

1 shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a); see, e.g., Chodos v. West
2 Publ’g Co., 292 F.3d 992, 1003 (9th Cir. 2002) (leave to amend granted with “extreme
3 liberality”).

4 In determining whether to grant leave to amend, a court is to consider five factors:
5 “(1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and
6 (5) whether the plaintiff has previously amended his complaint.” Nunes v. Ashcroft, 375 F.3d
7 805, 808 (9th Cir. 2004). The factors are not weighed equally. “Futility of amendment can, by
8 itself, justify the denial of a motion for leave to amend.” Bonin v. Calderon, 59 F.3d 815, 845
9 (9th Cir. 1995). Undue delay, “by itself...is insufficient to justify denying a motion to amend.”
10 Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 712-13 (9th Cir. 2001) (quotation
11 marks omitted) (quoting Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999)). “[I]t is the
12 consideration of prejudice to the opposing party that carries the greatest weight.” Eminence
13 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). “Absent prejudice, or a
14 strong showing of any of the remaining [] factors, there exists a presumption under Rule 15(a) in
15 favor of granting leave to amend.” Id.

16 B. Background

17 On March 13, 2019, plaintiff filed the original complaint. (ECF No. 1.) Plaintiff alleged
18 that he received inadequate medical care for hepatitis C at California State Prison-Corcoran
19 (“Corcoran”) and the California Medical Facility (“CMF”). (Id.) On May 8, 2019, the
20 undersigned dismissed the complaint with leave to amend. (ECF No. 6.)

21 On June 7, 2019, plaintiff filed a first amended complaint alleging inadequate medical
22 care for hepatitis C at Corcoran and CMF. (ECF No. 9.) On September 12, 2019, the
23 undersigned ordered service of the amended complaint as to defendants Loadholt, Brar, Moon,
24 Sanchez, Rading, Dhillon, Aguilera, Haile and Kelso. (ECF No. 11.)

25 On March 12, 2020, defendants Dhillon, Haile, Rading, Loadholt, Moon and Aguilera
26 answered the amended complaint. (ECF No. 39.)

27 On June 22, 2020, plaintiff filed a second amended complaint alleging inadequate medical
28 care for hepatitis C at CMF and Corcoran. (ECF No. 53.) On August 19, 2020, the undersigned

1 denied plaintiff's motion to file a second amended complaint with leave to file a third amended
2 complaint. (ECF No. 68.)

3 On September 21, 2020, plaintiff filed a third amended complaint alleging inadequate
4 medical care for hepatitis C at CMF and Corcoran. (ECF No. 78.) Plaintiff named previously
5 named defendants Loadholt, Moon, Rading, Dhillon, Aguilera and Haile as defendants in the
6 third amended complaint. (Id.) Plaintiff also named as defendants Dr. Bick, Dr. McCabe, Dr.
7 McGuiness, Dr. DiTomas and Nurse Plascencia. (Id.)

8 On November 25, 2020, the undersigned recommended that plaintiff's motion to file a
9 third amended complaint be granted in part and denied in part. (ECF No. 93.) In particular, the
10 undersigned recommended that plaintiff's motion to amend be granted as to the claims against
11 newly named defendants McCabe, McGuiness, Bick and DiTomas, and denied as to the claims
12 against newly named defendant Plascencia. (Id.)

13 On September 30, 2021, Chief District Judge Kimberly J. Mueller adopted the November
14 25, 2020 findings and recommendations. (ECF No. 101.) On October 1, 2021, Judge Mueller
15 appointed counsel to draft and file an amended complaint on plaintiff's behalf. (ECF No. 102.)

16 This action proceeds on plaintiff's fifth amended complaint, filed February 10, 2022,
17 prepared by court-appointed counsel on plaintiff's behalf. (ECF No. 106.) In the fifth amended
18 complaint, plaintiff generally alleges that he was denied adequate medical care for hepatitis C at
19 CMF. (Id.) Named as defendants in the fifth amended complaint are formerly named
20 defendants Rading, Haile, Aguilera, Dhillon and DiTomas. (Id.)

21 On February 24, 2022, defendants Dhillon, Haile, Rading and Aguilera answered the fifth
22 amended complaint. (ECF No. 108.) On May 23, 2022, the court dismissed the doe defendants
23 named in the fifth amended complaint. (ECF No. 124.) On August 19, 2022, the court granted
24 the motion to dismiss the claims against defendant DiTomas raised in the fifth amended
25 complaint with prejudice. (ECF No. 130.) The court found that the fifth amended complaint
26 failed to allege facts demonstrating that defendant DiTomas knew that plaintiff was denied
27 adequate treatment for hepatitis C. (ECF Nos. 126, 130).

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1 Plaintiff's proposed sixth amended complaint names defendants Dhillon, Haile, Rading
2 and Aguilera as defendants. (ECF No. 137 at 6-13.) Plaintiff also names as defendants
3 previously dismissed defendant DiTomas, former CMF Chief Medical Officer Dr. Bick, Pelican
4 Bay State Prison ("PBSP") Dr. Jacobson, PBSP Dr. Tootell, PBSP Nurse Hashem and PBSP
5 Nurse Williams. (Id. at 14-23.) Plaintiff alleges that defendants DiTomas, Bick, Jacobson,
6 Tootell, Hashem and Williams denied plaintiff adequate medical care for hepatitis C. (Id.)

7 In the motion to amend, filed in support of the proposed sixth amended complaint,
8 plaintiff alleges that the court-appointed counsel who prepared the fifth amended complaint failed
9 to name supervisory personnel as defendants, i.e., defendants DiTomas and Bick. (ECF No. 136
10 at 1.) Plaintiff alleges that he now seeks to name as defendants the supervisory personnel and
11 PBSP medical personnel who allowed plaintiff to be transferred to PBSP despite his health
12 problems related to hepatitis C and who failed to treat him. (Id.)

13 C. Discussion

14 The undersigned herein considers the five factors set forth above for evaluating motions to
15 amend.

16 *Previous Amendments*

17 As observed by defendants in the opposition, plaintiff previously amended his complaint
18 several times. Court appointed counsel prepared the operative fifth amended complaint.
19 Plaintiff's fifth amended complaint did not name as defendants the newly named PBSP
20 defendants or defendant Bick. The court previously dismissed with prejudice the claims raised
21 against defendant DiTomas in the fifth amended complaint. For these reasons, the undersigned
22 finds that plaintiff's previous amendments favor denial of his pending motion to amend.

23 *Prejudice to Defendants*

24 In the opposition, defendants argue that allowing plaintiff to amend will prejudice
25 defendants. Defendants contend that in the proposed sixth amended complaint, plaintiff seeks to
26 add six defendants, one of whom was already dismissed with prejudice, after discovery is closed
27 and the parties are two months from the dispositive motion deadline.¹

28 ¹ On September 22, 2022, the undersigned reopened discovery for forty-five days for the limited

1 “‘Undue prejudice’ means substantial prejudice or substantial negative effect.” SAES
2 Getters S.p.A. v. Aeronex, Inc., 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002). “[T]he Ninth
3 Circuit has found such substantial prejudice where the claims sought to be added ‘would have
4 greatly altered the nature of the litigation and would have required defendants to have undertaken,
5 at a late hour, an entirely new course of defense.’” Id. (quoting Morongro Band of Mission
6 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). “Prejudice is generally mitigated where
7 the case is still in the discovery stage, no trial date is pending and no pretrial conference has
8 occurred.” Calderon v. Tulare Reg’l Med. Ctr., 2018 WL 4473626, at *5 (E.D. Cal. Sept. 17,
9 2018).

10 The undersigned finds that expanding this action to include claims at PBSP greatly alters
11 the nature of this litigation at this late stage of the litigation. In addition, allowing plaintiff to
12 proceed with claims against defendant DiTomas, Bick and the PBSP defendants would require
13 reopening discovery. Therefore, allowing plaintiff to add these new defendants would
14 substantially prejudice defendants. For these reasons, this factor favors denying plaintiff’s
15 motion to amend.

16 *Undue Delay*

17 “Relevant to evaluating the delay issue is whether the moving party knew or should have
18 known the facts and theories raised by the amendment in the original pleading.” Jackson v. Bank
19 of Hawaii, 902 F.2d 1385, 1388 (9th Cir. 1990).

20 In the opposition, defendants contend that at the time plaintiff filed this action in March
21 2019, plaintiff knew of all the facts he relies on in his sixth amended complaint against the PBSP
22 defendants. The sixth amended complaint alleges that the alleged deprivations by the PBSP
23 defendants occurred in 2017-2018. (ECF No. 137 at 20-22.) Defendants argue that plaintiff
24 offers no reason for his delay in asserting his claims against the PBSP defendants.

