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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10
11 MARY LEE GAINES,

12 Plaintiff,

13 v.

14 BROWN, *et al.*,

15 Defendants.

Case No. 1:16-cv-01666-NONE-BAM (PC)

ORDER DENYING PLAINTIFF'S FIFTH
MOTION FOR EXTENSION OF TIME TO
OPPOSE DEFENDANTS' MOTION FOR
ORDER REQUIRING PLAINTIFF TO POST
SECURITY
(ECF No. 85)

FINDINGS AND RECOMMENDATIONS
REGARDING DEFENDANTS' MOTION
FOR ORDER REQUIRING PLAINTIFF TO
POST SECURITY
(ECF No. 60)

FOURTEEN (14) DAY DEADLINE

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20 **I. Background**

21 Plaintiff Mary Lee Gaines ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma*
22 *pauperis* in this civil rights action under 42 U.S.C. § 1983. This action proceeds on Plaintiff's
23 first amended complaint against Defendants Mirelez and Hoehing for deliberate indifference to
24 medical needs in violation of the Eighth Amendment.

25 On May 1, 2019, Defendants filed a motion for order requiring Plaintiff to post security
26 under Local Rule 151(b). (ECF No. 60.) Plaintiff attempted to file oppositions on June 21, 2019,
27 and June 24, 2019. (ECF Nos. 66, 67.) Defendants filed a reply on July 1, 2019. (ECF No. 68.)
28 On July 2, 2019, Plaintiff filed a request for the Court and all parties to disregard the opposition

1 filed on June 24, 2019. (ECF No. 69.)

2 On February 7, 2020, the Court found that Plaintiff had improperly filed certain
3 documents, either by lack of signature or by attempting to electronically file documents as a *pro*
4 *se* litigant, and ordered these documents, (ECF Nos. 66, 67, 69), stricken from the record. (ECF
5 No. 72.) As explained in the declaration of Attorney Christine Starkie, Plaintiff had received pro
6 bono legal assistance from Ms. Starkie, who was employed at a nonprofit organization called
7 Justice Now, in the form of research, advice, and the drafting and filing of an opposition to
8 Defendants' motion for an order requiring Plaintiff to post security.¹ (ECF No. 77, p. 1.)

9 The Court therefore granted Plaintiff twenty-one days to properly file her opposition to
10 Defendants' pending motion. (ECF No. 72.) Thereafter, the Court granted Plaintiff four
11 extensions of time to properly file her opposition to the pending motion. (ECF Nos. 76, 80, 82,
12 84.) In the order granting Plaintiff's fourth extension of time, Plaintiff was warned that any
13 future requests for extension of this deadline would be subject to a narrow interpretation of what
14 constitutes good cause. (ECF No. 84, p. 2.) Plaintiff was further instructed that any future
15 requests for extension of this deadline must describe what attempts she has made to access the
16 law library at her institution, the result of those attempts, and what specific further research or
17 other acts must be accomplished before her opposition could be completed and submitted to the

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19 ¹ In their opposition to Plaintiff's motion for extension of time, Defendants indicate in a
20 footnote that they contacted Justice Now on December 11, 2019. (ECF No. 87, p. 3, n. 1.) The
21 Director of Justice Now apparently indicated that the organization could not represent Plaintiff
22 until they hired another attorney. Defendants state that because there was no indication that
Justice Now had withdrawn as Plaintiff's counsel, defense counsel has considered Plaintiff a
represented party. (*Id.*)

23 It is unclear to the Court what Defendants are attempting to convey by this footnote.
24 Although it should not require clarification, in an abundance of caution, the Court notes for the
25 benefit of Defendants that Plaintiff remains, and has been throughout this litigation, a *pro se*
26 litigant. It was for this reason that Plaintiff's improper filings from Attorney Starkie were
stricken from the record—she had never made a proper appearance on behalf of Plaintiff in this
matter. (ECF No. 72.) Thus, no withdrawal from Attorney Starkie or any other representative of
Justice Now is required.

27 Further, this assertion from Defendants contradicts their own filing, made after December
28 11, 2019 but before Attorney Starkie's written clarification to the Court on March 13, 2020,
wherein Defendants served Plaintiff, by First-Class Mail and "In Pro Per" with their January 7,
2020 motion to modify the discovery and scheduling order. (ECF No. 70-3.)

1 Court. (Id.)

2 **II. Plaintiff's Fifth Motion for Extension of Time**

3 On July 21, 2020, Plaintiff filed her fifth motion for extension of time to file her
4 opposition to Defendants' motion for order requiring Plaintiff to post security. (ECF No. 85.)
5 Defendants filed an opposition on August 4, 2020. (ECF No. 87.) Plaintiff has not yet had the
6 opportunity to file a reply, but the Court finds a reply unnecessary, and the motion is deemed
7 submitted. Local Rule 230(l).

8 In her motion, Plaintiff states that due to the COVID-19 pandemic, she has been very
9 limited in obtaining access to the prison law library in order to research, complete, and file her
10 opposition. (ECF No. 85.) In addition, Plaintiff states that she has been hospitalized in Madera
11 General Hospital between May 1, 2020, and June 1, 2020, without access to her legal documents.
12 Plaintiff requests a fifth extension of time, from July 14, 2020 to August 14, 2020, in order to file
13 her opposition. (Id.)

14 In opposition, Defendants argue that Plaintiff has failed to comply with the express
15 requirements set forth in the Court's June 18, 2020 order, as she did not describe her attempts to
16 access the law library at her institution, the response of prison officials, or any other steps that she
17 took during that time, including what legal research she still needed to complete. (ECF No. 87.)
18 In addition, Defendant argues that Plaintiff misled the Court in her previous requests for
19 extension of time because the requests were based on false and misleading information. While
20 Plaintiff claims that she was hospitalized for a month, between May and June 1, 2020, Defendants
21 attach Plaintiff's "External Movement History" showing that Plaintiff was hospitalized for a total
22 of only eight days between March 1, 2020 and July 31, 2020. (ECF No. 87-1, p. 4.) Defendants
23 reiterate that Plaintiff is a vexatious litigant under California law, and the request for a further
24 extension of time should be denied. Defendants also argue that because the motion for an order
25 requiring Plaintiff to post security stands unopposed, the Court should grant the motion. (ECF
26 No. 87.)

27 As noted above, Plaintiff received pro bono legal assistance in the original research,
28 drafting, and filing of her opposition to Defendants' motion. (ECF No. 77.) The Court explained

1 in the order granting Plaintiff's fourth extension of time that the opposition was stricken from the
2 record based on purely procedural grounds, specifically because Plaintiff had not properly signed
3 the opposition or submitted it as a paper—rather than electronic—filing. (ECF No. 84, p. 2.) The
4 Court further noted that Plaintiff has not explained why she requires such extensive law library
5 access for the purpose of researching and completing an opposition that was already researched,
6 completed, and filed more than a year ago. (See ECF No. 66.)

7 Plaintiff's fifth motion for extension of time is nearly identical to her fourth request.
8 Indeed, Plaintiff again references her hospitalization from May 1 to June 1, 2020, but this has no
9 bearing on the instant request, as Plaintiff's hospitalization had ended well before the Court
10 granted Plaintiff's fourth extension of time. (See ECF No. 84 (issued June 18, 2020).) Further, it
11 appears from the External Movement History provided by Defendants that Plaintiff was only
12 hospitalized between March 9, 2020 through March 14, 2020, and from May 22, 2020 through
13 May 26, 2020. (ECF No. 87-1, p. 4.)

14 Finally, Plaintiff makes no effort to address the issues the Court previously identified,
15 failing again to explain why she requires additional time to perform research in the law library,
16 what efforts she has made to access the law library, and what additional steps are required for the
17 completion of her opposition.

18 The deadline for Plaintiff to re-file her opposition expired more than five months ago.
19 Plaintiff may not seek unlimited extensions of time for a matter that should require no more than
20 copying, signing, and mailing a brief that was completed over a year ago. **In addition, in light of**
21 **Plaintiff's apparent misrepresentations to the Court regarding her hospitalizations, Plaintiff**
22 **is admonished that future requests for extension of time for any deadline in this matter may**
23 **be held to a narrower interpretation of what constitutes good cause beginning with the first**
24 **request.** Accordingly, the Court finds that Plaintiff has failed to demonstrate good cause for the
25 instant request, and Plaintiff's fifth motion for extension of time is denied.

26 **III. Defendants' Motion for Order Requiring Plaintiff to Post Security**

27 **A. Introduction**

28 Defendants seek to have Plaintiff ordered to post security under Local Rule 151(b) or, in

1 the alternative, dismiss this case on the basis that Plaintiff has no reasonable probability of
2 prevailing in this litigation. (ECF No. 60.) As discussed above, despite being granted numerous
3 extensions of time, Plaintiff has failed to properly or timely file an opposition, and the motion is
4 therefore deemed submitted. Local Rule 230(l).

5 Local Rule 151(b) provides:

6 On its own motion or on motion of a party, the Court may at any time order a
7 party to give a security, bond, or undertaking in such amount as the Court may
8 determine to be appropriate. The provisions of Title 3A, part 2, of the California
9 Code of Civil Procedure, relating to vexatious litigants, are hereby adopted as a
10 procedural Rule of this Court on the basis of which the Court may order the
giving of a security, bond, or undertaking, although the power of the Court shall
not be limited thereby.

11 **B. Defendants' Request for Judicial Notice**

12 Defendants request that the Court take judicial notice of the following court dockets,
13 documents, orders, and proceedings:

- 14 1. Gaines v. Lewis, Madera County Superior Court Case No. MCV074759 Docket; Order
15 and Judgment Dismissing Plaintiff's Complaint, September 7, 2018.
- 16 2. Gaines v. Greenberg, Northern District of California Case No. 3:17-cv-05720-RS Docket;
17 Order and Judgment Dismissing Plaintiff's Complaint for failure to state a claim,
18 November 21, 2017, ECF Nos. 14–15.
- 19 3. Gaines v. Greenberg, Alameda County Superior Court Case No. RG17854239 Docket;
20 Order and Judgment Dismissing Plaintiff's Complaint, October 23, 2017.
- 21 4. Gaines v. Lwin, et al., Eastern District of California Case No. 1:16-cv-00168 Docket;
22 Judgment, December 15, 2016, ECF Nos. 17, 25–26.
- 23 5. Gaines v. Lwin, et al., Ninth Circuit Case No. 17-15142 Docket, Memorandum of USCA
24 Affirming District Court, October 3, 2017, ECF No. 13; Mandate of USCA, October 25,
25 2017, ECF No. 14.

26 Judicial notice may be taken of undisputed matters of public record, including documents on file
27 in federal or state courts. Fed. R. Evid. 201; Harris v. Cty. of Orange, 682 F.3d 1126, 1131–32
28 (2012). Accordingly, Defendants' request for judicial notice, (ECF No. 60-5), is GRANTED.

