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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

THOMAS DIMITRE,

No. CIV S-10-1194-FCD-CMK

Plaintiff,

vs.

ORDER

AFSCME DISTRICT COUNCIL 57,

Defendant.

_____ /

Plaintiff brings this civil action, proceeding in pro se, for breach of a collective bargaining agreement. Originally filed in the Siskiyou County Court, Defendant filed a notice of removal on May 17, 2010. On May 21, 2010, Defendant then filed and served a motion to dismiss (Doc. 8), currently pending before the court. The motion to dismiss is set for hearing on July 1, 2010. In addition to an opposition to the pending motion to dismiss, Plaintiff has filed a motion for leave to file a first amended complaint (Doc. 13), and has submitted a proposed first amended complaint.

Federal Rule of Civil Procedure 15(a)(1) provides that “[a] party may amend its pleading once as a matter of course within . . . (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a

1 motion under Rule 12(b), (e), or (f), whichever is earlier.” Here, no responsive pleading has been
2 filed. Therefore, pursuant to Rule 15(a)(1)(B), an amended complaint may be filed as of course
3 within 21 days after service of a Rule 12(b) motion to dismiss. The pending motion to dismiss,
4 pursuant to Rule 12(b)(6), was filed and served on May 21, 2010. Plaintiff then had 21 days to
5 file an amended complaint as of course. His proposed amended complaint was filed on June 9,
6 2010, within that time frame. Therefore, Plaintiff was free to file his amended complaint as of
7 course, without leave of court or consent of the opposing party. His motion therefore will be
8 denied as unnecessary. The Clerk of the Court will be directed to file the proposed amended
9 complaint, and this action will proceed pursuant thereto.

10 An amended complaint supersedes an original complaint. The pending motion to
11 dismiss was filed against the original complaint. The motion is therefore rendered moot by the
12 superseding amended complaint, and the Clerk of the Court will be directed to terminate the
13 motion. In addition, the hearing on the moot motion to dismiss will be taken off calendar.

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. Plaintiff’s motion for leave to file a first amended complaint (Doc. 13) is
16 denied as unnecessary;
- 17 2. The Clerk of the Court is directed to file the proposed amended complaint
18 (Doc. 14);
- 19 3. The motion to dismiss (Doc. 8) is now moot, and the Clerk of the Court is
20 further directed to terminate the motion as a pending motion; and
- 21 4. The July 1, 2010, hearing on the motion to dismiss is taken off calendar.

22
23 DATED: June 25, 2010

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25 **CRAIG M. KELLISON**
26 UNITED STATES MAGISTRATE JUDGE