

1 September 2, 2015 be dismissed without prejudice to their re-filing; and (4) plaintiff's remaining
2 claims and defendants be dismissed for failure to state a cognizable claim. *Smith I*, Doc. No. 16.
3 The Court adopted those findings and recommendations in full on June 20, 2018, and plaintiff's
4 misjoined claims were opened as separate actions. (Doc. No. 2.) Accordingly, the instant action
5 was opened as *Smith v. Weiss*, Case No. 1:18-cv-00852-NONE-BAM (PC), and proceeds against
6 Defendants E. Weiss, O. Hurtado, and F. Zavleta with respect to the alleged excessive force
7 incident of November 15, 2013.

8 On July 8, 2019, Defendants Hurtado, Weiss, and Zavleta filed an answer to the
9 complaint. (Doc. No. 19.) The magistrate judge then issued a discovery and scheduling order on
10 July 15, 2019. (Doc. No. 21.) On September 26, 2019, plaintiff moved to amend the complaint
11 and lodged a second amended complaint. (Doc. No. 25.) The magistrate judge denied the motion
12 to amend on October 1, 2019, finding that it was brought in bad faith. (Doc. No. 27.)

13 On August 29, 2019, plaintiff filed a motion for a protective order seeking to quash his
14 video deposition. (Doc. No. 23.) On October 15, 2019, plaintiff filed a motion for relief from
15 judgment/order challenging the magistrate judge's order denying plaintiff's motion amend by
16 which he sought to file a second amended complaint. (Doc. No. 28.) On March 2, 2020, the
17 magistrate judge denied the two motions and directed the parties to meet and confer, and agree on
18 a date for plaintiff's deposition, to be taken on or before April 30, 2020. The discovery deadline
19 was extended to April 30, 2020, and the dispositive motion was extended to July 1, 2020. (Doc.
20 No. 38.)

21 On March 30, 2020, plaintiff filed the instant motion seeking reconsideration of the
22 magistrate judge's March 2, 2020 order, and renewed his motion for protective order to quash
23 or stay his deposition pending the court's resolution of his motion for reconsideration. (Doc. No.
24 41.) Defendants have not yet had an opportunity to file a response, however, the Court finds a
25 response is unnecessary. Plaintiff's pending motions are deemed submitted. Local Rule 230(l).

26 **II. Motion for Reconsideration**

27 Pursuant to Local Rule 303, a party may seek reconsideration of a magistrate judge's
28 ruling by filing a request for reconsideration by a Judge and serve the request on the magistrate

1 judge and all parties, specifically designating the ruling, or part thereof, objected to and the basis
2 for that objection. Local Rule 303(c). The applicable standard of review for such a request is the
3 “clearly erroneous or contrary to law” standard set forth in 28 U.S.C. § 636(b)(1)(A). *See* Fed. R.
4 Civ. P. 72(a).

5 **A. Denial of Motion for Protective Order**

6 In his motion for reconsideration, plaintiff contends that the magistrate judge’s denial of
7 his motion for protective order, which requested that defendants be barred from taking plaintiff’s
8 deposition absent a showing of good cause, constitutes clear error. Primarily, plaintiff argues that
9 a deposition in this matter is futile, as he is entitled to summary judgment as a matter of law based
10 on his pleadings and a “Crime Report” regarding the November 15, 2013 incident placed at issue
11 in this action. Plaintiff therefore argues that his deposition is unnecessary and merely a fishing
12 expedition, meant to harass him and to force him to continue being housed at California State
13 Prison – Corcoran, all of which constitutes good cause for the issuance of the protective order he
14 requests. (Doc. No. 41, pp. 3–4.)

15 The magistrate judge originally construed plaintiff’s motion as an argument that he should
16 not be required to participate in his deposition because he did not have his legal files to produce
17 the documents requested or to prepare for his deposition, rather than a wholesale refusal to
18 engage in his deposition. (Doc. No. 38, p. 4.) However, as set forth in his motion for
19 reconsideration, plaintiff now appears to be refusing to participate in any deposition, on the
20 ground that he is entitled to summary judgment on the pleadings, and that any discovery
21 conducted in this action would therefore be futile. (Doc. No. 41.)

