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**UNITED STATES DISTRICT COURT**

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**DISTRICT OF ARIZONA**

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Janice Walker,

)

CV 08-310 TUC DCB

9

Plaintiff,

)

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v.

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Southern Arizona Legal Aid, Inc., Anthony Young, Sharon Rauseo, Bruce Plenk, Peter Akmajian, and Pamela Brown,

)

**ORDER**

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Defendants.

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On May 30, 2008, the Plaintiff was granted leave to proceed *in forma pauperis*, and the Clerk of the Court filed the Complaint without payment by the Plaintiff of the filing fee.

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The Plaintiff will have failed to serve the Complaint on the Defendants within 120 days on September 30, 2008, and the case will be subject to dismissal under Fed. R. Civ. P. 4(m).

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The Court, however, dismisses the Complaint, with leave to amend, for failure to state a claim. 28 U.S.C. § 1915(e)(2)(B). In the event the Plaintiff amends the Complaint to state

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a claim, the Court will allow Plaintiff an extension of 30 days to serve the Amended Complaint or it will be subject to dismissal for failure to serve it on Defendants.

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Background

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The Plaintiff alleges she is disabled due to having an impaired immune system. The Plaintiff alleges she contacted Defendant Southern Arizona Legal Aid (SALA) in September

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of 2005, seeking legal assistance to secure an accommodation for her disability at the apartment complex where she lived, the Oasis in the Catalinas. She alleges SALA initially

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refused to represent her due to her disability, but then assigned her an attorney, Bruce Plenk. She alleges that Defendant Plenk and other attorneys at SALA, who covered for Mr. Plenk

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1 during vacations and at other times, failed to adequately represent her with two owners and  
2 their management teams at the Oasis in the Catalinas from September 2005 until she was  
3 forced to move because the apartment complex continued to refuse to accommodate her  
4 disability.

5 In March of 2006, she moved to the Plum Tree Apartments. The Plaintiff alleges  
6 that the Plum Tree Apartments failed to accommodate her disability, which was instead  
7 aggravated by their failure to address leaks and mold during the monsoon rainy season. She  
8 alleges that again SALA attorneys failed to represent her interests with the landlord, and she  
9 was forced to move when the apartment complex refused her accommodations.

10 In November 2006, she moved to Sabino Canyon Apartments. They too failed to  
11 accommodate her disability. This time, however, the apartment complex filed a forcible  
12 detainer action in Superior Court, which resulted in her moving in December 2006, and a  
13 judgment against her.

14 In addition to this lawsuit against her attorneys, the Plaintiff has sued the three  
15 apartment complexes, CV 07-253 TUC CKJ, CV 08-413 TUC RCC,<sup>1</sup> (the Sabino Canyon  
16 Apartments); CV 07-478 TUC RCC, CV 08-134 TUC CKJ,<sup>2</sup> (Oasis in the Catalinas), and CV  
17 08-377 TUC RCC (the Plum Tree Apartments). The Plaintiff sued the Tucson Police  
18 Department for inaction and action they allegedly took after she called them to report  
19 harassment, an assault, and noise disturbances by her landlord while she was living at the  
20 Plum Tree Apartments. She filed suit in federal court to remove the forcible detainer action  
21 from the state to the federal court, CV 08-246 TUC CKJ, and sued the state court judges  
22 involved in the landlord-tenant dispute, CV 08-247 TUC DCB.

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24 <sup>1</sup>This is the same case filed as CV 07-253 TUC CKJ, which Plaintiff voluntarily  
25 dismissed on June 5, 2007. Plaintiff re-filed it on July 18, 2008, and it was randomly  
assigned to a different judge.

26 <sup>2</sup>The Oasis in the Catalinas Apartments were sold during the time she lived there, and  
27 she sues both owners for failing to accommodate her disability.

1 The cases against the apartment complexes have not been disposed of yet, but the  
2 removal case and the case against the state court judges have both been dismissed for failing  
3 to state a claim. In both instances, the cases were legally and factually frivolous.

4 In CV 08-246 TUC CKJ, Judge Jorgenson explained to the Plaintiff that she failed  
5 to allege any state statute or constitutional provision that commands the state courts to ignore  
6 federal rights or to allege in what way the state court failed to accommodate her, therefore,  
7 there was no exception to the *Rooker-Feldman* doctrine, which precludes the federal courts  
8 from reviewing state court judgments. (Order filed May 8, 2008 at 5-6) (citations omitted).

