

1 September 16, 2020, Plaintiff filed a pleading titled “Exhaustion Motion and Amend Pleadings.”
2 (Doc. No. 36). The Court construed that pleading as a motion to amend and permitted Plaintiff to
3 file an amended complaint. (Doc. No. 45). Plaintiff filed his first amended complaint on April
4 21, 2021. (Doc. No. 47, “FAC”). The FAC essentially alleges the same sole claim of excessive
5 force claim against Defendant Serrano, except it includes an allegation that Defendant’s actions
6 violated a CDCR policy. (*Id.* at 3).

7 Plaintiff’s instant Motion was filed after the deadline in the Scheduling Order. Plaintiff
8 does not attach a proposed second amended complaint to his Motion. In his Motion, Plaintiff
9 states only that he wishes to add the California Department of Corrections and Rehabilitation
10 (“CDCR”) as a defendant because CDCR’s inadequate training resulted in Defendant’s use of
11 excessive force. (Doc. No. 52). Plaintiff claims that due to limited access to the law library and
12 legal materials he only recently became aware CDCR could be named as a defendant. In
13 opposition, Defendant argues Plaintiff should not be permitted to amend because he has not
14 shown good cause to avoid the time bar and that adding CRCR as a defendant would be futile
15 because CDCR is immune from suit under the Eleventh Amendment. (Doc. No. 53).

16 II. APPLICABLE LAW

17 After a defendant has answered and the deadline to amend the pleadings set forth in the
18 scheduling order has expired, Rule 16 of the Federal Rules of Civil Procedure governs whether a
19 plaintiff may amend. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). Under
20 Rule 16(b)(4), “[a] schedule may be modified only for good cause and with the judge’s consent.”
21 Leave to amend should be denied if the proposed amendments appear to be futile. *Anderson v.*
22 *Anthem Blue Cross*, 776 F. App’x 465 (9th Cir. 2019). A proposed amendment is futile when “no
23 set of facts can be proved under the amendment to the pleadings that would constitute a valid and
24 sufficient claim or defense.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017)
25 (internal quotations omitted). Further, the Court’s rules provide when “filing a document requires
26 leave of court, such as an amended complaint after the time to amend as a matter of course has
27 expired, counsel shall attach the document proposed to be filed as an exhibit to moving papers
28 seeking such leave and lodge a proposed order as required by these Rules.” Local Rule 137(c).

1 **III. ANALYSIS**

2 At the outset, Plaintiff does not attach a proposed second amended complaint to his
3 Motion as required by Local Rule 137(c). Nor does Plaintiff show good cause for not timely
4 moving to amend. Plaintiff’s claimed delay due to the lack of access to the law library is belied
5 by his corresponding statement that his decision to add CDCR was prompted by advice from a
6 “legal information clinic.” (Doc. No. 52 at 2). Plaintiff does not explain why he was unable to
7 contact that clinic earlier when the Court gave him leave to amend in April 2021.

8 Nonetheless, adding CDCR as a defendant is futile. State agencies generally enjoy
9 immunity from liability under 42 U.S.C. § 1983 unless explicitly waived. *Will v. Michigan Dep’t*
10 *of State Police*, 491 U.S. 58, 66 (1989). The Ninth Circuit has held CDCR is a state agency
11 entitled to Eleventh Amendment immunity. *Brown v. California Dep’t of Corr.*, 554 F.3d 747,
12 752 (9th Cir. 2009). CDCR has not waived immunity in this matter. (Doc. No. 53 at 5 ¶¶ 8-10).
13 Thus, CDCR is entitled to immunity and, absent its waiver, cannot be sued in this matter.

14 Accordingly, it is **RECOMMENDED**:

15 Plaintiff’s motion to file second amended complaint (Doc. No. 52) be DENIED.

16 **NOTICE TO PARTIES**

17 These findings and recommendations will be submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
19 (14) days after being served with these findings and recommendations, a party may file written
20 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
21 Findings and Recommendations.” Parties are advised that failure to file objections within the
22 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
23 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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25 Dated: August 5, 2021

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27 HELENA M. BARCH-KUCHTA
28 UNITED STATES MAGISTRATE JUDGE