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28 purpose of defendants taking plaintiff’s deposition. (ECF No. 135.) The undersigned also reset
the dispositive motion deadline to January 13, 2023. (Id.)

1 As for defendant Bick, defendants contend that plaintiff dropped him as a defendant from
2 this lawsuit in February 2022. Defendants argue that plaintiff now attempts to reverse that
3 decision over eight months later and offers no explanation for this delay.

4 For the reasons stated by defendants in the opposition, the undersigned finds that plaintiff
5 engaged in undue delay in raising his claims against the PBSP defendants and in seeking to
6 reverse the decision to drop defendant Bick as a defendant. This factor favors denying plaintiff's
7 motion to amend.

8 *Bad Faith*

9 "A party acts in bad faith when it seeks to amend its pleadings solely for a 'wrongful
10 motive' such as unnecessary delay or harassment." Delgado v. Orchard Supply Hardware Corp.,
11 2011 WL 4627073, *3 (E.D. Cal. Oct. 3, 2011) (citing DCD Programs, 833 F.2d at 187); see also
12 Larios v. Nike Retail Servs., Inc., 2013 WL 4046680, *3 (S.D. Cal. Aug. 9, 2013) ("Finding bad
13 faith requires courts to focus on the plaintiff's motives for not amending the complaint to assert
14 the proposed new claims earlier," citing Adams v. Gould Inc., 739 F.2d 858, 868 (3d Cir. 1984)).
15 "[O]ccasionally, delay in itself may be evidence of bad faith sufficient to justify denial of leave to
16 amend." Larios, 2013 WL 4046680 at *3. Repetitious motions to amend can also be evidence
17 that a plaintiff seeks to amend her complaint in bad faith. Id. (citing Wood v. Santa Barbara
18 Chamber of Commerce, Inc., 705 F.2d 1515, 1520 (9th Cir. 1983)).

19 Defendants argue that plaintiff acts in bad faith because he attempts to sue defendant
20 DiTomas despite the fact that she was dismissed with prejudice in August 2022. Defendants also
21 argue that plaintiff was twice warned by the court that further amendments would likely be
22 rejected.

23 The claims against the newly named defendants at PBSP in the proposed sixth amended
24 complaint involve events occurring in 2017-2018. (ECF No. 137 at 20-23.) Plaintiff does not
25 explain his delay in raising these claims. In addition, court-appointed counsel did not name
26 defendant Bick or the PBSP defendants as defendants in the fifth amended complaint.

27 Plaintiff's delay in naming the PBSP defendants, his renaming of defendants DiTomas
28 and Bick and his repetitious motions to amend are evidence of bad faith. Accordingly, the

1 undersigned finds that the claims against the newly named defendants in the sixth amended
2 complaint are brought in bad faith.

3 *Futility*

4 Defendants argue that the proposed new claims against defendant DiTomas are futile
5 because the claims against defendant DiTomas were previously dismissed with prejudice.
6 Defendants argue that the proposed new claims against defendant Bick are futile because plaintiff
7 fails to link defendant Bick to the alleged deprivations. Finally, defendants argue that the
8 proposed new claims against the PBSP defendants are futile because these claims are barred by
9 the statute of limitations.

10 The undersigned agrees that plaintiff's proposed new claims against defendant DiTomas
11 are futile because the claims against defendant DiTomas were previously dismissed with
12 prejudice.

13 For the following reasons, the undersigned finds that plaintiff's claims against defendant
14 Bick raised in the sixth amended complaint are futile. In the fifth amended complaint, plaintiff
15 alleges that primary care providers are the gatekeepers when it comes to specialty care. (ECF No.
16 126 at 8.) The fifth amended complaint does not allege that a primary care provider at CMF
17 found plaintiff eligible for hepatitis C treatment. (Id.)

18 In the proposed sixth amended complaint, plaintiff alleges that defendant Bick was the
19 Chief Medical Executive at CMF and a member of the MARC/UMC. (ECF No. 137 at 17.)
20 Plaintiff alleges that the MARC/UMC reviews all decisions made by primary care physicians for
21 specialty care, including hepatitis C treatment. (Id.) Plaintiff also alleges that defendant Bick
22 reviewed grievances filed against primary care physicians. (Id.) Plaintiff alleges that defendant
23 Bick denied plaintiff treatment for hepatitis C despite knowing that plaintiff qualified for
24 treatment. (Id. at 17-19.)

