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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

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11 MICHAEL NEIL JACOBSEN,

12 Plaintiff,

13 v.

14 PEOPLE OF THE STATE OF  
15 CALIFORNIA,

16 Defendant.

**Case No. 1:14-cv-00108-JLT (PC)**

**ORDER GRANTING DEFENDANTS'  
MOTION TO STRIKE PLAINTIFF'S THIRD  
AMENDED COMPLAINT and DENYING  
PLAINTIFF'S REQUEST FOR LEAVE TO  
FILE AN AMENDED COMPLAINT**

**(Docs. 47, 50)**

17 **I. Background**

18 Plaintiff filed his original complaint in this action on January 24, 2014. (Doc. 1.) The  
19 Court screened it and dismissed it with leave to amend. (Doc. 11.) On May 7, 2014, Plaintiff  
20 filed the First Amended Complaint ("1stAC")<sup>1</sup> (Doc. 13) which the Court screened. (Doc. 15).  
21 On July 3, 2014, Plaintiff filed the Second Amended Complaint ("2ndAC"). (Doc. 16) The Court  
22 screened it and found the complaint stated cognizable claims for relief under section 1983. In  
23 particular, the Court found cognizable claims: (1) against Sergeant Diaz for using excessive force  
24 and for deliberate indifference to Plaintiff's serious medical needs in violation of the Eighth  
25 Amendment and for violation of Plaintiff's right of access to the courts and retaliation in violation  
26 of the First Amendment; (2) against Officer Barahas for using excessive force in violation of the

27 <sup>1</sup> A week later, Plaintiff filed a "motion to addendum" (Doc. 14) which was disregarded when the 1stAC was  
28 screened and Plaintiff was thereafter given another opportunity to amend (Doc. 15).

1 Eighth Amendment and for retaliation in violation of the First Amendment; and, (3) against  
2 Monica Choe, R.N. (erroneously sued herein as "Nurse Monica") for deliberate indifference to his  
3 serious medical needs in violation of the Eighth Amendment. (Doc. 17). Thereafter, Defendants  
4 Diaz and Barahas were served and filed answers. (Docs. 22, 25.) The Court then issued the first  
5 Discovery and Scheduling Order issued. (Doc. 24.) Defendant Choe was served later. (*See*  
6 Docs. 35, 38, 48.)

7 On August 13, 2015, Plaintiff lodged his Third Amended Complaint ("3rdAC"). (Doc.  
8 44.) In response, Diaz and Barahas ("Defendants") filed a motion to strike the 3rdAC. (Doc. 47.)  
9 Though Choe filed an answer (Doc. 48), she has not opposed the motion to amend or joined in the  
10 other Defendants' motion. Plaintiff did not file an opposition to Defendants' motion to strike.  
11 However, he filed a motion for leave to file an amended complaint. (Doc. 50.) Defendants Diaz  
12 and Barahas opposed the motion. (Doc. 52) Plaintiff did not file a reply.

## 13 **II. Amendment under Rule 15**

14 The decision to grant leave to amend a complaint is vested within the discretion of the  
15 Court, *Swanson v. United States Forest Service*, 87 F.3d 339, 343 (9th Cir. 1996), though leave  
16 should be "freely give[n] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, there is  
17 no abuse of discretion "in denying a motion to amend where the movant presents no new facts but  
18 only new theories and provides no satisfactory explanation for his failure to fully develop his  
19 contentions originally." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995); *see also Allen v.*  
20 *City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990). The Court should not grant leave where  
21 "amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or  
22 creates undue delay." *Madeja v. Olympic Packers*, 310 F.3d 628, 636 (9th Cir. 2002) (citing  
23 *Yakama Indian Nation v. Washington Dep't of Revenue*, 176 F.3d 1241, 1246 (9th Cir. 1999)).

### 24 **A. Defendants' Motion**

25 In their motion, Defendants argue only that a "court may strike from a pleading an  
26 insufficient defense or any redundant, immaterial, impertinent, or scandalous<sup>2</sup> matter" (Doc. 47,

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27 <sup>2</sup> Defendants fail to identify any parts of the 3rdAC they feel are "redundant, immaterial, impertinent, or scandalous"  
28 and the Court finds none.

