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

JANETTA SCONIERS,

Plaintiff,

vs.

CLARENCE WHITMORE, SR. et al.

Defendants.

CASE NO. CV F 08-1288 LJO SMS

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS (Doc. 16)**

ORDER DISMISSING ACTION

Plaintiff is proceeding pro se with an action for damages and other relief concerning alleged civil rights violations. The matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304. On March 19, 2009, the Magistrate Judge issued Findings and Recommendations that this matter should be dismissed for Plaintiff's failure to prosecute the action and to obey the Court's orders to file an amended complaint in conformity with the screening order. (Doc. 16.) On April 14, 2009, plaintiff filed objections to the Magistrate Judge's Findings and Recommendations. (Doc. 14.)

FACTUAL BACKGROUND

On September 2, 2008, plaintiff filed a 142 page, type-written complaint alleging fifty-one (51) causes of action against twenty-three (23) individuals or entities. On September 19, 2008, the Court issued an informational order in which the Court informed plaintiff that due to her pro se status, the Court will screen the complaint and "shall dismiss the case at any time if the Court determines . . . the action or appeal is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief." (Doc. 4.)

On December 1, 2009, the Magistrate Judge issued lengthy Findings and Recommendations

1 recommending that some of the federal causes of action be dismissed. In a forty-one page Findings and
2 Recommendations, the Magistrate Judge analyzed each of the federal claims according to the appropriate
3 federal law to determine whether plaintiff had, or could, state a claim for relief. The Magistrate Judge
4 recommended certain of the federal causes of action be dismissed without leave to amend:

5 “1) Plaintiff’s second through eleventh claims BE DISMISSED
6 WITHOUT LEAVE TO AMEND on the grounds of abstention from the
7 exercise of jurisdiction, or lack of subject matter jurisdiction, . . . (Doc.
8 6 p. 40-41) (Emphasis in original)

8 The Magistrate Judge also recommended that other causes of action be dismissed, but that leave to
9 amend should be granted:

10 2) Plaintiff’s first and twelfth through thirty-second claims BE
11 DISMISSED WITH LEAVE TO AMEND because they do not state a
12 federal claim upon which relief may be granted . . . (Doc. 6 p. 40-41)
13 (Emphasis in original)

13 The Magistrate Judge’s Findings and Recommendations informed plaintiff that she may object to the
14 Findings and Recommendations: “Within thirty (30) days after being served with a copy, any party may
15 file written objections with the Court and serve a copy on all parties. Such a document should be
16 captioned ‘Objections to Magistrate Judge’s Findings and Recommendations.’”

17 Plaintiff then sought, and obtained, an extension of time to file objections to the Magistrate
18 Judge’s Findings and Recommendations. Later, in response to the Findings and Recommendations,
19 plaintiff filed four documents on February 3, 2009: (1) Objections to the Findings and
20 Recommendations, (2) Motion for Temporary Restraining Order, (3) Declaration, and (4) First Amended
21 Complaint. (Doc. 9-12.)

22 On February 10, 2009, this Court considered the documents filed, but nonetheless adopted the
23 Findings and Recommendations. (Doc. 13.) As noted in the Court’s order adopting the Findings and
24 Recommendations, the Court construed the plaintiff’s Objections, not as objections, but as a request for
25 leave to file an amended complaint. The Court specifically held that plaintiff was granted leave to
26 amend her Complaint:

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1 The Court will deny Plaintiff's present motion for leave to file an
2 amended complaint. This is because the Court herein adopts the
3 Magistrate Judge's pending findings and recommendations and thus
4 **permits Plaintiff to file an amended complaint, but only in
compliance with the Court's findings and recommendations.**
Therefore, another request for leave to file an amended complaint is
unnecessary." (Doc. 13 p. 2-3) (Emphasis added.)

5 The Court admonished plaintiff that any future complaint must comply with the screening order and
6 must address the defects in the original complaint as ruled by the Magistrate Judge:

7 [T]he first amended complaint that Plaintiff will file in the future must
8 comply with the Court's determinations in the adopted findings and
recommendations. (Doc. 13.)

9 The Court then adopted the Magistrate Judge's Findings and Recommendations as follows:

10 2. With respect to claims two through seven of Plaintiff's complaint,
11 Plaintiff's complaint IS DISMISSED WITHOUT LEAVE TO AMEND
12 for failure to state a basis for subject matter jurisdiction in this Court
and/or because this Court should abstain from exercising jurisdiction; and

13 3. With respect to claims eight through eleven, Plaintiff's complaint IS
14 DISMISSED WITHOUT LEAVE TO AMEND for failure to state a claim
15 upon which relief may be granted and/or failure to state a basis for
subject matter jurisdiction in this Court; and

16 4. With respect to claims one, twelve through twenty-nine, and thirty, and
17 related derivative claims seeking injunctive or declaratory relief (claims
thirty-one and thirty-two), Plaintiff's complaint IS DISMISSED WITH
LEAVE TO AMEND. (Doc. 13 p. 5) (Emphasis in original.)

18 Thus, the court adopted the Findings and Recommendations and specifically granted leave to amend
19 some of the causes of action. The Court then struck plaintiff's Motion for Temporary Restraining Order,
20 the Declaration, and the First Amended Complaint as prematurely filed. (Doc. 13 p. 4.)

21 A month later, rather than filing an amended complaint as directed, plaintiff filed an interlocutory
22 appeal to the Ninth Circuit on March 11, 2009. (Doc. 14.) Plaintiff appealed the Court's adoption of
23 the Magistrate Judge's Findings and Recommendations.