1 **C. Analysis**

2 **1. Legal Standards – Federal Law**

3 Local Rule 151(b) is a procedural rule which allows courts in this district to impose
4 payment of a security upon a finding of vexatiousness. However, Defendants cite only to the
5 state statutory definition of vexatiousness to support a finding that Plaintiff is a vexatious litigant.
6 See Smith v. Officer Sergeant, 2016 WL 6875892, at *2 (E.D. Cal., Nov. 21, 2016) (the court
7 looks to federal law, not state law, to define a vexatious litigant”); see also Cranford v. Crawford,
8 2016 WL 4536199, at *3 (E.D. Cal., Aug. 31, 2016) (“ . . . the state statutory definition of
9 vexatiousness is not enough to find a litigant vexatious in federal court.”); Goolsby v. Gonzales,
10 2014 WL 2330108, at *1-2 (E.D. Cal., May 29, 2014) report and recommendation adopted 2014
11 WL 3529998 (E.D. Cal., July 15, 2014) (“Under federal law, however, the criteria under which a
12 litigant may be found vexatious is much narrower. While Local Rule 151(b) directs the Court to
13 look to state law for the *procedure* in which a litigant may be ordered to furnish security, this
14 Court looks to federal law for the definition of vexatiousness, and under federal law, the standard
15 for declaring a litigant vexatious is more stringent. . . . [T]he mere fact that a plaintiff has had
16 numerous suits dismissed against him is an insufficient ground upon which to make a finding of
17 vexatiousness.”).

18 This Court has inherent power under the All Writs Act, 28 U.S.C. § 1651 to enter pre-
19 filing orders against vexatious litigants, De Long v. Hennessey, 912 F.2d 1144, 1147 (9th Cir.
20 1990); Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007), and to sanction
21 parties or their attorneys for improper conduct. Chambers v. Nasco, Inc., 501 U.S. 32, 43–46
22 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980); Fink v. Gomez, 239 F.3d 989,
23 991 (9th Cir. 2001). This sanction authority is discretionary, Air Separation, Inc. v. Underwriters
24 at Lloyd’s of London, 45 F.3d 288, 291 (9th Cir. 1995), and ““extends to a full range of litigation
25 abuses,”” Fink, 239 F.3d at 992 (quoting Chambers, 501 U.S. at 46–47).

26 Sanctions may be imposed under a court’s inherent authority on “parties appearing before
27 it for acting in bad faith, vexatiously, wantonly, or for oppressive reasons,” Sassower v. Field,
28 973 F.2d 75, 81-82 (2d Cir. 1992), cert. denied, 507 U.S. 1043 (1993), as well as for delaying or

1 disrupting litigation, or for taking actions in the litigation for an improper purpose—all of which
2 are abusive of the judicial process, Chambers, 501 U.S. at 43–45. However, because of their very
3 potency, inherent powers must be exercised with restraint and discretion. Id., at 44. The litigant
4 to be sanctioned must be found to have engaged either “in bad faith or willful disobedience of a
5 court’s order,” id., at 46–47, or conduct which constitutes, or is tantamount to, bad faith,
6 Roadway Express, 447 U.S. at 767; Miller v. City of Los Angeles, 661 F.3d 1024, 1036 (9th Cir.
7 2011); Gomez v. Vernon, 255 F.3d 1118, 1134 (9th Cir. 2001), cert. denied, 534 U.S. 1066
8 (2001); Fink, at 993–94.

9 “Bad faith” means a party or counsel acted “vexatiously, wantonly or for oppressive
10 reasons.” Chambers, 501 U.S. at 45–46. Bad faith “does not require that the legal and factual
11 basis for the action prove totally frivolous; where a litigant is substantially motivated by
12 vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar assessment
13 of attorneys’ fees.” Mark Ind., Ltd. v. Sea Captain’s Choice, Inc., 50 F.3d 730, 732 (9th Cir.
14 1995) (internal quotation marks and citations omitted).

15 Under federal law, litigiousness alone is insufficient to support a finding of vexatiousness.
16 See Moy v. United States, 906 F.2d 467, 470 (9th Cir. 1990) (the plaintiff’s claims must not only
17 be numerous, but also be patently without merit). The focus is on the number of suits that were
18 frivolous or harassing in nature, rather than merely on the number of suits that were adversely
19 decided. See De Long, 912 F.2d at 1147–48 (before a district court issues a pre-filing injunction
20 against a *pro se* litigant, the court must find the litigant’s actions frivolous or harassing). The
21 Ninth Circuit has defined vexatious litigation as “without reasonable or probable cause or excuse,
22 harassing, or annoying.” Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 886 (9th Cir. 2012).
23 Accordingly, the mere fact that a party has had numerous prior suits dismissed is insufficient to
24 find him vexatious under Ninth Circuit precedent.

