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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LAWRENCE CHRISTOPHER SMITH,
Plaintiff,
vs.
K. ALLISON, et al.,
Defendants.

Case No. 1:10-cv-01814 LJO JLT (PC)

**FINDINGS AND RECOMMENDATION
TO DENY PLAINTIFF'S MOTION TO
FILE A SUPPLEMENT TO THE THIRD
AMENDED COMPLAINT**

(Docs. 169, 173, 174,)

I. Procedural Background

Lawrence Christopher Smith is proceeding on a complaint that he filed on October 1, 2010. (Doc. 1.) Initially, Plaintiff proceeded in this action on the following claims as stated in the Third Amended Complaint: (1) retaliation in violation of the First Amendment claim against Defendants Lt. Goss, Lt. Gallagher, and Officer Langler; (2) deliberate indifference to his serious medical needs in violation of the Eight Amendment against Defendants PA Byers and Lt. Gallagher; and (3) violation of his rights to due process against Defendant Lt. Goss based on events that occurred while Plaintiff was housed at the California Substance Abuse Treatment Facility in Corcoran, California ("SATF"). (Docs. 31, 42, 47.)

The Court granted summary judgment based on Plaintiff's failure to exhaust both his deliberate indifference claims against Defendant Gallagher as well as his retaliation claims against Defendants Gallagher and Goss, resulting in dismissal of Defendant Gallagher from this action. (Docs. 69, 114, 126.) The Court granted Defendant Byers' motion to dismiss resulting in

1 his dismissal from this action. (Docs. 109, 132, 146.) Further, the Court issued a Findings and
2 Recommendation to grant Defendant Goss' motion for judgment on the pleadings as to Plaintiff's
3 due process claim against Defendant Goss which is awaiting consideration by the District Judge.
4 (Docs. 162, 180.) If the Findings and Recommendation is adopted, Defendant Goss will be
5 dismissed from this action and Plaintiff will be proceeding only on his retaliation claim against
6 Defendant Langler. If the Findings and Recommendation is not adopted, Plaintiff will also
7 proceed on his due process claim against Defendant Goss.

8 Plaintiff filed a document entitled his declaration concerning initial filing service within
9 the Court to which he attached a new complaint. (Doc. 169.) Defendants opposed this effort to
10 file an amended pleading. (Doc. 172.) Plaintiff responded by filing a document which he titled a
11 "Notice of Non-Opposition to the Defendants Motion of Opposition Concerning the Plaintiff's
12 Separately Filed 42 U.S.C. § 1983 Civil Complaint Against Thirty-Five (plus) Correctional
13 Officials for Amendment Within Current Case As the Plaintiff Made No Motion To Do So."
14 (Doc. 176.) In his response, clarifies that he was attempting to file an entirely separate case, but
15 that Doc. 169 was errantly filed in this action instead. Thus, it is appropriate for the Court Clerk
16 to be directed to strike Doc. 169 from this case and to file it as an entirely new action on
17 Plaintiff's behalf.¹

18 However, on March 7, 2016, Plaintiff filed a motion to amend his complaint in this action
19 under Federal Rule of Civil Procedure 15(a)(2)² and lodged his desired amendment. (Docs. 173,
20 174.) Defendants filed an opposition on March 15, 2016. (Doc. 177.) Despite lapse of more than
21 the allowed time, Plaintiff has not filed a reply. The motion is deemed submitted.³ L.R. 230(l).

22 **II. Plaintiff's Proposed Fourth Amended Complaint**

23 In the proposed fourth amended complaint ("4thAC") Plaintiff names Defendants Goss

24 ¹The Court makes no comment as to the sufficiency of any claims in that complaint.

25 ² The Federal Rules of Civil Procedure will hereinafter be referred to as "Rule *." Any reference to other statutory
26 authority shall so indicate.

27 ³ The Court has reviewed the motion, opposition, and reply, but declines to exhaustively list every argument
28 presented, every fact recited, and every piece of evidence submitted by the parties. Omission of reference to various
arguments, facts, or evidence should not be interpreted by the parties as an indication that the Court overlooked it, but
rather that only those pertinent to the ruling are noted.

1 and Langler, seeks to resurrect Warden K. Allison as a defendant in this action, and seeks to add
2 two new defendants to this case. (Doc. 173.) Plaintiff also seeks to add additional claims against
3 all of the persons named as defendants therein and to pursue his due process claim against
4 Defendant Goss -- the recommended dismissal of which is currently awaiting District Judge
5 consideration. (*Id.*)

6 Plaintiff's motion to be allowed to file the 4thAC encompasses only two pages and is
7 sparse to say the least. (Doc. 174.) Plaintiff provides neither legal authorities, nor argument, nor
8 evidence to support his motion and, at best, provides anecdotal, conclusory statements as to why
9 his motion should be granted. (*Id.*)

10 **A. Legal Standards**

11 Granting or denying leave to amend a complaint is in the discretion of the Court, *Swanson*
12 *v. United States Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996), though leave should be “freely
13 give[n] when justice so requires.” Fed. R. Civ. P. 15(a)(2). However, there is no abuse of
14 discretion “in denying a motion to amend where the movant presents no new facts but only new
15 theories and provides no satisfactory explanation for his failure to fully develop his contentions
16 originally.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995); *see also Allen v. City of Beverly*
17 *Hills*, 911 F.2d 367, 374 (9th Cir. 1990).

18 Leave to amend should not be granted where “amendment would cause prejudice to the
19 opposing party, is sought in bad faith, is futile, or creates undue delay.” *Madeja v. Olympic*
20 *Packers*, 310 F.3d 628, 636 (9th Cir. 2002) (citing *Yakama Indian Nation v. Washington Dep't of*
21 *Revenue*, 176 F.3d 1241, 1246 (9th Cir. 1999)). Consequently, under Rule 15(a), there are
22 several factors a court may consider in deciding whether to grant leave to amend a complaint: (1)
23 whether the plaintiff has previously amended his complaint, (2) undue delay, (3) bad faith, (4)
24 futility of amendment, and (5) prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178,
25 182 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1319 (9th Cir.
26 1984). These factors are not of equal weight; prejudice to the opposing party has long been held
27 to be the most crucial factor in determining whether to grant leave to amend. *Eminence Capital,*
28 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (“As this circuit and others have held, it

1 is the consideration of prejudice to the opposing party that carries the greatest weight”); *Jackson*
2 *v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990); *Howey v. United States*, 481 F.2d 1187,
3 1190 (9th Cir. 1973).

4 **1. Prior amendments**

5 The Court’s discretion to deny an amendment is “particularly broad” where a party has
6 previously amended the pleading. *Allen*, 911 F.2d at 373. Here, Plaintiff has previously,
7 repeatedly been allowed to file amended complaints -- as is poignantly evidenced by the fact that
8 he is proceeding on the Third Amended Complaint in this action. Therefore, this factor weighs
9 against amendment.

10 **2. Undue delay**

11 By itself, undue delay is insufficient to prevent the Court from granting leave to amend
12 pleadings. *Howey*, 481 F.2d at 1191; *DCD Programs v. Leighton*, 833 F.2d 183, 186 (9th Cir.
13 1986). However, in combination with other factors, delay may be sufficient to deny amendment.
14 *See Hurn v. Ret. Fund Trust of Plumbing*, 648 F.2d 1252, 1254 (9th Cir. 1981). Evaluating undue
15 delay, the Court considers whether “permitting an amendment would . . . produce an undue delay
16 in the litigation.” *Jackson*, 902 F.2d at 1387. Here, Plaintiff seeks, in essence, to change his case
17 from having been whittled down to only proceeding against 1-2 Defendants on 1-2 claims to
18 envelope new conspiracy, retaliation, and conditions of confinement theories -- and attempting to
19 resurrect his claim of due process against Defendant Goss on which a dismissal recommendation
20 is pending, as well as his retaliation claim against Defendant Goss which was previously
21 dismissed. Given that discovery has already closed, the pleading amendment would necessarily
22 cause a delay in the action. Though Plaintiff asserts that no more discovery would be needed as
23 defense counsel is already aware of the facts for his new claims, any new defendants would need
24 and be entitled to opportunity to conduct their own discovery. As a result, this factor weighs
25 against granting Plaintiff leave to amend.

26 **3. Bad faith**

27 There is no evidence Plaintiff acted in bad faith in seeking amendment. Therefore, this
28 factor does not weigh against amendment.

1 **4. Futility of Amendment**

2 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.”
3 *Bonin*, 59 F.3d at 845; *see also Miller v. Rykoff-Sexton*, 845 F.2d 209, 214 (9th Cir. 1988) (“A
4 motion for leave to amend may be denied if it appears to be futile or legally insufficient”). Futility
5 may be found where added claims are duplicative of existing claims or patently frivolous, or both.
6 *See Bonin*, 59 F.3d at 846.

7 In Claim #1, Plaintiff attempts to resurrect his retaliation claim and to save his due process
8 claim from dismissal against Defendant Goss. (Doc. 173, pp. 3-7.) However, for the reasons
9 stated in the prior orders and recommendations on their dismissal, (*see* Docs. 114, 126, 180)
10 these claims are legally insufficient.

11 In Claim #2, Plaintiff complains of acts which took place as part of the re-hearing on the
12 RVR for an altercation with his cellmate. (Doc. 173, pp. 4-5.) In this claim, Plaintiff alleges that
13 he was provided an Investigative Employee (“IE”) who gave Plaintiff’s questions for witnesses to
14 the “SHO” and that his most important question of the witnesses was whether the altercation was
15 an incident of mutual combat or if it was a one-sided assault. (*Id.*) Plaintiff alleges that even the
16 cellmate with whom he fought responded that it was a mutual act of aggression between them.
17 (*Id.*) Plaintiff alleges that Lt. Oehlert and the “SHO” improperly denied review of relevant
18 exculpatory evidence that would have absolved him of the charges and caused his immediate
19 release from Ad-Seg. (*Id.*) Plaintiff also alleges that Appeals Coordinator R. Hall errantly denied
20 his inmate appeal regarding the second disciplinary hearing. The subject of Claim #2 could have
21 been, and was in fact mentioned in the Third Amended Complaint, but was not asserted as basis
22 for a claim in this action. (Doc. 31.) Plaintiff provides neither legal, nor logical argument as to
23 why he should be allowed to assert these claims for a first time now -- more than five years after
24 filing this litigation -- particularly given that he was obviously aware of their factual basis when
25 he filed this action. Thus, he fails to provide “satisfactory explanation for his failure to fully
26 develop his contentions originally.” *Bonin*, 59 F.3d at 845.

27 Claim #3 is against Defendant Langler for depriving Plaintiff of access to the courts to file
28 a timely petition with the California Supreme Court by denying Plaintiff access both to his legal

1 property and to the law library on a regular basis and by refusing and impeding Plaintiff's ability
2 to present viable claims to the courts regarding "illegal actions of correctional officials." (Doc.
3 173, pp. 5, 8.) Plaintiff further alleges that Defendant Langler deprived him of necessary medical
4 care, retaliated against him, and failed to meet his obligation as a supervisory official concerning
5 liability of his subordinate's actions which led to some of Plaintiff's grounds for relief being
6 dismissed with prejudice. (*Id.*) Plaintiff asserts that Defendant Langler took these actions out of
7 retaliation for his protected activities. (*Id.*) Plaintiff also alleges that these actions violated the
8 First, Fourth, and Fifth Amendments. (*Id.*) Plaintiff's allegations under this claim are conclusory
9 and lack specific factual support such that they are not accepted as true. *Ashcroft v. Iqbal*, 556
10 U.S. 662, 676-684 (2009). Thus, since none of the claims Plaintiff attempts to raise in the 4thAC
11 provide sufficient legal basis to allow him to proceed, this factor weighs against allowing
12 amendment.

13 **5. Prejudice to Defendants**

14 The most critical factor in determining whether to grant leave to amend is prejudice to the
15 opposing party. *Eminence Capital*, 316 F.3d at 1052. The burden of showing prejudice is on the
16 party opposing an amendment to the complaint. *DCD Programs*, 833 F.2d at 187; *Beeck v.*
17 *Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (9th Cir. 1977). Prejudice must be substantial to
18 justify denial of leave to amend. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
19 (9th Cir. 1990). There is a presumption in favor of granting leave to amend where prejudice is
20 not shown under Rule 15(a). *Eminence Capital*, 316 F.3d at 1052.

21 Importantly, reopening discovery would prejudice the existing Defendant(s). *See, e.g.,*
22 *Zivkovic*, 302 F.3d at 1087 (observing "[t]he requirement of additional discovery would have
23 prejudiced [the defendant]" if leave to amend a complaint was granted); *Lockheed Martin Corp.*
24 *v. Network Solutions Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("[a] need to reopen discovery and
25 therefore delay the proceedings supports a district court's finding of prejudice"). In addition,
26 there can be no doubt but that Defendant(s) would be prejudiced if the Court were to allow
27 Plaintiff to add new parties over five years after he initiated this lawsuit and just over a month
28 before the dispositive motion filing deadline of May 12, 2016. *See DCD Programs*, 833 F.2d at

1 187; *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054, 1069 (6th Cir.
2 1995)). Given the prejudice to Defendants, this factor weighs heavily against granting Plaintiff
3 leave to file a fourth amended complaint. Because four out of the five required factors weigh
4 against Plaintiff's motion, the recommends that the 4thAC should be **DENIED**.

5 **III. Recommendation**

6 Accordingly, the Court **RECOMMENDS**:

- 7 (1) Doc. 169 be **STRICKEN** from this case and the Court Clerk be **DIRECTED** to file
8 it as an entirely new action;
9 (2) Plaintiff's motion to file an amended complaint, filed March 7, 2016 (Doc. 174), be
10 **DENIED**.

11 These Findings and Recommendations will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 30**
13 **days** after being served with these Findings and Recommendations, Plaintiff may file written
14 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
15 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
16 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, __ F.3d __, __,
17 No. 11-17911, 2014 WL 6435497, at *3 (9th Cir. Nov. 18, 2014) (citing *Baxter v. Sullivan*, 923
18 F.2d 1391, 1394 (9th Cir. 1991)).

19 IT IS SO ORDERED.

20
21 Dated: April 7, 2016

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE