APPENDIX OF ATTACHMENTS - *infra*

APPENDIX OF ORDERS – *extra**

DECLARATORY RELIEF

COMPLAINT FOR DAMAGES

* Under separate cover.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

2500 Tulare Street, Room 1501
Fresno, CA 93721

LAWRENCE J. O'NEILL
Chief United States
District Judge

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June 19, 2018

PREFACE/PURPOSE

The purpose of this letter to the members of the Senate and the House of Representatives within the Eastern District of California is to provide notice of a current crisis and an upcoming exacerbation of that crisis that will have serious and catastrophic consequences if left unaddressed. The most serious consequence to inaction will be the inaccessibility to the Federal Courts by the more than 8 million people who reside within the Eastern District. We are 19 months away from that inevitability.

SIZE OF THE DISTRICT

The geographical size of the Eastern District of California (EDCA) is mammoth, and the corresponding judicial responsibilities are equally

enormous. The Eastern District encompasses 87,010 square miles, some 55% of the land mass of the entire state of California. Thirty-four of the fifty-eight counties within California sit under the jurisdiction of the Federal Court in the Eastern District. If the Eastern District of California were itself a separate state, forty-one of the states in the Country would be smaller in size than our judicial area.

In addition to the vast geographical size and a population of 8,094,480 persons (based on Census Bureau estimates,[27] which is greater than the population of thirty-eight states), there are other challenges faced by the District Court Judges. The federal judicial responsibilities in the Eastern District of California include 4 federal prisons, 188 federal buildings, 13 national forests, 9 national parks (including Yosemite, Kings Canyon and Sequoia), 19 state prisons, and 923,000 acres of military land.

JUDGESIDPS, CASELOADS and HISTORY

Currently (huge change to come within the next year and one-half), there are 6 District Judges, 3 Senior District Judges, 12 Magistrate Judges, and 6 Bankruptcy Judges. Each District Judge handles an average of approximately 900 cases at any given time, more than double the nationwide average caseload for District Judges, which is 425 cases.

Put in modern historical context, the last new District Judgeship created in the EDCA occurred in 1978 (now some 4 decades ago), when the population of the district was approximately 2.5 million people. Though the population has grown 220%, no new

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[27] Administrative Office of the U.S. Courts.

District Court Judgeships have been created in the Eastern District of California. For comparison purposes, the Northern District of California, with roughly the same population (less than a 4% difference) as the Eastern District of California, has 133% more District Judges (14 judges vs. 6 judges).

It is not debatable that the resources of our District have been deficient for three decades. For more than a decade, the Administrative Office of the Courts has recommended to the Judicial Conference that 4 to 6 new District Judges be added to the EDCA. Now, the judicial crisis rooted in the understaffing of District Court Judges is coming to fruition. Two of our six District Judges have given retirement dates that will occur in the next nineteen months. Neither has stated they intend to continue serving in senior status.

In addition, one of our three Senior District Judges has given notice of his intended retirement (departure from senior status service). Of the remaining two Senior District Judges, one judge turned 80 years old, and the other is no longer taking criminal cases and maintains a 50% civil caseload, which he may reduce further. The "shock-absorber" effect of senior-status judges filling in for the lack of new judgeship creation as the population in the District has more than doubled is rapidly becoming non-existent.[28]

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[28] Historically, district court judges elect to continue in senior status, assisting with the normal workload in a district, at no additional salary. Due to the stress and weight of the current caseload, neither of the two upcoming retirees has indicated that they will continue to serve as senior-status judges. In addition, still another District Judge has given the Chief Judge notice that he will be leaving the Court in 2022 and will not take senior status. This is not because they have a

SPECIFIC RESULTS TO BE FELT IN 19 MONTHS ABSENT CONGRESSIONAL ACTION

Should the two District Judges, one Senior District Judge, and one recalled Magistrate Judge leave the Court as anticipated, in 19 months more than 2000 cases will need to be distributed among the remaining 4 District Judges. An **additional** 500 cases to each of the district judges (who already are handling twice the national average of caseload per judge) will result in an inescapable consequence of being wholly unable to handle civil matters.

The United States Attorney for the Eastern District of California has recently announced that they will be filling all vacant and newly created lawyer positions in their offices across the District. The total of new Assistant U.S. Attorney prosecutors will be 12 in number. The anticipated consequences are twofold: 1) a serious and substantial uptick in the number of indictments to be sought and filed; and 2) an insistence that the time from indictment to disposition of criminal cases (now three times the national average) will be cut severely. Both have immediate and obvious consequences on the Court's ability to conduct civil matters due to the statutory and Constitutional mandates that result in giving priority to criminal cases over civil ones.

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lack of regard or compassion for the six authorized District Court Judges, but is indicative of how the more-than-double average caseload has worn down these dedicated members of the judiciary.

REMEDIES TRIED/REMEDIES SOUGHT

Both the Administrative Office of the Courts (AO) and the Chief Judge of the Ninth Circuit have done everything possible to help the Eastern District of California's courts due to the overburdened caseloads that have become routine. The unprecedented ratio of Magistrate Judges to District Judges (two to one) is one example of that effort by the AO. The district judges have made certain that each Magistrate Judge is being utilized to the maximum benefit under law. A second example of continued help and effort is the accepted offer of loaning visiting judges to the district over the last 15 years. For reasons that are apparent, the continued and temporary short-term approach to addressing a long term and chronic problem will fall far short of being an honest or effective solution.

The District Judges of the Eastern District of California suggest and request the following two solutions:

1. When the two District Judges submit their letters to the President that give the required notice of leaving their current positions (one notice in December of this year, and the other in January of 2019), that there be an immediate commitment to act on the nomination and confirmation process to enable there to be a seamless transition so that the new judges can be sworn into the court, one in December of 2019, and the other in January of 2020; and
2. The EDCA members of Congress unanimously introduce an emergency bill for the creation of a minimum of the five new judgeship positions that have been recommended year after year. Any judge on this Court will make himself or herself available

to talk with, or meet with, any member of Congress at any time or at any place to discuss this dire problem in an attempt to avoid the inevitable consequences should the issue remain unaddressed. Any of us will speak or testify, upon request, before any group or committee given even minimal notice.

With concern and Respect,

/s/_____
Lawrence J. O'Neill
Chief District Judge

/s/_____
Dale A. Drozd
District Judge

/s/_____
Morrison C. England
District Judge

/s/_____
John A. Mendez
District Judge

/s/_____
Kimberly J. Mueller
District Judge

/s/_____
Troy L. Nunley
District Judge

/s/_____
Garland E. Burrell
Senior District Judge

/s/_____
Anthony W. Ishii
Senior District Judge

/s/_____
William B. Shubb
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 1:20-CV-00411-NONE-JDP

STANDING ORDER IN LIGHT OF ONGOING JUDICIAL EMERGENCY IN THE EASTERN DISTRICT OF CALIFORNIA

ROGER TOWERS,
Plaintiff
v.

SUPERIOR COURT,
COUNTY OF STANISLAUS,
Defendant.

The judges of the United States District Court for the Eastern District of California have long labored under one of the heaviest caseloads in the nation even when operating with a full complement of six authorized District Judges.[29] Each of those six District Judges has regularly carried a caseload

[29] For over a decade the Judicial Conference of the United States has recommended that this district be authorized up to six additional judgeships. However, those recommendations have gone unacted upon. This is the case despite the fact that since the last new District Judgeship was created in the Eastern District in 1978, the population of this district has grown from 2.5 million to over 8 million people and that the Northern District of California, with a similar population, operates with 14 authorized District Judges

double the nationwide average caseload for District Judges. Even while laboring under this burden, the judges of this court have annually ranked among the top 10 districts in the country in cases terminated per judgeship for over 20 years. See Letter regarding Caseload Crisis from the Judges of the Eastern District of California (June 19, 2018), 23 http://www.caed.uscourts.gov/CAEDnew/index.cfm/news/important-letter-re-caseload-crisis/. On 24 December 17, 2019, District Judge Morrison C. England took Senior status. On December 31, 2019, Senior District Judge Garland E. Burrell, Jr. assumed inactive Senior status. On February 2, 2020, District Judge Lawrence J. O'Neill will assume inactive Senior status.[30] As a result of these long anticipated events, the shortfall in judicial resources will seriously hinder the administration of justice throughout this district, but the impact will be particularly acute in Fresno, where the undersigned will now be presiding over all criminal and civil cases previously assigned to Judge O'Neill as well as those already pending before the undersigned. As of the date of this order, this amounts to roughly 1,050 civil actions and 625 criminal defendants. Until two candidates are nominated and confirmed to fill this court's two vacant authorized district judgeships, this situation can only be expected to get progressively worse.

The gravity of this problem is such that no action or set of actions undertaken by this court can

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[30] In short, a Senior District Judge is one who has retired from regular active service, usually based on age 26 and length of service, but continues to preside over cases of a nature and in an amount as described in 28 U.S.C. § 371(e). A Senior District Judge taking inactive status is one who has ceased to perform such work

reasonably be expected to alleviate it. Nonetheless, this order will advise litigants and their counsel of the temporary procedures that will be put in place for the duration of this judicial emergency in cases over which the undersigned is presiding. What follows will in some respects be contrary to the undersigned's default Standing Order in Civil Actions,[31] and may also differ from the Local Rules of the Eastern District of 13 California. To the extent such a conflict exists, the undersigned hereby invokes the court's authority under 14 Local Rule 102(d) to issue orders supplementary or contrary to the Local Rules in the interests of justice and 15 case management.

A. DESIGNATION OF CIVIL CASES

As of February 3, 2020, all civil cases previously assigned to Judge O'Neill, and all newly filed cases 18 that will be assigned to his future replacement, will be unassigned. Those cases will bear the designation "NONE" as the assigned district judge and will continue to bear the initials of the assigned magistrate judge. Until new judges arrive, the undersigned will preside as the district judge in the cases so designated. Judge O'Neill's chambers staff will remain in place for seven months following his departure from the court. Accordingly, his remaining staff will continue to work on the cases bearing the "NONE" designation and Courtroom Deputy Irma Munoz (559–499–5682; imunoz@caed.uscourts.gov) will continue to be the contact person with respect to any questions regarding those cases. Proposed orders

[31] The undersigned's standing order in civil cases is available at http://www.caed.uscourts.gov/caednew/assets/File/DAD%20Standing%20Order052019.pdf

in those cases are to be sent to noneorders@caed.uscourts.gov. Finally, any hearings or trials before the undersigned in cases bearing the "NONE" designation will continue to be held in Judge O'Neill's former courtroom, Courtroom #4 on the 7th Floor at 2500 Tulare Street in Fresno, California.

CIVIL LAW AND MOTION

It has been the strong preference of the undersigned over the past twenty–three years to hear oral argument on all civil motions. In the undersigned's experience, doing so allows the court to more fully grasp the parties' positions and permits the parties to address the court's concerns without the need for supplemental briefing. However, given the judicial emergency now faced by this court, such hearings on civil law and motion matters will no longer be feasible. Accordingly, all motions filed before the undersigned in civil cases will be deemed submitted upon the record and briefs pursuant to Local Rule 230(g). The hearing date chosen by the moving party will nonetheless govern the opposition and reply filing deadlines pursuant to Local Rule 230(c). In cases bearing the "DAD" designation, the noticed hearing dates will remain the first and third Tuesdays of each month. In cases designated as "NONE," the noticed hearing dates may be any Tuesday through Friday. In the unlikely event that the Court determines a hearing would be helpful and feasible, the court will re–schedule a hearing date in accordance with its availability. In addition to the motions already assigned to magistrate judges by operation of Local Rule 302(c), the undersigned now orders that the following categories of motions in

cases bearing "DAD" and "NONE" designations shall be noticed for hearing before the assigned magistrate judge:

1. Motions seeking the appointment of a guardian ad litem;
2. Motions for class certification and decertification pursuant to Federal Rule of Civil Procedure 23;
3. Motions seeking preliminary or final approval of collective or class action settlements; and
4. Motions to approve minors' compromises.[32]

The undersigned will surely refer other motions to the assigned magistrate judge for the issuance of findings and recommendations by separate orders in particular cases.

CIVIL TRIALS

In the two civil caseloads over which the undersigned will be presiding for the duration of this judicial emergency, there are currently trials scheduled through the end of 2021. Given the enormous criminal caseload that will be pending before the undersigned and based upon the reasonable assumption that at least some of those criminal cases will proceed to trial, it is unlikely that those civil cases will be able to proceed to trial on the currently scheduled date.[33] Thus, the setting of new

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[32] Magistrate judges may resolve motions seeking the appointment of a guardian ad litem by way of order, while all other motions may be resolved by issuance of findings and recommendations. See 28 U.S.C. § 636(b)(1)(A).

[33] Even in those instances where a trial date has been set, such trial dates will be subject to vacatur with little to no advance notice due to the anticipated press of proceedings related to criminal trials before this court, which have statutory priority

trial dates in civil cases would be purely illusory and merely add to the court's administrative burden of vacating and re–setting dates for trials that will not take place in any event. **Accordingly, for the duration of this judicial emergency and absent further order of this court in light of statutory requirements or in response to demonstrated exigent circumstances, no new trial dates will be scheduled in civil cases assigned to "DAD" and "NONE" over which the undersigned is presiding.**[34] As such, scheduling orders issued in civil cases over which the undersigned is presiding will not include a trial date. Rather, the final pretrial conference will be the last date to be scheduled.[35]

Particularly in light of this judicial emergency, parties in all civil cases before the undersigned are

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over civil trials. In any civil action that is able to be tried before the undersigned during the duration of this judicial emergency, the trial will be conducted beginning at 8:30 a.m. Tuesday through Thursday. The court will have calendars for criminal cases bearing a "DAD" assignment on Monday at 10:00 a.m. and for those criminal cases bearing the "NONE" designation on Friday at 8:30 a.m.

[34] Any party that believes exigent or extraordinary circumstances justify an exception to this order in their case may file a motion seeking the setting of a trial date. Such motions shall not exceed five pages in length and must establish truly extraordinary circumstances. Even where such a showing is made, the parties are forewarned that the undersigned may simply be unable to accommodate them in light of the court's criminal caseload.

[35] Final Pretrial Conference dates may be later vacated and rescheduled depending on the court's ability to rule on dispositive motions that are filed. Moreover, in those "NONE" and "DAD" designated civil cases with trial dates, the parties are hereby ordered not to file any pretrial motions in limine prior to the issuance of the Final Pretrial Order and to do so only in compliance with the deadlines set in that order.

reminded of their option to consent to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). The magistrate judges of this court are highly skilled, experienced trial judges. Moreover, because magistrate judges cannot preside over felony criminal trials, trial dates in civil cases can be set before the assigned magistrate judge with a strong likelihood that the trial will commence on the date scheduled.

CONCLUSION

These are uncharted waters for this court. The emergency procedures announced above are being implemented reluctantly. They are not, in the undersigned's view, conducive to the fair administration of justice. However, the court has been placed in an untenable position in which it simply has no choice. There will likely be unforeseen consequences due to the implementation of these emergency procedures and the court will therefore amend this order as necessary.

DATED: May 15, 2020

/S/_____
DALE A. DROZD
U.S. DISTRICT COURT JUDGE

CONSTITUTION, STATUTES AND RULES

UNITED STATES CONSTITUTION

Article III, Section 1:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fourteenth Amendment – Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28 (in part)

§44- Appointment, tenure, residence and salary of circuit judges.

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

Circuits	Number of Judges
District of Columbia	11
First	6
Second	13
Third	14
Fourth	15
Fifth	17
Sixth	16
Seventh	11
Eighth	11
Ninth	29
Tenth	12
Eleventh	12
Federal	12.

(b) Circuit judges shall hold office during good behavior.

(c) Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service. While in active service, each circuit judge of the Federal judicial circuit appointed after the effective date of the Federal Courts Improvement Act of 1982, and the chief judge of the Federal judicial circuit, whenever appointed, shall reside within fifty miles of the District of Columbia. In each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state 1 in that circuit.

(d) Each circuit judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361), as adjusted by section 461 of this title.

§133- Appointment and number of district judges

(a) The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

Districts	Judges
Alabama:	
Northern	7
Middle	3
Southern	3
Alaska	3
Arizona	12
Arkansas:	
Eastern	5
Western	3
California:	
Northern	14
Eastern	6
Central	27
Southern	13
Colorado	7
Connecticut	8
Delaware	4
District of Columbia	15
Florida:	
Northern	4
Middle	15
Southern	17
Georgia:	
Northern	11

Middle 4
Southern 3
Hawaii 3
Idaho 2
Illinois:
Northern 22
Central 4
Southern 4
Indiana:
Northern 5
Southern 5
Iowa:
Northern 2
Southern 3
Kansas 5
Kentucky:
Eastern 5
Western 4
Eastern and Western 1
Louisiana:
Eastern 12
Middle 3
Western 7
Maine 3
Maryland 10
Massachusetts 13
Michigan:
Eastern 15
Western 4
Minnesota 7
Mississippi:
Northern 3
Southern 6
Missouri:
Eastern 6
Western 5

Eastern and Western 2
Montana 3
Nebraska 3
Nevada 7
New Hampshire 3
New Jersey 17
New Mexico 6
New York:
Northern 5
Southern 28
Eastern 15
Western 4
North Carolina:
Eastern 4
Middle 4
Western 4
North Dakota 2
Ohio:
Northern 11
Southern 8
Oklahoma:
Northern 3
Eastern 1
Western 6
Northern, Eastern, and Western .. 1
Oregon 6
Pennsylvania:
Eastern 22
Middle 6
Western 10
Puerto Rico 7
Rhode Island 3
South Carolina 10
South Dakota 3
Tennessee:
Eastern 5

Middle 4
Western 5
Texas:
Northern 12
Southern 19
Eastern 7
Western 13
Utah 5
Vermont 2
Virginia:
Eastern 11
Western 4
Washington:
Eastern 4
Western 7
West Virginia:
Northern 3
Southern 5
Wisconsin:
Eastern 5
Western 2
Wyoming 3

(b) (1) In any case in which a judge of the United States (other than a senior judge) assumes the duties of a full-time office of Federal judicial administration, the President shall appoint, by and with the advice and consent of the Senate, an additional judge for the court on which such judge serves. If the judge who assumes the duties of such full-time office leaves that office and resumes the duties as an active judge of the court, then the President shall not appoint a judge to fill the first vacancy which occurs thereafter in that court.

(2) For purposes of paragraph (1), the term "office of Federal judicial administration" means a position

as Director of the Federal Judicial Center, Director of the Administrative Office of the United States Courts, or Counselor to the Chief Justice.

§455- Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances: ...[deleted, n/a]

§471- Requirement for a district court civil justice expense and delay reduction plan

There shall be implemented by each United States district court, in accordance with this chapter, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

§636- Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b) (1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings,

and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial 1 relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the

parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt Authority. [deleted, n/a]

(f) In an emergency... [deleted n/a]

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. ...[deleted n/a]

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled ... [deleted n/a]

Federal Rules of Civil Procedure

Rule 12 – Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* (deleted, N/A.)

(3) *United States Officers or Employees Sued in an Individual Capacity.* (deleted, N/A.)

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with

one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. ...
(deleted, n/a)

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. ...
(deleted, n/a)

(f) Motion to Strike. ...
(deleted, n/a)

(g) Joining Motion. ...
(deleted, n/a)

(h) Waiving and Preserving Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. ...
(deleted, n/a)

Rule 56 – Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for

purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by **Rule 56(c)**, the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Rule 60 – Relief from a Judgment or Order

(a) Corrections ... Clerical Mistakes; ... (deleted, n/a)

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Rule 72 –Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) *Findings and Recommendations.* A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) *Objections.* Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party

may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) *Resolving Objections.* The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FRCP Rule 83 –

(a) Local Rules.

(1) *In General.* After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) *Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way

that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. ... [deleted, n/a]

Federal Rules of Evidence, Rule 201 – Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. ... [deleted, n/a]

CAED LOCAL RULES[36]

[LOCAL] RULE 101 – (Fed. R. Civ. P. 1)

DEFINITIONS

For purposes of these Rules, unless the context otherwise requires, the terms below are defined as follows. ...

"Affidavit" includes a declaration prepared in accordance with federal law. See 28 U.S.C. § 1746.

[LOCAL] RULE 260 – (Fed. R. Civ. P. 56) CIVIL MOTION CALENDAR AND PROCEDURE

(a) Motion Calendar. Each Judge or Magistrate Judge maintains an individual motion calendar. Information as to the times and dates for each motion calendar may be obtained from the Clerk or the courtroom deputy clerk for the assigned Judge or Magistrate Judge.

(b) Notice, Motion, Brief and Evidence. Except as otherwise provided in these Rules or as ordered or allowed by the Court, all motions shall be noticed on the motion calendar of the assigned Judge or Magistrate Judge. The moving party shall file a notice of motion, motion, accompanying briefs, affidavits, if appropriate, and copies of all documentary evidence that the moving party intends to submit in support of the motion. The matter shall be set for hearing on the motion calendar of the Judge or Magistrate Judge to whom the action has

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[36] These rules were effective March 1, 2022 and include "~~strike-through~~" and "underline" to reflect changes from the February 1, 2019 version. SEE: www.caed.uscourts.gov/caednew/index.cfm/rules/local-rules/

been assigned or before whom the motion is to be heard not less than ~~twenty-eight (28)~~ thirty-five (35) days after service and filing of the motion. Motions defectively noticed shall be filed, but not set for hearing; the Clerk shall immediately notify the moving party of the defective notice and of the next available dates and times for proper notice, and the moving party shall file and serve a new notice of motion setting forth a proper time and date. See L.R. 135.

(c) Opposition and Non-Opposition. Opposition, if any, to the granting of the motion shall be in writing and shall be filed and served not less no later than fourteen (14) days preceding the noticed (or continued) hearing date after the motion was filed. A responding party who has no opposition to the granting of the motion shall serve and file a statement to that effect, specifically designating the motion in question. No party will be entitled to be heard in opposition to a motion at oral arguments if opposition to the motion has not been timely filed by that party. See L.R. 135. A failure to file a timely opposition may also be construed by the Court as a non-opposition to the motion.

[LOCAL] RULE 302 (Fed. R. Civ. P. 72) DUTIES TO BE PERFORMED BY MAGISTRATE JUDGES

(a) General. It is the intent of this Rule that Magistrate Judges perform all duties permitted by 28 U.S.C. § 636(a), (b)(1)(A), or other law where the standard of review of the Magistrate Judge's decision is clearly erroneous or contrary to law. Specific duties are enumerated in (b) and (c); however, those described duties are not to be considered a limitation of this general grant.

Magistrate Judges will perform the duties described in 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 53 upon specific designation of a District Judge or by designation in (b) and (c).

(b) Duties to Be Performed in Criminal Matters by a Magistrate Judge Pursuant to 28 U.S.C. § 636(a), (b)(1)(A), (b)(1)(B), (b)(3), or Other Law.

