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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PATRICK NEAL BRADBERRY,)	
)	
Plaintiff,)	
)	
v.)	CIV 05-01336 PHX JAT MEA
)	
DORA SCHRIRO, et al.,)	REPORT AND RECOMMENDATION
)	
Defendants.)	
_____)	

TO THE HONORABLE JAMES A. TEILBORG:

This matter is before the Magistrate Judge on referral from the District Judge, and the determination of the Magistrate Judge is dispositive of some of Plaintiff's claims. Accordingly, the following proposed findings of fact, report, and recommendation are made pursuant to Rule 72(b), Federal Rules of Civil Procedure, and 28 U.S.C. § 636(b)(1)(B) and (C). Before the Court is, *inter alia*, Plaintiff's motion to amend his Second Amended Complaint at Docket No. 166.¹

Background

Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 on May 5, 2005, alleging the original Defendants were liable to him for violation of his constitutional rights while incarcerated. Plaintiff alleged twelve claims for relief

¹ Defendants' motion to dismiss at Docket No. 172 is not yet fully pled.

1 against 54 named Defendants. Plaintiff alleged claims based on
2 violation of his right to procedural due process, Defendants'
3 deliberate indifference, lack of access to the prison grievance
4 procedure, threats to Plaintiff's safety, conditions of
5 confinement claims, and property claims. The complaint was
6 dismissed without prejudice for failure to state a claim because
7 Plaintiff did not set forth specific factual allegations and
8 specific dates that each of the alleged incidents took place.

9 After three extensions of time, Plaintiff filed an
10 amended complaint on November 20, 2006, naming 54 defendants,
11 including Dora Schriro and Dr. Belcourt. Plaintiff alleged
12 seven claims for relief, based on his "First Amendment right to
13 redress," deliberate indifference to serious medical needs,
14 occurring in 2002, 2003, 2005, and 2006, threats to his safety
15 arising from events occurring in 2001 and Defendant Schriro's
16 inaction in 2003, a state-law based claim for violation of his
17 right to due process, a due process claim based on the
18 deprivation of property, a conditions of confinement claim
19 regarding events in 2003 and 2004, and a procedural due process
20 claim regarding the processing of his grievances. Plaintiff
21 sought compensatory and punitive damages and injunctive and
22 declaratory relief.

23 Plaintiff immediately sought to "supplement" the
24 complaint and for leave to file a second amended complaint. On
25 March 12, 2007, the Court ordered Plaintiff to file any proposed
26 amended complaint on a court-approved form within 30 days, i.e.,
27 almost two years after filing his original complaint, and
28 ordered that the matter be dismissed pursuant to section 1915(g)

1 if Plaintiff failed to comply with that order.

2 On April 6, 2007, Plaintiff filed an amended complaint
3 naming 53 defendants and stating eight claims for relief,
4 including claims arising from events occurring in 2007.

5 On May 8, 2007, the Court ordered the matter dismissed
6 pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

7 The Court noted:

8 In his Second Amended Complaint, Plaintiff
9 has again failed to comply with the Court's
10 orders. Plaintiff has violated the Court's
11 directive that he must comply with the 15
12 page limitation for filing a complaint
13 (Doc.#19). Moreover, Plaintiff has again set
14 forth conclusory allegations in his requests
15 for relief and he has not alleged specific
16 facts to establish how each of the named
17 Defendants played an affirmative role in the
18 alleged constitutional violations.

14 The Court further noted it was required to:

15 consider the rights and entitlements of
16 Defendants to finality, fairness, due process
17 of law and the prompt resolution of
18 litigation. That time has come in this
19 litigation. This case is over two years old
20 and many of Plaintiff's claims took place
21 beginning in the year 2000. It is prejudicial
22 to the Defendants to expect them to defend
23 claims which are this old, when evidence may
24 be difficult if not impossible to obtain.

21 Plaintiff appealed the decision dismissing his claims
22 to the Ninth Circuit Court of Appeals, which reversed and
23 remanded on January 23, 2008. Accordingly, on January 29, 2008,
24 the Court ordered Defendants be served with and answer the
25 Second Amended Complaint.

26 The Second Amended Complaint named 53 defendants. The
27 Second Amended Complaint states causes of action for violations
28 of the Eighth Amendment prohibition against cruel and unusual

1 punishment in relation to Plaintiff's medical care while
2 incarcerated (Count One) and threats to his safety stemming from
3 his cooperation with ADOC CIU investigators (Count Two).
4 Plaintiff also contests his placement, pursuant to a "'specific
5 policy' especially for [Plaintiff]," in the prison's Special
6 Management Unit for 10 years (Count Three). In Count Four, he
7 asserts violations of his Fourteenth Amendment Due Process
8 rights because some Defendants have retaliated against him for
9 filing complaints regarding prison conditions and staff abuses.