9 In CV 08-247 TUC DCB, this Court dismissed the case against the state court judges  
10 as barred by the doctrine of judicial immunity. (Order filed May 9, 2008.)

11 These two cases were dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B), which  
12 requires the district courts to screen a complaint filed *in forma pauperis*.

13 Screening: 28 U.S.C. § 1915(e)(2)(B)

14 The Plaintiff also proceeds in this case *in forma pauperis*, which subjects this  
15 Complaint to screening, pursuant to 28 U.S.C. § 1915(e)(2)(A), and requires dismissal of the  
16 action if the Court determines the action is: 1) frivolous or malicious, 2) fails to state a claim  
17 on which relief may be granted, or 3) seeks monetary relief against a defendant who is  
18 immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

19 Factual frivolousness includes allegations that are clearly baseless, fanciful, fantastic,  
20 or delusional. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Legal frivolousness justifies  
21 dismissal under § 1915 where a complaint is based on “an undisputably meritless legal theory  
22 . . . [such as] claims against which it is clear that the defendants are immune from suit, and  
23 claims of infringement of a legal interest which clearly does not exist . . .” *Id.* at 327.

24 This Complaint must be dismissed because it is legally and factually deficient and,  
25 therefore, fails to state a claim upon which relief may be granted.

1 The district courts have no obligation to act as counsel or paralegal to *pro se*  
2 litigants. *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9<sup>th</sup>  
3 Cir. 2000) (*en banc*). However, because the *pro se* litigant is unskilled in the law, she will  
4 be more prone to make errors in pleading her case than a person who has the benefit of being  
5 represented by counsel. Therefore, the Court will explain the deficiencies in her Complaint  
6 and afford her an opportunity to amend it. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9<sup>th</sup> Cir.  
7 1987).

8 The Plaintiff alleges that SALA Defendants violated her rights under the Americans  
9 with Disabilities Act, Civil Rights Laws of 1964, the federal privacy laws, and the Fourteenth  
10 Amendment right to due process.

11 As Judge Jorgenson explained in the screening order issued in CV 08-247 TUC CKJ  
12 on May 9, 2008, 21 days before the Plaintiff filed this Complaint, in order to state a claim  
13 under Title II of the ADA, the Plaintiff must allege the following: 1) she is an individual with  
14 a disability, 2) she is otherwise qualified to participate in or receive the benefit of some  
15 public entity's services, programs, or activities, 3) she was either excluded from participation  
16 in or denied the benefits of the public entity's services, programs, or activities, or was  
17 otherwise discriminated against by the public entity, and 4) such exclusion, denial of  
18 benefits, or discrimination was by reason of her disability. (Order at 6 (citing *O'Guinn v.*  
19 *Lovelock Correctional Center*, 502 F.3d 1056, 1060 (9<sup>th</sup> Cir. 2007)).

20 Like she did in CV 08-247 TUC CKJ, the Plaintiff summarily alleges these elements  
21 in the Complaint and also charges the Defendants with failing to accommodate her disability.  
22 She specifically alleges the following facts: 1) she is disabled due to an impaired immune  
23 system; 2) Defendants initially refused to provide her with legal services because she is  
24 disabled, and 3) Defendants failed to accommodate her by making services accessible to her.

25 The Plaintiff's factual allegations are insufficient to support her disability claim  
26 because contrary to her assertion that Defendants failed to provide services because she is  
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1 disabled, she alleges that they did provide services but they yelled at her, went on too many  
2 vacations, failed to give her case the attention it deserved, and generally betrayed her to her  
3 opponents. These are legal malpractice claims, which are state law claims over which there  
4 exists no independent basis for federal jurisdiction. *Aragon v. Federated Dept. Stores Inc.*,  
5 750 F.2d 1447, 1457-58 (9<sup>th</sup> Cir. 1985).

6 As to her claim that Defendants failed to accommodate her to make its services  
7 available to her, the Court is left to guess as to what reasonable accommodation she  
8 requested and Defendants allegedly denied her. Without this factual allegation, she cannot  
9 state a claim for failure to accommodate. *See* (CV 08-247 TUC CKJ, Order filed May 9,  
10 2008 at 6-7 (explaining this same problem in respect to Plaintiff's ADA claim that the  
11 Arizona Superior Court failed to grant her reasonable accommodation).

12 The Plaintiff's claim under the Civil Rights Act of 1964, Section 201, is for sexual  
13 harassment and sex and gender discrimination based on her allegation that she was denied  
14 services due to her refusal to provide sexual favors. The facts she alleges to support her  
15 claim are that SALA attorney, Bruce Plenk, made sexual innuendoes that she ignored, which  
16 caused him to stop calling her and to not return her calls, and he began misrepresenting her  
17 and mishandling her case. These facts support a claim for malpractice not her constitutional  
18 charge that she was sexually harassed and discriminated against by Defendants because she  
19 refused to provide sexual favors to Mr. Plenk. Additionally, these facts fail to support a  
20 claim under the Civil Rights Act of 1964, Section 201, which guards against sex  
21 discrimination in employment, 42 U.S.C. § 2000e. The relationship between Plaintiff and  
22 Defendants was not that of employee and employer. Her gender and sex discrimination  
23 claim fails under the Civil Rights Act of 1964.

24 The Plaintiff has alleged a violation of the Fourteenth Amendment right to equal  
25 protection under the United States Constitution. Again, the Court must guess at the factual  
26 basis for the claim. If the Plaintiff is seeking protection from gender or sex discrimination  
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1 under the Fourteenth Amendment, she may proceed under 42 U.S.C. § 1983, if Defendants  
2 were state actors. *Oona v. McCaffrey*, 143 F.3d 473, 476 (9<sup>th</sup> Cir. 1998). However, there is  
3 no factual allegation that the Defendants acted under color of state law. The Plaintiff’s claim  
4 of sex and gender discrimination fails unless she can show the attorneys were state actors or  
5 acting under color of state law. *Miranda v. Clark County*, 319 F.3d 465, 468 (9<sup>th</sup> Cir. 2003).

6 The Court dismisses the Plaintiff’s Fourteenth Amendment Due Process Rights claim  
7 for the same reason Judge Jorgenson dismissed it in CV 08-247 TUC CKJ. “. . . To state a  
8 claim under § 1983, a plaintiff must allege: (1) the violation of a right secured by the  
9 Constitution and laws of the United States and 2) the alleged deprivation was committed by  
10 a person acting under color of state law.” *Id.* at 8-9 (citation omitted). The Plaintiff must  
11 allege she was denied a specific right protected by the Constitution or federal law without  
12 due process or by a deliberate abuse of power without reasonable justification in aid of any  
13 government interest or objective, or done only to oppress her in a way that shocks the  
14 conscience. Negligence is not sufficient to state a claim for substantive due process  
15 violations. *Id.* at 9 (citations omitted).

16 If the Plaintiff’s Fourteenth Amendment claim is that she was deprived of a right to  
17 be assisted in court, there is no such right. (Complaint at 3.) There is no constitutional right  
18 to counsel in a civil case. *Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266,  
19 269 (9<sup>th</sup> Cir. 1982); *Randall v. Wyrick*, 642 F.2d 304, 307 n. 6 (8<sup>th</sup> Cir. 1981).

20 Assuming the Plaintiff’s attorneys were state actors, she must allege facts showing  
21 an affirmative act caused a constitutional deprivation. *Rizzo v. Goode*, 423 U.S. 362, 371-72  
22 (1976). As reflected above, the Court is left guessing regarding these two key elements.

23 The Plaintiff’s Privacy Act claims also fail. “[T]he Privacy Act safeguards the  
24 public from the unwarranted collection, maintenance, use, and dissemination of personal  
25 information contained in [federal] agency records. Walker has not alleged that any personal  
26 information contained in federal agency records was disseminated.” (CV 08-247-TUC CKJ,

1 Order filed May 9, 2008, at 8) (quoting *Wilborn v. Dept. of Health and Human Services*, 49  
2 F.3d 597, 600 (9<sup>th</sup> Cir. 1995), *abrogated on other grounds*). The Plaintiff fails to state a  
3 claim under the Health Insurance Portability and Accountability Act (HIPAA). “Indeed,  
4 the Ninth Circuit has stated that ‘HIPAA itself does not provide for a private right of  
5 action.’” *Id.* at 7 (quoting *Webb v. Smart Document Solutions, L.L.C.*, 499 F.3d 1078, 1081  
6 (9<sup>th</sup> Cir. 2007).

7 The Plaintiff may amend her Complaint to allege the necessary facts to support her  
8 claims. The Supreme Court has explained that to state a claim upon which relief can be  
9 granted, “factual allegations must be enough to raise a right to relief above the speculative  
10 level, on the assumption that all the allegations in the complaint are true even if doubtful in  
11 fact.” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations and internal  
12 quotations omitted). The Amended Complaint does not need detailed factual allegations, but  
13 it must provide grounds for Plaintiff’s entitlement to relief. It requires more than labels and  
14 conclusions. A formulaic recitation of the elements of a cause of action will not do. *Id.* at  
15 1964 (citations and internal quotations omitted).

16 Once the Plaintiff states each claim adequately, it must be supported by showing any  
17 set of facts consistent with the allegations in the complaint. *Id.* at 1968 (abrogating a literal  
18 reading of *Conley*: “A complaint should not be dismissed for failure to state a claim unless  
19 it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim  
20 which would entitle him to relief.”) Dismissal is appropriate if the facts alleged do not state  
21 a claim that is “plausible on its face.” *Id.* at 1973. Requiring the Plaintiff to allege facts  
22 plausibly supporting (not merely consistent with) her claims reflects Rule 8(a)(2)'s threshold  
23 requirement that the “plain statement” possess enough heft to “sho[w] that the pleader is  
24 entitled to relief.” *Id.* at 1959.

1 Vexatious litigant

2 The Plaintiff is being given leave to amend her Complaint to state a claim, however,  
3 Plaintiff is warned that there is some evidence her claims are frivolous and malicious. She  
4 appears to have sued every apartment complex where she lived from July 2005, until  
5 December 2006. In the past, she has filed legally and factually frivolous claims to remove  
6 the forcible detainer action from the state court to the federal court in an attempt to reverse  
7 the judgment entered against her, and she has sued the presiding state court judges. She has  
8 filed claims in this case substantially similar in their deficiencies to the claims that were  
9 dismissed in CV 08-247 TUC CKJ. She has done this despite very thorough explanations  
10 in CV 08-247 TUC CKJ as to the factual allegations necessary to support claims under the  
11 ADA and 42 U.S.C. § 1983.

12 In the event the Plaintiff cannot amend her Complaint to state facts to support these  
13 claims, yet she continues to pursue them they may be considered frivolous and malicious  
14 claims, and dismissed pursuant to 28 U.S.C. § 1915(e). The Court also has the power to  
15 impose sanctions under 28 U.S.C. § 1988 and may impose sanctions on *pro se* litigants where  
16 there is evidence of bad faith due to multiple proceedings which are unreasonable or  
17 vexatious. *Wages v. Internal Revenue Service*, 915 F.2d 1230, 1235-36 (9<sup>th</sup> Cir. 1989), *see*  
18 *also, Aloe Vera of America, Inc. v. United States*, 376 F.3d 960, 964-65 (9<sup>th</sup> Cir. 2004)  
19 (explaining the federal courts have inherent power to impose sanctions, such as awarding  
20 prevailing party attorney fees when losing party has acted in bad faith, vexatiously, wantonly,  
21 or for oppressive reasons).

22 The Court also has the inherent power to issue a vexatious litigant order, pursuant  
23 to 28 U.S.C. § 1651(a), to enjoin the Plaintiff from filing any further actions or papers in the  
24 federal district court without first obtaining leave of the court. *DeLong v. Hennessey*, 912  
25 F.2d 1144, 1146-49 (9<sup>th</sup> Cir. 1990). Issuing a prefilng order is an extreme sanction and is  
26 not appropriate except in the most exceptional circumstances. *Molski v. Evergreen Dynasty*



1 *Corp.*, 500 F.3d 1047, 1057 (9<sup>th</sup> Cir. 2007) (*per curium*). This Court would not enter such  
2 an order with undue haste because it impedes access to the courts. *Id.*<sup>3</sup> “Nevertheless,  
3 ‘flagrant abuse of the judicial process cannot be tolerated because it enables one person to  
4 preempt the use of judicial time that properly could be used to consider the meritorious  
5 claims of other litigants.’” *Id.* (quoting *DeLong*, 912 F.2d at 1148).

6 This Court will not take the extraordinary measure of issuing a prefiling order unless  
7 it is absolutely necessary. First, the Court will give the Plaintiff the opportunity to self-  
8 monitor and regulate her use of the federal courts. The Court dismisses the Complaint filed  
9 by the Plaintiff on May 30, 2008, for the reasons set out in this Order, and grants Plaintiff  
10 leave to file an Amended Complaint to state justiciable claims.

11 **Accordingly,**

12 **IT IS ORDERED** that Plaintiff has LEAVE TO AMEND her Complaint to state  
13 specific factual allegations against proper Defendants. THE AMENDED COMPLAINT  
14 MUST BE CLEARLY DESIGNATED AS "AMENDED COMPLAINT" ON THE FACE  
15 OF THE DOCUMENT. The Amended Complaint must state specific allegations against  
16 specific Defendant(s), named as Defendant(s); and identify who participated in which  
17 activities alleged in the Amended Complaint; and state what injury, if any, Plaintiff suffered  
18 as a result of the activities of each Defendant. THE AMENDED COMPLAINT MUST BE  
19 RETYPED OR REWRITTEN IN ITS ENTIRETY AND MAY NOT INCORPORATE ANY  
20 PART OF THE ORIGINAL COMPLAINT BY REFERENCE. Local Rule 7.1(d).

21 **IT IS FURTHER ORDERED** that in the event the Plaintiff files the Amended  
22 Complaint, she shall do so by September 25, 2008, and she shall serve it on Defendants  
23 within 30 days of the filing date of the Amended Complaint.

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26 <sup>3</sup>The Court will not take such an extraordinary measure without first affording  
27 Plaintiff an opportunity to show cause why a pre-filing order should not issue.

1           **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to DISMISS  
2 all claims and to close this case, without further notice to Plaintiff, if she fails to file the  
3 Amended Complaint by September 25, 2008.

4           **IT IS FURTHER ORDERED** that in the event the Plaintiff files an Amended  
5 Complaint, but fails to serve it within 30 days of its filing date, the Court shall dismiss the  
6 Amended Complaint for failure to serve it as required under Fed. R. Civ. P.4(m).

7           **IT IS FURTHER ORDERED** that if after screening the Amended Complaint this  
8 case proceeds, the Plaintiff shall serve upon Defendants, or if appearance has been entered  
9 by counsel, upon counsel, a copy of every further pleading or other document submitted for  
10 consideration by the Court. The Plaintiff shall include with the original document and copy,  
11 to be filed with the Clerk of the Court, a certificate stating the date a true and correct copy  
12 of the pleading or document was mailed to Defendants or counsel. Any paper received by  
13 a District Court Judge or Magistrate Judge which has not been properly filed with the Clerk  
14 of the Court may be disregarded by the Court.

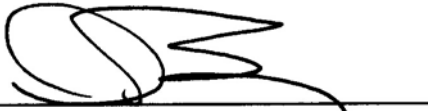
15           **IT IS FURTHER ORDERED** that the Plaintiff shall comply with the Local Rules  
16 of Practice for the United States District Court, District of Arizona. A copy of the Local  
17 Rules may be found under Rules of Court on the Court's internet site:  
18 <http://www.azd.uscourts.gov>. Also available on the website for the Plaintiff's review and use  
19 is a pamphlet, "Filing a Complaint on Your Own Behalf," which may be found under  
20 Operations & Filing.

21           **IT IS FURTHER ORDERED** that in the event Plaintiff proceeds here, she shall  
22 follow the Federal Rules of Civil Procedure and the Local Rules. The Plaintiff is instructed  
23 to take special notice of Local Rule 7.2 which provides specific requirements for civil  
24 motions, especially subsection (i) which provides that failure to file a timely response, or any  
25 other such non-compliance, "may be deemed a consent to the denial or granting of the motion  
26 and the Court may dispose of the motion summarily."

1           **IT IS FURTHER ORDERED** that at all times during the pendency of this action,  
2 Plaintiff shall immediately advise the Court of any change of address and its effective date.  
3 Such notice shall be captioned "NOTICE OF CHANGE OF ADDRESS." The notice shall  
4 contain only information pertaining to the change of address and its effective date. The  
5 notice shall not include any motions for any other relief. Failure to file a NOTICE OF  
6 CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute  
7 pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

8           **IT IS FURTHER ORDERED** that the Clerk of the Court shall send a copy of this  
9 Order to the judges of the United States District Court for the District of Arizona in the  
10 following cases: CV 07-478 TUC RCC, CV 08-134 TUC CKJ, CV 08-377 TUC RCC, CV  
11 08-412 TUC BPV, and CV 08-413 TUC RCC.

12           DATED this 5<sup>th</sup> day of September, 2008.

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17           David C. Bury  
18           United States District Judge

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21           *copy to RCC, CKJ, BPV on 9/5/08 by cjs*  
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