22 Plaintiff is obviously incorrect. Plaintiff’s belief that the allegations presented in his
23 pleadings, without more, should result in the granting of summary judgment in his favor, does not
24 relieve him of the obligation to participate in discovery as required by the Federal Rules of Civil
25 Procedure. Plaintiff brought this civil action and defendants are clearly entitled to take his
26 deposition. Plaintiff is simply unreasonably refusing to cooperate in that regard. Although
27 plaintiff should be provided with his legal documents to allow him to adequately prepare for his
28 deposition, there is no indication in the instant motion that a lack of legal documentation or

1 preparation prevented plaintiff from being deposed. Instead, plaintiff argues, without any
2 support, that the taking of his deposition would be futile and constitute harassment. The court
3 rejects that argument in its entirety. If plaintiff continues to fail to cooperate with discovery, this
4 action may be subject to terminating sanctions due to plaintiff's failure to obey a court order and
5 failure to cooperate in discovery. *See* Fed. R. Civ. P. 37(b)(2)(a)(v).

6 Plaintiff's mere disagreement with the magistrate judge's ruling on his request for the
7 issuance of a protective order, as discussed above, is similarly not sufficient to meet the "clearly
8 erroneous or contrary to law" standard set forth in 28 U.S.C. § 636(c). Plaintiff's request for
9 reconsideration of this ruling will therefore be denied.

10 **B. Denial of Motion for Relief from Judgment/Order**

11 In support of his request for reconsideration of the magistrate judge's denial of his motion
12 for relief from judgment/order, plaintiff raises two main arguments. First, plaintiff contends that
13 both the district judge and the magistrate judge assigned to this case are biased and should not
14 preside over the instant action. Plaintiff then argues that any deficiencies in his pleadings are a
15 result of the actions of defendants and their counsel in obstructing his access both to the courts
16 and to adequate nutrition. (Doc. No. 41.)

17 On these grounds, plaintiff requests relief in the form of a protective order prohibiting
18 defendants from conducting any deposition of him, by video or otherwise, and granting plaintiff
19 permission to lodge a first amended complaint to include a viable claim of conspiracy against
20 defendants pursuant to Federal Rule of Civil Procedure 22(a). (*Id.* at 6.)

21 **1. Alleged Bias of Assigned Judges**

22 In this motion, plaintiff appears to argue that U.S. District Judge Lawrence J. O'Neill, the
23 district judge previously assigned to the instant action, was prohibited from adjudicating this
24 action (in addition to *Smith v. Chanelo* and the subsequent severed actions, discussed above) due
25 to his bias against plaintiff and pursuant to 18 U.S.C. § 451.¹ Plaintiff claims that Judge O'Neill

26 ¹ The Court notes that there is no 18 U.S.C. § 451. Plaintiff may have intended to cite to 28
27 U.S.C. § 455 regarding "[d]isqualification of justice, judge, or magistrate judge," however the
28 lack of an accurate citation to statutory authority does not change the Court's analysis of this
issue.

1 was a witness to alleged misconduct by defense counsel in one of plaintiff's prior actions, and
2 therefore was privy to disputed material facts that were relevant to plaintiff's later cases. (Doc.
3 No. 41, p. 5.)

4 Plaintiff further argues that U.S. Magistrate Judge Barbara A. McAuliffe is also biased,
5 and alleges that the referral of his severed actions to her and Judge O'Neill were retaliatory, as
6 evidenced by Judge McAuliffe's rulings in the severed actions. Plaintiff contends that Judge
7 McAuliffe has repeatedly been made aware, through plaintiff's pleadings, of the conspiracy
8 between defendants and their counsel to deny and violate plaintiff's rights, but has nonetheless
9 repeatedly failed to act and has even gone so far as to act as counsel for defendants on several
10 occasions in the various actions. Plaintiff argues that this establishes a bias by Judge McAuliffe
11 that is in violation of federal law. (*Id.*)

12 A magistrate judge must disqualify himself or herself if their "impartiality might be
13 reasonably questioned," 28 U.S.C. § 455(a), or if the magistrate judge "has a personal bias or
14 prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the
15 proceeding," 28 U.S.C. § 455(b)(1). "[J]udicial rulings or information acquired by the court in its
16 judicial capacity will rarely support recusal." *United States v. Johnson*, 610 F.3d 1138, 1147 (9th
17 Cir. 2010) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)). The objective test for
18 determining whether recusal is required is whether a reasonable person with knowledge of all the
19 facts would conclude that the judge's impartiality might reasonably be questioned. *Johnson*, 610
20 F.3d at 1147 (quotation marks and citation omitted); *Pesnell v. Arsenault*, 543 F.3d 1038, 1043
21 (9th Cir. 2008). "Adverse findings do not equate to bias," *Johnson*, 610 F.3d at 1147.

22 To the extent plaintiff is requesting recusal of District Judge O'Neill, that request is
23 denied as moot, since Judge O'Neill is no longer an active district judge nor is he now presiding
24 over this action.

25 As to Judge McAuliffe, as discussed above, plaintiff's primary objection to Judge
26 McAuliffe's assignment to this action is that she has repeatedly issued orders ruling against him.
27 However, this is not sufficient to show personal bias or prejudice by the assigned judicial officer.
28 Plaintiff's belief that Judge McAuliffe is biased against him and that she has acted as counsel on

1 behalf of defendants does not make recusal either necessary or appropriate under § 455. *Clemens*
2 *v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 428 F.3d 1175, 1180 (9th Cir. 2005) (noting that
3 speculative allegations of bias are not sufficient to warrant recusal). As such, any request for
4 recusal with respect to Magistrate Judge McAuliffe will also be denied.

5 **2. Access to Courts and Adequate Nutrition**

6 Plaintiff next argues that it is a fact that defendants and their counsel have repeatedly
7 obstructed his access to the courts by either actively participating in the destruction of his legal
8 property or allowing prison staff to repeatedly deny him access to the prison law library. Further,
9 plaintiff alleges that his cognitive reasoning ability has been impaired by denials of adequate
10 nutrition and medical care, and therefore any deficiencies in his complaint pursuant to Federal
11 Rule of Civil Procedure 15 and 22(a) regarding defendants' conspiracy to deny and violate his
12 constitutional rights is excusable neglect on his part. (*Id.* at 5–6.) Plaintiff alleges that he became
13 extremely sick while housed at CSP-Corcoran, and as a result he continues to suffer from an
14 extreme inability to fully concentrate. (*Id.* at 7.)

15 The Court finds no merit to these allegations advanced by plaintiff. Exhibits attached to
16 plaintiff's complaint reveal that he filed an inmate administrative appeal on November 4, 2019,
17 alleging that he had been denied physical access to the facility law library since his arrival at the
18 institution on June 28, 2019. (*Id.* at 8.) However, in the First Level response to his appeal, it
19 appears that the law library records revealed that plaintiff was granted physical access to the law
20 library on September 18, September 25, and October 2, 2019, but that plaintiff refused the access
21 offered to him. Thereafter, plaintiff physically attended the law library on November 20 and
22 December 11, 2019, and January 8, 2020. (*Id.* at 11.) Aside from plaintiff's unsupported
23 allegations to the contrary, it appears to the Court that plaintiff has not been denied access to the
24 law library at his institution of confinement.

25 Plaintiff has also attached patient education materials regarding "Anemia, Nonspecific,"
26 apparently in support of his contention that he has been denied access to adequate nutrition, thus
27 impairing his ability to litigate this action. (*Id.* at 14–15.) However, the attached document does
28 not specify the cause of plaintiff's anemia (at least nine common causes of anemia are listed, only

1 one of which references nutrition). Moreover, plaintiff's health conditions, which are being
2 raised by him for the first time in the instant motion, do not provide a basis for a finding that the
3 magistrate judge's ruling was "clearly erroneous or contrary to law."

4 **III. Motion for Protective Order or Stay of Discovery**

5 Finally, plaintiff renews his motion for a protective order, or for a stay of discovery (his
6 deposition) on the grounds that his motion for reconsideration is pending before the court for
7 decision. (Doc. No. 41, p. 17.) Plaintiff states that on March 11, 2020, pursuant to the magistrate
8 judge's order, defense counsel contacted plaintiff via telephone and notified plaintiff of counsel's
9 intent to conduct a deposition of plaintiff on April 16, 2020. Plaintiff informed defense counsel
10 of his intent to file a motion for a protective order. Defense counsel offered to assist in locating
11 plaintiff's legal documents for forwarding to plaintiff's current institution of confinement, also as
12 directed by the magistrate judge's order, but plaintiff instructed counsel that this would be futile,
13 because plaintiff had been informed by prison officials that he would be sent back to Pelican Bay
14 State Prison, where plaintiff's legal documents are apparently already located. Plaintiff informed
15 defense counsel that he would prefer to address this issue once he was back at Pelican Bay and, if
16 needed, plaintiff would request defense counsel's assistance from there. Defense counsel agreed,
17 at plaintiff's request, to immediately forward to him a conformed copy of the "Crime Report"
18 generated on November 15, 2013. (*Id.* at 21.)

19 Because the Court is resolving plaintiff's motion for reconsideration in this order,
20 plaintiff's request for a protective order or for a stay of discovery on the basis that his motion
21 remains pending before the court for decision will be denied as moot.

22 Plaintiff further argues that the issuance of a protective order is warranted because the
23 Ninth Circuit has previously found good cause to deny discovery where a complaint did not raise
24 factual issues that required discovery for its resolution, citing *Rae v. Union Bank*, 725 F.2d 478,
25 487 (9th Cir. 1984). To the extent plaintiff is again arguing that defendants should not be
26 permitted to take his deposition on the ground that his pleadings provide sufficient evidence to
27 warrant the granting of summary judgment in his favor, the Court remains unpersuaded. The
28 cited case is inapplicable to the instant action. In *Rae* the Ninth Circuit concluded that a stay of

1 discovery was appropriate where the district court ultimately found that the plaintiff's federal
2 claims were wholly insubstantial and frivolous and dismissed them without leave to amend. *Rae*,
3 725 F.2d at 479. At this juncture, in this case, a ruling of summary judgment solely on the basis
4 of the pleadings would be premature since discovery is warranted in light of the factual
5 allegations of the complaint.

6 **IV. Conclusion**

7 As the magistrate judge warned in the order denying plaintiff's motions for a protective
8 order and for relief from judgment/order, plaintiff's repetitive, misnamed, overlapping, and
9 otherwise harassing filings waste this court's limited resources and delay the resolution of this
10 action. The instant motion, wherein plaintiff is again attempting to abdicate his responsibility to
11 participate in discovery and to renew his repeatedly rejected request to file a further amended
12 complaint in this action, is no exception. Plaintiff is once again warned that the filing of
13 additional baseless motions, including motions for reconsideration which merely repeat
14 arguments already raised before the magistrate judge, will likely subject him to the imposition of
15 sanctions, up to and including terminating sanctions. Furthermore, plaintiff's failure to cooperate
16 in the taking of his deposition may also result in the imposition of terminating sanctions, due to
17 plaintiff's failure to obey a court order and failure to cooperate in discovery.

18 For the reasons stated above, IT IS HEREBY ORDERED as follows:

- 19 1. Plaintiff's motions for reconsideration and motion for protective order, (Doc. No 41),
20 are DENIED;
- 21 2. Plaintiff's deposition shall be taken on or before **April 30, 2020**; and
- 22 3. This matter is referred back to the assigned magistrate judge for further proceedings
23 consistent with this order.

24 IT IS SO ORDERED.

25 Dated: April 3, 2020

26 
UNITED STATES DISTRICT JUDGE