10 In Counts Five and Six, Plaintiff alleges violations of
11 his Fourteenth Amendment Due Process rights because some
12 Defendants charge him a co-payment for medical visits
13 notwithstanding his contention that the state statute
14 authorizing the co-payment cannot be applied retroactively to
15 him. In Count Seven, Plaintiff claims a violation of his First
16 Amendment right to redress because some Defendants refuse to
17 process or answer his grievances, delay his grievance appeals,
18 and deny Plaintiff proper forms to file complaints. In Count
19 Eight, Plaintiff asserts a violation of his Fourteenth Amendment
20 Due Process rights because some Defendants have enacted and are
21 enforcing a new classification policy that eliminates a
22 classification hearing to challenge ongoing placements in
23 maximum or "supermax" security units. In his Request for Relief,
24 Plaintiff seeks declaratory and injunctive relief and
25 compensatory and punitive damages.

26 The Court's order upon remand dismissed Defendants
27 McHugh, Cione, and Betancourt without prejudice because,
28 although Plaintiff named them as Defendants, Plaintiff asserted

1 no claims against them and did not mention them in any of the
2 eight counts.

3 Extensive problems with effecting service on the
4 remaining fifty named defendants have ensued since the filing of
5 the Court's service order on January 29, 2008. On November 17,
6 2008, the undersigned granted the then-served Defendants' third
7 motion to extend the time allowed to file an answer to the
8 second amended complaint. Some Defendants filed an answer to
9 the Second Amended Complaint on December 19, 2008.

10 In the interim, Plaintiff filed a motion to amend his
11 standing complaint on December 16, 2008. See Docket No. 166.
12 Defendants filed a response to the motion to amend at Docket No.
13 166 on January 2, 2009, and Plaintiff filed a reply on January
14 16, 2009. See Docket No. 178 and Docket No. 184.

15 **Analysis**

16 Rule 15(a), Federal Rules of Civil Procedure, provides
17 that a plaintiff should be given leave to amend his complaint
18 when justice so requires. See, e.g., United States v. Hougham,
19 364 U.S. 310, 316, 81 S. Ct. 13, 17 (1960); Howey v. United
20 States, 481 F.2d 1187, 1190 (9th Cir. 1973). However, leave to
21 amend should be denied if the Court would eventually have to
22 dismiss the claim added to the complaint because the plaintiff
23 raised a claim which was legally frivolous or malicious, failed
24 to state a claim upon which relief may be granted, or that
25 sought monetary relief from a defendant who is immune from such
26 relief. 42 U.S.C. § 1997(c)(1) (2003 & Supp. 2008). See also
27 Newland v. Dalton, 81 F.3d 904, 907 (9th Cir. 1996) ("While Fed.
28 R. Civ. P. 15(a) encourages leave to amend, district courts need

1 not accommodate futile amendments.").

2 When the Court has already granted a plaintiff leave to
3 amend, its discretion in deciding subsequent motions to amend is
4 "particularly broad." Chodos v. West Publ'g Co., 292 F.3d 992,
5 1003 (9th Cir. 2002). When assessing a motion for leave to
6 amend the Court may consider bad faith, undue delay, prejudice
7 to the opposing party, futility of amendment, and whether the
8 plaintiff has previously amended the complaint. See, e.g.,
9 Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004).
10 "Futility alone can justify the denial of a motion to amend."
11 Id.

12 Plaintiff seeks to amend his complaint to add causes of
13 action arising from events occurring in 2008, after his second
14 amended complaint was filed and more than two years after his
15 original complaint. Pursuant to Rule 15(d), Federal Rules of
16 Civil Procedure, the Court may allow Plaintiff "to serve a
17 supplemental pleading setting forth transactions or occurrences
18 or events which have happened since the date of the pleading
19 sought to be supplemented." However, although leave to permit
20 a supplemental pleading is favored, a supplemental pleading may
21 not be used to introduce a "separate, distinct and new cause of
22 action." Planned Parenthood of S. Ariz. v. Neely, 130 F. 3d
23 400, 402 (9th Cir. 1997).

24 Plaintiff essentially seeks to litigate many events
25 which have occurred since the filing of his original complaint,
26 since the filing of the second amended complaint, and since the
27 remand of the matter from the Ninth Circuit Court of Appeals.
28 The Court's discretion should not be exercised to allow

1 Plaintiff to use an action originally filed in 2005 to address
2 relatively recent events allegedly giving rise to separate and
3 distinct new cause of action.

4 Plaintiff also seeks to amend his Second Amended
5 Complaint to add claims when the factual basis for the amendment
6 was known to Plaintiff prior to filing his Second Amended
7 Complaint. For example, Plaintiff seeks leave to add Dr. Baird
8 as a defendant. Dr. Baird was named as a defendant in the
9 original complaint, filed in 2005, and not named as a defendant
10 in either Plaintiff's first amended complaint or in the Second
11 Amended Complaint.² Plaintiff should not be permitted to cause
12 undue delay by adding this defendant at this time when he
13 clearly had the knowledge of the factual events giving rise to
14 his claims and the opportunity to include Dr. Baird in his
15 earlier pleadings. See Chodos, 292 F.3d at 1003.