2:17-18, citing Rule 12(f)); that the operative Amended Discovery and Scheduling Order stated September 22, 2015 as the deadline for filing of amended pleadings in compliance with Rule 15 and Local Rule 220 (*id.*, at 2:18-23); and that Plaintiff's 3rdAC should be stricken because he filed it without a stipulation of the parties and without leave of the court (*id.*, at 2:23-26). Defendants argue that since Plaintiff failed to comply with the Amended Discovery and Scheduling Order and Rule 15, "the Court should strike the entirety of Plaintiff's third amended complaint because it is immaterial." (*Id.*, at 2:26-28.) Defendants both fail to provide any argument as to why they feel the 3rdAC is "immaterial" and fail to address any of the factors under Rule 15 pertaining to amendment.

#### **B. Plaintiff's Motion**

Plaintiff's request for leave to amend is sparse and terse. The whole of Plaintiff's request is:

Petitioner, Michael Jacobsen, does hereby move the court to grant a leave of court to amend complaint pursuant to Federal Rules of Civil Procedure 15(a)(2).

The deadline to ammend [sic] said complaint is Sept. 22, 2015. The amended complaint Petitioner wishes to file is attached hereto.

Notably, there is no amended complaint attached to Plaintiff's request. (*See* Doc. 50.)

#### **C. Rule 15**

Defendants' motion to strike the 3rdAC and Plaintiff's motion to amend must be viewed in light of the requirements of Rule 15. Under Rule 15(a), there are five factors to be considered in deciding whether to grant leave to amend a complaint: (1) whether the plaintiff has previously amended his complaint, (2) undue delay, (3) bad faith, (4) futility of amendment, and (5) prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1319 (9th Cir. 1984). These factors are not of equal weight; prejudice to the opposing party has long been held to be the most crucial factor in determining whether to grant leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight"); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973).

1                               **1. Prior amendments**

2               The Court’s discretion to deny an amendment is “particularly broad” where a party has  
3 previously amended the pleading. *Allen*, 911 F.2d at 373. Here, the Court has permitted Plaintiff  
4 several opportunities to amend his complaint. Therefore, this factor weighs in favor of striking  
5 the 3rdAC.

6                               **2. Undue delay**

7               By itself, undue delay is insufficient to prevent the Court from granting leave to amend  
8 pleadings. *Howey*, 481 F.2d at 1191; *DCD Programs v. Leighton*, 833 F.2d 183, 186 (9th Cir.  
9 1986). However, in combination with other factors, delay may be sufficient to deny amendment.  
10 *See Hurn v. Ret. Fund Trust of Plumbing*, 648 F.2d 1252, 1254 (9th Cir. 1981). An important  
11 factor is whether “permitting an amendment would . . . produce an undue delay in the litigation.”  
12 *Jackson*, 902 F.2d at 1387. Plaintiff’s 3rdAC seeks to insert two new defendants and adds and/or  
13 clarifies factual allegations made in the 2ndAC. This action is over a year and a half old and the  
14 current discovery deadline is a mere two months away.<sup>3</sup>

15               Given the age and procedural position of this case, allowing the 3rdAC to proceed would  
16 cause a significant delay in the action. The two new defendants would need to be located, served  
17 and given the opportunity to conduct discovery. As a result, this factor weighs in favor of striking  
18 the 3rdAC.

19                               **3. Bad faith**

20               There is no evidence before the Court to suggest whether Plaintiff may have acted in bad  
21 faith when he submitted the 3rdAC. Thus, this factor has no bearing in whether the Court should  
22 strike the 3rdAC.

23                               **4. Futility of amendment**

24               While the Court is mindful of the liberality of Rule 15(a) and the leniency accorded *pro se*  
25 litigants, the Court may properly deny leave to amend if the proposed amendments are futile.  
26 *Woods v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012); *Silva v. Di Vittorio*, 658 F.3d

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27 <sup>3</sup> Defendant Choe has requested the operative discovery and scheduling order be significantly modified. (Doc. 55.)  
28 However, the time for the other parties to file oppositions and which may thereafter be replied to has yet to lapse.

1 1090, 1105-06 (9th Cir. 2011); *Carrico v. City and County of San Francisco*, 656 F.3d 1002,  
2 1008 (9th Cir. 2011). The Court has similar authority where the party seeking amendment knew  
3 or should have known of the facts upon which the proposed amendment is based, but failed to  
4 include them in prior pleadings, *E.E.O.C. v. Boeing, Co.*, 843 F.2d 1213, 1222 (9th Cir. 1988).

