



1 **DISCUSSION**

2 “Rule 15(a) is very liberal and leave to amend ‘shall be freely given when justice so requires.’”  
3 AmerisourceBergen Corp. v. Dialysis West, Inc., 465 F.3d 946, 951 (9th Cir. 2006) (quoting Fed. R.  
4 Civ. P. 15(a)). However, courts “need not grant leave to amend where the amendment: (1) prejudices  
5 the opposing party; (2) is sought in bad faith; (3) produces an undue delay in the litigation; or (4) is  
6 futile.” Id. The factor of “[u]ndue delay by itself . . . is insufficient to justify denying a motion to  
7 amend.” Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 712-13 (9th Cir. 2001)  
8 (quoting Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999)).

9 Plaintiff’s motion is essentially a motion to amend his complaint. He seeks to add a claim  
10 under the Federal Tort Claim Act. He states that he attempted to add the cause of action in his Fourth  
11 Amended Complaint, but he “just realized” why they were not combined. Mot. 2. Plaintiff’s tort  
12 claim appears to be based on the same facts giving rise to the Eighth Amendment claim.

13 Plaintiff’s motion must be denied for numerous reasons. First and foremost, this action has  
14 been pending since 2009 and Plaintiff has had numerous opportunities to amend. In fact, this case is  
15 proceeding on Plaintiff’s *Fourth* Amended Complaint. Although Plaintiff mentioned the Federal Tort  
16 Claim Act in the jurisdictional paragraph, it was not clear in the body of the complaint that he was  
17 attempting to allege a tort claim. Indeed, he did not allege compliance with the Federal Tort Claims  
18 Act, which is a jurisdictional requirement. Gillispie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980).

19 Second, allowing an amendment while Findings and Recommendations regarding dismissal are  
20 pending would be (1) prejudicial to Defendant; and (2) perhaps futile. If the Court dismisses this  
21 action for failure to exhaust, there will be no complaint to amend.

22 Accordingly, based on the above, Plaintiff’s motion is DENIED.

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25 IT IS SO ORDERED.

26 Dated: June 24, 2013

/s/ Dennis L. Beck  
27 UNITED STATES MAGISTRATE JUDGE

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