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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MARY LEE GAINES,  
Plaintiff,  
v.  
OFFICER BEAVER,  
Defendant.

Case No.: 1:16-cv-01689-LJO-JLT (PC)

**FINDINGS AND RECOMMENDATION  
TO DENY DEFENDANT’S MOTION FOR  
ORDER REQUIRING PLAINTIFF TO POST  
SECURITY**

(Doc. 42)

Defendant Beavers moves the Court for an order requiring Plaintiff to post security pursuant to Local Rule 151(b). (Doc. 42.) Plaintiff has not filed an opposition or statement of non-opposition to Defendant’s motion, and the time to do so has passed. Local Rule 230(l). The Court deems the motion submitted. For the reasons set forth below, the Court RECOMMENDS that Defendant’s motion be DENIED.

**I. LEGAL STANDARD**

“The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants.” *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (citation omitted). Such sanctions seek to restrain the “[f]lagrant abuse of the judicial process” that “enables one person to preempt the use of judicial time that properly could be used to consider ... meritorious claims.” *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990). “However, such pre-filing orders are an extreme remedy that should rarely

1 be used.” *Molski*, 500 F.3d at 1057. Courts should not issue these orders “with undue haste” or  
2 before “cautious review of the pertinent circumstances,” since “such sanctions can tread on a  
3 litigant’s due process right of access to the courts.” *Id.*

4 Per Local Rule 151(b), “[t]he provisions of Title 3A, part 2, of the California Code of  
5 Civil Procedure, relating to vexatious litigants, are ... adopted as a procedural Rule of this Court.”  
6 Under Title 3a, in relevant part, “a defendant may move the court, upon notice and hearing, for an  
7 order requiring the plaintiff to furnish security.... The motion ... shall be based upon the ground,  
8 and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a  
9 reasonable probability that he or she will prevail in the litigation against the moving defendant.”  
10 Cal. Civ. Proc. Code § 391.1.

11 Under Local Rule 151(b), the Court looks to state law for the *procedures* to use when  
12 deciding whether to order a plaintiff to furnish “a security, bond, or undertaking.” The Court  
13 looks to federal substantive law to determine whether a litigant is “vexatious.” *See, e.g., Smith v.*  
14 *Officer Sergeant*, No. 2:15-cv-0979-GEB-DBP, 2016 WL 6875892, at \*2 (E.D. Cal. 2016) (“local  
15 rule and Ninth Circuit decisions demonstrate that the court looks to federal law, not state law, to  
16 define a vexatious litigant”); *Cranford v. Crawford*, No. 1:14-cv-00055-AWI-MJS, 2016 WL  
17 4536199, at \*3 (E.D. Cal. 2016) (“state statutory definition of vexatiousness is not enough to find  
18 a litigant vexatious in federal court”); *Goolsby v. Gonzales*, No. 1:11-cv-00394-LJO-GSA, 2014  
19 WL 2330108, at \*1 (E.D. Cal. 2014) (“While Local Rule 151(b) directs the Court to look to state  
20 law for the *procedure* in which a litigant may be ordered to furnish security, this Court looks to  
21 federal law for the definition of vexatiousness, and under federal law, the standard for declaring a  
22 litigant vexatious is more stringent.”)

23 Under federal law, the Court must make specific findings of frivolousness or harassment  
24 to declare a litigant vexatious. *See Molski*, 500 F.3d at 1058. “To make such a finding, the district  
25 court needs to look at both the number and content of the filings as indicia of the frivolousness of  
26 the litigant’s claims.” *De Long*, 912 F.2d at 1148 (citations and internal quotation marks omitted).  
27 In other words, “[a]n injunction cannot issue merely upon a showing of litigiousness. The  
28 plaintiff’s claims must not only be numerous, but also be patently without merit.” *Moy v. United*

1 *States*, 906 F.2d 467, 470 (9th Cir. 1990).

## 2 **II. DISCUSSION**

### 3 **A. Plaintiff's Prior Lawsuits**

4 Per Defendant's request, (Doc. 42-2), the Court takes judicial notice of five of Plaintiff's  
5 prior lawsuits:<sup>1</sup> (1) *Gaines v. Lewis*, No. MCV074759 (Cal. Super. Ct., Madera Cty.); (2) *Gaines*  
6 *v. Greenberg*, No. 17-cv-05720-RS (N.D. Cal.); (3) *Gaines v. Greenberg*, No. RG17854239 (Cal.  
7 Super. Ct., Alameda Cty.); (4) *Gaines v. Lwin*, No. 1:16-cv-00168-LJO-MJS (E.D. Cal.); and, (5)  
8 *Gaines v. Lwin*, No. 17-15142 (9th Cir.).

9 In *Gaines v. Lewis*, No. MCV074759, the court dismissed Plaintiff's complaint without  
10 prejudice for her failure to file an amended complaint after the court sustained the defendants'  
11 demurrer. (Doc. 42-1 at 4; Doc. 42-2 at 5-6.) In *Gaines v. Greenberg*, No. 17-cv-05720-RS, the  
12 court dismissed Plaintiff's complaint, in part, because it was barred by the "favorable termination  
13 rule" of *Heck v. Humphrey*, 512 U.S. 477 (1994). 2017 U.S. Dist. LEXIS 192901, at \*4 (N.D.  
14 Cal. 2017). The Court stated that Plaintiff may refile some of her claims "if she can show that her  
15 convictions have been invalidated." *Id.* at \*4-5.

