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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10 **FRESNO DIVISION**

11 DAVID PHILLIPS-KERLEY,
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13 Plaintiff,
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15 vs.
16 CITY OF FRESNO FIRE
DEPARTMENT, a California
Governmental Entity; MIKE GILL, an
17 individual; RONALD CALDWELL, an
individual; CHARLES TOBIAS, an
18 individual; JERRY SMITH, an
individual; MARK HARVEY, an
19 individual; DONALD MAC ALPINE,
an individual; RONALD STOGDELL,
an individual; NICHOLAS MARTINO,
an individual; CASEY CLARK, an
20 individual; DANIEL ESCOBAR, an
individual; OSCAR BETANCOURT, an
21 individual; TONY ESCOBEDO, an
individual; JONATHAN CHEW, an
22 individual; KERRI DONIS, an
individual; RANDALL REITZ, an
23 individual; RICHARD CABRAL, an
individual; JOHN CREASY, an
24 individual; RICHARD WILLARD, an
individual; CARLTON JONES, an
25 individual; KENNETH PHILLIPS, an
individual; JEFFREY CARDELL, an
26 individual; BRUCE RUDD, an
individual; VAN TASSEL, an
27 individual; and DOES 1 to 10, inclusive,
28 Defendants.

Case No. 1:18-cv-00438-AWI-BAM

**STIPULATION AND [PROPOSED] ORDER
TO FILE FIRST AMENDED COMPLAINT
AND ORDER VACATING JUNE 25, 2018
HEARING AND DENYING MOTION TO
DISMISS AS MOOT**

(Doc. Nos. 10, 12)

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On June 18, 2018, the parties filed the following stipulation

Plaintiff DAVID PHILLIPS-KERLEY (“Plaintiff”) and Defendant CITY OF FRESNO (sued erroneously as City of Fresno Fire Department) (“Defendant”), by and through their respective counsel (collectively hereinafter, the “Parties”), hereby enter into this stipulation to allow Plaintiff to file a First Amended Complaint and to vacate the pending June 25, 2018 hearing on Defendant City of Fresno’s Motion to Dismiss pursuant to FRCP, Rule 12.

WHEREAS, Plaintiff filed his Complaint on March 28, 2018;

WHEREAS, Defendant City of Fresno filed a Motion to Dismiss on May 15, 2018;

WHEREAS, Plaintiff has prepared a First Amended Complaint which attempts to cure the defects raised in the pending motion;

WHEREAS, the Parties agree that Plaintiff should be granted leave to file the First Amended Complaint on or before June 18, 2018;

WHEREAS, the filing of the First Amended Complaint will obviate the need to go forward with the scheduled hearing on Defendant City of Fresno’s Rule 12 Motion.

THE PARTIES HEREIN STIPULATE AS FOLLOWS:

- (1) Plaintiff shall be granted leave until June 18, 2018, to file his First Amended Complaint;
- (2) The hearing on Defendant City of Fresno’s Motion to Dismiss is VACATED upon Plaintiff’s filing the First Amended Complaint;
- (3) Defendant City of Fresno will have until July 9, 2018, in which to file a responsive pleading.

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Dated: June 14, 2018

BETTS & RUBIN

/s/ Joseph D. Rubin
JOSEPH D. RUBIN
Attorney for Defendant CITY OF FRESNO

Dated: June 14, 2018

LAW OFFICE OF STEVE WHITWORTH

/s/ Steve Whitworth
STEVE WHITWORTH
Attorney for Plaintiff DAVID PHILLIPS-
KERLEY

The Court will give effect to the stipulation. Additionally, with the filing of the first amended complaint and the vacation of the June 25 hearing date, the pending motion to dismiss is now moot and will be denied as such.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Pursuant to the parties June 18, 2018 stipulation, the first amended complaint (Doc. No. 13) is considered FILED and OPERATIVE;
2. The June 25, 2018, hearing date on Defendants' motion to dismiss is VACATED;
3. Defendants' motion to dismiss (Doc. No. 10) is DENIED as moot; and
4. Defendants shall file a response to the first amended complaint on or by July 9, 2018.

IT IS SO ORDERED.

Dated: June 19, 2018



SENIOR DISTRICT JUDGE