

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LORENZO R. CUNNINGHAM,  
Plaintiff,  
v.  
MEDTRONIC INC., et al.,  
Defendants.

Case No. 14-cv-04814-HSG (PR)

**ORDER DENYING WITHOUT  
PREJUDICE PLAINTIFF’S MOTION  
TO FILE SUPPLEMENTAL  
COMPLAINT; DENYING DEFENDANT  
BURCH’S MOTION TO DISMISS;  
DENYING AS MOOT PLAINTIFF’S  
MOTION FOR SERVICE**

Re: Dkt. Nos. 40, 48, 51

United States District Court  
Northern District of California

**INTRODUCTION**

Plaintiff, a California state prisoner incarcerated at the California Healthcare Facility, filed this pro se action pursuant to 42 U.S.C. § 1983, alleging constitutional and state tort violations arising out of a 2012 surgery during which he had rods installed in his back. The surgery was performed by defendant UCSF Medical Doctor Shane Burch (“Burch”), and the rods were manufactured by a company acquired by defendant Medtronic, Inc (“Medtronic”). In an order filed March 2, 2015, the Court screened the complaint (Dkt. No. 1), and determined that it stated the following cognizable claims: (1) deliberate indifference to serious medical needs against defendant Burch; (2) a supplemental state law negligence claim against defendant Burch; and (3) supplemental state law product liability claims against defendant Medtronic. See Dkt. No. 18. Now before the Court are: (1) plaintiff’s motion to file a supplemental complaint; (2) defendant Burch’s motion to dismiss; and (3) plaintiff’s motion for service.

**DISCUSSION**

**1. Plaintiff’s Motion to File a Supplemental Complaint**

Plaintiff has filed a motion to file a supplemental complaint pursuant Federal Rule of Civil Procedure 15(d). Dkt. No. 40. The Court first decides whether plaintiff’s motion is more appropriately considered a Rule 15(d) motion for leave to file a supplemental pleading or a Rule 15(a) motion for leave to amend. Amended pleadings under Rule 15(a) “relate to matters that

1 occurred prior to the filing of the original pleading, and entirely replace the earlier pleading.” 6A  
2 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1504  
3 (3d. ed. 1998). In contrast, supplemental pleadings under Rule 15(d) “deal with events subsequent  
4 to the pleading to be altered and represent additions to or continuations of the earlier pleadings.”  
5 Id. Rule 15(d) enables plaintiffs to “introduce[] a cause of action not alleged in the original  
6 complaint and not in existence when the original complaint was filed.” *Cabrera v. City of*  
7 *Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998) (internal quotation and citation omitted).

8 Along with his motion, plaintiff has filed a list of his proposed supplemental claims. Dkt.  
9 No. 40-1. A review of these claims shows that the facts underlying them occurred prior to the  
10 filing of the original complaint.<sup>1</sup> Consequently, plaintiff’s request will be construed as a motion  
11 for leave to amend pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

12 Civil Local Rule 10-1 provides that any party moving to file an amended pleading must  
13 reproduce the entire proposed pleading and may not incorporate any part of a prior pleading by  
14 reference. Plaintiff has not included with his motion a proposed amended complaint. Parties may  
15 not file piecemeal complaints or amendments that contain portions of claims and defendants.  
16 Therefore, plaintiff’s motion is DENIED for this reason. However, denial is without prejudice to  
17 filing another motion submitted with a proposed amended complaint. Plaintiff is cautioned that,  
18 because an amended complaint completely replaces the original complaint, plaintiff must include  
19 in it all the claims he wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.  
20 1992). He may not incorporate material from the original complaint by reference.

21 **2. Defendant Burch’s Motion to Dismiss**

22 Defendant Burch has filed a motion to dismiss the original complaint. Dkt. No. 51.

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25 <sup>1</sup> The only possible exception is plaintiff’s proposed supplemental claims that defendants failed to  
26 preserve evidence. See Dkt. No. 40-1 at 8-9. Even assuming these claims relate to matters that  
27 arose after the filing of the original complaint, they do not state a claim for relief. California does  
28 not recognize a spoliation tort cause of action “against a person who has intentionally destroyed or  
suppressed evidence relevant to a lawsuit.” *Warden v. Cross*, 94 Fed. Appx. 474, 475 (9th Cir.  
2004) (applying California law); see also *Temple Cmty. Hosp. v. Superior Ct.*, 20 Cal. 4th 464,  
473 (1999) (holding that a tort remedy for spoliation of evidence would produce an “endless spiral  
of lawsuits over litigation-related misconduct”). The Court therefore need not decide whether  
plaintiff should be able to supplement his original complaint with these claims.

1 Therein, he argues that the original complaint does not state a claim pursuant to 42 U.S.C. § 1983  
2 and that this Court therefore lacks subject matter jurisdiction. The motion is DENIED because the  
3 Court has already determined that plaintiff's allegations, when liberally construed, do state federal  
4 claims for relief. Defendant's arguments are better raised in a motion for summary judgment.

5 **3. Plaintiff's Motion for Service**

6 Plaintiff has filed a motion asking the Court to serve defendant Burch. Dkt. No. 48. The  
7 motion is DENIED as moot, as defendant Burch has been served and has now appeared through  
8 counsel.

9 **CONCLUSION**


10 For the foregoing reasons, the Court orders as follows:

- 11 1. Plaintiff's motion to file a supplemental complaint, construed as a motion for leave  
12 to amend, is DENIED without prejudice.
- 13 2. Defendant Burch's motion to dismiss is DENIED.
- 14 3. Plaintiff's motion for service is DENIED as moot.
- 15 4. If plaintiff intends to file a renewed motion for leave to amend pursuant to Rule  
16 15(a), he must do so within **twenty-eight (28)** days from the date this order is filed. The motion  
17 must include a proposed amended complaint with the caption and civil case number used in this  
18 order *Lorenzo R. Cunningham v. Medtronic, Inc. et al.*, C 14-4814 HSG (PR) and the words  
19 [PROPOSED] AMENDED COMPLAINT. If plaintiff does not wish to file an amended  
20 complaint, he shall so inform the Court within **twenty-eight (28)** days from the date of this order,  
21 and the Court will thereafter set a briefing schedule for dispositive motions.

22 This order terminates Docket Nos. 40, 48, and 51.

23 **IT IS SO ORDERED.**

24 Dated: 12/8/2015

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27 HAYWOOD S. GILLIAM, JR.  
28 United States District Judge