(1) All pretrial matters in felony criminal actions except motions to suppress evidence, motions to quash or dismiss an indictment or information, motions to discover the identity of an informant, motions for severance, and entry of pleas of guilty;

(2) Preliminary proceedings in felony probation or supervised release revocation actions;

(3) All pretrial, trial, and post-trial matters in any misdemeanor action (including petty offenses and infractions), see Fed. R. Crim. P. 58; L.R. 421;

(4) Supervision of proceedings conducted pursuant to letters rogatory or letters of request;

(5) Receipt of indictments returned by the grand jury in accordance with Fed. R. Crim. P. 6(e)(4), 6(f);

(6) Conduct of all proceedings contemplated by Fed. R. Crim. P. 1, 3, 4, 5, 5.1, 9, 40, 41, except Rule 41(e) post-indictment/information motions and Rule

41(f) motions in felony actions made at any time; included within this grant are applications for mobile tracking devices (18 U.S.C. § 3117), pen registers or trap and trace devices (18 U.S.C. § 3121 et seq.), applications for retrieval of electronic communications records (18 U.S.C. § 2701 et seq.), and applications for disclosure of tax return information (26 U.S.C. § 6103);

(7) Motions to exonerate bail;

(8) Extradition proceedings, 18 U.S.C. § 3181 et seq.;

(9) Upon specific designation of a Judge and consent of the parties, jury voir dire in criminal actions.

(c) Duties to Be Performed in Civil Matters by a Magistrate Judge Pursuant to 28 U.S.C. § 636(a), (b)(1)(A), (b)(1)(B), (b)(3), or Other Law.

(1) – (20), deleted, n/a.

(21) In Sacramento, all actions in which all the plaintiffs or defendants are proceeding in propria persona, including dispositive and non-dispositive motions and matters. Actions initially assigned to a Magistrate Judge under this paragraph shall be referred back to the assigned Judge if a party appearing in propria persona is later represented by an attorney appearing in accordance with L.R. 180.

(d) Retention by a District Judge.
Notwithstanding any other provision of this Rule, a Judge may retain any matter otherwise routinely referred to a Magistrate Judge. Applications for retention of such matters, however, are looked upon with disfavor and granted only in unusual and compelling circumstances.

[LOCAL] RULE 303 (Fed. R. Civ. P. 72)

ROLE OF MAGISTRATE JUDGE AND PROCEDURE FOR RESOLVING GENERAL PRETRIAL MATTERS IN CRIMINAL AND CIVIL ACTIONS

(a) Determination. In accordance with 28 U.S.C. § 636(b)(1), a Magistrate Judge shall hear, conduct such evidentiary hearings as are appropriate in, and determine all general pretrial matters referred in accordance with L.R. 302. Rulings of the Magistrate Judge shall be in writing with a statement of the reasons therefor and shall be filed and served on all parties.

(b) Finality. Rulings by Magistrate Judges pursuant to this Rule shall be final if no reconsideration thereof is sought from the Court within fourteen (14) days calculated from the date of service of the ruling on the parties, unless a different time is prescribed by the Magistrate Judge or the Judge.

(c) Reconsideration by a District Judge. A party seeking reconsideration of the Magistrate Judge's ruling shall file a request for reconsideration by a Judge and serve the Magistrate Judge and all parties. Such request shall specifically designate the ruling, or part thereof, objected to and the basis for that objection. This request shall be captioned "Request for Reconsideration by the District Court of Magistrate Judge's Ruling."

(d) Opposition. Opposition to the request shall be served and filed within seven (7) days after service of the request.

(e) Notice and Argument. The timing requirements of L.R. 230 have no application to requests for reconsideration under this Rule. The

request shall be referred to the assigned Judge automatically by the Clerk, promptly following the date for filing opposition, without the necessity of a specific motion for such reference by the parties. Unless otherwise ordered, requests in criminal actions shall be calendared and heard at the trial confirmation. No oral argument shall be allowed in the usual civil action unless the assigned Judge specifically calendars such argument, either on request of a party or sua sponte.

(f) Standard of Review. The standard that the assigned Judge shall use in all such requests is the "clearly erroneous or contrary to law" standard set forth in 28 U.S.C. § 636(b)(1)(A). See Fed. R. Civ. P. 72(a).

(g) The assigned Judge may also reconsider any matter at any time sua sponte.

[LOCAL] RULE 304 (FED. R. P. 72) MAGISTRATE JUDGES AUTHORITY IN EXCEPTED PRETRIAL MATTERS

(a) Determination. In accordance with 28 U.S.C. § 636(b)(1)(B) and (C), the Magistrate Judges shall hear, conduct such evidentiary hearings as are appropriate in, and submit to the assigned Judge proposed findings of fact and recommendations for the disposition of excepted pretrial motions referred in accordance with L.R. 302. The Magistrate Judge shall file the proposed findings and recommendations and shall serve all parties.

(b) Objections. Within fourteen (14) days after service of the proposed findings and recommendations on the parties, unless a different time is prescribed by the Court, any party may file, and serve on all parties, objections to such proposed

findings and/or recommendations to which objection is made and the basis for the objection.

(c) Transcripts. If objection is made to a proposed finding or recommendation based upon a ruling made during the course of any evidentiary hearing, which ruling has not otherwise been reduced to writing, the party making such objection shall so indicate at the time of filing objections and shall forthwith cause a transcript of all relevant portions of the record to be prepared and filed.

(d) Response. Responses to objections shall be filed, and served on all parties, within fourteen (14) days after service of the objections.

(e) Notice and Argument. The timing requirements of L.R. 230 have no application to objections to proposed findings and recommendations under this Rule. No separate notice is required. The objections shall be referred to the assigned Judge automatically by the Clerk, promptly following the date for filing opposition, without the necessity of a specific motion for such reference by the parties. Unless otherwise ordered, requests in criminal actions shall be calendared by the courtroom deputy clerk upon request of any party filed with that party's objections or opposition thereto or upon the direction of the assigned Judge.

(f) Review. See Fed. R. Civ. P. 72(b).

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re Roger Towers, et al.

ON PETITION FOR WRIT OF MANDAMUS
TO THE
NINTH CIRCUIT COURT OF APPEALS

APPENIDIX CONTINUED
(ORDERS)
(A-43 to A103)

Roger Towers
Catherine (Kate) Towers
2601 Surrey Ave.,
Modesto, CA 95355
209-604-8121
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APPENDIX OF ORDERS

DECLARATORY RELIEF

COMPLAINT FOR DAMAGES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:17-cv-02597-JAM-KJN (PS)

ROGER TOWERS,
Plaintiff,

v. ORDER

COUNTY OF SAN JOAQUIN,
Defendant.

On January 10, 2018, Plaintiff Roger Towers, who is proceeding without counsel in this action, moved for partial summary judgment.[1] (ECF No. 6.) According to plaintiff's certificate of service, defendant County of San Joaquin was served with a copy of the complaint on January 9, 2018. (See ECF No. 5.) Therefore, defendant's time to respond to the complaint has not yet elapsed. See Fed. R. Civ. P. 12.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for partial summary judgement (ECF No. 6.) is DENIED without prejudice as premature.
2. The February 8, 2018 hearing, set before the undersigned, is vacated.

IT IS SO ORDERED.
Dated: January 16, 2018

/S/_____
Kendall J. Newman
UNITED STATES MAGISTRATE JUDGE

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[1] This action proceeds before the undersigned pursuant to Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 2:17-cv-02597-JAM-KJN(PS)
ROGER TOWERS,
Plaintiff,
v.
COUNTY OF SAN JOAQUIN,
Defendant.

ORDER AND FINDINGS AND RECOMMENDATIONS

Presently pending before the court are defendant's motion to dismiss (ECF No. 11) and plaintiff's motion for partial summary judgment. (ECF No. 13.) An opposition and a reply were filed to each motion. (ECF Nos. 23–26.) These motions came on regularly for hearing on March 8, 2018, at 10:00 a.m. At the hearing, plaintiff appeared and represented himself, and Derek Cole appeared on behalf of defendant County of San Joaquin ("County"). (ECF No. 28.)

After carefully considering the parties' briefing, the oral argument at the hearing, and the applicable law, the court recommends that defendant's motion to dismiss be granted; plaintiff's complaint be dismissed with prejudice, without leave to amend; and plaintiff's motion for partial summary judgment be denied as moot.

I. BACKGROUND

Plaintiff's allegations in this matter can be placed into two categories: claims about the County's land use designation of plaintiff's property as Open Space/Resource Conservation ("OS/RC"); and claims about the restraining orders obtained by the County against plaintiff. The background facts discussed below are taken from plaintiff's complaint (see Complaint, ECF No. 1 ["Compl."]) and the public records attached to the County's request for judicial notice (see Request for Judicial Notice, ECF No. 27 ["RJN"]).[2]

A. Land Use Designation (Towers I, II, and IV)

Plaintiff Roger Towers along with Catherine Towers, who is not a party to this matter, have been challenging San Joaquin County's land use designation of their property for the better part of two decades. Indeed, as defendant points out, this is plaintiff's fifth lawsuit against the County (ECF No. 11-1 at 2), including a 2004 state court challenge ("Towers I") to the land use designation (see RJN, Ex. 1); a 2009 state court challenge ("Towers II") to the same land use designation (see RJN, Ex. 7);[3] and

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[2] The court may take judicial notice of court filings and other matters of public record. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006). The court takes judicial notice of each of the exhibits attached to defendant's RJN, notwithstanding plaintiff's objections (see ECF No. 24 at 8–11) because each is either a court filing or other public record. At the same time, while the court takes judicial notice of pleadings and other public filings here, the court does not—and need not for the purposes of this order—assume the truth of unsubstantiated allegations contained there within.

[3] While RJN, Ex. 7 is a copy of the appellate opinion in Towers II, for ease of reference the court cites directly to the opinion rather than to the exhibit. Compare Towers v. Cty. of San

a 2016 federal court challenge ("Towers IV") to the County's 2035 General Plan, which also incorporated the same land use designation (see Towers et al. v. Villapudua et al., Case No. 2:16-CV-02417-MCE-KJN). Each of these cases is discussed in more detail below.[4]

Much of the relevant factual and procedural history was recited in Towers II by the California Third District Court of Appeal in an unpublished opinion, affirming the trial court's judgment against the Towers. See Towers v. Cty. of San Joaquin, No. C073598, 2017 WL 3275178 (Cal. Ct. App. Aug. 2, 2017), reh'g denied (Aug. 28, 2017), review denied (Nov. 1, 2017). As the Third District Court of Appeal explained:

In March 2001, [Roger and Catherine Towers] bought three adjacent parcels of land totaling approximately 19 acres in the Vernalis area in southern San Joaquin County. . . .

The nearby land with the mining operations and most of plaintiffs' three parcels are in an area

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Joaquin, No. C073598, 2017 WL 3275178, (Cal. Ct. App. Aug. 2, 2017), reh'g denied (Aug. 28, 2017), review denied (Nov. 1, 2017) with RJN, Ex. 7.

[4] The third lawsuit referenced by defendant ("Towers III") concerns related but different issues to the instant matter. In that case, plaintiff "alleg[ed] that in 2014 the County . . . acted improperly in enacting County ordinance No. 4454, which benefitted mining operators by extending the previously approved deadline for initiating land use entitlements by an additional 24 months." Towers v. Cty. of San Joaquin, No. C080667, 2018 WL 671356, at *1 (Cal. Ct. App. Feb. 2, 2018). That matter was dismissed by the superior court because plaintiff failed to join indispensable parties. Id. The California Third District Court of Appeal affirmed, on appeal. Id.

designated by the County as OS/RC, an area of regional significance containing significant mineral resources. . . . [First so classified] in 1988 and reiterated . . . in 2012. In accordance with [state law], the County in its "General Plan 2010," adopted July 29, 1992, included within the general plan conservation element a "General Plan 2010 Map" designating specific areas as OS/RC to protect significant natural resources areas.

