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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 ROBERT DEWAYNE BOSLEY, JR.,

11 Plaintiff,

12 v.

13 M. VALASCO, et al.,

14 Defendants.  
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Case No. 1:14-cv-00049-MJS (PC)

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR EXTENSION OF TIME,  
STRIKING PLAINTIFF'S THIRD  
AMENDED COMPLAINT, AND DENYING  
DEFENDANT'S MOTION TO STRIKE**

**(ECF Nos. 33-35)**

17 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil  
18 rights action pursuant to 42 U.S.C. § 1983. He initiated this action on January 14, 2014,  
19 and is proceeding on a second amended complaint that, as screened, states a  
20 Fourteenth Amendment excessive force claim against Defendant Valasco. (ECF Nos.  
21 13, 14.) Defendant filed an answer on April 30, 2015, and a Discovery and Scheduling  
22 Order issued on May 12, 2015. (ECF Nos. 21, 22.) Pursuant to that order, the deadline  
23 for filing an amended pleading was November 12, 2015.

24 Now pending is Plaintiff's November 5, 2015, motion for 60-day extension of time  
25 to file a third amended complaint. (ECF No. 33.) On November 19, 2015, Plaintiff lodged  
26 a third amended complaint, but has not moved for leave to file this complaint. (ECF No.  
27 34.) Defendant moves to strike the third amended complaint. (ECF No. 35.)  
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1 Under Rule 15(a), a plaintiff may amend his complaint once “as a matter of  
2 course,” and without leave of court, before a response has been filed. Fed. R. Civ. P.  
3 15(a)(1); Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). However, a party can only  
4 amend the pleading with the opposing party's written consent or the court's leave once  
5 a responsive pleading has been filed. Fed. R. Civ. P. 15(a)(2). Here, Defendant filed a  
6 responsive pleading to Plaintiffs' second amended complaint and has not agreed to the  
7 amendment, so leave of the Court is required.

8 Rule 15(a) provides that a court “should freely give leave [to amend] when justice  
9 so requires.” The United States Supreme Court has stated:

[i]n the absence of any apparent or declared reason—such  
11 as undue delay, bad faith or dilatory motive on the part of the  
12 movant, repeated failure to cure deficiencies by  
13 amendments previously allowed, undue prejudice to the  
14 opposing party by virtue of allowance of the amendment,  
15 futility of amendment, etc.—the leave sought should, as the  
16 rules require, be “freely given.”

Foman v. Davis, 371 U.S. 178, 182 (1962).

17 This policy is “to be applied with extreme liberality.” Eminence Capital, LLC v.  
18 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (citations omitted). The Ninth Circuit  
19 has summarized these factors to include the following: (1) undue delay; (2) bad faith; (3)  
20 prejudice to the opponent; and (4) futility of amendment. Loehr v. Ventura County Cmty.  
21 Coll. Dist., 743 F.2d 1310, 1319 (9th Cir. 1984). These factors are not of equal weight  
22 as prejudice to the opposing party has long been held to be the most critical factor in  
23 determining whether to grant leave to amend. Eminence Capital, 316 F.3d at 1052 (“As  
24 this circuit and others have held, it is the consideration of prejudice to the opposing  
25 party that carries the greatest weight”); Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387  
26 (9th Cir. 1990). Additionally, “leave to amend will not be granted where an amendment  
27 would be futile.” Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1010  
28 (9th Cir. 2008).

1 Even though Plaintiff has not sought leave to file an amended pleading, the Court  
2 has examined the third amended complaint and finds that it does not name any new  
3 Defendants or assert any new claims. Instead, Plaintiff adds additional, detailed  
4 allegations related to Defendant's use of excessive force, such as how and where  
5 Defendant struck Plaintiff. But since Plaintiff's allegations in the second amended  
6 complaint were found sufficient to state an excessive force claim against this Defendant,  
7 the Court finds that the addition of these details would serve no useful purpose.

8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1. Plaintiff's November 5, 2015, motion for extension of time (ECF No. 33) is  
10 GRANTED;
- 11 2. Plaintiff's November 12, 2015, third amended complaint (ECF No. 34) is  
12 STRICKEN; and
- 13 3. Defendant's November 19, 2015, motion to strike (ECF No. 35) is DENIED as  
14 moot.

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16 IT IS SO ORDERED.

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18 Dated: January 31, 2016

/s/ Michael J. Seng  
19 UNITED STATES MAGISTRATE JUDGE  
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