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

8
9 Finn MacCool, et al.,

10 Plaintiffs,

11 v.

12 State of Arizona, et al.,

13 Defendants.

No. CV-14-00803-PHX-JAT

ORDER

14 Pending before the Court are: (1) Defendants' Motion to Dismiss Plaintiffs'
15 Second Amended Complaint ("SAC") (Doc. 4); (2) Plaintiffs' Motion to File a Third
16 Amended Complaint ("TAC") pursuant to Federal Rule of Civil Procedure 15(a)(2) (Doc.
17 11); and (3) Plaintiffs' lodged TAC pursuant to LRCiv 15.1(b) (Docs. 18, 18-1). The
18 Court notes that Plaintiffs also filed and later withdrew a Motion to File a TAC pursuant
19 to Federal Rule of Civil Procedure 15(a)(1)(B). (Docs. 21, 25). The Court will: (1) grant
20 Plaintiffs' Motion to File a TAC; (2) strike Plaintiffs' lodged TAC; and (3) deny
21 Defendants' Motion to Dismiss as moot for the following reasons.

22 **I. BACKGROUND**

23 Finn MacCool ("Finn") was diagnosed with Diabetes Mellitus Type 2 ("DM-2")
24 and hypertension during the time he was an inmate housed by the New Jersey
25 Department of Corrections. (Doc. 1-3 at 41). While in New Jersey, Finn's DM-2 and
26 hypertension were "well-controlled." (*Id.*). In June 2011, Finn was transferred to the
27 custody of the Arizona Department of Corrections ("ADC") and housed at the Eyman
28 Complex-Browning Unit ("Eyman") from June 2, 2011 until April 15, 2012. (*Id.* at 38).

1 Upon Finn's arrival to Eyman, his medication regimen was changed and both insulin
2 therapy and daily monitoring were discontinued. (*Id.* at 42).

3 While housed at Eyman, Finn experienced nausea, headaches, vomiting, and
4 blurry vision. (*Id.*). James Baird, M.D. ("Dr. Baird"), Finn's primary treating physician at
5 Eyman (*Id.* at 38), attributed Finn's symptoms to "food poisoning, flu, or migraine
6 headaches." (*Id.* at 42). On August 20, 2011, an optometrist examined Finn and
7 recommended that Dr. Baird "'get control' of Finn's blood pressure and blood sugar and
8 get a 'retina consult ASAP.'" (*Id.*). Dr. Baird did not institute tighter monitoring of Finn's
9 blood sugar or blood pressure and Finn's "blood pressure and blood sugar remained
10 poorly controlled." (*Id.*). In the following eight months, Finn's health deteriorated. (*See*
11 *Id.* at 42-43).

12 On April 15, 2012, Finn was transferred to ADC's Lewis Complex-Buckley Unit
13 ("Lewis") where he remained until September 4, 2012. (*Id.* at 37-38). Upon Finn's
14 transfer to Lewis, he was "essentially wheelchair bound and legally blind." (*Id.* at 44). At
15 Lewis, a Defendant referred to in Plaintiffs' SAC as "CO-III Lamb" "refused multiple
16 inmate letters and Health Needs Requests from Finn for accommodation under the
17 Americans with Disability Act (ADA)." (*Id.*). CO-III Lamb denied Finn's request for an
18 ADA porter because "he could have his 'cellie' write for him" and told Finn that he did
19 not need a physician-ordered wheelchair because "he could find a spare wheelchair and
20 get other inmates to push him or help him walk." (*Id.*). Finn relied on other inmates to get
21 to and from meals and, between April and July of 2012, "he was found on multiple
22 occasions in his cell near comatose state, unable to walk and unconscious." (*Id.*). On
23 September 4, 2012, Finn was rushed to Tempe St. Luke's Hospital for end-stage renal
24 disease and a heart attack. (*Id.*). Finn has not returned to Lewis and, instead, has remained
25 in Tucson-Rincon's Health Unit or in hospitals in Phoenix and Tucson. (*Id.*).

26 During the time Finn was housed by the ADC, ADC Director Charles Ryan
27 ("Director Ryan") was responsible for the overall operation of both Eyman and Lewis.
28 (*Id.* at 38). Also during this time, Dr. Michael Adu-Tutu ("Dr. Adu-Tutu") was the Health

1 Services Division Director of the ADC and “was responsible for overseeing all health
2 care services of [the ADC] and for coordinating medical and mental health services for
3 all inmates, including Finn.” (*Id.*). Both Ryan and Adu-Tutu knew of failures in care and
4 “needs of inmate[s] like [Finn] suffering from chronic diseases, specifically diabetes and
5 hypertension.” (*Id.* at 43).

6 On August 9, 2012, Plaintiffs filed a Complaint against Defendants in Maricopa
7 County Superior Court (“Superior Court”). (*See* Doc. 1-2). Between August 2012 and
8 April 2014, Plaintiffs filed a First Amended Complaint (Doc. 1-3 at 1) and, later, the
9 Superior Court granted Plaintiffs’ Motion to File a SAC (*Id.* at 13). Plaintiffs’ SAC was
10 filed on October 1, 2013 (*Id.* at 37) and served to Defendants by April 3, 2014 (Doc. 1-4
11 at 22-51). Additionally, during this time period, the Superior Court granted Plaintiffs’
12 motions for extension of time to serve process on Defendants. (Docs. 1-2 at 22, 1-3 at 21,
13 1-4 at 4). On April 16, 2014, Defendants removed the case to this Court. (Doc. 1).

14 On May 19, 2014, Plaintiffs filed a Motion to File a TAC (Doc. 11) and, a lodged
15 TAC (Doc. 18) pursuant to LRCiv 15.1(b). Plaintiffs’ lodged TAC asserts factual
16 allegations in support of four causes of action: (1) medical malpractice against the State
17 of Arizona as Dr. Baird’s employer; (2) negligence and gross negligence against the State
18 of Arizona based on the actions and inactions of Director Ryan and Dr. Adu-Tutu; (3)
19 violations of 42 U.S.C. § 1983 against Dr. Baird, Dr. Adu-Tutu, Director Ryan, and CO-
20 III Lamb; and (4) violations of the ADA, 42 U.S.C. § 12102 and the Rehabilitation Act of
21 1973 (“RA”), 29 U.S.C. § 705(20)(B) against CO-III Lamb and Dr. Baird, both
22 individually and officially, as well as the State of Arizona. (Doc. 18-1 at 12-17).

23 **II. MOTION TO FILE A THIRD AMENDED COMPLAINT**

24 **A. LEGAL STANDARD**

25 A party may amend a pleading once as a matter of course within 21 days after
26 serving it or within 21 days of service of, among others, a Federal Rule of Civil
27 Procedure 12(b)(6) motion. Fed. R. Civ. P. 15(a)(1). In all other circumstances, a party
28 must seek leave to amend from the court. Fed. R. Civ. P. 15(a)(2). “The court should

1 freely give leave when justice so requires.” *Id.* In determining whether to grant a motion
2 to amend, a court should consider five factors: “(1) bad faith; (2) undue delay; (3)
3 prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff
4 has previously amended his complaint.” *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir.
5 2004). The most important of these factors is prejudice to the opposing party. *U.S. v.*
6 *Pend Oreille Public Utility Dist., No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991).
7 “Significantly, ‘[t]he party opposing amendments bears the burden of showing prejudice,’
8 futility, or one of the other permissible reasons for denying a motion to amend.” *Farina v.*
9 *Compuware Corp.*, 256 F. Supp. 2d 1033, 1060 (D. Ariz. 2003) (quoting *DCD Programs,*
10 *Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987)).

11 **B. ANALYSIS**

12 Defendants argue that the Court should not grant Plaintiffs’ Motion to File a TAC
13 because of: (1) prior amendments; (2) undue delay; and (3) futility. (Doc. 19 at 2).
14 Defendants have not argued that Plaintiffs acted in bad faith in requesting to amend their
15 SAC. (*Id.*). Nor have Defendants argued they will be prejudiced if the Court allows
16 Plaintiffs to amend their Complaint (*id.*), which is the most important factor to the
17 Court’s analysis, *Pend Oreille*, 926 F.2d at 1511. Because it is Defendants’ burden to
18 show why the Court should not grant Plaintiffs’ Motion to File a TAC, the Court will
19 only examine whether granting Plaintiffs’ Motion to File a TAC is prohibited by: (1)
20 prior amendments; (2) undue delay; or (3) futility.

21 **1. Prior Amendments**

22 Defendants’ first argument is that the Court should deny Plaintiffs’ Motion to File
23 a TAC because of previous amendments to the Complaint and First Amended Complaint.
24 (Doc. 19 at 2).

25 The Court’s discretion to deny an amendment is “particularly broad” where a
26 plaintiff has previously amended his complaint. *Allen v. City of Beverly Hills*,
27 911 F.2d 367, 373 (9th Cir. 1990). The presence of prior amendments may persuade a
28 court to deny leave, even in absence of the four other factors “when the movant present[s]

1 no new facts but only new theories and provide[s] no satisfactory explanation for his
2 failure to fully develop his contentions originally.” *Id.* at 374.

3 While Plaintiffs have made previous amendments to *filed* complaints, the SAC
4 was the only complaint *served* upon Defendants. (Doc. 22 at 3). Additionally, Plaintiffs’
5 stated purpose in amending the SAC is to “clarify issues raised in Defendants’ [Motion to
6 Dismiss].” (Doc. 11 at 3). In achieving this purpose, Plaintiffs allege new facts in the
7 lodged TAC to support their claims. Because this is the first amendment requested since
8 Defendants were served and Plaintiffs allege new facts to support their claims, this factor
9 does not weigh against granting Plaintiffs’ Motion to File a TAC.

10 **2. Undue Delay**

11 Defendants’ second argument is that the Court should deny Plaintiffs’ Motion to
12 File a TAC because the “19+ months” delay between filing the original Complaint and
13 service of the SAC created an undue delay. (Doc. 19 at 2).

14 By itself, undue delay is insufficient to prevent a court from granting leave to
15 amend a complaint. *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973) (noting
16 that refusing an amendment solely because of delay does not promote any sound judicial
17 policy); *DCD Programs*, 833 F.2d at 186 (“delay, by itself, is insufficient to justify denial
18 of leave to amend”). In evaluating undue delay, a court considers “whether the moving
19 party knew or should have known the facts and theories raised by the amendment in the
20 original pleading.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). A
21 court should also consider whether “permitting an amendment . . . would produce an
22 undue delay in the litigation.” *Id.* at 1387.

23 Plaintiffs attribute delays between filing the Complaint and serving the SAC to
24 Finn’s attempts to exhaust his grievances within the ADC which were interrupted by
25 Finn’s illnesses and transfers to various hospitals. (Doc. 22 at 3). Each extension of time
26 to serve Defendants was judicially-ordered for good cause in Superior Court. (Docs. 1-2
27 at 22, 1-3 at 21, 1-4 at 4). Additionally, this Court has not yet held a Federal Rule of Civil
28 Procedure 16 scheduling conference, and an amendment would not cause a delay in the

1 proceedings. Accordingly, this factor does not weigh against granting Plaintiffs' Motion
2 to File a TAC.

3 **3. Futility**

4 Defendants' third argument is that the Court should deny Plaintiffs' Motion to File
5 a TAC because the lodged TAC is futile. (Doc. 19 at 2).

6 Futility alone is enough to deny a motion for leave to amend. *Nunes*, 375 F.3d at
7 808. A proposed amendment is futile only if "no set of facts can be proved under the
8 amendment to the pleadings that would constitute a valid and sufficient claim." *Miller v.*
9 *Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Additionally, futility may be
10 found where proposed amendments are "either duplicative of existing claims or patently
11 frivolous, or both." *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995). The party
12 opposing amendment bears the burden of proving futility. *Rodriguez v. City of Phoenix*,
13 No. CV-11-01992-PHX-JAT, 2014 WL 1053602, at *3 (D. Ariz. Mar. 19, 2014).

14 Defendants argue that Plaintiffs' lodged TAC is futile because: (1) "Count Three
15 reasserts the civil rights claims under 42 U.S.C. § 1983 against supervisors [Director]
16 Ryan and [Dr.] Adu-Tutu despite there being no allegations supporting supervisor
17 liability" and (2) "Count Four introduces a new theory of recovery based on the [ADA]
18 and [RA]. But the Ninth Circuit has stated that § 1983 liability cannot be imposed for
19 ADA violations." (Doc. 19 at 2-3). In their Response to Plaintiffs' Motion to File a TAC,
20 Defendants also invite the Court to evaluate arguments made in their Motion to Dismiss
21 within the futility context for Plaintiffs' lodged TAC. The Court declines this invitation
22 and will only evaluate the two aforementioned futility arguments that were explicitly
23 referenced in Defendants' Response to the Plaintiffs' Motion to File a TAC.

24 **a. Count Three Futility**

25 Defendants argue that reasserted civil rights claims under 42 U.S.C. § 1983 in
26 Count Three against Director Ryan and Dr. Adu-Tutu are futile because there are "no
27 allegations supporting supervisor liability." (*Id.* at 2).

28 A supervisor may be individually liable under § 1983 "if there exists either: (1) his

1 or her personal involvement in the constitutional deprivation, or (2) a sufficient causal
2 connection between the supervisor’s wrongful conduct and the constitutional violation.”
3 *Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001). “Acquiescence or culpable
4 indifference may suffice to show that a supervisor personally played a role in the alleged
5 constitutional violations.” *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011) (internal
6 quotation marks omitted). A supervisor is culpably or deliberately indifferent if he is
7 “aware of facts from which the inference could be drawn that a substantial risk of serious
8 harm exists, and he must also draw the inference.” *Clouthier v. County of Contra Costa*,
9 591 F.3d 1232, 1242 (9th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837
10 (1994)).

11 In *Ashcroft v. Iqbal*, the Supreme Court addressed supervisor liability under the
12 context of § 1983. 556 U.S. 662, 675-78 (2009). The Supreme Court noted that since
13 “[g]overnment officials may not be held liable for unconstitutional conduct of their
14 subordinates . . . a plaintiff must plead that each Government-official defendant, through
15 the official’s own individual actions, has violated the Constitution.” *Id.* at 676. The
16 Supreme Court went on to reject that “a supervisor’s mere knowledge of his
17 subordinate’s actions is sufficient to allege § 1983 liability against a supervisor in his
18 individual capacity.” *Id.* at 677.

19 The Ninth Circuit recently addressed the post-*Iqbal* pleading standard for
20 supervisory liability holding that “[t]he Supreme Court’s decision in *Iqbal*, did not alter
21 the substantive requirements for supervisory liability claims in an unconstitutional
22 conditions of confinement case under the Eighth and Fourteenth Amendments where
23 deliberate indifference is alleged.” *Starr*, 652 F.3d at 1217. In *Starr*, the Ninth Circuit
24 concluded that “a plaintiff may state a claim against a supervisor for deliberate
25 indifference based upon the supervisor’s knowledge of and acquiescence in
26 unconstitutional conduct by his or her subordinates.” *Id.* at 1207. There, the plaintiff
27 brought Eighth Amendment claims against a sheriff in his individual capacity for his role
28 as a supervisor of the detention facility where plaintiff was held. *Id.* at 1204-05. Because

1 the plaintiff pleaded that the sheriff was given several reports which indicated systematic
2 problems in his county jails and did not take action to rectify these problems despite the
3 reports, the Ninth Circuit held that the complaint was adequate to withstand a motion to
4 dismiss. *Id.* at 1208. Consequently, the allegations of the reports and of the defendant’s
5 inaction were sufficient to state a claim for supervisory liability. *Id.*

6 Here, the Plaintiffs attempt to bring an Eighth Amendment claim in their lodged
7 TAC against Director Ryan and Dr. Adu-Tutu in their individual capacity and “as the
8 highest ranking supervisors, respectively, in [the] ADC and its Health Division.” (Doc.
9 18-1 at 15). As in *Starr*, Plaintiffs allege reports from ADC staff warning Director Ryan
10 and Dr. Adu-Tutu about the type of unreasonable treatment that inmates like Finn were
11 receiving. (*Id.* at 7). Plaintiffs further allege that the lack of a strategy to remedy such
12 “systemic failures” led to Finn’s poor health conditions. (*Id.*). Based on the pleading
13 standard set forth in *Starr*, Plaintiffs have alleged sufficient facts linking both Director
14 Ryan and Dr. Adu-Tutu to a § 1983 violation. Since Plaintiffs have met the *Starr*
15 pleading standard, their § 1983 supervisory liability claims against both Director Ryan
16 and Dr. Adu-Tutu in their individual capacities are not futile.

17 **b. Count Four Futility**

18 Defendants make a general futility argument that amending the SAC to include
19 ADA and RA claims against CO-III Lamb and Dr. Baird would be futile because “§1983
20 liability cannot be imposed for ADA violations.” (Doc. 19 at 3).

21 **i. ADA and RA Violations in Official Capacity**

22 Plaintiffs allege in their lodged TAC that CO-III Lamb and Dr. Baird are “liable in
23 their . . . official capacities to Finn for damages from Defendant [CO-III] Lamb’s
24 violations of the ADA and the [RA].” (Doc. 18-1 at 17).

25 Under Title II of the ADA, “no qualified individual with a disability shall, by
26 reason of such disability, be excluded from participation in or be denied the benefits of
27 the services, programs, or activities of a public entity, or be subjected to discrimination
28 by any such entity.” 42 U.S.C. § 12132. A ‘public entity’ is “any State or local

1 government; [or] (B) any department, agency, special purpose district, or other
2 instrumentality of a State or States or local government” 42 U.S.C. § 12131. To state
3 an ADA claim, a plaintiff must show that “(1) [he] is a qualified individual with a
4 disability; (2) [he] was excluded from participation in or otherwise discriminated against
5 with regard to a public entity’s services, programs, or activities; and (3) such exclusion or
6 discrimination was by reason of [his] disability.” *Lovell v. Chandler*, 303 F.3d 1039,
7 1052 (9th Cir. 2002). The term ‘qualified individual with a disability’ means:

8 an individual with a disability who, with or without
9 reasonable modifications to rules, policies or practices, the
10 removal of architectural, communication, or transportation
11 barriers, or the provision of auxiliary aids and services, meets
12 the essential eligibility requirements for the receipt of
13 services or the participation in programs or activities provided
14 by a public entity.

12 42 U.S.C. § 12131(2). A disability within the meaning of the statute is a “physical or
13 mental impairment that substantially limits one or more of the major life activities of such
14 individual.” 42 U.S.C. § 12102.

15 The Ninth Circuit has found that “[t]he ADA prohibits discrimination because of
16 disability, not inadequate treatment for disability.” *Simmons v. Navajo County, Ariz.*,
17 609 F.3d 1011, 1022 (9th Cir. 2010) (citing *Bryant v. Madigan*, 84 F.3d 246, 249 (7th
18 Cir. 1996) (“[T]he Act would not be violated by a prison’s simply failing to attend to the
19 medical needs of its disabled prisoners The ADA does not create a remedy for
20 medical malpractice.”)).

21 The RA is “materially identical and the model for the ADA, except limited to
22 programs that receive federal financial assistance.” *Armstrong v. Davis*, 275 F.3d 849,
23 862 n.17 (9th Cir. 2001) (internal quotation marks omitted). Title II of the ADA was
24 expressly modeled after § 504 of the RA. *Zukle v. Regents of the University of California*,
25 166 F.3d 1041, 1045 (9th Cir. 1999). Additionally, because the ADA has a broader scope,
26 the Ninth Circuit analyzes both Acts under an ADA standard. *See id.* at n.11 (“There is
27 no significant difference in analysis of the rights and obligations created by the ADA and
28 the [RA].”).

1 Plaintiffs' lodged TAC includes facts that Finn was "blind" and "wheelchair
2 bound" making him an "otherwise qualified individual" for the purposes of bringing the
3 ADA and RA claims. (Doc. 18-1 at 16). Plaintiffs allege that "CO-III Lamb's conduct
4 violated the ADA . . . because she ignored Finn's need and requests for medical
5 assistance and for assistance in obtaining services to which he was entitled and needed as
6 a blind, wheelchair bound individual." (*Id.* at 17). Plaintiffs further allege that CO-III
7 Lamb "treated [Finn] with hostility, disdain, and anger because of his disability and the
8 additional work his status caused her." (*Id.* at 16). Taking Plaintiffs' factual allegations to
9 be true, Plaintiffs make a valid claim under the ADA that Finn, a qualified individual
10 with a disability, was treated with hostility and disdain *because* of his disability. As a
11 result, Plaintiffs' proposed amendments in the lodged TAC to include ADA and RA
12 claims against CO-III Lamb in her official capacity are not futile.

13 Plaintiffs also allege that Dr. Baird violated Finn's rights under the ADA and the
14 RA because his "failure to treat deprived Finn of medical services." (*Id.* at 17). Here,
15 Plaintiffs do not set forth any facts supporting a claim that Finn was subjected to any
16 intentional discrimination *because* of his disability nor was he excluded from
17 participation in any prison program or activity. Improper medical treatment is not the
18 same as discrimination under the ADA. As a result, Plaintiffs' proposed amendments in
19 their lodged TAC to include ADA and RA claims against Dr. Baird in his official
20 capacity are futile. *See Hewitt v. Luis*, 2013 WL 4702266, at *10 (Dist. Nev. July 2,
21 2013) (granting summary judgment against plaintiff's ADA claim because "plaintiff
22 merely allege[d] a difference of opinion regarding proper medical treatment for plaintiff's
23 back and leg pain—not discrimination under the ADA"); *and Calloway v. Contra Costa*
24 *County Jail Correctional Officers*, 2007 WL 134581, at *34 (N.D. Cal. Jan. 16, 2007)
25 (denying presence of an actionable ADA/RA where the defendant's inadequate medical
26 treatment denied the sick plaintiff an opportunity to engage in regular prison life).

27 Plaintiffs' ADA and RA claims against CO-III Lamb in her official capacity are
28 not futile while ADA and RA claims against Dr. Baird are futile.

