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

JASON LATRELL THOMAS,

No. 2:12-CV-0471-MCE-CMK-P

Plaintiff,

vs.

ORDER

TERRY, et al.,

Defendants.

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Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s motion (Doc. 56) for leave to amend. Also before the court are: (1) defendants’ motion (Doc. 57) to vacate the court’s June 26, 2014, scheduling order; and (2) defendants’ motions (Doc. 59 and 61) for additional time to respond to plaintiff’s discovery requests served on June 30, 2014, July 20, 2014, and September 25, 2014. Plaintiff’s motions for appointment of counsel (Docs. 60, 64, and 65) will be addressed separately.

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1 This action currently proceeds on the second amended complaint (Doc. 32), which
2 was deemed appropriate for service on the only two named defendants – Lawrence and Terry.
3 Plaintiff alleges that defendants Lawrence and Terry violated his Eighth Amendment rights in
4 connection with a May 26, 2010, cell extraction. Specifically, he claims that defendants
5 threatened to “have their staff beat me if I did not exit the cell willingly” and then, when staff did
6 beat him, defendants “watched and did nothing to stop it.”

7 In the proposed third amended complaint (Doc. 56-1), plaintiff seeks to add
8 additional defendants and claims. For additional defendants, plaintiff seeks to join: Price,
9 Bachman, Reynolds, Shirazzi, Hartley, Geringson, Sawador, Bates, Vickers, Malibunas, Reif,
10 Chandrantha, Gooselaw, Holloway, Delacruz, Vandoran, and Castellanos. For additional claims,
11 plaintiff seeks to add a First Amendment claim based on alleged denial of access to the courts
12 (against Price, Bachman, Reynolds, Shirazzi, Hartley, Geringson, Sawador, Vickers, and Bates),
13 as well as claims based on alleged violations of California state law and various federal criminal
14 statutes. As to his original Eighth Amendment claim against defendants Lawrence and Terry
15 arising from the May 26, 2010, cell extraction, plaintiff now alleges that all of the newly-named
16 defendants – except Geringson – are also liable. More specifically, plaintiff now alleges that
17 newly-named defendants Price, Bachman, Shirazzi, Hartley, Sawador, and Vickers are liable
18 because they “created a policy of torture.”

19 Where, as here, leave of court to amend is required and sought, the court considers
20 the following factors: (1) whether there is a reasonable relationship between the original and
21 amended pleadings; (2) whether the grant of leave to amend is in the interest of judicial economy
22 and will promote the speedy resolution of the entire controversy; (3) whether there was a delay in
23 seeking leave to amend; (4) whether the grant of leave to amend would delay a trial on the merits
24 of the original claim; and (5) whether the opposing party will be prejudiced by amendment. See
25 Jackson v. Bank of Hawai’i, 902 F.2d 1385, 1387 (9th Cir. 1990). Leave to amend should be
26 denied where the proposed amendment is frivolous. See DCD Programs, Ltd. v. Leighton, 833

1 F.2d 183, 186 (9th Cir. 1987).

2 In his motion for leave to amend, plaintiff states:

3 Plaintiff Thomas is requesting for leave to file his third amended
4 complaint to add defendants and additional facts after the defendants
produced documents identifying defendants.

5 On September 22, 2014, Thomas received his production of
6 documents from the Defendants which identifies other defendants attached
7 which personally participated in the illegal acts described in the attached
third amended complaint.

8 Plaintiff offers no further argument in support of his motion.

9 Turning to the first factor, which assesses the relationship between the currently
10 operative pleading and the proposed amended pleading, the court finds that there is no reasonable
11 relationship between the pleadings as to plaintiff's proposed First Amendment claim because
12 they are not connected in terms of the same defendants, timeframe, or alleged conduct. Any First
13 Amendment claims against newly-named defendants should be litigated by way of a separate
14 action.

15 As to plaintiff's additional theories of liability under state law and various federal
16 criminal status, and to the extent plaintiff can even assert such theories, plaintiff has not
17 explained why he could not have asserted these theories earlier. While plaintiff states that
18 recently provided discovery responses identified "other defendants," such responses would not
19 have been necessary to identify new legal theories. Therefore, as to new theories of liability
20 relating to the May 26, 2010, cell extraction, the court finds that plaintiff fails to demonstrate
21 good cause for the delay in seeking amendment.

22 Finally, as to plaintiff's proposed joinder of additional defendants with respect to
23 the original Eighth Amendment claim, the argument made by defendants Lawrence and Terry in
24 their opposition that the amendment is futile because plaintiff's new allegations are too vague
25 and conclusory to state a claim is well made. However, because it is possible that plaintiff may
26 be able to cure this defect through further amendment to allege more specific facts related to the

1 alleged liability of new defendants under the Eighth Amendment in connection with the May 26,
2 2010, cell extraction, plaintiff will be provided such an opportunity. See 28 U.S.C. § 1915A(a).

3 In preparing any further amended complaint, plaintiff should bear in mind that
4 leave to amend is granted only with respect to the joinder of new defendants allegedly liable
5 under the Eighth Amendment for excessive force used on May 26, 2010. Plaintiff is informed
6 that, as a general rule, an amended complaint supersedes the original complaint. See Ferdik v.
7 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, following dismissal with leave to amend,
8 all claims alleged in the original complaint which are not alleged in the amended complaint are
9 waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). Therefore, if plaintiff amends
10 the complaint, the court cannot refer to the prior pleading in order to make plaintiff's amended
11 complaint complete. See Local Rule 220. An amended complaint must be complete in itself
12 without reference to any prior pleading. See id.

13 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
14 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
15 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how
16 each named defendant is involved, and must set forth some affirmative link or connection
17 between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d
18 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). If plaintiff
19 chooses not to file a further amended complaint, the action shall proceed on the third amended
20 complaint on plaintiff's Eighth Amendment claim against defendants Lawrence and Terry only.

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