24 Since plaintiff did not follow the Court's order to file an amended complaint, the Magistrate
25 Judge issued Findings and Recommendations To Dismiss Action For Plaintiff's Failure To Follow A
26 Court Order, File An Amended Complaint, And Prosecute The Case on March 19, 2009. (Doc. 16.) The
27 Magistrate Judge found that plaintiff failed to comply with Local Rule 11-110 for failure to obey a court
28 order or failure to comply with local rules. Plaintiff filed objections on April 14, 2009. (Doc. 17.)

1 **PLAINTIFF’S OBJECTIONS**

2 In her objections to the Findings and Recommendations To Dismiss, plaintiff argues that she was
3 not given the opportunity to re-file the amended complaint after it was stricken.

4 To the contrary, the amended complaint was stricken in the Court’s February 10, 2009 order.
5 In that same order, the Court explicitly directed plaintiff to file an amended complaint thereafter. The
6 Title of the Order directed plaintiff to file the complaint:

7 ORDER DIRECTING PLAINTIFF TO FILE A FIRST AMENDED
8 COMPLAINT NO LATER THAN THIRTY DAYS AFTER THE DATE
OF SERVICE OF THIS ORDER (Doc. 13 p.1) (Emphasis in original.)

9 In addition, as noted above, the body of the order also directed plaintiff to file an amended complaint.
10 (Doc. 13 p. 2-3) (“[T]he Court herein adopts the Magistrate Judge’s pending findings and
11 recommendations and thus permits Plaintiff to file an amended complaint, but only in compliance with
12 the Court’s findings and recommendations.”) The Order specifically informed plaintiff of the time frame
13 for filing the complaint:

14 Plaintiff IS GRANTED thirty days from the date of service of this order
15 to file a first amended complaint that complies with this order, . . . and
must be labeled "First Amended Complaint." (Doc. 13 p. 5-6.)

16 The Order also cautioned plaintiff as to the consequences for failure to file an amended complaint:

17 “[F]ailure to file an amended complaint in accordance with this order will
18 be considered to be a failure to comply with an order of the Court
pursuant to Local Rule 11-110 and will result in dismissal of this action.”

19 Thus, plaintiff was fully informed that she had the opportunity, and the obligation, to file an amended
20 complaint and to file one that conformed with the Court’s order.

21 In recommending dismissal of the action, the Magistrate Judge thoroughly analyzed that
22 plaintiff’s failure to file an amended complaint violated Local Rule 11-110. The Magistrate Judge
23 analyzed whether dismissal was in (1) the public’s interest in expeditious resolution of litigation;
24 (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
25 favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives. (Doc.
26 16 p. 304.)

27 Rather than file an amended complaint, plaintiff filed a “Notice of Appeal,” nearly a month after
28 the Court’s order and after sufficient time to digest the Court’s order. The Notice of Appeal appealed

1 the Court’s order adopting the Findings and Recommendations. Thus, plaintiff failed to comply with
2 the Court’s order to file an amended complaint within the specific time. Instead, she chose to appeal the
3 order.

4 Plaintiff argues that by filing an appeal, she thought the action would be stayed. The filing of
5 a notice of interlocutory appeal does not divest the district court of jurisdiction over the particular issues
6 involved in the appeal. A notice of appeal from an interlocutory order appealable by permission under
7 28 U.S.C. § 1292(b) is “filed” when the appellate court issues an order permitting the appeal. Until then,
8 the district court retains jurisdiction and may reconsider, rescind or modify its previously-issued orders.
9 *City of Los Angeles, Harbor Division v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001).
10 Thus, this Court is not divested of jurisdiction because the Ninth Circuit has not permitted the appeal.
11 As shown above, plaintiff chose to file an appeal to challenge the dismissal of the causes of action rather
12 than comply with the Court’s order.¹

13 In her objections to the Magistrate Judge’s Findings and Recommendations To Dismiss, plaintiff
14 argues that she was not provided guidance as to what would be required to state a claim. (Doc. 17, p.2.)
15 To the contrary, the Magistrate Judges 41-page Findings and Recommendations itemized each cause of
16 action. For the causes of action which were legally deficient, the Magistrate Judge recommended the
17 causes of action be dismissed without leave to amend. For the Causes of action which were factually
18 deficient, the Magistrate Judge recommended that the causes of action be dismissed with leave to amend.
19 The Magistrate Judge detailed the deficiencies of each cause of action. For instance, the Magistrate
20 Judge noted where the allegations were conclusory or ambiguous or where the allegations were
21 speculative. Thus, the Magistrate Judge provided sufficient guidance as to the deficiencies contained
22 in the complaint.

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26 ¹ Plaintiff argues that she is not an attorney and is unfamiliar with the legal proceedings. While plaintiff appears
27 pro se in this case, the Court notes the extraordinarily complex complaint and thorough responses which to date plaintiff has
28 filed. Her filings are complete with numerous relevant case citations, analysis and argument. Thus, the Court finds that
plaintiff is being helped by behind-the-scenes counsel or other form of legal assistance. Therefore, her argument carries little
weight.

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RULING

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)©, this Court therefore has conducted a *de novo* review of the case. Having carefully reviewed the entire file, the Court finds that the Findings and Recommendations are supported by the record and proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations issued March 19, 2009 are ADOPTED IN FULL;
and
2. The complaint is DISMISSED WITHOUT LEAVE TO AMEND.

This terminates this action in its entirety.

IT IS SO ORDERED.

Dated: April 16, 2009

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