25 2. Discussion

26 Defendants argue that because Plaintiff meets California’s vexatious litigant definition,
27 this Court should find that she is a vexatious litigant and require Plaintiff to post security. (ECF
28 No. 60-1, p. 10.) Defendants rely almost exclusively on California law and do not address federal

1 substantive law requirements to show bad faith or willful disobedience of a court's order by
2 Plaintiff. (See ECF No. 60-1, pp. 2–5.) The only evidence and arguments submitted by
3 Defendants show that Plaintiff has filed a handful of lawsuits which have been dismissed for
4 various reasons over the years. (Id. at 5.)

5 Of the cases cited by Defendants, only two were dismissed with prejudice for Plaintiff's
6 failure to state a cognizable claim. (Gaines v. Greenberg, N.D. Cal. Case No. 3:17-cv-05720-RS;
7 Gaines v. Lwin, et al., E.D. Cal. Case No. 1:16-cv-00168.) One case was dismissed without
8 prejudice after Plaintiff filed a motion for voluntary dismissal. (Gaines v. Greenberg, Alameda
9 County Superior Court Case No. RG17854239.) One case was dismissed for Plaintiff's failure to
10 file an amended complaint within the time allowed after the court sustained Defendants' demurrer
11 with leave to amend. (Gaines v. Lewis, Madera County Superior Court Case No. MCV074759.)
12 The final case cited was an appeal where the Ninth Circuit Court of Appeals summarily affirmed
13 the district court's order dismissing Plaintiff's complaint for failure to state a claim. (Gaines v.
14 Lwin, 9th Cir. Case No. 17-15142.)

15 To sanction a litigant under the court's inherent powers, the Court must make a specific
16 finding of "bad faith or conduct tantamount to bad faith." Fink, 239 F.3d at 994. Voluntary
17 dismissal, either of a claim or an entire action, is not tantamount to bad faith. Failure to file an
18 amended complaint in compliance with a court's order also does not equate to bad faith.
19 Defendants have not argued, and the Court has no basis before it to make a specific finding of bad
20 faith, or to declare Plaintiff a vexatious litigant under federal law.

21 Accordingly, Defendants have failed to meet their burden to demonstrate that Plaintiff is a
22 vexatious litigant under the applicable federal standards to warrant requiring security under Local
23 Rule 151(b). Based on the foregoing, the Court recommends denying Defendants' motion. The
24 Court also recommends doing so without prejudice as Defendants may choose to file a motion
25 requesting that Plaintiff be declared a vexatious litigant under federal standards. Because
26 Defendants have not argued that Plaintiff is a bad faith litigant under federal law, the Court does
27 not comment on the merits of such a motion.

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1 **IV. Conclusion and Recommendation**

2 As discussed above, Plaintiff's motion for a fifth extension of time to file her opposition,
3 (ECF No. 85), is HEREBY DENIED.

4 Furthermore, the Court HEREBY RECOMMENDS that Defendants' motion for order
5 requiring Plaintiff to post security, (ECF No. 60), be denied without prejudice.

6 These Findings and Recommendations will be submitted to the United States District
7 Judge assigned to the case, under the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**
8 **days** after being served with these Findings and Recommendations, the parties may file written
9 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
10 Findings and Recommendations." The parties are advised that failure to file objections within the
11 specified time may result in the waiver of the "right to challenge the magistrate's factual
12 findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
13 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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15 IT IS SO ORDERED.

16 Dated: August 6, 2020

17 /s/ Barbara A. McAuliffe
18 UNITED STATES MAGISTRATE JUDGE
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