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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Javier G. Cazares,

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No. CV-09-2168-PHX-ROS (LOA)

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Plaintiff,

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**ORDER**

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vs.

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Warden E. Morris, et al.,

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Defendants.

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This matter is before the Court on Plaintiff’s Motion to File a Second Amended

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Complaint. (Doc. 45) Defendant Scheetz opposes the motion. (Doc. 46) For the reasons set

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forth below, the Court will deny the Motion.

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**I. Background**

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Plaintiff, proceeding *pro se*, commenced this civil rights action pursuant to 42

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U.S.C. § 1983 on October 15, 2009. (Doc. 1) Plaintiff also sought leave to proceed *in forma*

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*pauperis*. On January 6, 2010, the Court granted Plaintiff leave to proceed *in forma*

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*pauperis*. (Doc. 6) This case was referred to the undersigned Magistrate Judge on June 28,

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2010 pursuant to 28 U.S.C. § 636(b)(1), Fed.R.Civ.P. 72, 72.2 by the Honorable Roslyn O.

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Silver, Chief United States District Judge. (Doc. 15 at 9)

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On February 24, 2010, the Court dismissed the initial Complaint for failure to state

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a claim and directed Plaintiff to file an amended complaint within thirty days. (Doc. 9)

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Plaintiff filed two subsequent motions for extensions of time, and, generously, the Court

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ultimately extended the deadline for filing the amended complaint to June 14, 2010. (Docs.

1 10-13) Thus, Plaintiff was given approximately four months in which to file an amended  
2 complaint, more than ample time to draft a pleading that cured the deficiencies noted in the  
3 Court's February 24, 2010 Order. (Doc. 9)

4 On June 17, 2010, Plaintiff filed an Amended Complaint against Terry Allred,  
5 Moise, E. Morris, Scheetz, Dora Schiro, and Jerry Sternes. (Doc. 14) Plaintiff raised six  
6 grounds for relief, all alleging violations of his Eighth Amendment rights related to medical  
7 care. (Doc. 14) On June 28, 2010, the Court screened the Amended Complaint in  
8 accordance with 28 U.S.C. § 1915A(a). (Doc. 15) The Court dismissed, without prejudice,  
9 Counts I, II, III, IV, and VI, and Defendants Morris, Schiro, Maise, Sterns, and Allred. The  
10 Court directed Defendant Scheetz to answer Count V which alleged that Scheetz knew about  
11 Plaintiff's medical condition but discontinued Plaintiff's thyroid medication for several  
12 weeks. Plaintiff further alleged that Defendant Scheetz gave Plaintiff a placebo medication,  
13 rather than his prescribed medication. (Docs. 14-15)

14 After some difficulty, service was executed on Defendant Scheetz on March 14,  
15 2011. (Doc. 24) Defendant Scheetz answered the Amended Complaint, and moved for  
16 summary judgment on May 6, 2011. (Docs. 24, 37) In the meantime, Plaintiff filed a  
17 Motion to file a Second Amended Complaint. (Doc. 31) The Court notified Plaintiff that the  
18 motion did not comply with Local Rule of Civil Procedure ("LRCiv") 15.1, and directed  
19 Plaintiff to file an appropriate motion to amend on or before May 12, 2011. (Doc. 32)  
20 Plaintiff did not file a proposed Second Amended Complaint that satisfied the requirements  
21 of LRCiv 15.1 by the May 12, 2011 deadline. Thus, on May 23, 2011, the Court denied  
22 Plaintiff's Motion to file a Second Amended Complaint for failure to comply with the  
23 applicable Local Rules of Civil Procedure. (Doc. 44)

24 Plaintiff subsequently filed another "Motion to Accept Second Amended  
25 Complaint," which complies with the technical requirements of LRCiv 15.1. (Doc. 45) Thus,  
26 the Court will consider the merits of Plaintiff's request to file a Second Amended Complaint.

## 27 **II. Magistrate Judge Authority**

28 Generally, a motion for leave to amend the pleadings is a nondispositive matter

1 that may be ruled on by a magistrate judge pursuant to 28 U.S.C. § 636(b)(1). *JJCO, Inc. v.*  
2 *Isuzu Motors America, Inc.*, 2009 WL 3818247, \* 2 (D.Haw., November 12, 2009)  
3 (magistrate judge’s denial of a motion for leave to amend complaint is not a dispositive  
4 ruling) (citing *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1102  
5 n. 1 (9th Cir. 1985), *superseded by statute on other grounds as recognized in Simpson v.*  
6 *Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996) (noting that the plaintiff’s motion for  
7 leave to amend its Complaint was properly treated as a nondispositive motion when the  
8 magistrate judge granted the plaintiff’s motion); *Continental Cas. Co. v. Dominick*  
9 *D’Andrea, Inc.*, 150 F.3d 245, 250-51 (3d Cir. 1998) (noting that a motion to amend is not  
10 dispositive); *Hall v. Norfolk S. Ry. Co.*, 469 F.3d 590, 595 (7th Cir. 2006) (finding a  
11 magistrate judge’s denial of a motion to amend on grounds of futility to be nondispositive  
12 and subject to review for clear error by the district judge). Thus, the undersigned Magistrate  
13 Judge may properly rule on Plaintiff’s Motion because it is not dispositive of Plaintiff’s case  
14 or existing claims alleged).

### 15 **III. Analysis**

16 Pursuant to the Court’s March 22, 2011 scheduling order, the deadline to amend  
17 the pleadings is September 23, 2011. (Doc. 25 at 2) Plaintiff’s Motion is timely under the  
18 scheduling order and is therefore governed by Rule 15(a) of the Federal Rules of Civil  
19 Procedure, which provides that Plaintiff may amend with leave of the court, and leave shall  
20 be freely given when justice so requires. Fed.R.Civ.P. 15(a); *Johnson v. Mammoth*  
21 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (“Unlike Rule 15(a)’s liberal  
22 amendment policy which focuses on the bad faith of the party seeking to interpose an  
23 amendment and the prejudice to the opposing party, Rule 16(b)’s ‘good cause’ standard  
24 primarily considers the diligence of the party seeking the amendment.”); *Crawford v.*  
25 *Washington Nat. Ins. Co.*, 2009 WL 890968, \* 1 (D.Ariz., April 2, 2009) (“Because the  
26 motion [to amend complaint] is untimely under this Court’s scheduling order, Plaintiff must  
27 meet the good cause standard under Rule 16 for the untimely request before the Court  
28 considers whether amendment is appropriate under Rule 15.”).

1           Generally, Federal Rule of Civil Procedure 15 governs the amendment of civil  
2 complaints. Because Plaintiff has already amended his complaint and Defendant opposes the  
3 motion to file a second complaint, Plaintiff needs leave to further amend his complaint.  
4 Fed.R.Civ.P. 15(a)(2); *Burnham v. U.S.*, 2008 WL 477874, \* 1 (D.Ariz., Feb. 19, 2008)  
5 (“Because Plaintiff previously amended the complaint . . . , she was required under Rule 15  
6 to obtain Defendants’ consent or leave of Court to file the second amended complaint[.]”  
7 citing *Glaros v. Perse*, 628 F.2d 679, 686 (1st Cir. 1980)). Rule 15 provides that leave to  
8 amend should be freely given “when justice so requires.” Fed.R.Civ.P. 15(a)(2). The Ninth  
9 Circuit has construed this Rule broadly. *Morongo Band of Mission Indians v. Rose*, 893 F.2d  
10 1074, 1079 (9th Cir. 1990). In determining whether it should grant leave to amend a  
11 complaint, the district court must consider (1) the plaintiff’s bad faith; (2) undue delay; (3)  
12 prejudice to the defendant; (4) futility of amendment; and (5) whether the plaintiff has  
13 previously amended his or her pleadings. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir.  
14 2004) (citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)), *reh’g and reh’g en banc*  
15 *denied*, 375 F.3d 810 (9th Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005).

16           Here, there is no evidence of bad faith. However, the remaining factors weigh  
17 against granting leave to amend. Plaintiff has previously been granted leave to file an  
18 amended complaint to correct deficiencies in his pleading. Moreover, Plaintiff waited nearly  
19 a year after filing his First Amended Complaint, doc. 14, to seek leave to file a second  
20 amended complaint which is nearly identical to First Amended Complaint. Additionally,  
21 Plaintiff states that he seeks to file a second amended complaint “restating . . . counts  
22 previously dismissed for failing to state a claim.” (Doc. 45 at 4) Indeed, the allegations in  
23 the proposed Second Amended Complaint are nearly identical to those in the First Amended  
24 Complaint. (compare docs. 14 and 45) Plaintiff’s additional allegations do not correct the  
25 deficiencies noted in the Court’s February 24, 2010 Order. (Doc. 9) Thus, permitting  
26 Plaintiff to file a second amended complaint would be futile. In summary, because the  
27 relevant considerations weigh against permitting amendment, the Court will deny Plaintiff’s  
28 Motion to File Second Amended Complaint.

1           The Court notes that while Plaintiff's motion to file a second amended complaint  
2 was pending, Defendant filed a summary judgment motion. Plaintiff has not filed a response,  
3 which was due on June 7, 2011. (Doc. 43) The Court will *sua sponte* extend the deadline for  
4 Plaintiff to file a response to Defendant's motion for summary judgment because Plaintiff  
5 likely refrained from responding to the motion for summary judgment in view of his pending  
6 motion for leave to amend. Plaintiff is reminded that if he fails to timely respond or does not  
7 submit his own evidence in opposition, summary judgment, if appropriate, may be entered  
8 against him.

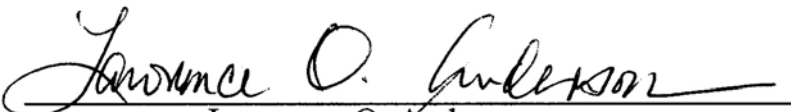
9           In view of the foregoing,

10           **IT IS ORDERED** that Plaintiff's Motion to File Second Amended Complaint,  
11 doc. 45, is **DENIED**.

12           **IT IS FURTHER ORDERED** that the deadline for Plaintiff to file a response to  
13 Defendant's Motion for Summary Judgment, doc. 37, is extended to **June 28, 2011**.

14           DATED this 16<sup>th</sup> day of June, 2011.

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Lawrence O. Anderson  
United States Magistrate Judge