5 The amendment is futile where added claims duplicate existing claims or are patently  
6 frivolous. *See Bonin*, 59 F.3d at 846. In this case, Plaintiff's allegations against the two  
7 individuals whom he names in the 3rdAC as new defendants in this action duplicate Plaintiff's  
8 claims against Defendant Diaz. Plaintiff's allegations against the two potential new defendants  
9 are stated within Plaintiff's claims which have already been found cognizable against Defendant  
10 Diaz and Plaintiff alleges that the two potential new defendants acted at Defendant Diaz's behest.  
11 (*See e.g.* Doc. 44, pp. 6-10.)

12 Further, the 3rdAC is based on the precise factual allegations that Plaintiff alleged in his  
13 prior pleadings in this action -- particularly those of the 2ndAC. However, Plaintiff fails to  
14 provide any explanation, let alone anything even verging on a satisfactory explanation, as to why  
15 he failed to include them in his prior pleadings. *Bonin*, 59 F.3d at 845. This is of particular  
16 concern because the Court directed Plaintiff to identify each individual defendant(s) "by name or  
17 by a Doe designation" in the order related to the screening of the 1stAC. (Doc. 15, 4:7-5:1)  
18 Despite this explicit direction, in his 2ndAC, Plaintiff failed to indicate there were any other  
19 actors whose names/identities he did not know, but to whom he attributed culpability (*see* Doc.  
20 16).

21 Finally, Plaintiff's new allegations that the violations of his due process rights prevented  
22 him from timely filing pre-trial motions which caused him to be convicted of a crime which he  
23 did not commit (Doc. 44, pp. 7-8), raises an issue as to whether this action would be barred by the  
24 favorable termination rule. When a prisoner raises a constitutional challenge, which could entitle  
25 him to an earlier release, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*,  
26 411 U.S. 475 (1973); *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990), *cert. denied* 498 U.S. 1126  
27 (1991). Moreover, when seeking damages for an allegedly unconstitutional conviction or  
28 imprisonment, "a § 1983 plaintiff must prove that the conviction or sentence has been reversed on

1 direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to  
2 make such determination, or called into question by a federal court's issuance of a writ of habeas  
3 corpus, 28 U.S.C. §2254.” *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). “A claim for  
4 damages bearing that relationship to a conviction or sentence that has not been so invalidated is  
5 not cognizable under § 1983.” *Id.*, at 487. Plaintiff does not state any facts in the 3rdAC to show  
6 that his conviction or sentence has been reversed, expunged, declared invalid, or called into  
7 question. (Doc. 44.) Thus, his new allegations that was held in Ad-Seg for the purpose of  
8 blocking his access to phones, visits with his family, and access to the courts—via blocking his  
9 access to the law library—are not cognizable in this action. The Court notified Plaintiff as much  
10 in its order screening his 1stAC. (See Doc. 15, 6:12-7:1.) Accordingly, this factor weighs  
11 heavily in favor of striking the 3rdAC.

## 12 **5. Prejudice to the opposing party**

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

20 Importantly, extending the discovery period has been found to prejudice existing  
21 defendants in this scenario. *See, e.g., Zivkovic*, 302 F.3d at 1087 (observing “[t]he requirement of  
22 additional discovery would have prejudiced [the defendant]” if leave to amend a complaint was  
23 granted); *Lockheed Martin Corp. v. Network Solutions Inc.*, 194 F.3d 980, 986 (9th Cir. 1999)  
24 (“[a] need to reopen discovery and therefore delay the proceedings supports a district court’s  
25 finding of prejudice”). Defendants would be prejudiced if the Court were to allow Plaintiff to add  
26 new parties more than 18 months after initiation of the lawsuit where the vast majority of  
27 discovery with two of the three current Defendants is (or should be) nearly completed. *See DCD*  
28 *Programs*, 833 F.2d at 187; *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d

1 1054, 1069 (6th Cir. 1995)). Given the likely prejudice to Defendants, this factor also weighs in  
2 favor of striking the 3rdAC.

3 **III. Conclusion**

4 The Court finds that the predominance of factors under Federal Rule of Civil Procedure  
5 15 weigh in favor of granting Defendants' motion to strike Plaintiff's lodged Third Amended  
6 Complaint from this action. Based on the above, the Court **ORDERS**:

- 7 1. Defendants' motion to strike the lodged Third Amended Complaint (Doc. 47), is  
8 **GRANTED**;  
9 2. Plaintiff's request for leave to file an amended complaint (Doc. 50), is **DENIED**; and  
10 3. Plaintiff's Third Amended Complaint (Doc. 44), is **STRICKEN**.

11 IT IS SO ORDERED.  
12

13 Dated: September 29, 2015

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE