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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DION SCOTT BUCKELEW,  
  
Plaintiff,  
  
v.  
  
WILLIAM D. GORE; CAPTAIN  
BUCHANAN; CAPTAIN HAYES,  
  
Defendants.

Case No.: 21cv810-LL (NLS)

**REPORT AND  
RECOMMENDATION FOR ORDER:**

**(1) GRANTING IN PART AND  
DENYING IN PART DEFENDANTS’  
MOTION TO DISMISS; [ECF NO. 7]**

**(2) GRANTING SPECIALLY  
APPEARING DEFENDANTS  
ERRONEOUSLY LISTED AS  
CAPTAIN BUCHANAN AND  
CAPTAIN HAYES’S MOTION TO  
QUASH; [ECF NO. 9]**

**(3) DENYING WITHOUT  
PREJUDICE PLAINTIFF’S MOTION  
FOR SUMMARY JUDGMENT; [ECF  
NO. 11]**

Dion Scott Buckelew (“Plaintiff”), a California prisoner proceeding *pro se*, filed this action under 42 U.S.C. § 1983 against Sheriff William D. Gore, Captain Buchanan, and Captain Hayes (collectively, “Defendants”). ECF No. 4. Plaintiff alleges that

1 Defendants violated his constitutional rights while he was at San Diego Central Jail on  
2 several occasions. Before the Court are several motions, which will be addressed in turn  
3 below.

#### 4 I. BACKGROUND

5 Plaintiff's allegations in his amended complaint center around two separate  
6 Counts.<sup>1</sup> ECF No. 4.

7 First, Plaintiff argues that Defendants violated his rights to freedom of religion,  
8 freedom of association, and under the Religious Land Use and Institutionalized Persons  
9 Act ("RLUIPA"). ECF No. 4 at 3. Specifically, Plaintiff alleges that starting from  
10 March 15, 2020, Defendants have denied him access to church services, denied  
11 communion, and denied pastor/chaplain services. *Id.* Plaintiff alleges that such denials  
12 during the Covid-19 pandemic have severely burdened his religious beliefs, and caused  
13 him to suffer mental and physical damage. *Id.* Plaintiff alleges that these denials were all  
14 due to policies and procedures implemented and carried out by Defendants. *Id.*

15 Second, Plaintiff alleges that Defendants violated his rights to be "free from  
16 infectious diseases," from cruel and unusual punishment, and to medical care by  
17 implementing and carrying out Covid-19 protocols that resulted in Plaintiff contracting  
18 the virus around December 16, 2020. *Id.* at 4. Plaintiff further alleges that after  
19 contracting the virus, he was not given proper and adequate medical and mental health  
20  
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22  
23 <sup>1</sup> Plaintiff's amended complaint includes a third count, where he alleges that Defendants violated his  
24 rights to medical care, from cruel and unusual punishment, and from a "clean and safe environment" by  
25 specifically implementing and carrying out procedures that allowed an inmate to be transferred out of  
26 Plaintiff's housing module (8-C) on August 22, 2020 for inciting racial tensions and permitting the same  
27 inmate to be transferred back on February 7, 2021. *Id.* at 5. Upon return, Plaintiff alleges that this  
28 inmate, along with 2-3 others, attacked Plaintiff, causing his physical injury including abrasions, a  
bloody nose, black eye, fat lip, possibly a broken nose and broken jaw, and various mental injuries. *Id.*  
However, on screening, the Court discussed his claim against Defendants Gore, Buchanan, and Hayes as  
insufficient to state a claim for relief that was plausible on its face. ECF No. 5 at 8-9. Thus, this claim  
has already been dismissed from this case.

1 treatment, and was only given an inhaler and told to “drink water.” *Id.* Plaintiff alleges  
2 that he suffered from various physical ailments as a result of contracting the virus. *Id.*

## 3 **II. MOTION TO DISMISS [ECF No. 7]**

4 The first motion before the Court is Defendants’ motion to dismiss filed by  
5 Defendant William D. Gore and joined by specially appearing Defendants Captain  
6 Buchanan and Captain Hayes. ECF Nos. 7, 9.