The OS/RC requirements of the general plan were implemented through the County's zoning code, which. . . . specified that landowners who want a "nonextractive project" such as a residence . . . must file an application for site approval with the County, which has discretion to approve or disapprove it.

Before plaintiffs purchased the three parcels in 2001, plaintiffs consulted with County staff. Staff informed plaintiffs that the property was designated OS/RC in the county general plan adopted on July 29, 1992, and plaintiffs could not build on the land without first obtaining a "site approval" from the County, which the County had discretion to approve or disapprove.

[. . .]

In 2002, the Towers applied for site approval to build a house on each of the three parcels. . . . The application was administratively approved by county staff but two mining companies, who were applying for quarry excavation permits in the area, appealed. The planning commission subsequently granted the appeal and revoked the Towers' site approval permits on January 9, 2003. The Towers appealed to the board of supervisors, which denied the appeal on March 25, 2003.

Thereafter, the Towers submitted a preliminary application for a general plan amendment to change

their property's designation. They withdrew the application when they learned the County was not approving applications that created additional demand on groundwater.

On February 24, 2004, the Towers filed an administrative appeal of the County's determination that their property is within the OS/RC land use area. Plaintiffs argued their property should be designated general agricultural (AG), which would mean they could build their houses as a matter of right. . . . The planning commission denied the Towers' administrative appeal seeking redesignation.

Thereafter, the Towers appealed to the board of supervisors, which denied the appeal on April 27, 2004.

On June 18, 2004, plaintiffs filed [Towers I] in the trial court . . . seeking judicial review of the County's refusal to redesignate their property. However, plaintiffs did not prosecute that case. . . . [Rather] plaintiffs—"[s]eeking a remedy as a less costly and more efficient alternative to litigation"—explored settlement and asked the County for a "Development Title" (zoning) amendment to allow non-extractive projects for parcels within the OS/RC area for which excavation was infeasible. The County ultimately rejected plaintiffs' proposed zoning amendment in June 2008. Plaintiffs applied for a permit to use their land for a truck-parking facility with a residence for "security." The County denied the application for a residence. In October 2009, the trial court dismissed [Towers I], without prejudice, due to plaintiffs' failure to bring the matter to trial within five years (Code Civ. Proc., § 583.310).

[. . .]

Plaintiffs initiated [Towers II] on December 1, 2009. . . . [and listed] five "causes of action" for five remedies they seek:

[. . .]

(3) Petition for writ of administrative mandate (Code Civ. Proc., § 1094.5) seeking to require the County to change the general plan's OS/RC designation for plaintiffs' property;

[. . .]

(5) A claim for money damages for alleged civil rights violations (42 U.S.C. § 1983), claiming the County's actions deprived plaintiffs of property interests in violation of federal due process and equal protection. . . .

Towers II, 2017 WL 3275178, at *3–6.

The trial court rulings in Towers II included a June 28, 2011 order by the San Joaquin Superior Court. (RJN, Ex 4 at 69–84.) The court observed that the third cause of action essentially sought "an order from the Court . . . directing the County to vacate its April 27, 2004 decision on [the Towers'] appeal by which the County upheld the decision that [their] property is within the OS/RC . . . land designation." (Id. at 70.) The court noted that "the three-year statute of limitations applied to the Third Cause of Action and that the cause accrued on April 27, 2004—the date [the Towers'] appeal was denied." (Id. at 73.) Furthermore, the court held that the Towers "had presumptive knowledge that the maps were wrong and yet, allowed their timely challenge to the April 27, 2004 decision to uphold the OS/RC designation to lapse and ultimately, be dismissed." (Id. at 75.) As a result, the San Joaquin Superior Court sustained the County's demurrer and

dismissed the third cause of action without leave to amend. (Id. at 84.)

On January 8, 2013, the San Joaquin Superior Court granted summary adjudication on the procedural and substantive due process claims contained in the fifth cause of action. (RJN, Ex. 4 at 7, 116–19.) Specifically, the court concluded that the "County ha[d] carried its burden of showing that [the Towers do] not have a constitutionally protected property interest in a Site Approval. . . . Therefore, [the Towers] cannot not establish the required elements for the due process cause of action." (Id. at 117.)

The San Joaquin Superior Court ultimately entered judgment against the Towers (RJN Ex. 4 at 6–8) and the Third District Court of Appeal affirmed, explaining in relevant part:

> We first conclude that plaintiffs have no basis to challenge the OS/RC designation of their land or the allegedly "phony maps," because plaintiffs have forfeited those matters by failing to provide any legal authority or analysis on appeal to challenge the trial court's conclusion that those claims are barred by the statute of limitations (Code Civ. Proc., § 338, subd. (d)).
>
> Plaintiffs' pleading raised these claims in the third count seeking administrative mandamus to undo the County's denial of plaintiffs' application to redesignate their property from OS/RC to agricultural zoning. In the fifth cause of action, the pleading repeated the designation and map matters among the alleged civil rights violations (42 U.S.C. § 1983).
>
> The trial court eliminated the third count on demurrer because the claim was barred by the three-

year statute of limitations, in that the 2009 lawsuit was not filed within three years of the County's 2004 refusal to redesignate plaintiffs' parcels.

[. . .]

However, [on appeal] plaintiffs present no argument, analysis, or authority that the trial court erred in ruling the statute of limitations barred the state law claims, and plaintiffs present no argument, analysis, or authority, that they can revive these barred claims by alleging they violate federal civil rights.

[. . .]

Moreover, the bar of the statute of limitations forecloses not only the third count challenging the designation, but also the fifth count alleging federal civil rights violations, because the state statute of limitations governs the length of the limitations period for the federal civil rights action (42 U.S.C. § 1983). (Wallace v. Kato (2007) 549 U.S. 384, 387 [166 L.Ed.2d 973, 980]; Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322–323.)

Accordingly, we disregard plaintiffs' complaints about the OS/RC designation and the maps.

[. . .]

. . . To prove a due process cause of action under section 1983, a party must, as a threshold matter, show """a liberty or property interest within the protection of the Fourteenth Amendment. [Citation.] A property interest is defined as 'a legitimate claim of entitlement to [a benefit].' [Citation.] Thus, 'to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.'""" ([Golden Gate Water Ski Club v. County of Contra Costa (2008) 165 Cal.App.4th 249,] 268.)

Plaintiffs rehash all of their foregoing arguments under the guise of deprivation of a legitimate claim of entitlement. However, we have explained that none of plaintiffs' arguments have merit. Accordingly, none can serve as a legitimate claim of entitlement to support a due process claim.

We conclude plaintiffs fail to show grounds for reversal as to their federal civil rights claim.

Towers II, 2017 WL 3275178, at *15–16, 28.

The Towers' petition for rehearing in Towers II was denied on August 28, 2017 (RJN, Ex. 8), and on November 1, 2017, the California Supreme Court denied their petition for review (RJN, Ex. 9).

Meanwhile, on September 29, 2016, the San Joaquin County Planning Commission held a public hearing concerning the proposed 2035 Plan, and at the hearing, Roger Towers spoke in opposition to the plan. (Comp. ¶ 13.)

On October 11, 2016, Roger and Catherine Towers filed Towers IV in federal court, against the County and several other defendants. 2:16-CV-02417-MCE-KJN, ECF No. 1. The Towers raised several allegations, related to the land use designation of their property. The complaint included a claim that the County violated their substantive due process, based upon allegations that "COUNTY staff and its consultants have intentionally misrepresented, and intentionally delayed, the background reports and information intended to be included within, and support, the General Plan 2035 update." Towers IV, 2:16-CV-02417-MCE-KJN, ECF No. 1 at 21. With various motions to dismiss still pending, the Towerses voluntarily dismissed Towers IV on December 8, 2016. Id., 2:16-CV-02417-MCE-

KJN, ECF No. 28. "[O]n or about December 13, 2016 the Board of Supervisors adopted the 2035 Plan" which listed plaintiff's property as OS/RC. (Comp. ¶ 10.)

B. Restraining Orders (County v. Towers)

On October 25, 2016, the County served Roger Towers with a temporary restraining order, a petition for a workplace violence restraining order, and a notice of hearing, based upon his allegedly threatening behavior against County employees Kerry Sullivan and Amy Skewes-Cox. (RJN, Exs. 10 & 11.) The County also initiated the state court action San Joaquin County Counsel's Office v. Rogers Towers ("County v. Towers"), Case No. STK-CV-UWV-2016-0010753, currently on appeal as Case No. C084030.

A hearing was held on the restraining orders on November 18, 2016. (RJN, Ex. 12.) The superior court judge determined that while Towers' activities occurred at public sessions where he had a right to be, the "credible threat of violence including the course of conduct [placed] Ms. Sullivan and Ms. Skewes-Cox in reasonable fear for their own safety and would place any reasonable person in fear for their own safety." (RJN, Ex. 12, at 151–52.) The superior court further concluded that the County had established workplace violence by clear and convincing evidence, and issued a three year workplace violence restraining order. (RJN, Ex. 13.) Towers' motion to set aside the judgment was denied on January 13, 2017. (RJN, Ex. 14.) He then filed an appeal with the Third District Court of Appeal on February 3, 2017, which is still pending. (RJN, Ex. 15.) In his opening appellate brief, Towers asserts

many of the same arguments that he does in this action—that issuance of the temporary restraining order against him violated due process and that the workplace violence restraining order violates his rights under the First Amendment. (RJN, Ex. 17, at 18, 31–33, 35–36.)

C. Complaint and Procedural History

Plaintiff filed the current matter on December 8, 2017, and paid the filing fee. (ECF No. 1.) In the operative complaint, he seeks a declaratory judgment against defendant. In relevant part, plaintiff requests that the court declare:

a) The OS/RC designation of TOWERS' property denies all reasonable economic use of TOWERS' Property. . . .

b) The OS/RC land use designation of the 2035 General Plan, as it relates to the Property and the area surrounding the Property, has been arbitrarily, irrationally, and discriminatorily drawn in violation of the Fourteenth Amendment, and was therefore a void act. . . .

c) The decision of the San Joaquin County Superior Court to issue a TRO and a Workplace Violence Restraining Order was without due process of law and otherwise violated TOWERS' rights under the First Amendment. . . .

d) TOWERS has a right to speak his mind during public comment periods on matters before the San Joaquin County Planning Commission or the San Joaquin County Board of Supervisors including the right to criticize public officials or be angry while making such comments. Such speech on public issues

is at the core of that which is protected by the First Amendment. . . .

(ECF No. 1 at 9–10.)

On January 10, 2018, thirty-three days after filing his complaint, plaintiff filed a motion for partial summary judgment, while simultaneously reporting that defendant had just been served on January 9, 2018. (See ECF Nos. 5, 6.) The court denied plaintiff's motion for partial summary judgment as premature. (ECF No. 7.) Thereafter, defendant filed the pending motion to dismiss. (ECF No. 11.) Plaintiff then filed a second motion for partial summary judgment. (ECF No. 13.) The parties opposed and replied to each motion. (ECF Nos. 23–26.)