16 In *Gaines v. Greenberg*, No. RG17854239, the court dismissed Plaintiff's case without  
17 prejudice after Plaintiff filed a request for dismissal. (Doc. 42-1 at 4; Doc. 42-2 at 24.) Finally, in  
18 *Gaines v. Lwin*, No. 1:16-cv-00168-LJO-MJS, the Court dismissed Plaintiff's complaint for  
19 failure to state a claim of deliberate indifference to Plaintiff's safety. 2016 U.S. Dist. LEXIS  
20 128356, at \*5-6 (E.D. Cal. 2016). There, Plaintiff alleged that the defendant "pushed her along on  
21 a walker too quickly," causing her to fall and injure herself. *Id.* The Court concluded that the  
22 allegations may assert carelessness or negligence but not a cognizable Eighth Amendment claim.  
23 *Id.* at \*6. The Ninth Circuit affirmed the district court's dismissal in *Gaines v. Lwin*, No. 17-  
24 15142, 698 F. App'x 352, 352 (9th Cir. 2017).

### 25 **B. Defendant's Motion**

26 As explained above, the Court must find that Plaintiff's prior claims were frivolous or  
27 harassing to declare her a vexatious litigant. *See Molski*, 500 F.3d at 1058. A complaint is

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<sup>1</sup> The Court may take judicial notice of court records. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 frivolous “where it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S.  
2 319, 325 (1989) (defining “frivolous” under the *in forma pauperis* statute, 28 U.S.C. § 1915); *see*  
3 *also Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (same). But, a complaint that fails to  
4 state a claim under Federal Rule of Civil Procedure 12(b)(6) is not *per se* frivolous, *id.* at 331, nor  
5 is a complaint that is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). *Washington v. Los*  
6 *Angeles Cty. Sheriff’s Dep’t*, 833 F.3d 1048, 1055 (9th Cir. 2016).

7         In *Gaines v. Lwin*, Plaintiff states an arguable claim; the Court simply found that it failed  
8 to rise to the level of a constitutional violation. 2016 U.S. Dist. LEXIS 128356, at \*6. In *Gaines*  
9 *v. Greenberg*, No. 17-cv-05720-RS, the Court dismissed Plaintiff’s complaint, in part, because it  
10 was barred by *Heck*, 2017 U.S. Dist. LEXIS 192901, at \*4; and, the Ninth Circuit affirmed. 698  
11 F. App’x at 352. None of these three cases were dismissed because they were frivolous.

12         Likewise, neither *Gaines v. Lewis* nor *Gaines v. Greenberg*, No. RG17854239, were  
13 dismissed because they were frivolous. The California Superior Court dismissed the former  
14 because Plaintiff failed to file an amended complaint, and it dismissed the latter because Plaintiff  
15 filed a notice of voluntary dismissal. (Doc. 42-1 at 4; Doc. 42-2 at 5-6, 24.)

16         In her motion, Defendant utilizes state law to argue that Plaintiff is a vexatious litigant.  
17 (See Doc. 42-1 at 3-4.) Under California law, a litigant is vexatious if, “[i]n the immediately  
18 preceding seven-year period[, she] has commenced, prosecuted, or maintained in propria persona  
19 at least five litigations other than in a small claims court that have been ... finally determined  
20 adversely to the person....” Cal. Civ. Proc. Code § 391(b)(1). However, as explained above, the  
21 Court looks to federal law to determine whether Plaintiff is vexatious, *see Smith*, 2016 WL  
22 6875892, at \*2; and, under federal law, “the standard for declaring a litigant vexatious is more  
23 stringent.” *Goolsby v. Gonzales*, 2014 WL 2330108, at \*1 (E.D. Cal. 2014).

24         Based on the five lawsuits above, the Court does not find that Plaintiff’s litigation efforts  
25 have yet risen to the level of vexatious. None of the above cases were dismissed because they  
26 were frivolous, and none reveal an intention to harass. *See Molski*, 500 F.3d at 1058. Plaintiff has  
27 not filed numerous complaints, and no court has found that any of her complaints were patently  
28 without merit. *See Moy*, 906 F.2d 467, 470 (9th Cir. 1990). District courts should issue orders

1 sanctioning vexatious litigants only in rare circumstances, *see Molski*, 500 F.3d at 1057, and the  
2 Court declines to do so here. Because the Court does not find that Plaintiff is vexatious, the Court  
3 does not reach the issue of whether there is a reasonable probability that she will prevail in this  
4 case.

5 **III. CONCLUSION AND RECOMMENDATION**

6 For the reasons set forth above, the Court **RECOMMENDS** that Defendant’s motion,  
7 (Doc. 42), be **DENIED**.

8 These Findings and Recommendations will be submitted to the United States District  
9 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**  
10 of the date of service of these Findings and Recommendations, Defendant may file written  
11 objections with the Court. The document should be captioned, “Objections to Magistrate Judge’s  
12 Findings and Recommendations.” Defendant’s failure to file objections within the specified time  
13 may result in waiver of her rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.  
14 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

15 IT IS SO ORDERED.

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17 Dated: December 10, 2019

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

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