERROR AND A POSSIBLE INADVERTENT ABUSE OF DISCRETION.

Where there is no analysis of the case on the merits of each cause, there is no recognition of good cause not to dismiss by medical impossibility. Any one of the medical conditions or the nexus between permanent progressive disability limitations and difficulties and ability to perform timely within the requirements of the Court; should receive accommodation, NOT dismissal. If this is confusion, then that too is evidence of the limitations of disability; for which, no Plaintiff should be punished by denial of access to the court to redress serious grievances as set forth in this action. No defendant should "get away with" their misconduct and violation of law because of Plaintiff's medical detriment. Appointment of counsel to resolve any discomfort of the Court is appropriate and application is renewed on request for permission and appeal here."

An issue is the question of whether appointment of counsel should have and should issue in this action and NOT USED AS A DENIAL TO EFFECTUATE A DISMISSAL WITH PREJUDICE!!!

By reason of limited time to mail this appeal for receipt on or before September 18, 2020, plaintiff must incorporate by reference here the issues raised in her motion under 59e/60b. Further, the issue of length and clarity was addressed in Plaintiff's objections to the magistrate judge's findings and recommendations (ECF 80) at pages 23-28 showing the contentions are wrong and themselves, uncertain, vague, ambiguous sans citation to the SAC and which show appearance of bias against persons with disability, who require

additional time to accommodate medical limitations; time granted, that should not be held against the requesting party.

Plaintiff has stated a claim sufficient to warrant consideration on appeal for reversal of the dismissal with prejudice, grant of leave to amend and appointment of counsel.

This case presents the Ninth Circuit with an opportunity to tell its lower courts that persons deemed "vexatious litigants" and persons with disabilities, are still entitled to due process, constitutional protections and the rights and benefits provided under the laws of the United States and its State courts.

It is the right to proceed in forma pauperis on a proper showing pursuant to 28 U.S.C. section 1915, that this court is urged to protect against pre-determined opinion bias of "frivolous" attributed to pro se complaints filed by persons with disability and from the inherent "stigma" attributed to such parties as being "vexatious," precipitating denial of due process and unwarranted dismissals with prejudice. It appears that instant action met the wrongful guillotine of bias and hostile opinion pertaining to plaintiff, rather than any issue of fact or law.

THIS COURTS NEEDS TO ENSURE THAT EFFECTS OF ILLNESS, LIMITATIONS OF DISABILITY AND EXTENSIONS OF TIME TO ACCOMMODATE SAME, DO NOT BECOME THE MEASURE OF DENYING ACCESS TO THE COURT AND DUE PROCESS IN THIS COUNTRY; as occurred for plaintiff in this action. Plaintiff's physicians have stated that the inability to meet court time and other procedural expectations is not willful; but a problem related to her medical condition and that counsel should be appointed (See Medical Statements under Seal; in particular, Dr. Apperson 8/23/18). The facts showing considerable merit set forth in this case do not warrant denial of leave to amend, a "dismissal with prejudice,"an implied determination of "*frivolous*" to

prejudice Plaintiff hereafter generally, by res judicata effect and specifically in any future in forma pauperis filing. There is no direct ruling that the SAC is frivolous. Extensions of time that are granted for good cause, should not be construed against the requesting party for dismissal. The failure to appoint counsel, is also NOT a reason to dismiss an action with prejudice. For all the harm plaintiff has suffered trying to "stand up for justice" in exercise of civil rights under the law, a denial of review would be a painful manifest injustice where the statute of limitations has run, where a dismissal with prejudice issued; which essentially says: the facts showing abuse are warranted and issues raised cannot be re-litigated; thereby, denying constitutional/statutory protections not only for plaintiff; but all similarly situated plaintiffs with "stigma" and/or disability.

Assistance by appointment of counsel for both the process of permission here and appeal is respectfully requested. The application with medical necessity statement attached will be submitted separately to the Court of Appeal.

Your kind consideration is appreciated.

Plaintiff respectfully submits: **The issues in this appeal are substantial and warrant further review and appointment of counsel.**

Dated: September 16, 2020

PATRICIA A. MCCOLM
Plaintiff and Appellant, pro se