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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Arturo Reyes,

No. CV 07-1451-PHX-MHM (JRI)

9

Plaintiff,

ORDER

10

vs.

11

Maricopa County Sheriff's Office, et al.,

12

Defendants.

13

Plaintiff Arturo Reyes, who is confined in the Maricopa County Durango Jail, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. The Court will dismiss the Complaint with leave to amend.

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I. Application to Proceed *In Forma Pauperis* and Filing Fee

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Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$9.00. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

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II. Statutory Screening of Prisoner Complaints

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The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised

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1 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
2 be granted, or that seek monetary relief from a defendant who is immune from such relief.
3 28 U.S.C. § 1915A(b)(1), (2). If the Court determines that a pleading could be cured by the
4 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint
5 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)
6 (*en banc*).

7 The Court should not, however, advise the litigant how to cure the defects. This type
8 of advice “would undermine district judges’ role as impartial decisionmakers.” Pliler v.
9 Ford, 542 U.S. 225, 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide
10 whether the court was required to inform a litigant of deficiencies). Plaintiff’s Complaint
11 will be dismissed for failure to state a claim, with leave to amend because the Complaint may
12 possibly be saved by amendment.

13 **III. Complaint**

14 Plaintiff names the Maricopa County Sheriff’s Office and Sheriff Joe Arpaio as
15 Defendants. The Complaint contains three counts, arising from Plaintiff’s conditions of
16 confinement. In Count I, Plaintiff alleges that his right to be in a facility with population
17 limitations has been violated, which resulted in Plaintiff sitting on the floor because there
18 were too few seats in the eating areas; Plaintiff alleges he was exposed to floor cleaning
19 chemicals. In Count II, Plaintiff alleges that he was exposed to asbestos, which caused a sore
20 throat, runny nose, chest pains and other complaints. In Count III, Plaintiff alleges that his
21 right to access to legal materials was violated.

22 Plaintiff seeks damages.

23 **IV. Improper Defendant—Maricopa County Sheriff’s Office**

24 The Maricopa County Sheriff’s Office is not a proper Defendant. In Arizona, the
25 responsibility of operating jails and caring for prisoners is placed by law upon the sheriff.
26 See A.R.S. § 11-441(A)(5); A.R.S. § 31-101. A sheriff’s office is simply an administrative
27 creation of the county sheriff to allow him to carry out his statutory duties and not a “person”
28 amenable to suit pursuant to § 1983.

1 This is not to say, however, that a claim cannot be brought against Maricopa County
2 challenging a county policy or custom under a theory of municipal liability, or against the
3 sheriff himself as a policymaker, personal participant in the violative conduct, or for his
4 failure to act on his knowledge of widespread abuse in the jail.

5 **V. Failure to State a Claim**

6 **A. Failure to Link Defendant to Harm**

7 To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific
8 injury as a result of specific conduct of a defendant and show an affirmative link between the
9 injury and the conduct of that defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

10 To state a claim against a supervisory official, the civil rights complainant must allege that
11 the supervisory official personally participated in the constitutional deprivation or that the
12 supervisory official was aware of widespread abuses and, with deliberate indifference to the
13 inmate’s constitutional rights, failed to take action to prevent further misconduct. See Ortez
14 v. Washington County, Or., 88 F.3d 804, 809 (9th Cir. 1996); Taylor v. List, 880 F.2d 1040,
15 1045 (9th Cir. 1989); King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987); see also Monell v.
16 New York City Department of Social Services, 436 U.S. 658, 691 (1978). There is no
17 *respondeat superior* liability under § 1983, and, therefore, a defendant’s position as the
18 supervisor of persons who allegedly violated Plaintiff’s constitutional rights does not impose
19 liability. Monell, 436 U.S. at 691-92; Taylor, 880 F.2d at 1045.

20 Plaintiff does not allege that Defendant Arpaio personally participated in the
21 constitutional deprivation or that he was aware of widespread abuses and, with deliberate
22 indifference to Plaintiff’s constitutional rights, failed to take action to prevent further
23 misconduct, or that he formed policies that resulted in Plaintiff’s injuries. Plaintiff makes
24 no allegations at all regarding Defendant Arpaio and, therefore, fails to state a claim against
25 him.

26 **B. Count III—Access to the Courts**

27 In Count III, Plaintiff alleges violation of his rights to “meaningful access to legal
28 materials as necessary to perform . . . research.” The right of meaningful access to the courts

1 prohibits state officials from actively interfering with inmates' attempts to prepare or file
2 legal documents. Lewis v. Casey, 518 U.S. 343, 350 (1996). The right of access to the
3 courts is only a right to bring petitions or complaints to federal court and not a right to
4 discover such claims or even to litigate them effectively once filed with a court. Id. at 354;
5 see also Cornett v. Donovan, 51 F.3d 894, 899 (9th Cir. 1995) ("The right of access is
6 designed to ensure that a habeas petition or civil rights complaint of a person in state custody
7 will reach a court for consideration.") The right "guarantees no particular methodology but
8 rather, the conferral of a capability – the capability of bringing contemplated challenges to
9 sentences or conditions of confinement before the courts." Lewis, 518 U.S. at 356.

10 As a matter of standing, for an access to courts claim, a plaintiff must show that he
11 suffered an "actual injury" with respect to contemplated litigation; the plaintiff must
12 demonstrate that the conduct of the defendants prevented him from bringing to court a
13 nonfrivolous claim that he wished to present. Lewis, 518 U.S. at 351-53. An "actual injury"
14 is "actual prejudice with respect to contemplated or existing litigation, such as the inability
15 to meet a filing deadline or present a claim." Id. at 348.

16 Here, Plaintiff alleges that completing "this necessary document"—apparently the
17 court-approved complaint form—was prolonged because research materials were not
18 accessible. This does not state a claim because Plaintiff does not allege actual injury.

19 **VI. Leave to Amend**

20 For the foregoing reasons, Plaintiff's Complaint will be dismissed for failure to state
21 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
22 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
23 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
24 to use the court-approved form, the Court may strike the amended complaint and dismiss this
25 action without further notice to Plaintiff.

26 Plaintiff must clearly designate on the face of the document that it is the "First
27 Amended Complaint." The first amended complaint must be retyped or rewritten in its
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1 entirety on the court-approved form and may not incorporate any part of the original
2 Complaint by reference. Plaintiff may include only one claim per count.

3 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
4 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
5 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
6 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
7 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
8 565, 567 (9th Cir. 1987).

9 **VII. Warnings**

10 **A. Release**

11 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
12 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
13 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
14 in dismissal of this action.

15 **B. Address Changes**

16 Plaintiff must file and serve a notice of a change of address in accordance with Rule
17 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
18 relief with a notice of change of address. Failure to comply may result in dismissal of this
19 action.

20 **C. Copies**

21 Plaintiff must submit an additional copy of every filing for use by the Court. See
22 LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice
23 to Plaintiff.

24 **D. Possible “Strike”**

25 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
26 to file an amended complaint correcting the deficiencies identified in this Order, the
27 dismissal will count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
28 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil

1 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior
2 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
3 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
4 or fails to state a claim upon which relief may be granted, unless the prisoner is under
5 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

6 **E. Possible Dismissal**

7 If Plaintiff fails to timely comply with every provision of this Order, including these
8 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
9 1260-61 (a district court may dismiss an action for failure to comply with any order of the
10 Court).

11 **IT IS ORDERED:**

12 (1) Plaintiff’s Application to Proceed *In Forma Pauperis*, filed with the Complaint,
13 is **granted**.

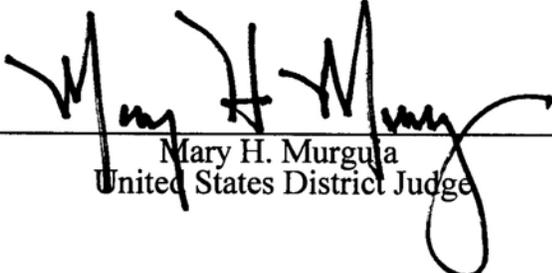
14 (2) As required by the accompanying Order to the appropriate government agency,
15 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$9.00.

16 (3) The Complaint (Doc. #1) is **dismissed** for failure to state a claim. Plaintiff has
17 **30 days** from the date this Order is filed to file a first amended complaint in compliance with
18 this Order.

19 (4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of
20 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
21 that states that the dismissal counts as a “strike” under 28 U.S.C. § 1915(g).

22 (5) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
23 rights complaint by a prisoner.

24 DATED this 6th day of August, 2007.

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Mary H. Murgula
United States District Judge

**Instructions for a Prisoner Filing a Civil Rights Complaint
in the United States District Court for the District of Arizona**

1. Who May Use This Form. The civil rights complaint form is designed to help incarcerated persons prepare a complaint seeking relief for a violation of their federal civil rights. These complaints typically concern, but are not limited to, conditions of confinement. **This form should not be used to challenge your conviction or sentence.** If you want to challenge a state conviction or sentence, you should file a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment.

2. The Form. **Local Rule of Civil Procedure (LRCiv) 3.4(a) provides that complaints by incarcerated persons must be filed on the court-approved form.** The form must be typed or neatly handwritten. The form must be completely filled in to the extent applicable. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages, **but no more than fifteen additional pages**, of standard letter-sized paper. You must identify which part of the complaint is being continued and number all pages. If you do not fill out the form properly, you will be asked to submit additional or corrected information, which may delay the processing of your action. You do not need to cite law.

3. Your Signature. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

4. The Filing Fee. The filing fee for this action is \$350.00. If you are unable to immediately pay the filing fee, you may request leave to proceed *in forma pauperis*. Please review the “Information for Prisoners Seeking Leave to Proceed with a (Non-Habeas) Civil Action in Federal Court *In Forma Pauperis* Pursuant to 28 U.S.C. § 1915” for additional instructions.

5. Original and Judge’s Copy. You must send an **original plus one copy** of your complaint and of any other documents submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.

6. Where to File. You should file your complaint in the division **where you were confined when your rights were allegedly violated.** See LRCiv 5.1(a) and 77.1(a). If you were confined in Maricopa, Pinal, Yuma, La Paz, or Gila County, file in the Phoenix Division. If you were confined in Apache, Navajo, Coconino, Mohave, or Yavapai County, file in the Prescott Division. If you were confined in Pima, Cochise, Santa Cruz, Graham, or Greenlee County, file in the Tucson Division. **Mail the original and one copy of the complaint with the \$350 filing fee or the application to proceed *in forma pauperis* to:**

Phoenix & Prescott Divisions:
U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:
U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. Change of Address. You must immediately notify the Court and the defendants in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. Certificate of Service. You must furnish the defendants with a copy of any document you submit to the Court (except the initial complaint and application to proceed *in forma pauperis*). Each original document (except the initial complaint and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the defendants and the address to which it was mailed. See Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Defendant(s)

(Signature)

9. Amended Complaint. If you need to change any of the information in the initial complaint, you must file an amended complaint. The amended complaint must be written on the court-approved civil rights complaint form. You may file one amended complaint without leave (permission) of Court before any defendant has answered your original complaint. See Fed. R. Civ. P. 15(a). After any defendant has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended complaint. LRCiv 15.1. In addition, an amended complaint may not incorporate by reference any part of your prior complaint. LRCiv 15.1(a)(2). **Any allegations or defendants not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

10. Exhibits. You should not submit exhibits with the complaint or amended complaint. Instead, the relevant information should be paraphrased. You should keep the exhibits to use to support or oppose a motion to dismiss, a motion for summary judgment, or at trial.

11. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

12. Completing the Civil Rights Complaint Form.

HEADING:

1. Your Name. Print your name, prison or inmate number, and institutional mailing address on the lines provided.
2. Defendants. If there are **four or fewer** defendants, print the name of each. If you name **more than four** defendants, print the name of the first defendant on the first line, write the words “and others” on the second line, and attach an additional page listing the names of **all** of the defendants. Insert the additional page after page 1 and number it “1-A” at the bottom.
3. Jury Demand. If you want a jury trial, you must write “JURY TRIAL DEMANDED” in the space below “CIVIL RIGHTS COMPLAINT BY A PRISONER.” Failure to do so may result in the loss of the right to a jury trial. A jury trial is not available if you are seeking only injunctive relief.

Part A. JURISDICTION:

1. Nature of Suit. Mark whether you are filing the complaint pursuant to 42 U.S.C. § 1983 for state, county, or city defendants; “Bivens v. Six Unknown Federal Narcotics Agents” for federal defendants; or “other.” If you mark “other,” identify the source of that authority.
2. Location. Identify the institution and city where the alleged violation of your rights occurred.
3. Defendants. Print all of the requested information about each of the defendants in the spaces provided. If you are naming more than four defendants, you must provide the necessary information about each additional defendant on separate pages labeled “2-A,” “2-B,” etc., at the bottom. Insert the additional page(s) immediately behind page 2.

Part B. PREVIOUS LAWSUITS:

You must identify any other lawsuit you have filed in either state or federal court while you were a prisoner. Print all of the requested information about each lawsuit in the spaces provided. If you have filed more than three lawsuits, you must provide the necessary information about each additional lawsuit on a separate page. Label the page(s) as “2-A,” “2-B,” etc., at the bottom of the page and insert the additional page(s) immediately behind page 2.

Part C. CAUSE OF ACTION:

You must identify what rights each defendant violated. The form provides space to allege three separate counts (**one violation per count**). If you are alleging more than three counts, you must provide the necessary information about each additional count on a separate page. Number the additional pages “5-A,” “5-B,” etc., and insert them immediately behind page 5. Remember that you are limited to a total of fifteen additional pages.

1. Counts. You must identify which civil right was violated. **You may allege the violation of only one civil right per count.**

2. Issue Involved. Check the box that most closely identifies the issue involved in your claim. **You may check only one box per count.** If you check the box marked "Other," you must identify the specific issue involved.

3. Supporting Facts. After you have identified which civil right was violated, you must state the supporting facts. Be as specific as possible. You must state what each individual defendant did to violate your rights. If there is more than one defendant, you must identify which defendant did what act. You also should state the date(s) on which the act(s) occurred, if possible.

4. Injury. State precisely how you were injured by the alleged violation of your rights.

5. Administrative Remedies. You must exhaust any available administrative remedies before you file a civil rights complaint. See 42 U.S.C. § 1997e. Consequently, you should disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided.

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

You must sign your name and print the date you signed the complaint. Failure to sign the complaint will delay the processing of your action. Unless you are an attorney, you may not bring an action on behalf of anyone but yourself.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number the pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

(Full Name of Plaintiff) Plaintiff,

vs.

CASE NO. _____
(To be supplied by the Clerk)

(1) _____
(Full Name of Defendant)

(2) _____

(3) _____

(4) _____

Defendant(s).

Check if there are additional Defendants and attach page 1-A listing them.

**CIVIL RIGHTS COMPLAINT
BY A PRISONER**

- Original Complaint
- First Amended Complaint
- Second Amended Complaint

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:
 - 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
 - 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
 - Other: _____
2. Institution/city where violation occurred: _____

B. DEFENDANTS

- 1. Name of first Defendant: _____ . The first Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 2. Name of second Defendant: _____ . The second Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 3. Name of third Defendant: _____ . The third Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 4. Name of fourth Defendant: _____ . The fourth Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

- 1. Have you filed any other lawsuits while you were a prisoner? Yes No
- 2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:
 - a. First prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - b. Second prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - c. Third prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

COUNT III

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count III.** Identify the issue involved. Check **only one**. State additional issues in separate counts.
 Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count III. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies.**
a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
b. Did you submit a request for administrative relief on Count III? Yes No
c. Did you appeal your request for relief on Count III to the highest level? Yes No
d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

If you assert more than three Counts, answer the questions listed above for each additional Count on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.