25 In the proposed sixth amended complaint, plaintiff alleges that his primary care providers
26 at CMF (defendants Rading, Dhillon, Haile, and Aguilera) denied him treatment for hepatitis C.
27 Plaintiff does not allege that a primary care provider at CMF found plaintiff eligible for hepatitis
28 C treatment and referred him to the MARC/UMC. Plaintiff also does not specifically allege that

1 defendant Bick denied a grievance filed by plaintiff seeking hepatitis C treatment. For these
2 reasons, the undersigned finds that the plaintiff's claim in the sixth amended complaint that
3 defendant Bick denied him treatment for hepatitis C is unsupported. See Blantz v. CDCR, 727
4 F.3d 917, 926 (9th Cir. 2013) (supervisory liability may not be based solely on conclusory
5 allegations made on "information and belief.")

6 Turning to the claims against the PBSP defendants raised in the sixth amended complaint,
7 plaintiff alleges that these defendants denied his requests for hepatitis C treatment in 2017-2018.
8 (ECF No. 137 at 20-22.) In the opposition, defendants argue that plaintiff's claims against the
9 PBSP defendants accrued in June 2018, when plaintiff began hepatitis C treatment. (ECF Nos.
10 137 at 22; ECF No. 139 at 6.) Defendants contend that plaintiff had four years from the date his
11 claims accrued to raise his claims. Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004) (for
12 claims under 42 U.S.C. § 1983, the court uses the statute of limitations for personal injury actions
13 from the forum state); Cal. Code Civil Proc. § 335.1 (two-year statute of limitations); Cal. Code
14 Civil Proc. § 352.1 (two-year tolling for imprisonment). Defendants argue that plaintiff raised his
15 claims regarding the PBSP more than four years after June 2018 because plaintiff filed the
16 proposed sixth amended complaint on October 21, 2022.

17 The statute of limitations is tolled while a prisoner completes the mandatory exhaustion
18 process. Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005). Without further information
19 regarding the time plaintiff exhausted administrative remedies regarding his claims against the
20 PBSP defendants, the undersigned cannot determine whether plaintiff's claims against these
21 defendants are barred by the statute of limitations.

22 Because plaintiff's claims against defendants DiTomas and Bick are futile, the
23 undersigned finds that this factor favors denying plaintiff's motion to amend as to these
24 defendants.

25 *Conclusion*

26 The undersigned finds that the five factors discussed above weigh against granting
27 plaintiff's motion to proceed on the sixth amended complaint. Most importantly, the undersigned
28 finds that defendants would be prejudiced were plaintiff allowed to raise new claims against new

1 defendants at this stage of the litigation. If the court granted plaintiff's motion to amend,
2 discovery would have to be reopened and the dispositive deadline extended. The further delay in
3 resolution of this action would prejudice defendants. Eminence Capital, LLC v. Aspeon, Inc.,
4 316 F.3d 1048 at 1052 (“[I]t is the consideration of prejudice to the opposing party that carries the
5 greatest weight.”). Accordingly, for the reasons discussed above, the undersigned recommends
6 that plaintiff's motion to amend be denied.

7 III. Plaintiff's Motion to Amend Dispositive Motion Deadline

8 The dispositive motion deadline is January 13, 2023. (ECF No. 135.) In the pending
9 motion, plaintiff requests that the dispositive motion deadline be rescheduled following resolution
10 of plaintiff's pending motion to amend. (ECF No. 138.) On December 1, 2022, defendants filed
11 an opposition to plaintiff's motion to amend the dispositive motion deadline. (ECF No. 140.)

12 In an abundance of caution, the undersigned finds good cause to vacate the January 13,
13 2023 dispositive motion deadline until thirty days after the district court rules on plaintiff's
14 motion to amend.

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. Plaintiff's motion to amend the dispositive motion deadline (ECF No. 138) is granted;
- 17 2. The January 13, 2023 dispositive motion deadline is vacated and reset to thirty days
18 after the district court's ruling on plaintiff's pending motion to amend; and

19 IT IS HEREBY RECOMMENDED that plaintiff's motion to file a sixth amended
20 complaint (ECF No. 136) be denied.

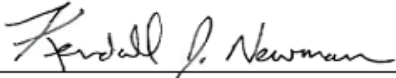
21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
23 after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 “Objections to Magistrate Judge's Findings and Recommendations.” Any response to the
26 objections shall be filed and served within fourteen days after service of the objections. The

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1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: December 9, 2022

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6 KENDALL J. NEWMAN
7 UNITED STATES MAGISTRATE JUDGE

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