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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

HILTON FISHER,

Plaintiff,

v.

S. ADAIR,

Defendant.

CASE NO. 1:11-cv-00609-AWI-SMS PC

ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AS PREMATURE

(ECF No. 9)

ORDER DENYING PLAINTIFF’S MOTION FOR LEAVE TO AMEND AS UNNECESSARY

(ECF No. 10)

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**I. Procedural History**

Plaintiff Hilton Fisher (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The complaint in this action was filed on April 15, 2011. (ECF No. 1.) Plaintiff filed a motion for a speedy trial on May 10, 2011, and a motion for leave to amend on May 31, 2011. (ECF Nos. 9, 10.)

**II. Motion for Summary Judgment**

Plaintiff’s motion, entitled motion for a speedy trial, requests the Court to grant summary judgment pursuant to Federal Rule of Civil Procedure 56. The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that “fails to state a claim on which relief may be granted,” or that “seeks monetary relief against a defendant who is immune

1 from such relief.” 28 U.S.C. § 1915(e)(2)(B). The Court will order the United States Marshall to  
2 serve Plaintiff’s complaint if, and only if, it determines that Plaintiff has stated a cognizable claim.

3 The Court is yet to screen Plaintiff’s complaint to determine whether it states a claim upon  
4 which relief could be granted. As such, none of the Defendants have been served or have appeared  
5 in this case. With this procedural background in mind, the Court will address Plaintiff’s pending  
6 motion.

7 Federal Rule of Civil Procedure 56 contemplates that, prior to filing a motion for summary  
8 judgment, the opposing party should have a sufficient opportunity to discover information essential  
9 to its position. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In other words, the  
10 case must be sufficiently advanced in terms of pretrial discovery for the summary judgment target  
11 to know what evidence likely can be mustered and be afforded a reasonable opportunity to present  
12 such evidence. Portsmouth Square, Inc., v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th  
13 Cir.1985). Until such time as Defendants have entered an appearance and had the opportunity to  
14 conduct discovery, Plaintiff’s motion is premature. Once Defendants have filed an answer, a  
15 discovery order will be entered, and a deadline for the filing of dispositive motions will be set.  
16 Accordingly, Plaintiff’s motion for summary judgment shall be denied.

17 **III. Motion for Leave to Amend**

18 Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party’s  
19 pleading once as a matter of course at any time before a responsive pleading is served. Otherwise,  
20 a party may amend only by leave of the court or by written consent of the adverse party, and leave  
21 shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). In this case, a responsive  
22 pleading has not been served and Plaintiff has not previously amended his complaint. Therefore,  
23 Plaintiff may file an amended complaint without leave of the Court.

24 Plaintiff is advised that his amended complaint should be brief, Fed. R. Civ. P. 8(a), but must  
25 state what each named defendant did that led to the deprivation of Plaintiff’s constitutional or other  
26 federal rights, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948-49 (2009). “The inquiry into causation must  
27 be individualized and focus on the duties and responsibilities of each individual defendant whose  
28 acts or omissions are alleged to have caused a constitutional deprivation.” Leer v. Murphy, 844 F.2d

1 628, 633 (9th Cir. 1988). Although accepted as true, the “[f]actual allegations must be [sufficient]  
2 to raise a right to relief above the speculative level . . . .” Bell Atlantic Corp. v. Twombly, 550 U.S.  
3 554, 555 (2007) (citations omitted). Finally, an amended complaint supercedes the original  
4 complaint, Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d  
5 565, 567 (9th Cir. 1987), and must be “complete in itself without reference to the prior or superceded  
6 pleading,” Local Rule 220.

7 In addition it appears that Plaintiff is requesting to amend his complaint to add events that  
8 occurred at the time of or after he filed his complaint in this action. Plaintiff is advised that pursuant  
9 to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with respect to prison  
10 conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,  
11 prison, or other correctional facility until such administrative remedies as are available are  
12 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is required regardless of  
13 the relief sought by the prisoner. Booth v. Churner, 532 U.S. 731, 741 (2001). Proper exhaustion  
14 is required so “a prisoner must complete the administrative review process in accordance with the  
15 applicable rules, including deadlines, as a precondition to bringing suit in federal court.” Ngo v.  
16 Woodford, 539 F.3d 1108, 1109 (9th Cir. 2008) (quoting Woodford v. Ngo, 126 S. Ct. 2378, 2384  
17 (2006)).

18 Accordingly, it is HEREBY ORDERED that:

- 19 1. Plaintiff’s motion for summary judgment, filed May 10, 2011, is DENIED as  
20 premature; and
- 21 2. Plaintiff’s motion for leave to amend, filed May 31, 2011, is DENIED as  
22 unnecessary.

23  
24 IT IS SO ORDERED.

25 **Dated: June 2, 2011**

26 **/s/ Sandra M. Snyder**  
27 **UNITED STATES MAGISTRATE JUDGE**