D. Admissions at the Hearing

At the March 8, 2018 hearing, plaintiff made a number of important admissions. First, the undersigned questioned plaintiff about the land use designation in the 2035 General Plan that plaintiff purportedly challenges here. Plaintiff admitted that his issues with the land use designation date back to 2001, when he first bought his property. Ever since that time, the County has allegedly continued to prevent plaintiff from using his property. In this respect, by plaintiff's own admission, the 2035 General Plan has not substantively changed how the County treats plaintiff's property. Moreover, while plaintiff does not accept the validity of the OS/RC designation, his land was so designated by the County in the 2010 General Plan, and it remains so designated in the 2035 General Plan.

Second, plaintiff has asserted in his briefing that he was forced to dismiss his prior federal case,

Towers IV, to defend against the restraining order action, County v. Towers. (ECF No. 14 at 5.) When questioned at the hearing, however, plaintiff admitted that he was not compelled to dismiss Towers IV. Rather, he dismissed the case because he was overwhelmed and did not have the time, energy, or resources to either continue to represent himself in both cases, or to hire an attorney.

Third, in response to further questioning, plaintiff admitted that the main reason that he has brought this action in federal court is due to his frustration with the state court decisions. As explained above, the Third District Court of Appeal has already ruled against him in Towers II and Towers III. What is apparently equally frustrating to plaintiff is the current appeal pending before the Third District Court of Appeal in County v. Towers. At the hearing, plaintiff reiterated his briefed arguments that the state court has not adequately addressed his First Amendment claims in County v. Towers because they have not decided the issues as quickly as he asserts the law requires. At the same time, plaintiff admitted that he has received decisions from the Third District Court of Appeal, denying his requests for writ treatment and for a writ of supersedeas to prevent criminal enforcement of the workplace violence restraining order. Yet, he has not petitioned the California Supreme Court for review of any of these decisions. (ECF No. 24 at 16.)

II. DISCUSSION

A. Motion to Dismiss

1. *Legal Standard*

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the pleadings set forth in the

complaint. Vega v. JPMorgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

In considering a motion to dismiss for failure to state a claim, the court accepts all of the facts alleged in the complaint as true and construes them in the light most favorable to the plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is "not, however, required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, and [the court does] not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Paulsen, 559 F.3d at 1071. The court must construe a pro se pleading liberally to determine if it states a claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (stating that "pro se pleadings are

liberally construed, particularly where civil rights claims are involved"); see also Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (stating that courts continue to construe pro se filings liberally even when evaluating them under the standard announced in Iqbal).

In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not consider a memorandum in opposition to a defendant's motion to dismiss to determine the propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

2. *Land Use Designation Claims*

As explained, in Towers II plaintiff previously challenged the County's OS/RC designation of his property. The San Joaquin Superior Court dismissed the third and fifth causes of action, concluding that plaintiff's challenges were barred by the relevant statute of limitations, and that he did not otherwise demonstrate that the County had violated his due process. (See RJN, Ex 4.) The Third District Court of Appeal subsequently affirmed these rulings, and the California Supreme Court denied plaintiff's petition for review. See Towers II, 2017 WL 3275178; RJN Ex. 9.

Here, plaintiff once again challenges the OS/RC designation of his property. He asserts that the OS/RC designation "denies all reasonable economic use of [his] Property. . . . [and that t]he OS/RC land use designation of the 2035 General Plan, as it relates to the Property and the area surrounding the Property, has been arbitrarily, irrationally, and discriminatorily drawn in violation of the Fourteenth Amendment." (ECF No. 1 at 9–10.) As plaintiff admitted during the March 8, 2018 hearing, his complaints concerning the OS/RC designation are long-standing, dating back to when he obtained the property in 2001, and are centered on the allegation that he has remained unable to use his property ever since that date. Importantly, the adoption of 2035 General Plan did not substantively alter the County's designation of plaintiff's property—it was and remains designated OS/RC.

Relying on the doctrines of claim and issue preclusion, defendant asserts that plaintiff "is precluded from bringing claims concerning the OS/RC designation of his property because [in Towers II] the San Joaquin Superior Court and the Third District Court of Appeal already ruled on the issues he wishes to relitigate in this forum." (ECF No. 11-1 at 6.)

i. **Claim Preclusion**

Claim preclusion "bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. . . . The doctrine is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (internal citations and quotation marks omitted). The Ninth Circuit has identified four

factors that should be considered by a court in determining whether successive lawsuits involve an identity of claims:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;

(2) whether substantially the same evidence is presented in the two actions;

(3) whether the two suits involve infringement of the same right; and

(4) whether the two suits arise out of the same transactional nucleus of facts. See C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir.1987); accord Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005); Littlejohn v. United States, 321 F.3d 915, 920 (9th Cir. 2003). "The central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts." Owens, 244 F.3d at 714.

Plaintiff does not directly address the elements of issue preclusion, but construing his opposition liberally, he appears to argue that issue preclusion does not apply because there is no identity of claims. (See ECF No. 24 at 11–13.)

It is undisputed that there is identity between the parties. Both plaintiff Roger Towers and defendant the County of San Joaquin were parties to Towers II. Similarly, the opinion of the Third District Court of Appeal in Towers II—affirming the trial court's dismissal of the third cause of action without leave to amend, and summary adjudication of the fifth cause of action—is a final judgment on the merits. "Dismissal of an action with prejudice, or without leave to amend, is considered a final judgment on the

merits." Nnachi v. City of San Francisco, 2010 WL 3398545, at *5 (N.D. Cal. Aug. 27, 2010) (citing Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005)).

Moreover, there is an identity of claims between Towers II and the instant matter. First, Towers II clearly established that plaintiff's ability to challenge the OS/RC designation is foreclosed by the statute of limitations. 2017 WL 3275178, at *15–16. Therefore, to allow plaintiff to revive this claim here would impermissibly disturb the rights Towers II imparted on the County, which has a reasonable expectation to not have to relitigate a previously barred claim.

Second, the complaint here involves substantially the same evidence as in Towers II—allegedly fabricated maps. Third, the same rights are at stake here as in Towers II—plaintiff's Fourteenth Amendment rights. Fourth, as this discussion demonstrates, the complaint here centers on the same transactional nucleus of facts as in Towers II. The fact that plaintiff is now challenging the long-standing OS/RC designation that is once again contained in the County's newest general plan does not change the fact that plaintiff is seeking to relitigate the same claims that he lost in Towers II.

Additionally, plaintiff's argument that there is no identity of claims because the state courts never considered or ruled on his substantive due process claim is not well taken. First, the superior court explicitly ruled on this claim. (See "March 21, 2013 Judgement" RJN 4 at 7 "the Court granted summary adjudication on the procedural due process and substantive due process cases of action contained in the Fifth Cause of Action"). Second, assuming that the state court did not appropriately consider this argument in Towers II, the proper way to remedy

such a mistake is through direct appeal of the underlying action. Third, claim preclusion bars further litigation of any claim that was or *could have been* brought in the prior action. See Owens, 244 F.3d at 713. Even assuming that plaintiff's substantive due process challenge to the OS/RC designation is being raised for the first time in this matter, because such a claim could have been raised in Towers II, it is now barred by claim preclusion.

Therefore, plaintiff's land use designation claims are barred by claim preclusion.

ii. **Issue Preclusion**

Issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or different claim." New Hampshire v. Maine, 532 U.S. 742, 749 (2001). "A party invoking issue preclusion must show:

(1) the issue at stake is identical to an issue raised in the prior litigation;

(2) the issue was actually litigated in the prior litigation; and

(3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action." Littlejohn, 321 F. 3d at 923. The "actually litigated" requirement is satisfied where the parties "have a full and fair opportunity to litigate the merits of the issue." Id.

Plaintiff also failed to directly address the elements of issue preclusion in his opposition. However, similar to the claim preclusion analysis above, plaintiff's claims regarding the land use designation are barred by issue preclusion.

First, as explained, the issues plaintiff raises here are substantively identical to those raised in Towers II—whether the county's OS/RC land use designation was properly determined and whether the County violated plaintiff's due process when making that designation. Second, these issues were actually litigated in Towers II, as evidenced by the multiple rulings by the trial court (see RJN, Ex. 4) and by the opinion of the Third District Court of Appeal (see 2017 WL 3275178). Further, notwithstanding plaintiff's dissatisfaction with the state courts' rulings, plaintiff had a full and fair opportunity to litigate these issues. He raised arguments in the trial court, and then again on appeal, where he had ample opportunity to brief and argue these issues. Third, these issues were a critical and necessary part of the judgment in Towers II because by deciding these issues the court was able to dispense with two out of plaintiff's five claims in that matter. (See RJN, Ex. 4 at 7, 69–84, 116–19; Towers II, 2017 WL 3275178, at *15–16, 28.)

3. *Restraining Order Claims*

Plaintiffs remaining claims here pertain to the County's restraining orders in County v. Towers that plaintiff asserts violate his First Amendment rights. (ECF No. 1 at 9–10.) These same issues are currently on appeal before the Third District Court of Appeal. (RJN Exs. 15, 16, 17.) Defendant argues that this court "should abstain and allow the Third District Court of Appeal[] to decide the constitutionality of and other issues regarding the TRO and Workplace Violence Restraining Order." (See ECF No. 11-1 at 8–9.)

"The Supreme Court in Younger [v. Harris, 401 U.S. 37, 38 (1971),] 'espouse[d] a strong federal policy

against federal-court interference with pending state judicial proceedings.'" H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000) (quoting Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982)). "Absent extraordinary circumstances, Younger abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." San Remo Hotel v. City & Cnty. of S.F., 145 F.3d 1095, 1103 (9th Cir. 1998). "When the case is one in which the Younger doctrine applies, the case must be dismissed." Koppel, 203 F.3d at 613. "Extraordinary circumstances" include "a statute [that is] ... flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph," as well as "bad faith and harassment." Younger, 401 U.S. at 53.

Plaintiff does not dispute that state proceedings are ongoing in County v. Towers. (See ECF No. 24 at 14–16.) Nor does plaintiff dispute that the the state courts have an important interest in determining the validity of restraining orders obtained by a county government.

Instead, plaintiff argues that Younger abstention does not apply because the state court proceeding does not afford him an adequate opportunity to litigate his constitutional claims because the the Third District Court of Appeal is biased against him as it allegedly "has no intent to comply with a federal mandate to speedily hear and decide this First Amendment case." (ECF No. 24 at 16.) Additionally, plaintiff argues that this matter represents extraordinary circumstances that obviate the application of Younger abstention because "the pleadings (and evidence) clearly show that the

restraining order was based on false affidavits and testimony," demonstrating that the County was engaged in a bad faith prosecution and flagrant constitutional violations against plaintiff. (Id. at 18.) Plaintiff's arguments are unpersuasive.

First, plaintiff has not demonstrated any bias by the California courts—ruling against him and not acting as quickly as he would like does not constitute bias. Indeed, there is no guarantee that a federal court would have decided these issues any faster. Moreover, plaintiff admits that he has not even attempted an interlocutory appeal or petition to the California Supreme Court. (ECF No. 24 at 16.) Therefore, the court finds that plaintiff has an adequate opportunity to litigate his federal claims in the pending matter.

Second, contrary to plaintiff's assertions, he has not sufficiently demonstrated "extraordinary circumstances" based on the County's alleged bad faith in seeking these restraining orders, so as to prevent the application of Younger. In order for this court to determine whether plaintiff's assertions of "bad faith" against the County have any merit, this court would have to make factual findings that are central to the pending state court action. Making such a ruling would run afoul of the very policies of Younger abstention.

Therefore, Younger abstention directs this court to refrain from interfering with the pending state judicial proceedings, and to dismiss plaintiff's claims regarding the County's restraining orders.

4. *Leave to amend*

Federal Rule of Civil Procedure 15(a) provides that a court should generally freely give leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). Five factors are frequently used to assess whether leave to amend should be granted: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of the amendment; and (5) whether plaintiff has previously amended her complaint. Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004); Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." Allen, 911 F.2d at 373.

Here, leave to amend would be futile because each of plaintiff's claims is bared by either claim and issue preclusion or by Younger abstention, and plaintiff could not cure these deficiencies by alleging additional consistent facts.

B. Motion for Partial Summary Judgment

Plaintiff's motion for partial summary judgment is moot because the undersigned recommends dismissal of the complaint with prejudice, without leave to amend.

III. CONCLUSION

For the reasons discussed above, IT IS HEREBY RECOMMENDED that:

1. Defendant's motions to dismiss (ECF No. 11) be GRANTED.

2. Plaintiff's complaint be DISMISSED WITH PREJUDICE.

3. Plaintiff's motion for partial summary judgment (ECF No. 13) be DENIED as moot.

4. The Clerk of Court be ordered to close this case.

In light of these recommendations, IT IS ALSO HEREBY ORDERED that all pleading, discovery, and motion practice in this action are STAYED pending resolution of the findings and recommendations. With the exception of objections to the findings and recommendations and any non-frivolous motions for emergency relief, the court will not entertain or respond to any motions and other filings until the findings and recommendations are resolved.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served on all parties and filed with the court within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

IT IS SO ORDERED AND RECOMMENDED.

Dated: March 13, 2018

/S/_____

Kendall J. Newman

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No.2:17-cv-02597-
JAM-KJN(PS)
ROGER TOWERS,)
Plaintiff,)
v.) ORDER
COUNTY OF SAN JOAQUIN,)
Defendant.)
----------)

On March 13, 2018, the magistrate judge filed findings and recommendations (ECF No.29), which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within fourteen (14) days. On March 28, 2018, plaintiff filed objections to the findings and recommendations (ECF No. 30), which have been considered by the court.

This court reviews de novo those portions of the proposed findings of fact to which an objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981); see also Dawson v. Marshall, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the matter on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the findings and recommendations in full. Accordingly,

IT IS HEREBY ORDERED that:

1. The findings and recommendations (ECF No. 29) are ADOPTED.

2. Defendant's motion to dismiss (ECF No. 11) is GRANTED.

3. Plaintiff's complaint is DISMISSED WITH PREJUDICE.

4. Plaintiff's motion for partial summary judgment (ECF No. 13) is DENIED as moot.

5. The Clerk of Court shall close this case.

Dated: August 29, 2018

/s/ John A. Mendez
UNITED STATES DISTRICT COURT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 13 2020
Molly C. Dwyer, Clerk

ROGER DAVID TOWERS, Plaintiff-Appellant, v. COUNTY OF SAN JOAQUIN, Defendant-Appellee.	) NO. 18-16712) D.C. No. 2:17cv-02597-JAM-KJN))) MEMORANDUM*[5]

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding
Submitted April 7, 2020**[6]

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

Roger David Towers appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional violations arising from the land use designation of his property. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's application of the

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

doctrines of claim preclusion and issue preclusion. *Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003). We may affirm on any ground supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008). We affirm.

Dismissal was proper because plaintiff's land use claims involved litigation of the same primary right previously and finally adjudicated by the state Supreme Court. See *Dodd v. Hood River County*, 136 F.3d 1219, 1225 (9th Cir. 1998) (providing that federal courts must give state court judgments the same preclusive effect as they would be given by courts of that state); *Slater v. Blackwood*, 543 P.2d 593, 594-95 (Cal. 1975) (explaining California's claim preclusion doctrine).

The district court properly dismissed plaintiff's claims pertaining to restraining orders as barred under the Younger abstention doctrine because federal courts are required to abstain from interfering with pending state court proceedings. See *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758-59 (9th Cir. 2014) (setting forth de novo standard of review, requirements for *Younger* abstention in civil cases, and explaining that "the date for determining whether *Younger* applies is the date the federal action is filed" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion in taking judicial notice of court filings and other matters of public record. See *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (setting forth standard of review and stating that court may take judicial notice of matters of public record).

We reject as without merit plaintiff's contentions that the district court's judgment is void, and that

the magistrate judge was biased and violated plaintiff's due process rights.

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

The parties' requests for judicial notice and related filings (Docket Entry Nos. 21, 29 and 34) are denied as unnecessary. Plaintiff's request in his opening brief for an order to show cause is denied. Plaintiff's request in his reply brief for sanctions against defense counsel is denied.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 24 2020
Molly C. Dwyer, Clerk

ROGER DAVID TOWERS, Plaintiff-Appellant, v. COUNTY OF SAN JOAQUIN, Defendant-Appellee.	) NO. 18-16712) D.C. No. 2:17cv-02597-JAM-KJN) Eastern District of California, Sacramento)) ORDER

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

We treat Towers's motion for reconsideration (Docket Entry No. 37) as a petition for panel rehearing, and deny the petition.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 31 2021
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROGER DAVID TOWERS, Plaintiff-Appellant	) NO. 18-16712) D.C. No.) 2:17-cv-02597-) JAM-KJN
v.	)
COUNTY OF SAN JOAQUIN, Defendant-Appellee.	) Eastern District of) California, Sacramento)
	) **MANDATE**

The judgment of this Court, entered April 13, 2020, takes effect this date.

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

FOR THE COURT:
MOLLY C. DWYER
CLERK OF COURT
By: Craig Westbrook
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROGER TOWERS, Plaintiff, v. COUNTY OF SAN JOAQUIN, Defendant. ----------	) CASE NO:) 2:17-cv-02597-) JAM-KJN(PS)))))
ROGER TOWERS, Plaintiff, v. J. MARK MYLES, et al., Defendants. ----------	) CASE NO:) 2:17-cv-02597-) JAM-KJN(PS))))

Review of the above-captioned actions reveals they are related under this Court's Local Rule 123. Both actions involve the same or similar parties, property, claims, events, and questions of fact and law. Therefore, assignment of the actions to the same district judge and magistrate judge will promote convenience, efficiency, and economy for the Court and parties.

An order relating cases under this Court's Local Rule 123 merely assigns them to the same district judge and magistrate judge; it does not consolidate the matters.

Accordingly, IT IS HEREBY ORDERED that the above-captioned actions are reassigned to U.S. District Judge John A. Mendez and U.S. Magistrate Judge Kendall J. Newman.

IT IS SO ORDERED. Dated: November 27, 2018
Dated: November 27, 2018

/s/_____
KENDAL J. NEWMAN
U.S. MAGISTRATES JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROGER TOWERS, Plaintiff, v. J. MARK MYLES, et al., Defendants.	) CASE NO: 2:18-cv-02996-JAM-KJN(PS)) ORDER AND FINDINGS AND RECOMMENDATION

Plaintiffs Roger and Catherine Towers, who proceed without counsel, initiated this action on November 19, 2018, and paid the filing fee.[7] (ECF No. 1.) Pending before the court are defendants' motion to dismiss and plaintiffs' motion for recusal. (ECF Nos. 8, 14.) Plaintiffs opposed defendants' motion to dismiss, and defendants replied. (ECF Nos. 19, 20) Defendants opposed plaintiffs' motion for recusal. (ECF No. 21.) The court took these matters under submission on the briefing pursuant to Local Rule 230(g). (ECF Nos. 13, 17.)

After carefully considering the parties' briefing, the court's record, and the applicable law, plaintiffs' motion for recusal is DENIED. The court also recommends that defendants' motion to dismiss be GRANTED and plaintiffs' complaint be DISMISSED WITH PREJUDICE for the following reasons.

[7] This case proceeds before the undersigned pursuant to E.D. Cal. L.R. 302(c)(21) and 28 U.S.C. § 636(b)(1).

I. BACKGROUND

The complaint brings claims against the County of San Joaquin ("County") and several individual defendants based upon alleged violations of plaintiffs' First Amendment rights pursuant to 42 U.S.C. § 1983; alleged conspiracy to obstruct justice pursuant to 42 U.S.C. § 1985(2); and alleged neglect to prevent pursuant to 42 U.S.C. § 1986. (See generally Complaint, ECF No. 1 ["Compl."].)

A close review of the complaint reveals that the underlying allegations are based on two categories of claims that plaintiffs have raised in previous cases: claims about the County's land use designation of plaintiffs' property as Open Space/Resource Conservation ("OS/RC") and claims about a 2016 restraining order the County obtained against Roger Towers.

Indeed, plaintiffs admit that they have been challenging the County's land use designation of their property for the last 18 years. (Compl. ¶ 10.) As defendants point out, this is plaintiffs' sixth lawsuit against the County (see ECF No. 9 at 5), and at least the seventh matter in which Roger Towers and the County are both parties:

"Towers I," a 2004 state court challenge to the land use designation, Roger and Catherine Towers v. County of San Joaquin, Case No. CV-2004-0007721 (June 18, 2004) (see Defendants' Request for Judicial Notice, ECF No. 10 ["RJN"], Ex. 1.);[8]

[8] The court takes judicial notice of each of the exhibits attached to defendants' request for judicial notice because each is either a court filing or other public record. The court may take judicial notice of court filings and other matters of public record. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006). At the same time, the court does not—and need not for the purposes of this order—assume the

"Towers II," a 2009 state court challenge to the land use designation, Towers v. Cty. of San Joaquin, No. C073598, 2017 WL 3275178, (Cal. Ct. App. Aug. 2, 2017), reh'g denied (Aug. 28, 2017), review denied (Nov. 1, 2017);

"Towers III," a 2014 state court challenge to a County ordinance benefitting mining operators. Towers v. Cty. of San Joaquin, No. C080667, 2018 WL 671356, at *1 (Cal. Ct. App. Feb. 2, 2018).

"Towers IV," a 2016 federal court challenge to the County's 2035 General Plan, which incorporated the disputed land use designation, Towers et al. v. Villapudua et al., Case No. 2:16- CV-02417-MCE-KJN;

"Towers V," a 2017 federal court challenge to the County's 2035 General Plan/land use designation and the 2016 restraining order, Towers v. County of San Joaquin, Case No. 2:17-CV02597-JAM-KJN; and

"County v. Towers," in which Roger Towers directly appealed the 2016 restraining order in state court, San Joaquin Cty. Counsel's Office v. Towers, No. C084030, 2018 WL 2424114, at *1 (Cal. Ct. App. May 30, 2018).

A. Land Use Designation and State Court Challenges

In March 2001, plaintiffs bought three adjacent parcels of land in southern San Joaquin County. Towers II, 2017 WL 3275178, at *3. Most of plaintiffs' property and the surrounding land was "designated by the County as OS/RC, an area of regional significance containing significant mineral resources." Id. Plaintiffs consulted with County staff before they purchased the property, and "[s]taff

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truth of any unsubstantiated allegations contained within any of these documents.

informed plaintiffs that the property was designated OS/RC in the county general plan adopted on July 29, 1992, and plaintiffs could not build on the land without first obtaining a 'site approval' from the County, which the County had discretion to approve or disapprove." Id. at *4.

From 2002 until 2008, plaintiffs submitted several applications and appeals to change the land use designation and to gain permission to develop the property and build residences on the land. See Towers II, 2017 WL 3275178, at *4. The County denied each of plaintiffs' applications and appeals. Id.

In 2009, plaintiffs initiated Towers II in San Joaquin County Superior Court, seeking to overturn the County's decisions related to the land use designation. The San Joaquin County Superior Court ultimately entered judgment against plaintiffs and the California Third District Court of Appeal affirmed, explaining in relevant part:

> We first conclude that plaintiffs have no basis to challenge the OS/RC designation of their land or the allegedly "phony maps," because plaintiffs have forfeited those matters by failing to provide any legal authority or analysis on appeal to challenge the trial court's conclusion that those claims are barred by the statute of limitations (Code Civ. Proc., § 338, subd. (d))...
>
> Moreover, the bar of the statute of limitations forecloses . . . the fifth count alleging federal civil rights violations, because the state statute of limitations governs the length of the limitations period for the federal civil rights action. . . .

> Plaintiffs rehash all of their foregoing arguments under the guise of deprivation of a legitimate claim of entitlement. However, we have explained that none of plaintiffs' arguments have merit. Accordingly, none can serve as a legitimate claim of entitlement to support a due process claim.
>
> We conclude plaintiffs fail to show grounds for reversal as to their federal civil rights claim.

Towers II, 2017 WL 3275178, at *15-16, 28. Plaintiffs' petition for rehearing in Towers II was denied on August 28, 2017, and on November 1, 2017, the California Supreme Court denied plaintiffs' petition for review. See Id.

B. 2016 Restraining Order

On September 29, 2016, the planning commission held a meeting on the proposed 2035 General Plan. (Compl. ¶ 25.) Roger Towers made critical public comments about the 2035 General plan, including his concern "of the impact of mining in the vicinity of his Property and because he was being denied use of his property." (Compl. ¶ 27.)

On October 25, 2016, the board of supervisors held a meeting to consider the proposed 2035 General Plan. (Compl. ¶ 37.) The County served Roger Towers with a temporary restraining order, a petition for a workplace violence restraining order, and a notice of hearing, based upon his allegedly threatening behavior against County employees Kerry Sullivan and Amy Skewes-Cox. (Compl. ¶ 38; see also RJN, Exs. 10, 11.)

Thereafter, the County initiated County v. Towers, in which the superior court issued a three

year workplace violence restraining order against Roger Towers. (Compl. ¶ 49; see also RJN, Exs. 12, 13.) On appeal, the Third District Court of Appeal affirmed the lower court decision, and concluded that "substantial evidence supports the issuance of the order, and that the order did not violate Roger Towers's right of free speech." County v. Towers, No. C084030, 2018 WL 2424114, at *1.

C. Federal Complaints

On October 11, 2016, plaintiffs filed Towers IV in this court against the County and several other defendants, raising several allegations related to the land use designation of plaintiffs' property. 2:16-CV-02417-MCE-KJN, ECF No. 1. The complaint included a claim that the County violated plaintiffs' substantive due process, based upon allegations that "COUNTY staff and its consultants have intentionally misrepresented, and intentionally delayed, the background reports and information intended to be included within, and support, the General Plan 2035 update." Id., ECF No. 1 at 21. With several motions to dismiss pending, plaintiffs voluntarily dismissed Towers IV on December 8, 2016. Id., ECF No. 28.

On December 8, 2017, Roger Towers filed Towers V in this court against the County and several other defendants, challenging the land use designation in the 2035 General Plan, and the 2016 restraining order obtained by the County. 2:17-CV-02597-JAM-KJN, ECF No. 1. After a motion to dismiss, the court determined that Roger Tower's claims were barred by claim preclusion, issue preclusion, and Younger v. Harris, 401 U.S. 37, 38 (1971). 2:17-CV-02597- JAM-KJN, ECF Nos. 29 at 11-16; 36. Roger Towers

appealed the dismissal to the Ninth Circuit Court of Appeals, which is still pending. Id., ECF No. 38.

On November 19, 2018, plaintiffs filed this action against the County and several other individuals, rehashing many of plaintiffs' long-standing complaints regarding the land use designation and the 2016 restraining order. (See Compl.) The pending motion to dismiss and motion for recusal followed. (ECF Nos. 8, 14.)

II. LEGAL STANDARDS

A. Motion for Recusal

"Federal judges are required by statute to recuse themselves from any proceeding in which their impartiality might reasonably be questioned." Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 714 (9th Cir. 1990); see 28 U.S.C. § 455(a) "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); see also 28 U.S.C. § 144 ("[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein. . .").

"[T]he test for [judicial] recusal is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Milgard Tempering, Inc., 902 F.2d at 714 (internal citations omitted). "The 'reasonable person' in this context means a 'well-informed, thoughtful observer,' as opposed to a 'hypersensitive or unduly suspicious person.'" Clemens v. U.S. Dist. Court for Cent. Dist. of

California, 428 F.3d 1175, 1178 (9th Cir. 2005) (citing In re Mason, 916 F.2d 384, 386 (7th Cir.1990)). "The moving party bears a substantial burden to show that the judge is not impartial. A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation." United States v. Bell, 79 F. Supp. 2d 1169, 1171 (E.D. Cal. 1999)(internal citations and quotation marks omitted).

B. Motion to Dismiss

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. In considering a motion to dismiss for failure to state a claim, the court accepts all of the facts alleged in the complaint as true and construes them in the light most favorable to the plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is "not, however, required to accept as true conclusory

allegations that are contradicted by documents referred to in the complaint, and [the court does] not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Paulsen, 559 F.3d at 1071. The court must construe a pro se pleading liberally to determine if it states a claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (stating that "pro se pleadings are liberally construed, particularly where civil rights claims are involved"); see also Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (stating that courts continue to construe pro se filings liberally even when evaluating them under the standard announced in Iqbal).

In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not consider a memorandum in opposition to a defendant's motion to dismiss to determine the propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

III. DISCUSSION

A. Motion for Recusal

Plaintiffs move for recusal of the judges assigned to this matter based on allegations that (1) both judges "employ a scheme that violates the right of pro se litigants to be heard;" (2) both judges "deployed [this] scheme against Roger Towers, a pro se litigant;" (3) the undersigned "knowingly applied rules for judicial notice different[ly] and unlawfully against Towers;" (4) the undersigned "created evidence to fit [a] false narrative;" (5) the undersigned "created procedural barriers to block court access;" and (6) the "bias of Judge Mendez against Towers as a pro se litigant was manifested in several ways." (ECF No. 15 at 8-15.)

As defendants aptly point out, however, "[p]laintiffs' contention that District Judge Mendez and Magistrate Judge Newman should recuse themselves from this proceeding is strictly dependent on Plaintiff Roger Towers' dissatisfaction with the Court's rulings in Towers V, which is currently on appeal." (ECF No. 21 at 3-4.) Indeed, far from meeting their substantial burden to demonstrate that the undersigned and Judge Mendez are not impartial, see Bell, 79 F. Supp. 2d at 1171, plaintiffs have merely voiced their displeasure over the court's previous rulings, while mischaracterizing the court's orders. For example, plaintiffs assert that the undersigned does not consider the arguments of pro se litigants, based upon a statement found in the undersigned's orders on motions to dismiss—namely, that "the court may not consider a memorandum in opposition to a defendant's motion to dismiss." (See ECF No. 15 at 8-9.) This argument is fundamentally flawed, because it is based upon a selective quotation of the legal standard set fourth in previous orders. In context, the standard reads:

> In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not consider a memorandum in opposition to a defendant's motion to dismiss to determine the propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

Towers V, 2:17-CV-02597-JAM-KJN, ECF No. 29 at 10 (emphasis added). Nothing in the above-quoted standard suggests that the court does not consider the arguments of pro se litigants. There is simply no reasonable basis for recusal here. To the extent that there is merit to any of plaintiffs' arguments, they may be "proper grounds for appeal, not for recusal." Liteky v. United States, 510 U.S. 540, 555, (1994). Prior unfavorable rulings alone do not justify recusal.

B. Motion to Dismiss

Defendants move to dismiss the complaint based upon the Rooker-Feldman Doctrine, claim and issue preclusion, failure to state a claim, and failure to demonstrate state action under 42 U.S.C. § 1983. (See ECF No. 9.) Even assuming the complaint could

survive defendants' other arguments, the complaint is clearly subject to dismissal because plaintiffs' claims are barred by claim and issue preclusion. These matters have been thoroughly litigated. To the extent that plaintiffs attempt to raise any novel claims in this matter, these claims could have been included in plaintiffs' previous suits against the County. Furthermore, all of the events that serve as the basis of plaintiffs' claims here, took place before the filing of Towers V. (Compare Compl., with Towers V, 2:17-CV02597-JAM-KJN, ECF No. 1.) And, like Towers V, the claims here are barred.

1. *Claim and Issue Preclusion*

Claim preclusion "bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. . . . The doctrine is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (internal citations and quotation marks omitted). The Ninth Circuit has identified four factors that should be considered by a court in determining whether successive lawsuits involve an identity of claims: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. See C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir.1987); accord Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005); Littlejohn

v. United States, 321 F.3d 915, 920 (9th Cir. 2003). "The central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts." Owens, 244 F.3d at 714.

Similarly, issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or different claim." New Hampshire v. Maine, 532 U.S. 742, 749 (2001). "A party invoking issue preclusion must show:

(1) the issue at stake is identical to an issue raised in the prior litigation;

(2) the issue was actually litigated in the prior litigation; and

(3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action." Littlejohn, 321 F. 3d at 923. The "actually litigated" requirement is satisfied where the parties "have a full and fair opportunity to litigate the merits of the issue." Id.

2. *Land Use Designation*

At the heart of this action, plaintiffs are challenging the land use designation of their property, as they have been doing "for the past 18 years." (Compl. ¶ 10.) Under the first cause of action, the complaint alleges that defendants prevented plaintiffs from accessing information relevant to the 2035 General Plan. According to plaintiffs "[a]s a result of Defendants' actions [delaying and preventing the production of documents] the 2035 General Plan was approved and Plaintiffs have been substantially harmed through the continued deprivation of the ability to develop their Property." (Compl. ¶ 68-69.) Yet, as Roger Towers previously admitted to this court,

> his issues with the land use designation date back to 2001, when he first bought his property. Ever since that time, the County has allegedly continued to prevent plaintiff from using his property. In this respect, by plaintiff's own admission, the 2035 General Plan has not substantively changed how the County treats plaintiff's property. Moreover, while plaintiff does not accept the validity of the OS/RC designation, his land was so designated by the County in the 2010 General Plan, and it remains so designated in the 2035 General Plan.

Towers V, 2:17-CV-02597-JAM-KJN, ECF No. 29 at 8-9.

Thus, despite plaintiffs' reference to the First Amendment and the 2035 General Plan, the first cause of action is just another challenge to the County's land use designation, and is barred by Towers II.

i. **Claim Preclusion**

First, there is identity between the parties. Plaintiffs Roger and Catherine Towers and defendant the County of San Joaquin were also parties to Towers II.

Second, there was a final judgment on the merits—the opinion of the Third District Court of Appeal affirming the trial court's dismissal of all of plaintiffs' causes of action. Towers II, 2017 WL 3275178, at *15-16, 28. "Dismissal of an action with prejudice, or without leave to amend, is considered a final judgment on the merits." Nnachi v. City of San Francisco, 2010 WL 3398545, at *5 (N.D. Cal. Aug. 27, 2010) (citing Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005)).

Third, there is an identity of claims between Towers II and the first cause of action here. Towers II established that plaintiffs' ability to challenge the OS/RC designation is foreclosed by the statute of limitations. 2017 WL 3275178, at *15-16. To allow plaintiffs to pursue the first cause of action would impermissibly disturb the rights Towers II imparted on the County, which has a reasonable expectation to not have to relitigate a previously barred claim. Also, the complaint here involves substantially the same evidence as in Towers II—allegedly fabricated maps and purportedly withheld information related to the land use designation.

While plaintiffs appear to raise their First Amendment rights for the first time in this context, the claim nonetheless arises out of the same transactional nucleus of facts as in Towers II—the County's decisions and actions related to the OS/RC designation of plaintiffs' property. See Owens, 244 F.3d at 714 ("The central criterion . . . is whether the

two suits arise out of the same transactional nucleus of facts").

Despite plaintiffs' attempt to dress up their claim as something new and different, plaintiffs seek to relitigate the same issues decided in Towers II. Even assuming that this claim is truly novel, it arises from the same transactional nucleus of facts, and claim preclusion bars further litigation of any claim that *could have been* brought in the prior action. See Owens, 244 F.3d at 713.

ii. **Issue Preclusion**

Similarly, the first cause of action is barred by issue preclusion. First, the central issue raised in the first cause of action is substantively identical to the central issue raised in Towers II—whether the County's OS/RC land use designation was properly determined. Second, the issue was actually litigated in Towers II, as evidenced by the multiple rulings by the trial court and by the opinion of the Third District Court of Appeal. See 2017 WL 3275178. Plaintiffs had a full and fair opportunity to litigate this issue in the trial court and on appeal. Third, the decision that plaintiff had no legal basis to challenge the land use designation was a critical and necessary part of the previous litigation—indeed, it was the central issue before the court. See Towers II, 2017 WL 3275178, at *15-16, 28.

3. *Restraining Order Claims*

Under the second cause of action, plaintiffs allege that defendants obtained the restraining order against Roger Towers in retaliation for his speech, in violation of the First Amendment. (See Compl. ¶ 73 ("Without qualification, SKEWES-COX has admitted that she sought the restraining order because of

Tower's speech on September 29, 2016, and the October 11, 2016 lawsuit").) Under the fourth cause of action, plaintiffs allege that defendants J. Mark Myles and Kerry Sullivan neglected to prevent harm to plaintiff by failing to "ensure that records of the Community Development Department were maintained in a publicly reasonable manner" which would have "prevented the charade that was the prosecution of the restraining order" against Roger Towers. (Compl. ¶¶ 84, 86.) Accordingly, both claims are essentially challenges to the 2016 restraining order and barred by County v. Towers.

i. **Claim Preclusion**

First, there is identity between the parties because Roger Towers and the County were both parties in County v. Towers. (See Compl. ¶ 49; RJN, Exs. 12, 13.)

Second, there was a final judgment on the merits—the Third District Court of Appeal's opinion in County v. Towers that "substantial evidence supports the issuance of the [restraining] order, and that the order did not violate Roger Towers's right of free speech." 2018 WL 2424114, at *1; see Nnachi, 2010 WL 3398545, at *5.

Third, there is an identity of claims between County v. Towers and the instant matter. County v. Towers established that the County had a right to issue the restraining order and that it did not violate the First Amendment. 2018 WL 2424114, at *1. To allow plaintiffs to revive this claim would impermissibly disturb the rights County v. Towers imparted on the County, which has a reasonable expectation to not have to relitigate a previously barred claim. This matter and County v. Towers also both concern Roger Towers' First Amendment rights. Additionally, the complaint here involves the same

evidence and arises out of the same transactional nucleus of facts as County v. Towers—the circumstances leading to the issuance of the restraining order against Roger Towers. See Owens, 244 F.3d at 714 ("The central criterion . . . is whether the two suits arise out of the same transactional nucleus of facts").

Even assuming that the claims here regarding the restraining order are truly novel, they arise from the same transactional nucleus of facts, and claim preclusion bars further litigation of any claim that could have been brought in the prior action. See Owens, 244 F.3d at 713.

ii. **Issue Preclusion**

Similarly, the second and fourth causes of action are barred by issue preclusion. First, the issues plaintiffs raise here are substantively identical to those raised in County v. Towers— whether there was substantial evidence to support the restraining order and whether the order violated Roger Towers' First Amendment rights. Second, these issues were actually litigated in County v. Towers because plaintiffs had a full and fair opportunity to litigate these issues in the trial court and on appeal. Third, the determination that there was (1) clear and convincing evidence to issue a restraining order and (2) that such an order did not violate the First Amendment were critical and necessary parts of the judgment in the prior case—indeed, these were the central issues before the court. See County v. Towers, 2018 WL 2424114.

4. Dismissal of Towers IV

Under the third cause of action, the complaint alleges that defendants conspired to obstruct justice

by "successfully forc[ing] Plaintiffs to dismiss their federal lawsuit," i.e., Towers IV. (Compl. ¶ 82.) Even assuming, without deciding, that this claim is not barred by claim or issue preclusion, it is nonetheless subject to dismissal.[9] Plaintiffs voluntarily dismissed Towers IV in a filing before this court. 2:16-CV-02417-MCE-KJN, ECF No. 28. To the extent that plaintiffs assert that they were somehow coerced by defendants to dismiss Towers IV, plaintiffs' recourse is to move to reopen the matter, not to file a new civil action.

III. CONCLUSION

It seems as if plaintiffs are taking multiple bites of the same apple and hoping for a different result. The court does not take kindly to such fruitless and frivolous exercises. While plaintiffs proceed without counsel, they are expected to comply with the applicable law and rules of procedure. Eastern District Local Rule 183(a) provides, in part:

> Any individual representing himself or herself without an attorney is bound by the Federal Rules of Civil or Criminal Procedure, these Rules, and all other applicable law. All obligations placed on "counsel" by these Rules apply to individuals appearing in propria persona. Failure to comply therewith may be ground for dismissal, judgment by default, or any other sanction appropriate under these Rules.

See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se litigants must follow the same rules of

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[9] However, the court notes that this same argument was raised in Towers V. See 2:17-cv-02597- JAM-KJN, ECF No. 1 at 6.

procedure that govern other litigants") (overruled on other grounds).

Moreover, Eastern District Local Rule 110 provides that "[f]ailure of counsel or of a party to comply with these Rules or with any order of the Court may be grounds for imposition by the Court of any and all sanctions authorized by statute or Rule or within the inherent power of the Court."

Accordingly, plaintiffs are admonished to be mindful of Federal Rule of Civil Procedure Rule 11 before filing additional motions or cases regarding claims and issues that have been conclusively litigated. Any future filing found to be for an improper purpose, or without a reasonable basis, may be grounds for sanctions. See Fed. R. Civ. P. 11(c).

For the reasons discussed above, IT IS HEREBY RECOMMENDED that:

1. Defendants' motions to dismiss (ECF No. 8) be GRANTED.

2. Plaintiffs' complaint be DISMISSED WITH PREJUDICE.

3. The Clerk of Court be ordered to close this case.

IT IS ALSO HEREBY ORDERED that:

1. Plaintiffs' motion for recusal (ECF No. 14) is DENIED.

2. All pleading, discovery, and motion practice in this action are STAYED pending resolution of the findings and recommendations. With the exception of objections to the findings and recommendations and any non-frivolous motions for emergency relief, the court will not entertain or respond to any motions and other filings until the findings and recommendations are resolved.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served on all parties and filed with the court within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991)

IT IS SO ORDERED AND RECOMMENDED.
Dated: June 7, 2019

/s/_____
KENDAL J. NEWMAN
UNITED STATES MAGISTRATES JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROGER TOWERS, Plaintiff, v. J. MARK MYLES, et al., Defendants.	) CASE NO: 2:18-cv-02996-JAM-KJN(PS)) ORDER

On June 7, 2019, the magistrate judge filed findings and recommendations (ECF No. 22), which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within fourteen (14) days. Plaintiffs filed timely objections to the findings and recommendations and defendants replied (ECF Nos. 23, 25), both of which have been considered by the court. This court reviews de novo those portions of the proposed findings of fact to which an objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981); see also Dawson v. Marshall, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the matter on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that

it is appropriate to adopt the findings and recommendations in full. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations (ECF No. 22) are ADOPTED.
2. Defendants' motions to dismiss (ECF No. 8) is GRANTED.
3. Plaintiffs' complaint is DISMISSED WITH PREJUDICE.
4. The Clerk of Court shall close this case.

Dated: August 2, 2019

/s/_____
John A. Mendez
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 27 2020
Molly C. Dwyer, Clerk

ROGER DAVID TOWERS,	) NO. 18-16684
CATHERINE TOWERS,	) D.C. No.
Plaintiff-Appellant,	) 2:18cv-02996-
v.	) JAM-KJN
COUNTY OF	) Eastern District of
SAN JOAQUIN,	) California, Sacramento
Defendant-Appellee.	)
	) ORDER

Before: CANBY and GOULD, Circuit Judges.

Appellants' motion for disqualification of the magistrate judge and district judge (Docket Entry No. 6) is denied. No motions for reconsideration, clarification, or modification of this denial shall be filed or entertained.

The opening brief was due December 24, 2019. No opening brief was filed. If appellants seek to raise any additional issues in this appeal unrelated to the disqualification arguments just rejected, they shall file an opening brief by March 27, 2020. Failure to file an opening brief will result in dismissal of this appeal for failure to prosecute.

If appellants file an opening brief, appellees may file an answering brief by April 27, 2020. Appellants' optional reply brief is due 21 days after service of the answering brief.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 23 2021
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROGER DAVID TOWERS, CATHERINE TOWERS, Plaintiff-Appellant, v. JAMES MARK MYLES; et al., Defendant-Appellee.	) NO. 19-16684) D.C. No.) 2:18-cv-02996-) JAM-KJN) Eastern District of) California, Sacramento)) MEMORANDUM[10]

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding
Submitted February 17, 2021[11]

Before: FERNANDEZ, BYBEE, AND BADE, Circuit Judges.

Roger David Towers and Catherine Towers appeal pro se from the district court's judgment dismissing their action alleging federal claims related to the land use designation of their property and a restraining order against Mr. Towers. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

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

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

In their opening brief, plaintiffs fail to raise, and therefore have waived, any challenge to the district court's dismissal of their action as barred by claim and issue preclusion. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993) (issues not supported by argument in pro se appellant's opening brief are waived). On February 28, 2020, a panel denied plaintiffs' motion for disqualification of the magistrate judge and district judge. The February 28, 2020 order further stated that "[n]o motions for reconsideration, clarification, or modification of this denial shall be filed or entertained," and that plaintiffs should not raise these same arguments in the opening brief. Accordingly, we do not consider plaintiffs' contentions related to the issue of recusal of the magistrate judge and district judge. We reject as without merit plaintiffs' contentions that the district judge failed to conduct a de novo review of the magistrate judge's findings and recommendations, and that the action was erroneously referred to the jurisdiction of the magistrate judge. We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 26 2021
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROGER DAVID TOWERS, CATHERINE TOWERS, Plaintiff-Appellant, v. JAMES MARK MYLES; et al., Defendant-Appellee.	) NO. 19-16684) D.C. No.) 2:18-cv-02996-) JAM-KJN) Eastern District of) California, Sacramento)) ORDER

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Before: FERNANDEZ, BYBEE, AND BADE, Circuit Judges.

Plaintiffs' petition for panel rehearing (Docket Entry No. 29) is denied. No further filings will be entertained in this closed case

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 26 2021
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROGER DAVID TOWERS, CATHERINE TOWERS, Plaintiff-Appellant, v. JAMES MARK MYLES; et al., Defendant-Appellee.	) NO. 19-16684) D.C. No.) 2:18cv-02996-) JAM-KJN) Eastern District of) California, Sacramento)) **MANDATE**

The judgment of this Court, entered February 23, 2021, takes effect this date.

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

FOR THE COURT

MOLLY C. DWYER
CLERK OF THE COURT
By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7