### 7 **A. Legal Standards**

8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to  
9 state a claim tests the legal sufficiency of a plaintiff’s claim. *Navarro v. Block*, 250 F.3d  
10 729, 732 (9th Cir. 2001). When considering the motion, the court must accept as true all  
11 well-pleaded factual allegations in the complaint. *Bell Atlantic Corp. v. Twombly*, 556  
12 U.S. 544, 555 (2007). The court need not accept as true legal conclusions cast as factual  
13 allegations. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[t]hreadbare recitals of the  
14 elements of a cause of action, supported by mere conclusory statements” are insufficient).

15 A complaint must “state a claim for relief that is plausible on its face.” *Twombly*,  
16 550 U.S. at 570. To survive a motion to dismiss, a complaint must include non-  
17 conclusory factual content. *Id.* at 555; *Iqbal*, 556 U.S. at 679. The facts and the  
18 reasonable inferences drawn from those facts must show a plausible—not just a  
19 possible—claim for relief. *Twombly*, 550 U.S. at 556; *Iqbal*, 557 U.S. at 679; *Moss v.*  
20 *U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The focus is on the complaint, as  
21 opposed to any new facts alleged in, for example, the opposition to a defendant’s motion  
22 to dismiss. *See Schneider v. California Dep’t of Corrections*, 151 F.3d 1194, 1197 n.1  
23 (9th Cir. 1998), *reversed and remanded on other grounds as stated in* 345 F.3d 716 (9th  
24 Cir. 2003). “Determining whether a complaint states a plausible claim for relief [is] . . . a  
25 context-specific task that requires the reviewing court to draw on its judicial experience  
26 and common sense.” *Iqbal*, 557 U.S. at 679. The “mere possibility of misconduct” or  
27 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting  
28 this plausibility standard. *Id.*; *see also Moss*, 572 F.3d at 969.

1 In addition, factual allegations asserted by *pro se* petitioners, “however inartfully  
2 pleaded,” are held “to less stringent standards than formal pleadings drafted by lawyers.”  
3 *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Thus, where a plaintiff appears *pro se* in a  
4 civil rights case, the court “must construe the pleadings liberally and must afford plaintiff  
5 the benefit of any doubt.” *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621,  
6 623 (9th Cir. 1988).

7 **B. Claim 1: Access to Religious Services**

8 Plaintiff’s first claim alleges that he has been denied access to various religious  
9 services since March 15, 2020. ECF No. 4 at 3. He alleges that Sheriff Gore and  
10 Captains Buchanan and Hayes denied him such services, and that they have also  
11 implemented and carried out procedures and policies that caused these alleged violations.  
12 *Id.*

13 Plaintiff alleges violation of both his First Amendment right to freedom of religion  
14 and also under RLUIPA. In order to state a First Amendment free exercise claim,  
15 Plaintiff must “show that the government action in question substantially burdens the  
16 person’s practice of [their] religion.” *Jones v. Williams*, 791 F.3d 1023, 1031-32 (9th Cir.  
17 2015) (internal citations, quotation marks, and alterations omitted). *Jones* defines  
18 “substantial burden” as one which “places more than an inconvenience on religious  
19 exercise; it must have a tendency to coerce individuals into acting contrary to their  
20 religious beliefs or exert substantial pressures on an adherent to modify his behavior and  
21 to violate his beliefs.” *Id.*

22 Section 3 of RLUIPA provides that “[n]o government shall impose a substantial  
23 burden on the religious exercise of a person residing in or confined to an institution . . .  
24 even if the burden results from a rule of general applicability” absent a showing that the  
25 burden imposed is “in furtherance of a compelling government interest” and “is the least  
26 restrictive means of furthering . . . that interest.” 42 U.S.C. § 2000cc-1(a); *see also*  
27 *Khatib v. County of Orange*, 639 F.3d 898, 904-05 (9th Cir. 2011) (concluding that  
28 RLUIPA applies to county jail facilities). “RLUIPA provides more ‘expansive

1 protection’ for inmates’ ‘religious liberty’ than the First Amendment.” *Phillips v. County*  
2 *of Riverside*, 2020 WL 6203574 (C.D. Cal. Oct. 22, 2020) (citing *Holt v. Hobbs*, 574 U.S.  
3 352, 358 (2015) and *Shakur v. Shiriro*, 514 F.3d 878, 888 (9th Cir. 2008).) A  
4 “‘substantial burden’” sufficient to state a RLUIPA claim is a “‘significantly great  
5 restriction or onus upon [religious] exercise.’” *Hartmann*, 707 F.3d at 1124-25 (quoting  
6 *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1039 (9th Cir. 2004)).

7 Here, Plaintiff has alleged that since March 15, 2020 through the time he filed his  
8 complaint, he has essentially been deprived of all access to “church services for  
9 congregation, seeking counsel, encouragement, direction, worship, prayer and ministry.”  
10 ECF No. 4 at 3. Additionally, he has been denied communion and “pastor or chaplain for  
11 prayer, ministry, counseling, awareness, bible study, direction, hope and love of god . . .  
12 .” *Id.* These allegations, if taken as true as required on a motion to dismiss, sufficiently  
13 state a deprivation of access to religious services that constitutes a significant burden  
14 under the First Amendment and RLUIPA.

15 Defendant Sheriff Gore argues in the motion to dismiss that his individual capacity  
16 claim should be dismissed because Plaintiff has not alleged any personal participation by  
17 him. ECF No. 7 at 3. Gore argues that he is a supervisor and there needs to be  
18 allegations that he directed the defendant deputies or that he had actual contact with  
19 Plaintiff. *Id.* However, Plaintiff states in his complaint that “Sheriff William D. Gore,  
20 Captain Buchanan and Captain Hayes violated my 1st amendment right to religion and  
21 [RLUIPA]” by depriving him of various religious services. ECF No. 4 at 3. Construing  
22 this allegation liberally and affording Plaintiff benefit of the doubt as a *pro se* litigant,  
23 this alleges personal involvement by Sheriff Gore in actual deprivation of his rights. In  
24 addition, Plaintiff alleges that the violations were “due to policies and procedures  
25 implemented and carried out by Sheriff Gore, Captain Hayes and Captain Buchanan.” *Id.*  
26 Thus, the Court concludes that these arguments are insufficient to show failure to state on  
27 claim for these reasons.  
28

1           Accordingly, the Court **RECOMMENDS** that Defendants’ motion to dismiss this  
2 claim be **DENIED** as to Sheriff Gore, Captain Buchanan, and Captain Hayes.

3           **C.     Claim 2: Covid-19 Policies and Procedures**

4           Plaintiff’s second claim centers around his allegations that he contracted Covid-19  
5 due to the policies and procedures that Sheriff Gore and Captains Buchanan and Hayes  
6 implemented. ECF No. 4 at 4.

7           Because Plaintiff was a pretrial detainee, this claim must be analyzed under the  
8 Fourteenth Amendment. *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir.  
9 2018); *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). During the  
10 period of detention prior to trial, a pretrial detainee may be properly subject to the  
11 conditions of the jail so long as they do not amount to punishment. *Bell v. Wolfish*, 441  
12 U.S. 520, 545 (1979). Such detainees have a “right to adequate food, shelter, clothing,  
13 and medical care.” *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

14           To state a claim of unconstitutional conditions of confinement against an  
15 individual defendant, a pretrial detainee must allege facts that show: (i) the defendant  
16 made an intentional decision with respect to the conditions under which the plaintiff was  
17 confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious  
18 harm; (iii) the defendant did not take reasonable available measures to abate that risk,  
19 even though a reasonable official in the circumstances would have appreciated the high  
20 degree of risk involved—making the consequences of the defendant’s conduct obvious;  
21 and (iv) by not taking such measures, the defendant caused the plaintiff’s injuries.  
22 *Gordon*, 888 F.3d at 1125. Courts borrow from Eighth Amendment principles in  
23 determining the care to be afforded pretrial detainees. *Pobursky v. Madera Cnty.*, No.  
24 107-CV-0611 AWI DLB, 2007 WL 4557090, at \*8 (E.D. Cal. Dec. 21, 2007).

25           Since the Covid-19 pandemic, many district courts within the Ninth Circuit have  
26 addressed similar claims related to the virus. *See, e.g., Cedillos v. Youngblood*, No.  
27 121CV00138DADBAMPC, 2021 WL 2534534, at \*4 (E.D. Cal. June 21, 2021), report  
28 and recommendation adopted, No. 121CV00138DADBAMPC, 2021 WL 3032688 (E.D.

1 Cal. July 19, 2021). Many courts have found that Covid-19 does pose a substantial risk  
2 of serious harm. *Id.* (citing *Plata v. Newsom*, 445 F. Supp. 3d 557, 559 (N.D. Cal. Apr.  
3 17, 2020)). However, Plaintiff must state more than “generalized allegations that  
4 [Defendants] have not done enough to control the spread.” *Id.* Rather, Plaintiff must  
5 “specifically identify a defendant’s challenged conduct, explain how such conduct is  
6 unreasonable under the circumstances, and describe how such conduct harmed Plaintiff.”  
7 *Id.*

8 For example, “generalized allegations that Defendants have not done enough to  
9 enforce six-foot social and living distancing, or provided sufficient cleaning supplies, in  
10 order to control the spread of COVID-19” is not sufficient to state a claim. *McKissick v.*  
11 *Gastelo*, No. 221CV01945VAPMAA, 2021 WL 2895679, at \*5 (C.D. Cal. July 9, 2021);  
12 *see also Cedillos*, 2021 WL 2534534, at \*2, \*4 (no cognizable claim based on allegations  
13 that inmates were not being quarantined, cells and showers were not disinfected after  
14 contamination, inmates who tested positive were rotated, living quarters were dirty, and  
15 showers have discarded and soiled personal products). In contrast, in *Jones v. Sherman*,  
16 the Court found sufficient details to state a claim where plaintiff alleged that he was  
17 housed in a facility that turned into a quarantine, causing him to be infected, and he was  
18 housed with seven other inmates without any social distancing procedures. No.  
19 121CV01093DADEPGPC, 2022 WL 783452, at \*2, 8 (E.D. Cal. Mar. 11, 2022).

20 Here, while Plaintiff does list his complaints—including policies that alleged  
21 allowed inmate to inmate transfers, insufficient quarantine time, insufficient soap and  
22 other hygiene items, insufficient cleaning supplies, insufficient social distancing,  
23 insufficient coping mechanisms, and not releasing low level offenders—these do not  
24 amount to more than generalized allegations that inadequate Covid-19 procedures were  
25 followed. Listing more of such generalized allegations, without more specific allegations  
26 that explain how Defendants subjected Plaintiff to a substantial risk of serious harm, does  
27 not sufficiently state a claim. *See McKissick*, 2021 WL 2895679, at \*5; *Cedillos*, 2021  
28 WL 2534534, at \*2, \*4.



1 should be liberally construed to uphold service so long as a party receives sufficient  
2 notice of the complaint.” *Chanv. Society Expeditions*, 39 F.3d 1398, 1404 (9th Cir.  
3 1994). However, “[n]either actual notice, nor simply naming the person in the caption of  
4 the complaint, will subject defendants to personal jurisdiction if service was not made in  
5 substantial compliance with Rule 4.” *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th  
6 Cir. 1982) (internal citations omitted).

7 In a prisoner § 1983 action where the Plaintiff has been granted IFP status, as  
8 Plaintiff has here, Federal Rule of Civil Procedure 4(c)(2)(B)(i) entitles plaintiff to  
9 service by the U.S. Marshal and 28 U.S.C. § 1915(c) states that “officers of the court  
10 shall issue and serve all process.” “An incarcerated pro se plaintiff proceeding in forma  
11 pauperis is entitled to rely on the U.S. Marshal for service of the summons and complaint,  
12 and, having provided the necessary information to help effectuate service, plaintiff should  
13 not be penalized by having his or her action dismissed for failure to effect service where  
14 the U.S. Marshal or the court clerk has failed to perform the duties required of each of  
15 them under 28 U.S.C. § 1915(c) and Rule 4 of the Federal Rules of Civil Procedure.”  
16 *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990).

17 When Plaintiff was granted IFP status, the Clerk of the Court issued an amended  
18 summons, listing all the Defendants, and provided Plaintiff with an IFP packet, which  
19 included 4 copies of the summons, 5 copies of the amended complaint, 4 copies, of the  
20 IFP order, and 3 U.S. Marshal Service (USM-285) forms. ECF Nos. 6, 6-1. The  
21 instructions alerted Plaintiff that he must fill out and return the USM-285 forms, and  
22 must fill out one for each Defendant listed on the summons. ECF No. 6-1.

23 The Proof of Service from the U.S. Marshals shows only one USM-285 form.  
24 ECF No. 8. It appears that Plaintiff filled out one form, but included all defendants on  
25 that form. Plaintiff did fill out that the “Number of parties to be served in this case” is  
26 “3” and in the “Defendant” field, he listed “William D. Gore (Sheriff), Capt. Buchanan,  
27 Capt. Hayes.” *Id.* In the “Name of Individual . . . to serve,” Plaintiff again listed “S.D.  
28 Sheriff William D. Gore, Capt. Buchanan, Capt. Hayes” and listed the address as the

1 Ridgehaven Court location. *Id.* This form was signed by the U.S. Marshal who effected  
2 service.

3 According to Ms. Lawyer from the Sheriff's Office, the U.S. Marshal came to her  
4 office and only served one copy of the summons and amended complaint. ECF No. 9-1  
5 at ¶ 2. The summons was directed to Sheriff Gore. *Id.* at 4. Ms. Lawyer also declares  
6 that she is not authorized to accept service on behalf of the captains and that Captain  
7 Hayes does not work at the Sheriff's department. *Id.* at ¶ 3.

8 Under Federal Rule of Civil Procedure 4, a summons must name the court and the  
9 parties and be directed to the defendant. Fed. R. Civ. P. 4(a). If there are multiple  
10 defendants, a summons or copy of a summons that is addressed to multiple defendants  
11 must be issued for each defendant to be served. Fed. R. Civ. P. 4(b). An individual may  
12 be served by "delivering a copy of the summons and of the complaint to the individual  
13 personally," "leaving a copy of each at the individual's dwelling or usual place of abode  
14 with someone of suitable age and discretion who resides there," or "delivering a copy of  
15 each to an agent authorized by appointment or by law to receive service of process." Fed.  
16 R. Civ. P. 4(e).

17 Here, it appears that Rule 4 was not strictly followed. No individual summons was  
18 presented for Captains Buchanan and Hayes, and it appears only one copy of the  
19 complaint was presented. However, it also appears that Plaintiff was not notified of this  
20 issue by the U.S. Marshals, who were charged with effecting service due to his IFP  
21 status. It is true that Plaintiff did not separately fill out a USM-285 form for each  
22 Defendant. However, the proof of service form lists all three defendants in several  
23 places, states that 3 defendants were requested to be served, and was signed by a U.S.  
24 Marshal as completed. Nothing on the form would have indicated to Plaintiff that there  
25 was an issue with service.

26 Here, Plaintiff did make a technical mistake in not filling out the USM-285 for  
27 each Defendant and instead filling out one and listing all three defendants on it.  
28 However, he was not made aware of the issue and the proof of service form could

1 reasonably be interpreted to state that all three defendants listed were served. In such  
2 situations, where an IFP plaintiff relies on the U.S. Marshals to affect service, “courts  
3 recognize that the Plaintiff’s claims should not be subject to dismissal, but instead that  
4 measures be taken to either re-issue summons and re-authorize service by the officers of  
5 the Court, or ask the defendant to waive the insufficient service issues and agree to  
6 waiver of service of summons under Federal Rule of Civil Procedure 4(d).” *Cordova v.*  
7 *Cuendiz*, No. 4:20-CV-1198-O, 2021 WL 5323762, at \*3 (N.D. Tex. Nov. 16, 2021); *see*  
8 *Kaminsky v. Wake Forest Univ. Baptist Med. Center*, No. 1:08-cv-882, 2009 WL  
9 3208449, at \*5 (M.D.N.C. Sept. 30, 2009) (“[T]he court remains under a duty to assist  
10 Plaintiff with regard to service of process in view of his pro se status and the granting of  
11 leave to proceed in forma pauperis. Therefore, rather than recommending dismissal of  
12 the action as to the Defendants on the basis of inadequate service, the Court must take  
13 reasonable steps to see that service is effected on all Defendants properly before the  
14 Court in accordance with Rule 4(c)(3)”).

15 Thus, the Court **RECOMMENDS** that the motion to quash service on Captain  
16 Buchanan and Captain Hayes be **DENIED** but that Plaintiff and the Marshals are given  
17 an additional 60 days to properly effect service. Plaintiff shall fill out the USM-285  
18 separately for each of Captains Buchanan and Hayes, and return them to the U.S.  
19 Marshals to complete service.

#### 20 **IV. MOTION TO SUMMARY JUDGMENT**

21 The final motion before the Court is a combined motion filed by Plaintiff, which  
22 appears to be a Motion to Appoint Counsel, Opposition to Defendants’ Motion to  
23 Dismiss, and a Motion for Summary Judgement.<sup>3</sup> ECF No. 11.

24 Defendants filed an Objection to the Motion for Summary Judgment portion of this  
25 filing. ECF No. 16. Defendants object because the motion is untimely, and Plaintiff  
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28 <sup>3</sup> The Court will address the motion to appoint counsel in a separate order.

1 failed to follow rules in filing the motion, including getting a motion date, serving a copy  
2 on Defendants, or the required elements of a motion for summary judgment. *Id.* at 2-3.  
3 In addition, Defendants object that the motion does not include the actual evidence that is  
4 referenced in the motion for summary judgment. *Id.* at 3. Moreover, the motion for  
5 summary judgment includes arguments regarding incidents that are not in the operative  
6 complaint. *Id.*

7 The Court agrees with Defendants regarding the deficiencies on the motion for  
8 summary judgment. Thus, the Court **RECOMMENDS** that Plaintiff's motion for  
9 summary judgment be **DENIED WITHOUT PREJUDICE**. Plaintiff may file a  
10 renewed motion for summary judgment, following the procedural rules and with actual  
11 evidence he relies upon for the motion.

## 12 V. CONCLUSION

13 As outlined herein, the undersigned recommends as follows:

- 14 a) Plaintiff's claim under the 14th Amendment for cruel and unusual  
15 punishment be **DISMISSED WITH LEAVE TO AMEND**. Defendants'  
16 motion to dismiss be **DENIED** otherwise.
- 17 b) Defendants' motion to quash service for Defendants Captain Buchanan and  
18 Captain Hayes be **DENIED**. However, Plaintiff must perfect service on  
19 these two Defendants within 60 days.
- 20 c) Plaintiff's motion for summary judgment be **DENIED WITHOUT**  
21 **PREJUDICE**.

22 This report and recommendation is submitted to the United States District Judge  
23 assigned to this case pursuant to 28 U.S.C. § 636(b)(1).

24 **IT IS ORDERED** that no later than **August 15, 2021**, any party to this action may  
25 file written objections and serve a copy on all parties. The document should be captioned  
26 "Objections to Report and Recommendation."

27 **IT IS FURTHER ORDERED** that any reply to the objections must be filed and  
28 served on all parties no later than **August 22, 2021**.

1           The parties are advised that failure to file objections within the specified time may  
2 waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*,  
3 951 F.2d 1153, 1157 (9th Cir. 1991).

4           **IT IS SO ORDERED.**

5 Dated: August 1, 2022

A handwritten signature in black ink, reading "Nita L. Stormes", written over a horizontal line.

6  
7 Hon. Nita L. Stormes  
8 United States Magistrate Judge  
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