

1 **I. BACKGROUND AND PROCEDURAL HISTORY.**

2 Plaintiff filed his initial complaint on October 16, 2012, which the Court dismissed with leave
3 to amend on October 30, 2012. (Docs. 2, 5). Plaintiff filed his first amended complaint on November
4 21, 2012. (Doc. 11). The Court screened Plaintiff’s first amended complaint pursuant to 28 U.S.C. §
5 1915(e)(2)(B) and determined that Plaintiff stated a cognizable Eighth Amendment claim of failure to
6 protect pursuant to 42 U.S.C. § 1983 against Defendant Jaramillo. (Doc. 15). In the screening order,
7 the Court also directed service of the first amended complaint on Defendant Jaramillo on November
8 26, 2012. (Doc. 15). Defendant Jaramillo answered the first amended complaint on March 11, 2013.
9 (Doc. 21).

10 In his motion to file a second amended complaint, Plaintiff appears to be adding a common law
11 complaint of negligence and an intentional tort of “malicious act.” (Doc. 29). Defendant Jaramillo
12 indicates that Plaintiff’s filing of a second amended complaint would be futile. (Doc. 30).

13 **II. DISCUSSION AND ANALYSIS.**

14 Under Fed.R.Civ.P. 15(a), a party may amend a pleading once as a matter of course within 21
15 days of service, or if the pleading is one to which a response is required, 21 days after service of the
16 responsive pleading. “In all other cases, a party may amend its pleading only with the opposing
17 party’s written consent or the court’s leave.” Fed.R.Civ.P. 15(a)(2). Here, Defendant filed an answer
18 on March 11, 2013. (Doc. 21). Therefore, Plaintiffs require either consent of Defendant or leave of the
19 Court to file amended pleadings. Defendants do not consent to Plaintiff’s proposed amendment. (Doc.
20 30).

21 Granting or denying leave to amend a complaint is in the discretion of the Court, Swanson v.
22 United States Forest Service, 87 F.3d 339, 343 (9th Cir. 1996), though leave should be “freely given
23 when justice so requires.” Fed.R.Civ.P. 15(a)(2). “In exercising this discretion, a court must be
24 guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the
25 pleadings or technicalities.” United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). After a
26 defendant files a responsive pleading, leave to amend should not be granted where “amendment would
27 cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay.” Madeja
28 v. Olympic Packers, 310 F.3d 628, 636 (9th Cir. 2002), *citing* Yakima Indian Nation v. Wash. Dep’t

1 of Revenue, 176 F.3d 1241, 1246 (9th Cir. 1999). There is no abuse of discretion “in denying a
2 motion to amend where the movant presents no new facts but only new theories and provides no
3 satisfactory explanation for his failure to fully develop his contentions originally.” Bonin v. Calderon,
4 59 F.3d 815, 845 (9th Cir. 1995); *see also* Allen v. City of Beverly Hills, 911 F.2d 367, 374 (9th Cir.
5 1990).

6 **A. Permitting the amendment would be futile.**

7 There is no indication or suggestion that bad faith motivates Plaintiff’s request to amend his
8 first amended complaint. Rather, Defendants proffer that it would be futile to permit amendment of
9 the complaint as Plaintiff’s operative Eighth Amendment claim for punitive damages encompasses the
10 term “malicious act.” (Doc. 30 at 3). Additionally, Defendants indicate that there is no cause of action
11 for “incompetence” under state or federal law and that Plaintiff fails to state a cause of action for
12 “negligence.” Id.

13 Without screening the proposed second amended complaint to determine whether Plaintiff
14 states any cognizable claim for “negligence,”¹ “failure to protect” or “incompetence,” the Court notes
15 that Plaintiff’s first amended complaint already contains a claim for failure to protect in violation of
16 the Eighth Amendment. (Doc. 11). Furthermore, Plaintiff avers that “Defendant Jaramillo was aware
17 [a] the serious risk of violence existed,” which speaks to “deliberate indifference” or “malicious act.”
18 Id. at 5. This is already an element of Plaintiff’s Eighth Amendment claim. Thus, it would be futile to
19 permit Plaintiff to amend his first amended complaint.

20 **B. Permitting the amendment would cause undue delay.**

21 Plaintiff provides no reasons for seeking to amend the complaint, but rather submits a proposed
22 second amended complaint in the body of his motion. (Doc. 29). In addition, Plaintiff does not allege
23 new facts in his proposed second amended complaint, but rather presents new legal theories. The
24

25 ¹In addition, it would be futile to permit Plaintiff to amend his complaint to contain the alleged common law action of
26 negligence. Under the California Tort Claims Act (“CTCA”), a plaintiff may not maintain an action for damages against a
27 public employee unless he has presented a written claim to the state Victim Compensation and Government Claims Board
28 within six months of accrual of the action. See Cal. Gov’t Code §§ 905, 911.2(a), 945.4 & 950.2; Mangold v. California
Pub. Utils. Comm’n, 67 F.3d 1470, 1477 (9th Cir. 1995). Failure to allege compliance constitutes a failure to state a cause
of action and will result in the dismissal of plaintiff’s state law claims. State of California v. Superior Court (Bodde), 32
Cal.4th 1234, 1243-44 (2004). Plaintiff has made no mention of the CTCA.