16 Additionally, in Count I of the proposed third amended
17 complaint, Plaintiff's allegations against Defendant Stapler now
18 include a claim regarding the doctor's treatment of him in 2003,
19 a claim clearly known to Plaintiff at the time he filed his
20 prior complaints and arguably time-barred at the time Plaintiff
21 filed his original complaint. Furthermore, the allegations
22 against Defendant Belcourt in the proposed third amended
23 complaint include an additional claim that this defendant failed
24 to adequately treat Plaintiff from July to October 2006, a
25 factual predicate for a claim clearly known to Plaintiff when he

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27 ² An amended complaint may not incorporate any part of an
28 original complaint by reference and supercedes an original complaint.
See Tellier v. Fields, 280 F.3d 69, 76 (2d Cir. 2000); Campbell v.
Towse, 99 F.3d 820, 825 (7th Cir. 1996).

1 filed his Second Amended Complaint in 2007.

2 Plaintiff also seeks to add former ADC Division
3 Director of Offender Operations Samuel Sublett, and the current
4 ADC Division Director of Offender Operations, John Hallahan, to
5 Counts VII, VIII, IX, and X. However, Plaintiff has not alleged
6 any basis for these individuals' liability other than respondeat
7 superior. Plaintiff should not be permitted to add as
8 defendants Mr. Sublett, Mr. Hallahan, and Dr. Baird, because the
9 claims set forth against these defendants in the proposed third
10 amended complaint are based solely on their status as
11 supervisors. Additionally, Plaintiff seeks to amend to include
12 CO III Sambora in Count I. Ms. Sambora is the Grievance
13 Coordinator at the SMU I; a position she has held since April
14 2007. Plaintiff's claims against this defendant arose after the
15 filing of the Second Amended Complaint and should not be
16 addressed to this suit to the prejudice of the other Defendants.

17 **Conclusion**

18 Plaintiff should not be permitted to amend his
19 complaint for a third time more than three years after filing
20 his original complaint and after receiving numerous extensions
21 of the time allowed to file a complaint properly stating
22 actionable claims for relief against defendants who may be sued.
23 More than a year and a half passed between the filing of the
24 original complaint and the first amended complaint on November
25 20, 2006, and Plaintiff's Second Amended Complaint was filed on
26 April 6, 2007. Accordingly, most events occurring after the
27 filing of the Second Amended Complaint are not temporally
28 related to the claims stated in the original complaint.

1 After lengthy delays, the incidents giving rise to the
2 Second Amended Complaint appear to be ready for discovery and
3 adjudication. Allowing the filing of an amended complaint
4 naming additional defendants and additional causes of action
5 predicated on events occurring more than two years after the
6 filing of the original complaint will prejudice the efficient
7 execution of justice and unduly prejudice both the current
8 Defendants and any newly-added defendants. Cf. Jackson v. Bank
9 of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990) (upholding the
10 denial of leave to amend because the plaintiff had delayed
11 filing the amended complaint for eight months beyond the time
12 they should have known of the existence of the claims and noting
13 that “[p]rejudice to the opposing party is the most important
14 factor” in determining whether to grant leave to amend).

15 Furthermore, Plaintiff fails to show good cause for his
16 inability to achieve the filing of a proper complaint stating
17 all of his intended causes of action and naming each of his
18 proposed defendants in the several years that this action has
19 now been pending. Accordingly,


20
21 **IT IS RECOMMENDED THAT** Plaintiff’s motion to amend his
22 complaint (Docket No. 166) be **denied**.

23
24 This recommendation is not an order that is immediately
25 appealable to the Ninth Circuit Court of Appeals. Any notice of
26 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
27 Procedure, should not be filed until entry of the district
28 court’s judgment.

1 Pursuant to Rule 72(b), Federal Rules of Civil
2 Procedure, the parties shall have ten (10) days from the date of
3 service of a copy of this recommendation within which to file
4 specific written objections with the Court. Thereafter, the
5 parties have ten (10) days within which to file a response to
6 the objections. Pursuant to Rule 7.2, Local Rules of Civil
7 Procedure for the United States District Court for the District
8 of Arizona, objections to the Report and Recommendation may not
9 exceed seventeen (17) pages in length.

10 Failure to timely file objections to any factual or
11 legal determinations of the Magistrate Judge will be considered
12 a waiver of a party's right to de novo appellate consideration
13 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
14 1121 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003).
15 Failure to timely file objections to any factual or legal
16 determinations of the Magistrate Judge will constitute a waiver
17 of a party's right to appellate review of the findings of fact
18 and conclusions of law in an order or judgment entered pursuant
19 to the recommendation of the Magistrate Judge.

20 DATED this 6th day of February, 2009.

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24 _____
25 Mark E. Aspey
26 United States Magistrate Judge
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