

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Richard LeGrand Gause,

10 Plaintiff,

11 v.

12 Unknown Indy, et al.,

13 Defendants.
14

No. CV-15-02514-JJT-ESW

ORDER

15
16 Pending before the Court are a number of motions, which the Court has reviewed
17 and rules on as set forth below.

18 **I. DISCUSSION**

19 **A. Plaintiff's "Motion Requesting Leave to make 2nd Amendment to**
20 **complaint" (Doc. 88) and Defendants Ende and Rojas' "Motion for Leave**
21 **to File Sur-Reply to Plaintiff's Second Motion to Amend (Doc. 88)" (Doc.**
22 **118)**

23 On May 16, 2016, pursuant to Federal Rule of Civil Procedure 16(b) and Local
24 Rule of Civil Procedure ("LRCiv") 16.2(b)(2), the Court issued a Scheduling Order (Doc.
25 19). The Court set July 15, 2016 as the deadline for filing a motion to amend the First
26 Amended Complaint (Doc. 8). (Doc. 19 at 4). A Rule 16 scheduling order may be
27 "modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).
28 Once a district court has filed a Rule 16 scheduling order setting a deadline for amending
pleadings, a motion seeking to amend pleadings is governed first by Rule 16(b) and only

1 secondarily by Rule 15(a).¹ *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-
2 09 (9th Cir. 1992) (“A court’s evaluation of good cause is not coextensive with an inquiry
3 into the propriety of the amendment under . . . Rule 15.”); *Coleman v. Quaker Oats Co.*,
4 232 F.3d 1271, 1294 (9th Cir. 2000). The standards of review under Rules 15 and 16 are
5 markedly different. “Unlike Rule 15(a)’s liberal amendment policy which focuses on the
6 bad faith of the party seeking to interpose an amendment and the prejudice to the
7 opposing party, Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of
8 the party seeking the amendment.” *Johnson*, 975 F.2d. at 609. Although prejudice to the
9 opposing party can be an additional reason to deny a motion to amend under Rule 16, the
10 focus of the inquiry is on the movant’s reasons for seeking modification. *Id.* If the
11 movant “was not diligent, the inquiry should end.” *Id.*

12 In addition, Ninth Circuit case law supports a district court’s denial of a motion
13 filed after the applicable scheduling order deadline on the ground that the movant did not
14 request to modify the deadline. *Johnson*, 975 F.2d at 608 (“Johnson did *not* specifically
15 request that the court modify its scheduling order; he merely moved to amend his
16 complaint. He points out that some courts have considered a motion to amend the
17 complaint as a motion to amend the scheduling order and the court’s denial of that
18 motion a denial of a motion to amend the scheduling order. . . . We have suggested the
19 contrary.”); *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104
20 (9th Cir. 1985) (holding that a district court properly denied a motion as untimely where
21 it was filed after the applicable scheduling order deadline and the movant “never
22 requested a modification” of the scheduling order), *superseded by statute on other*
23 *grounds as recognized in Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996);
24 *Dedge v. Kendrick*, 849 F.2d 1398, 1398 (11th Cir. 1988) (holding that a district court

25
26
27 ¹ Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that, except in
28 circumstances not present in this case, “a party may amend its pleading only with the
opposing party’s written consent or the court’s leave,” which “[t]he court should freely
give . . . when justice so requires.”

1 properly denied a motion as untimely where the motion was filed after the deadline set
2 forth in the scheduling order and the movant did not request a modification of the
3 scheduling order).

4 Almost a month after the applicable deadline, Plaintiff filed a “Motion Requesting
5 leave to make 2nd Amendment to complaint” (Doc. 88). The Motion may be denied
6 solely on the basis that it is untimely. *Johnson*, 975 F.2d at 608; *U.S. Dominator*,
7 *Inc.*, 768 F.2d at 1104; *Dedge*, 849 F.2d at 1398. Denial of the Motion is warranted even
8 if it is deemed as a de facto motion to modify the Scheduling Order. Because the Motion
9 was filed after the deadline, Plaintiff cannot “appeal to the liberal amendment procedures
10 afforded by Rule 15; his tardy motion [has] to satisfy the *more stringent* ‘good cause’
11 showing required under Rule 16.” *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465
12 F.3d 946, 952 (9th Cir. 2006) (emphasis in original). Plaintiff has failed to show the
13 diligence and good cause necessary for the Court to deviate from its Rule 16 Scheduling
14 Order.

15 Further, LRCiv 15.1 requires a party moving to amend a complaint to file a copy
16 of the amended pleading indicating “in what respect it differs from the pleading
17 which it amends, by bracketing or striking through the text to be deleted and
18 underlining the text to be added.” The District Court of Arizona routinely denies parties
19 the opportunity to amend a complaint for failure to comply with LRCiv 15.1. *See, e.g.*,
20 *Bivins v. Ryan*, No. CV-12-1097-PHX-ROS (LOA), 2013 WL 321847, at *4 (D. Ariz.
21 Jan. 28, 2013); *Huminski v. Heretia*, No. CV11-0896-PHX-DGC, 2011 WL 2910536, at
22 *1 (D. Ariz. July 18, 2011); *Miles v. King*, No. CV-13-370-PHX-SRB (LOA), 2013 WL
23 5526997 (D. Ariz. Oct. 7, 2013).

24 In their Response (Doc. 104), Defendants Ende and Rojas note that Plaintiff’s
25 Motion (Doc. 88) fails to comply with LRCiv 15.1. Attached to Plaintiff’s Reply (Doc.
26 107)² is a proposed Second Amended Complaint. Defendants Ende and Rojas move for

27
28 ² The Reply is captioned “Response to Defendant Ende and Rojas’ response to my

1 leave to file a sur-reply. To the extent that a party raises a new argument or proffers
2 new evidence and information in a reply brief, that argument or evidence is
3 improper because the opposing party is deprived of an opportunity to respond. *See*
4 *Tovar v. United States Postal Service*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993). A court
5 cannot consider new evidence provided in a reply when the other party does not have an
6 opportunity to respond to the evidence. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th
7 Cir. 1996). Granting leave to file a sur-reply therefore is generally appropriate when a
8 party raises new issues or new evidence in a reply brief. Because Plaintiff's Reply
9 attached a copy of the proposed Second Amended Complaint, which had not previously
10 been submitted, the Court will grant Defendants Ende and Rojas' Motion (Doc. 118).
11 The Court has considered the sur-reply attached to the Motion. (Doc. 118-1 at 2-9).

12 As the proposed Second Amended Complaint attached to Plaintiff's Reply does
13 not indicate how it differs from the First Amended Complaint, Plaintiff has failed to
14 comply with LRCiv 15.1. Plaintiff's failure to comply with LRCiv 15.1(a) hinders the
15 Court's ability to compare the First Amended Complaint to the proposed Second
16 Amended Complaint. Plaintiff's untimely Motion (Doc. 88) will be denied.

17 **B. Plaintiff's "Motion Requesting to be appointed counsel" (Doc. 106)**

18 On June 7, 2016, the Court denied Plaintiff's request for court-appointed counsel
19 after finding that Plaintiff has not shown that exceptional circumstances are present that
20 would require the appointment of counsel. (Doc. 25 at 1-2). In his September 7, 2016
21 Motion (Doc. 106), Petitioner again requests court-appointed counsel. However,
22 Petitioner still has not shown the presence of exceptional circumstances warranting the
23 appointment of counsel. Plaintiff's Motion (Doc. 106) will be denied.

24 **C. Plaintiff's "Addittional [sic] Discovery Disclosure" (Doc. 108)**

25 Attached to Plaintiff's September 9, 2016 "Addittional [sic] Discovery
26 Disclosure" (Doc. 108) are information sheets on certain medications. Federal Rule of
27

28 2nd Amended Complaint Request."

1 Civil Procedure 5(d) prohibits the filing of disclosures until they are used in the
2 proceeding or the Court orders filing. However, LRCiv 5.2 requires the filing of a
3 “Notice of Service” of disclosures. Because Petitioner has not yet “used” the medication
4 information sheets in this proceeding, the filing of the “Addittional [sic] Discovery
5 Disclosure” (Doc. 108) instead of a “Notice of Service” violates the Federal and Local
6 Rules of Civil Procedure. The filing (Doc. 108) will be stricken. The Court deems
7 September 9, 2016 the date the disclosure was served.

8 **D. Plaintiff’s “Notice of Service of Complaint filed on Defendant Ende with**
9 **Arizona Board of Nursing” (Doc. 111)**

10 In his September 13, 2016 Notice (Doc. 111), Plaintiff attached a copy of a
11 complaint filed against Defendant Ende with the Arizona Board of Nursing. The Court
12 advised the parties in its September 1, 2016 Order (Doc. 105) that in the interest of
13 controlling the Court’s docket, it will not allow the parties to file notices that are not
14 required to be filed pursuant to the Federal and Local Rules of Civil Procedure (e.g. a
15 “Notice of Service” filed pursuant to LRCiv 5.2 of the disclosures and discovery requests
16 and responses listed in Fed. R. Civ. P. 5(d)). Plaintiff’s Notice (Doc. 111) will be
17 stricken.

18 **E. Plaintiff’s “Motion Requesting Courts Rule in my favor due to Defendants**
19 **Refusing to comply with repeated Court Orders” (Doc. 115)**

20 On September 1, 2016, the Court ordered counsel for Defendant Utterbeck to file
21 under seal the last known address for Defendant Dentist Doe, identified by Plaintiff as
22 Laura Hale. (Doc. 105 at 8). The Court further ordered that upon receipt of the address,
23 the Clerk of Court shall complete and forward to the United States Marshals Service
24 (“USMS”) a service packet for Defendant Hale. (*Id.* at 9). Finally, the Court extended
25 the time to effectuate service on Defendant Hale by sixty days. (*Id.*).

26 Counsel for Defendant Utterbeck filed under seal Defendant Hale’s last known
27 address on September 14, 2016. (Doc. 112). The docket reflects that the Clerk of Court
28 forwarded to the USMS a service packet for Defendant Hale on September 16, 2016.

On September 15, 2016, Plaintiff filed a Motion (Doc. 115) contending that “The

1 Courts have now Ordered Defendants [sic] Utterbecks [sic] counsel (Doc. 35 and Doc.
2 105) multiple times to produce under seal last known address Defendant Dentist Doe
3 Laura Hale, the address from her employment records.” Contrary to the preceding
4 sentence, Doc. 35 is not an Order, but Plaintiff’s “Motion to have Defendants provide
5 Marshall [with] Home Address of Defendant Dentist Doe.” The Court granted the
6 Motion in its September 1, 2016 Order (Doc. 105). Counsel for Defendant Utterbeck
7 timely complied with the Order on September 14, 2016. (Doc. 112). To the extent
8 Plaintiff seeks to compel compliance with the Court’s September 1, 2016 Order, his
9 Motion (Doc. 115) is denied as moot.

10 Plaintiff’s Motion (Doc. 115) also requests the Court “to rule Summary Judgement
11 in [Plaintiff’s] favor for Defendants Council [sic] refusing to respond to multiple Court
12 Orders.” It is unclear whether Plaintiff intended to file a motion for summary judgment
13 pursuant to Federal Rule of Civil Procedure 56. Plaintiff’s Motion (Doc. 115) is not
14 captioned as a motion for summary judgment and it does not comply with the applicable
15 procedure requirements for such a motion. If Plaintiff intended to file a motion for
16 summary judgment pursuant to Federal Rule of Civil Procedure 56, Plaintiff must timely
17 re-file his Motion in compliance with the procedural requirements set forth in Federal
18 Rule of Civil Procedure 56 and LRCiv 56.1.³

19 **F. Plaintiff’s “Response to Defendants Ende and Rojas’ Fourth Request for**
20 **Productions” (Doc. 120)**

21 In his September 20, 2016 filing, Plaintiff alleges that Defendants Ende and Roajs
22 are refusing to produce all of Plaintiff’s medical records, medical reports, and “Medical
23 E-Mails that have [Plaintiff’s] name attached to the file from 7-2014 to present.” (Doc.
24 120 at 2). Plaintiff asserts that “Defendants just ignore my correspondence when I write

25
26 ³ For instance, LRCiv 56.1(a) requires any party filing a motion for summary
27 judgment to submit a separate statement of facts that sets forth “each material fact on
28 which the parties relies in support of the motion.” A failure to submit a separate
statement of facts in the form required by the rules “may constitute ground for denial of
the motion.” LRCiv 56.1(a).

1 to try and resolve this without the Courts being involved. After 7 letters they finally
2 respond to tell me they don't have to respond to any correspondence not through the
3 Courts.” (*Id.* at 3).

4 On September 1, 2016, the Court struck a number of Plaintiff’s discovery motions
5 for failure to comply with the discovery dispute resolution procedure set forth in the
6 Court’s Scheduling Order (Doc. 19). (Doc. 105 at 1-2). The Court’s Scheduling Order
7 advises the parties in bold letters that the Court will not consider a motion regarding
8 discovery matters unless the parties have participated in a discovery conference. (Doc.
9 19 at 3). By filing the “Response to Defendants Ende and Rojas’ Fourth Request for
10 Production” (Doc. 120) instead of a request for a discovery conference, Plaintiff has
11 failed to comply with the Scheduling Order.

12 “A scheduling order is not a frivolous piece of paper, idly entered, which can be
13 cavalierly disregarded” *Johnson*, 975 F.2d at 610. However, the Court observes
14 that the October 14, 2016 discovery and November 15, 2016 dispositive motion deadlines
15 are fast approaching. In addition, the Court is mindful that “summary judgment is
16 disfavored where relevant evidence remains to be discovered, particularly in cases
17 involving confined pro se plaintiffs.” *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir.
18 2004) (citing *Klinge v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988)). As this case
19 involves an Eighth Amendment claim of deliberate indifference to serious medical needs,
20 Plaintiff’s ability to defeat summary judgment may be prejudiced by not having his
21 complete medical file. *See Calloway v. Veal*, 571 F. App’x 626, 628 (9th Cir. 2014)
22 (“The district court erred by entering judgment against Calloway—who appeared
23 below in pro per and in forma pauperis while incarcerated—without providing him
24 an appropriate opportunity to conduct discovery” and noting that the plaintiff
25 requested, but did not receive his complete medical records).

26 The Court will require Defendants Ende and Rojas to respond to Plaintiff’s
27 September 20, 2016 filing (Doc. 120) by advising the Court of the status of Plaintiff’s
28 request for “all Medical Records and all Medical Reports, Medical E-Mails that may have

1 [Plaintiff's] name attached to the file from 7-2014 to present.” (*Id.* at 2).

2 **II. CONCLUSION**

3 Based on the foregoing,

4 **IT IS ORDERED** denying Plaintiff's “Motion Requesting Leave to make 2nd
5 Amendment to complaint” (Doc. 88).

6 **IT IS FURTHER ORDERED** granting Defendants Ende and Rojas' “Motion for
7 Leave to File Sur-Reply to Plaintiff's Second Motion to Amend (Doc. 88)” (Doc. 118).
8 The sur-reply lodged (Doc. 118-1 at 2-9) is deemed filed and has been considered.

9 **IT IS FURTHER ORDERED** denying Plaintiff's “Motion Requesting to be
10 appointed counsel” (Doc. 106).

11 **IT IS FURTHER ORDERED** directing the Clerk of Court to strike Plaintiff's
12 “Addittional [sic] Discovery Disclosure” (Doc. 108).

13 **IT IS FURTHER ORDERED** directing the Clerk of Court to strike Plaintiff's
14 “Notice of Service of Complaint filed on Defendant Ende with Arizona Board of Nursing
15” (Doc. 111).

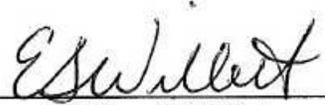
16 **IT IS FURTHER ORDERED** denying Plaintiff's “Motion Requesting Courts
17 Rule in my favor due to Defendants Refusing to comply with repeated Court Orders”
18 (Doc. 115). If Plaintiff intended to file a motion for summary judgment pursuant to
19 Federal Rule of Civil Procedure 56, Plaintiff must timely re-file his Motion in compliance
20 with the procedural requirements set forth in Federal Rule of Civil Procedure 56 and
21 LRCiv 56.1. The Clerk of Court is directed to amend the docket to remove the indication
22 that Plaintiff's Motion (Doc. 115) is a motion for summary judgment.

23 **IT IS FURTHER ORDERED** that by **October 7, 2016**, Defendants Ende and
24 Rojas shall respond to Plaintiff's September 20, 2016 filing (Doc. 120) by advising the
25 Court of the status of Plaintiff's request for “all Medical Records and all Medical
26 Reports, Medical E-Mails that may have [Plaintiff's] name attached to the file from 7-
27 2014 to present.” (*Id.* at 2). Plaintiff may file a reply to Defendants Ende and Rojas'
28 response within seven days from the date of service.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that in light of the discovery issue pertaining to Plaintiff's medical records, the dispositive motion deadline set forth in the Court's Scheduling Order is stayed pending further order of the Court. Defendants shall not file a motion for summary judgment until the Court sets the new deadline. All other deadlines, including the October 14, 2016 discovery deadline, are affirmed.

Dated this 28th day of September, 2016.



Eileen S. Willett
United States Magistrate Judge