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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 WILLIAM HEARN, CDCR
12 #AS-7111,
13 Plaintiff,
14 v.
15 RJD WARDEN et al.,
16 Defendants.
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Case No.: 22-cv-255-TWR-DDL

**REPORT AND
RECOMMENDATION FOR
ORDER DENYING
DEFENDANTS' MOTION TO
DISMISS AS MOOT**

[Dkt. No. 15]

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19 Plaintiff William Hearn ("Plaintiff"), an inmate at Richard J. Donovan
20 Correctional Facility ("RJD") is proceeding *pro se* and *in forma pauperis* in this civil
21 rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that Defendants
22 violated rights afforded to him by the First and Eighth Amendments to the U.S.
23 Constitution. See *generally* Dkt. Nos. 1, 26. Before the Court is a Motion to
24 Dismiss Plaintiff's Complaint (the "Motion to Dismiss") by Defendants E. Frijas
25 ("Frijas") and M. Pollard ("Pollard," and, with Frijas, "Defendants"). Dkt. No. 15.
26 Also before the Court is Plaintiff's First Amended Complaint (the "FAC"). Dkt. No.
27 26. For the reasons stated below, the undersigned **RECOMMENDS** that the
28 District Court **DENY** Defendants' Motion to Dismiss as **MOOT**.

I.

BACKGROUND

Plaintiff filed his initial complaint in this action on February 24, 2022, asserting claims against the RJD Warden, E. Frijas, M. Pollard and Does 1 through 8 for violation of his constitutional rights.¹ Dkt. No. 1. Specifically, Plaintiff alleged that Defendants used excessive force against him and denied him adequate medical care in violation of his Eighth Amendment rights, and that the Warden and Defendants Frijas and Pollard retaliated against him for filing a grievance in violation of his First Amendment rights. *See generally id.*

On June 13, 2022, the District Court granted Plaintiff's request to proceed *in forma pauperis*. Dkt. No. 5. The District Court also conducted the preliminary screening required by 28 U.S.C. §§ 1915(e)(1) and 1915A(b). As to Plaintiff's Eighth Amendment claims, the District Court found that Plaintiff failed to state a claim for relief against the Warden and Defendants herein because he "fail[ed] to include specific factual allegations which describe how or when these officials were personally involved" in the events described in Plaintiff's complaint. *Id.* at 7-8. Plaintiff's Eighth Amendment claims against Does 1 through 8 survived screening. *Id.* at 9. As to Plaintiff's First Amendment claims, the District Court found that Plaintiff's allegations "[were] sufficient to state a plausible retaliation claim" against all defendants. *Id.* at 10-11. The District Court dismissed Plaintiff's Eighth Amendment claims, and instructed Plaintiff to either file an amended complaint or notify the Court that he intended to proceed with his complaint as filed. *Id.* at 12. The District Court explained that if Plaintiff chose the latter, he could pursue Eighth

¹ Defendants state in their Motion to Dismiss that, on information and belief, M. Pollard was the Warden of RJD at the time of the events giving rise to the Complaint. See Dkt. No. 15 at 4. However, as Plaintiff has identified M. Pollard and the Warden as separate individuals in his Complaint, the Court will treat them accordingly.

1 Amendment claims against the Doe defendants **only**, and First Amendment claims
2 against all defendants. *Id.*

3 On June 23, 2022, Plaintiff filed a “Notice of Intent to Proceed with His
4 Complaint as Filed.” Dkt. No. 6. In response to the District Court’s June 13, 2022
5 Order, Plaintiff declined to amend his complaint and confirmed that he “chooses to
6 proceed as to his Eighth Amendment claims against defendants Does 1 to 8 and
7 his First Amendment retaliation claim against RJD Warden, Frijas Pollard and John
8 Does 1 to 8 only.” *Id.* at 1 (emphasis in original). Plaintiff stated he intended to
9 pursue discovery to learn the identities of the Doe defendants, and therefore
10 requested that the Court proceed with service of his complaint upon the Warden
11 and Defendants Frijas and Pollard by the U.S. Marshal, so that discovery could
12 begin. *Id.* at 1-2.

13 Having received Plaintiff’s notice, on July 18, 2022, the District Court
14 dismissed plaintiff’s Eighth Amendment claims against the Warden, Frijas and
15 Pollard, directed service of the complaint upon those defendants, and ordered
16 them to respond to the complaint and any subsequent pleading plaintiff filed in
17 which they were named as parties without awaiting further instruction or action
18 from the Court. Dkt. No. 7.

19 Defendants moved to dismiss the complaint on September 29, 2022. Dkt.
20 No. 15. Plaintiff’s FAC was mailed to the Court on October 10, 2022. See Dkt.
21 No. 26 at 9. It was received by the Court on November 17, 2022 and docketed the
22 same day. See *id.* at 1, 13.

23 II.

24 DISCUSSION

25 Pursuant to Federal Rule of Civil Procedure 15, a plaintiff may amend his
26 complaint once “as a matter of course” (*i.e.*, without prior leave of Court) within 21
27 days after being served with defendants’ answer or a motion under Federal Rule
28 of Civil Procedure 12. See Fed. R. Civ. P. 15(a)(1). An amended complaint

1 supersedes the original complaint. See *CDK Global LLC v. Brnovich*, 16 F.4th
2 1266, 1274 (9th Cir. 2021); see also *Rhodes v. Robinson*, 621 F.3d 1002, 1005
3 (9th Cir. 2010) (noting that “[a]s a general rule, when a plaintiff files an amended
4 complaint, ‘the amended complaint super[s]edes the original, the latter being
5 treated thereafter as non-existent”).

6 Defendants’ Motion to Dismiss was filed on September 29, 2022, and Plaintiff
7 alleges he received the Motion and notice thereof on October 5, 2022. See Dkt.
8 No. 15, Dkt. No. 26 at 1. Plaintiff’s FAC was not received by the Court and
9 docketed until November 17, 2022. However, because Plaintiff is incarcerated and
10 self-represented in this matter, the so-called “Prison Mailbox Rule” requires the
11 Court to treat Plaintiff’s filing as filed on the date he alleges he gave it to prison
12 staff for mailing. See *Wolff v. California*, 235 F.Supp.3d 1127, 1129 n.1 (C.D. Cal.
13 2017) (describing application of the rule) (citations omitted). Here, Plaintiff avers
14 that he mailed his FAC to the Court on October 10, 2022. Dkt. No. 26 at 9. That
15 date is comfortably within the 21-day time limit specified by Rule 15(a)(1)(B). The
16 Court therefore finds that Plaintiff’s FAC was timely filed and is now the operative
17 complaint in the Action.

18 In their Motion to Dismiss, Defendants assert that Plaintiff failed to provide
19 Pollard and Frijas of the basis of his claims against him because he failed to plead
20 facts about specific actions taken by the Defendants individually that purportedly
21 violated his First Amendment Rights. See Dkt. No. 15 at 5-6. Plaintiff states he
22 filed his FAC “to address Defendants’ concerns on their Motion to Dismiss.” Dkt.
23 No. 26 at 1. Without making any findings as to whether Plaintiff’s FAC states a
24 claim against Defendants, the Court observes that the FAC is similar to Plaintiff’s

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1 initial complaint but purports to add facts related to Defendants’ involvement in the
2 events giving rise to Plaintiff’s complaint.²

3 Rather than expend judicial resources resolving a Motion to Dismiss that
4 pertains to a superseded complaint, the Court finds that the interests of judicial
5 economy would be best served by requiring Defendants to address in the first
6 instance whether Plaintiff’s FAC obviates their concerns. *See De Souza v. Dawson*
7 *Tech., Inc.*, No. 21-CV-1103 JLS (MSB), 2022 WL 3006045, at *4 (S.D. Cal. July
8 28, 2022) (finding the “[p]arties’ and the Court’s resources” would not be well spent
9 “deciding a Motion to Dismiss that is potentially obviated by” a forthcoming
10 amendment to the complaint). For these reasons, the undersigned
11 **RECOMMENDS** that the Motion to Dismiss be **DENIED AS MOOT**. The
12 undersigned further **RECOMMENDS** that Defendants be ordered to respond to
13 Plaintiff’s FAC, whether by responsive pleading or renewed motion pursuant to
14 Federal Rule of Civil Procedure, within 21 days of the date of the District Court’s
15 order disposing of the Motion to Dismiss. See Dkt. No. 7 at 5.

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25 ² Under the heading “Claim Two” in the FAC, Plaintiff includes allegations that
26 relate to both his Eighth Amendment and First Amendment claims. The Court
27 reminds Plaintiff that his Eighth Amendment claims against Pollard and Frijas have
28 been dismissed. Dkt. Nos. 5, 7. As Plaintiff has acknowledged, his only claims
against Defendants herein are for their alleged retaliation in violation of his First
Amendment rights. See Dkt. No. 6.

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III.

CONCLUSION

The undersigned Magistrate Judge respectfully submits this Report and Recommendation to the Honorable Todd W. Robinson, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Civil Local Rule 72.3. For the reasons stated above, the undersigned **RECOMMENDS** that the District Court issue an Order:

- (1) Adopting this Report and Recommendation in its entirety;
- (2) Denying Defendants’ Motion to Dismiss [Dkt. No. 15] as moot; and
- (3) Requiring Defendants Pollard and Frijas to respond to Plaintiff’s First Amended Complaint [Dkt. No. 26] within 21 days of the date of the District Court’s Order on the pending Motion to Dismiss.

IT IS HEREBY ORDERED that any objection to this Report and Recommendation must be filed with the Court and served on all parties by **December 30, 2022**. The document should be titled “Objections to Report and Recommendation.” Failure to timely object may result in a waiver of the right to raise those objections on appeal of the Court’s order. See *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998).

IT IS SO ORDERED.

Dated: December 14, 2022



Hon. David D. Leshner
United States Magistrate Judge