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

SHEPARD JOHNSON,

Plaintiff,

No. CIV S-10-1968 GEB GGH PS

vs.

CHESTER MITCHELL, et al.,

Defendants.

ORDER

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Plaintiff initiated this diversity action for malicious prosecution and civil conspiracy to commit malicious prosecution on July 23, 2010 and is currently proceeding with the second amended complaint filed on August 24, 2011. (See Dkt. No. 80.)

Before the court is plaintiff's motion for leave to file a third amended complaint. (Dkt. No. 111.) A hearing on this motion is currently scheduled for November 10, 2011. No opposition to the motion was filed. Having reviewed the motion, the court determines that it is suitable for decision without oral argument. The hearing set for November 10, 2011 is therefore vacated.

Also before the court are letters submitted by defendants Kahler and Tornga that purport to be answers and/or motions to dismiss plaintiff's second amended complaint. (Dkt. Nos. 102, 113.)

1 In light of the above-mentioned filings, the Court issues the following order.

2 Motion for leave to file third amended complaint

3 Plaintiff seeks leave to file a third amended complaint, and has submitted a  
4 proposed third amended complaint with his motion. Plaintiff proposes to add six additional  
5 defendants, remove his demand for a jury trial, and correct certain typographical errors. (See  
6 Motion for Leave to File Third Amended Complaint, Dkt. 111 [“Mot.”] ¶ 12.)

7 “After a party has amended a pleading once as a matter of course, it may only  
8 amend further after obtaining leave of the court, or by consent of the adverse party.” Eminence  
9 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003). Generally, “leave shall be  
10 freely given when justice so requires” and this policy is “to be applied with extreme liberality.”  
11 Id. However, leave to amend is not without limits. Courts consider four factors in deciding  
12 whether to permit amendment: (1) bad faith on the part of the plaintiff; (2) undue delay; (3)  
13 prejudice to the opposing party; and (4) futility of the proposed amendment. Lockheed Martin  
14 Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999).

15 In his motion, plaintiff acknowledges that the court previously indicated that  
16 “amendments to the complaint in this case are at an end.” (Dkt. No. 78, at p. 6.) However,  
17 plaintiff explains that after he filed the second amended complaint, defendant Ford Hermanson  
18 filed a purported motion to dismiss, which included an e-mail from defendant Miner to various  
19 persons that were involved in filing criminal complaints against plaintiff in Panama. (Dkt. No.  
20 82, at pp. 51-52.) This e-mail alerted plaintiff to the names of additional alleged conspirators,  
21 which plaintiff now seeks to add as defendants. This newly discovered information is sufficient  
22 to overcome the court’s reluctance to allow another amendment to the complaint. There is no  
23 indication that plaintiff was acting in bad faith, with undue delay, or that the proposed  
24 amendment would be futile. Moreover, there has been no meet and confer or scheduling order  
25 and the parties have not engaged in discovery. No opposition to plaintiff’s motion was filed.  
26 Therefore, it will be granted. That said, as plaintiff himself acknowledges, the case needs to

1 move forward, and leave to amend based on this newly discovered information should not be  
2 construed as a license for further amendments.

3           Plaintiff will be required to file and serve the third amended complaint on the  
4 defendants who have already been served with process within fourteen (14) days of the date of  
5 service of this order. Those defendants will be required to respond to the third amended  
6 complaint within 21 days of being served. However, defendants who have already answered the  
7 second amended complaint (defendants Ford Hermanson, Patricia Hermanson, James Lynch,  
8 David Miner, Sarah Miner, Todd Johnson, Efim Shargorodsky, Elena Shargorodsky, Chester  
9 Mitchell, and Catherine Mitchell) will not be required to file another answer to the third amended  
10 complaint. Unless they elect to amend their answers, their prior answers will be deemed to be  
11 answers to plaintiff's third amended complaint.

12           Plaintiff will also be required to complete proper service of process with the third  
13 amended complaint on defendants who have not yet been served with process, including the  
14 additional defendants to be added (Smith, Cohen, Fine, Parsons, Hamond, and the Solarte Inn  
15 Corporation), within 28 days of the date of service of this order. Those defendants will be  
16 required to respond to the third amended complaint within 21 days of being served.<sup>1</sup>

17           Letters submitted by defendants Kahler and Tornga

18           On September 26, 2011, defendant Julie Anne Kahler filed a "Request for Julie  
19 Kahler's Dismissal from Shephard Johnson's Complaint." (Dkt. No. 102.) Also, on October 12,  
20 2011, defendant Sandra Tornga filed a response to and request for dismissal of plaintiff's  
21 complaint. (Dkt. No. 113.) These documents are essentially letters to the district judge outlining  
22 these defendants' versions of the facts related to this case. To the extent the letters can be  
23 construed as motions to dismiss, they have not been noticed for hearing nor have they been  
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25           <sup>1</sup> It is the court's understanding that plaintiff will dismiss the additional action filed on  
26 October 5, 2011 (2:11-CV-2629-KJM-CKD) in light of plaintiff being given leave to amend his  
complaint and add the additional defendants in the instant case.

1 served on plaintiff or the other parties who have appeared in this action.

2           Procedural requirements serve an important function in the orderly conduct of  
3 litigation, and pro se litigants are expected to comply with procedural rules. See McNeil v.  
4 United States, 508 U.S. 106, 113 (1993) (“[W]e have never suggested that procedural rules in  
5 ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed  
6 without counsel”). Thus, even though pleadings are liberally construed in their favor, pro se  
7 litigants remain bound by the rules of procedure. King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.  
8 1987); Jacobsen v. Filler, 790 F.2d 1362, 1364-65 (9th Cir.1986); see also American Ass’n of  
9 Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107 (9th Cir. 2000) (holding that pro se  
10 litigants are not excused from knowing the most basic pleading requirements). The Local Rules  
11 further provide that failure to comply with the Federal and Local Rules are grounds for judgment  
12 by default and other appropriate sanctions. E.D. Cal. L.R. 183.

13           The court understands that procedural rules are complex and can be confusing.  
14 Titling a document a “motion,” however, is more than a mere formality. Court personnel as well  
15 as opposing counsel need certainty in characterizing, calendaring, and responding to pending  
16 matters. Unnecessary judicial resources are expended when an improperly styled matter is  
17 presented to the Clerk for filing pursuant to an unorthodox procedure. Neither court personnel  
18 nor opposing counsel are prepared to construe or respond to filings which do not comply with the  
19 federal and local rules. Letters addressed to the court do not constitute proper pleadings or  
20 motions in response to a complaint. See Fed. R. Civ. P. 7. Accordingly, to the extent defendants  
21 Kahler and Tornga’s letters can be construed as motions to dismiss, they are denied without  
22 prejudice.

23           In the event defendants Kahler and Tornga intend to file answers to plaintiff’s  
24 complaint, they must comply with the requirements of Rule 8(b), (c), and (d) of the Federal Rules  
25 of Civil Procedure. Among other requirements, the answering party must “admit or deny the  
26 allegations asserted against it by an opposing party.” Fed. R. Civ. P. 8(b)(1)(B). “A denial must

1 fairly respond to the substance of the allegation. A party that intends in good faith to deny all the  
2 allegations of a pleading – including the jurisdictional grounds – may do so by a general denial.  
3 A party that does not intend to deny all the allegations must either specifically deny designated  
4 allegations or generally deny all except those specifically admitted. A party that intends in good  
5 faith to deny only part of an allegation must admit the part that is true and deny the rest. A party  
6 that lacks knowledge or information sufficient to form a belief about the truth of an allegation  
7 must so state, and the statement has the effect of a denial.” Fed. R. Civ. P. 8(b)(2)-(5). An  
8 allegation – other than one relating to the amount of damages – is admitted if a responsive  
9 pleading is required and the allegation is not denied.” Fed. R. Civ. P. 8(b)(6). Furthermore, the  
10 answering party must “state in short and plain terms its defenses to each claim asserted against  
11 it.” Fed. R. Civ. P. 8(b)(1)(A). That includes any of the affirmative defenses listed in Fed. R.  
12 Civ. P. 8(c)(1), if applicable.

13           In the event defendants Kahler and Tornga instead intend to file motions to  
14 dismiss plaintiff’s complaint, they must comply with Rule 12 of the Federal Rules of Civil  
15 Procedure. Such a motion must be properly served on plaintiff and the other parties who have  
16 appeared in the action and noticed for hearing according to the requirements of Eastern District  
17 Local Rule 230. Available hearing dates can be obtained from the undersigned’s courtroom  
18 deputy clerk, Valerie Callen, at (916) 930-4199.

19           As discussed above, plaintiff will be required to serve the third amended  
20 complaint on the defendants who have already been served with process, including defendants  
21 Kahler and Tornga, within fourteen (14) days of the date of service of this order. Defendants  
22 Kahler and Tornga will be required to file a proper response to the third amended complaint  
23 within 21 days of being served with the third amended complaint.

24           Status Conference/Status Reports

25           To lend efficiency to these proceedings, the court will set a status conference in  
26 this matter for January 26, 2012. The parties shall confer as soon as practicable pursuant to Fed.

1 R. Civ. P. 26(f) and file a status report(s) no later than January 12, 2012. The filing of a joint  
2 status report is strongly encouraged. The parties' report(s) should briefly describe the case and  
3 address:

- 4 (a) Progress in serving process;
- 5 (b) Possible joinder of additional parties;
- 6 (c) Expected or desired amendment of pleadings;
- 7 (d) Jurisdiction and venue;
- 8 (e) Anticipated motions and their scheduling;
- 9 (f) The report required by Rule 26 outlining the proposed discovery plan and its  
10 scheduling, including initial disclosures and disclosure of expert witnesses;
- 11 (g) The potential for utilizing collective discovery responses in lieu of individual  
12 responses in light of the number of parties involved;
- 13 (h) Cut-off dates for discovery and law and motion, and dates for the  
14 pretrial conference and trial;
- 15 (i) The potential appointment of defense lead counsel;
- 16 (j) Special procedures, if any;
- 17 (k) Estimated trial time;
- 18 (l) Modification of standard pretrial procedures due to the simplicity or  
19 complexity of the proceedings;
- 20 (m) Whether a case is related to any other case, including bankruptcy;
- 21 (n) Whether a settlement conference should be scheduled;
- 22 (o) Any other matters that may add to the just and expeditious disposition of  
23 this matter.

24 After the status conference, the court will issue a scheduling order pursuant to  
25 Fed. R. Civ. P. 16(b).

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1                    Discovery

2                    All discovery in this matter will be stayed until the status conference has taken  
3 place.

4                    CONCLUSION

5                    For the foregoing reasons, IT IS HEREBY ORDERED THAT:

6                    1. The November 10, 2011 hearing on plaintiff’s motion for leave to file a third  
7 amended complaint is vacated.

8                    2. Defendants Kahler and Tornga’s answers and/or motions to dismiss (dkt. nos.  
9 102, 113) are denied without prejudice.

10                    3. Plaintiff’s motion for leave to file a third amended complaint (dkt. no. 111) is  
11 granted.

12                    4. Plaintiff shall file and serve the third amended complaint on the defendants  
13 who have already been served with process within fourteen (14) days of the date of service of this  
14 order. Those defendants, including but not limited to defendants Kahler and Tornga, shall  
15 respond to the third amended complaint within 21 days of being served. However, defendants  
16 who have already answered the second amended complaint (defendants Ford Hermanson,  
17 Patricia Hermanson, James Lynch, David Miner, Sarah Miner, Todd Johnson, Efim  
18 Shargorodsky, Elena Shargorodsky, Chester Mitchell, and Catherine Mitchell) will not be  
19 required to file another answer to the third amended complaint. Unless they elect to amend their  
20 answers, their prior answers will be deemed to be answers to plaintiff’s third amended complaint.

21                    5. Plaintiff shall complete proper service of process with the third amended  
22 complaint on defendants who have not yet been served with process, including the additional  
23 defendants to be added (Smith, Cohen, Fine, Parsons, Hamond, and the Solarte Inn Corporation),  
24 within 28 days of the date of service of this order. Those defendants shall respond to the third  
25 amended complaint within 21 days of being served.

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6. A status conference in this matter is set for January 26, 2012 at 10 a.m. The parties shall confer as soon as practicable pursuant to Fed. R. Civ. P. 26(f) and file a status report(s) in accordance with this order no later than January 12, 2012. After the status conference, the court will issue a scheduling order pursuant to Fed. R. Civ. P. 16(b).

7. All discovery in this matter is stayed until the court's status conference has taken place.

DATED: November 3, 2011

/s/ Gregory G. Hollows  
UNITED STATES MAGISTRATE JUDGE

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