

1 to show cause why this action should not be dismissed for failure to obey a court order and failure
2 to prosecute. (ECF No. 26.)

3 On June 20, 2017, Plaintiff filed a motion to continue proceedings, stating that he believed
4 he did not need to file an amended complaint because Defendant's counsel was aware of his
5 timely motion to amend solely the amount of damages. In addition, Plaintiff stated that his
6 institution refused to provide him with legal materials or access to the law library. (ECF No. 27.)
7 The Court discharged the order to show cause and directed Defendant Kamena to file a response.
8 (ECF No. 28.)

9 Counsel for Defendant filed a declaration on July 10, 2017, stating that he made no
10 representation to Plaintiff that his acknowledgment of the motion to amend was a substitute for
11 compliance with the Court's order. (ECF No. 29.) Defense counsel further stated that he was
12 informed that Plaintiff had full access to his legal property, had received indigent supplies twice
13 in June 2017, had attended law library on approximately a dozen occasions, and did not attend on
14 approximately a dozen other dates in the same time period. (Id.) Plaintiff did not file a reply.

15 The Court granted Plaintiff a final opportunity to file a first amended complaint or to
16 affirmatively notify the Court that he wished to proceed only on the damages pled in the
17 complaint filed on May 8, 2015. (ECF No. 30.)

18 Upon Plaintiff's failure to file a first amended complaint or a response, on September 11,
19 2017, the Court ordered that this action proceed only on the cognizable claims and damages pled
20 in the original complaint filed on May 8, 2015. (ECF No. 31.)

21 On October 2, 2017, Defendant Kamena filed a motion for summary judgment on the
22 grounds that Plaintiff's failure to protect and deliberate indifference to medical treatment claims
23 are unsupported by any admissible evidence, and Defendant Kamena is entitled to qualified
24 immunity. (ECF No. 32.) Plaintiff's opposition was due on or before October 26, 2017.

25 On October 6, 2017, Plaintiff filed the instant motion to amend pleadings without having
26 to file an amended complaint. (ECF No. 33.) Defendant filed an opposition on October 19, 2017.
27 (ECF No. 34.) Plaintiff did not file a reply, and the deadline to file a reply has expired. The
28 motion is deemed submitted. Local Rule 230(l).

1 **II. Motion to Amend**

2 In his renewed motion to amend, Plaintiff again asserts his institution refuses to provide
3 him with the legal supplies needed to litigate this action. Plaintiff states that in the twenty months
4 he has been housed at Salinas Valley State Prison, he has been issued exactly two used pens and
5 exactly thirty pages of blank typing paper. In addition, Plaintiff again states that the facility law
6 library does not contain any legal print materials, and only provides duplication services, a
7 stapler, and legal mailing envelopes. Plaintiff argues that it is impossible for him to file an
8 amended complaint. (ECF No. 33.)

9 In opposition, Defendant argues that Plaintiff has not demonstrated good cause sufficient
10 to explain his failure to comply, for six months, with the Court’s order granting leave to amend.
11 In addition, Defendant argues that there is strong evidence of bad faith given that Plaintiff’s
12 motion to amend was filed four days after Defendant’s motion for summary judgment, and the
13 granting of leave to amend at this time would be prejudicial. (ECF No. 34.)

14 **A. Legal Standard**

15 Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party’s
16 pleading once as a matter of course at any time before a responsive pleading is served.
17 Otherwise, a party may amend only by leave of the court or by written consent of the adverse
18 party. Fed. R. Civ. P. 15(a). “Rule 15(a) is very liberal and leave to amend shall be freely given
19 when justice so requires.” AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 951
20 (9th Cir. 2006) (citation and quotation omitted).

21 However, courts “need not grant leave to amend where the amendment: (1) prejudices the
22 opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is
23 futile.” Id. These factors do not carry equal weight. Prejudice is the most important factor to
24 consider. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990).

25 **B. Discussion**

26 The Court initially granted Plaintiff’s motion to amend the complaint, solely with respect
27 to damages, on April 19, 2017. (ECF No. 25.) In the five months between that order and the
28 Court’s September 11, 2017 order that this action shall proceed on the complaint filed May 8,

1 2015, the Court provided Plaintiff with multiple opportunities to file a first amended complaint.
2 (See ECF Nos. 26, 30.)

3 While Plaintiff has argued that he was not provided with the paper and pens needed to file
4 a first amended complaint, since the Court's April 19, 2017 order, he has filed a motion to
5 continue proceedings and the instant motion to amend, totaling thirty (30) pages. (See ECF Nos.
6 27, 33.) Plaintiff's original complaint was twenty-five (25) pages in length. (See ECF No. 1.)
7 Moreover, Plaintiff has stated that the law library, despite its limitations, provides duplication
8 services. (ECF No. 33, pp. 7, 8.) Given the limited nature of the amendment, Plaintiff could have
9 provided the Court with a photocopy of the original complaint, with the alterations noted.
10 Plaintiff did not do so.

11 In this case, the Court declines to find bad faith. Although Defendant is correct that
12 Plaintiff's renewed motion to amend was docketed four days following the filing of the motion
13 for summary judgment, the proof of service is dated October 1, 2017, one day prior to the motion
14 for summary judgment. Pursuant to the prison mailbox rule, a pleading filed by a pro se prisoner
15 is deemed to be filed as of the date the prisoner delivered it to the prison authorities for mailing to
16 the court clerk. See Houston v. Lack, 487 U.S. 266, 270 (1988); Douglas v. Noelle, 567 F.3d
17 1103, 1108–09 (9th Cir. 2009) (mailbox rule articulated in Houston applies to civil rights
18 actions). Thus, contrary to Defendant's assertions, Plaintiff's motion was filed prior to the
19 motion for summary judgment, and the filing does not indicate a dilatory motive.

20 However, the Court finds that prejudice to the Defendant here warrants the denial of
21 Plaintiff's motion. Plaintiff was provided multiple opportunities and extensions of time to file a
22 first amended complaint, and he has failed to do so. Plaintiff's explanation that he lacks
23 sufficient legal materials to file the amended complaint is unpersuasive. Moreover, the filing of
24 an amended complaint at this juncture would cause undue delay, given the filing of Defendant's
25 motion for summary judgment.

26 **III. Motion for Summary Judgment**

27 As noted above, Defendant Kamena filed a motion for summary judgment on October 2,
28 2017. Fed. R. Civ. P. 56; (ECF No. 32.) Plaintiff was provided with notice of the requirements

1 for opposing a motion for summary judgment. Woods v. Carey, 684 F.3d 934 (9th Cir. 2012);
2 Rand v. Rowland, 154 F.3d 952, 957 (9th Cir.1988); Klinge v. Eikenberry, 849 F.2d 409, 411–
3 12 (9th Cir.1988). (ECF No. 32-1.) Plaintiff’s opposition was due within twenty-one (21) days
4 of service of Defendant’s motion. More than thirty (30) days have passed, but Plaintiff has not
5 filed an opposition or statement of non-opposition to the motion. Plaintiff also has not otherwise
6 communicated with the Court regarding the pending motion for summary judgment.

7 **IV. Conclusion and Order**

8 Based on the foregoing, IT IS HEREBY ORDERED as follows:

- 9 1. Plaintiff’s motion for leave to amend his complaint, (ECF No. 33), is DENIED;
10 2. Pursuant to Local Rule 230(1), Plaintiff is DIRECTED to file an opposition or a
11 statement of non-opposition to Defendant’s motion for summary judgment (ECF No.
12 32) within **thirty (30) days**; and
13 3. **Plaintiff is warned that the failure to comply with this order will result in**
14 **dismissal of this action, with prejudice, for failure to prosecute and failure to**
15 **obey a court order.**

16
17 IT IS SO ORDERED.

18 Dated: November 7, 2017

18 /s/ Barbara A. McAuliffe
19 UNITED STATES MAGISTRATE JUDGE