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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

TYRONE ROGERS,

Plaintiff,

v.

GJ GIURBINO, et al.,

Defendant.

CASE NO. 11cv560-WQH-RBB

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Leave to Amend the Complaint by Filing a Fourth Amended Complaint filed by Plaintiff Tyrone Rogers. (ECF No. 151).

**I. Background**

On March 21, 2011, Plaintiff, a state prisoner proceeding pro se, initiated this action by filing a complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). On April 20, 2011, United States District Judge Irma E. Gonzalez issued an Order sua sponte dismissing Plaintiff's complaint for failure to state a claim. (ECF No. 3).

On May 31, 2011, Plaintiff filed a first amended complaint. (ECF No. 5). On June 7, 2016, Judge Gonzalez issued an Order sua sponte dismissing the first amended complaint for failure to state a claim. (ECF No. 7).

On July 12, 2011, Plaintiff filed a second amended complaint. (ECF No. 8). On August 9, 2011, Judge Gonzalez issued an Order sua sponte dismissing Defendant Narvis from the litigation and dismissing Plaintiff's Eighth Amendment and access to courts claims with prejudice. Plaintiff's religious claims remained following the

1 Court's sua sponte screening. (ECF No. 9).

2 On October 31, 2011, Defendants G.J. Giurbino, P. Kuzil-Ruan, and Domingo  
3 Uribe, Jr. filed a motion to dismiss the second amended complaint. (ECF No. 18). On  
4 February 14, 2012, Judge Gonzalez issued an Order granting the motion in part and  
5 denying the motion in part. (ECF No. 33). The Court granted the motion as to  
6 Plaintiff's claims under the first and fourteenth Amendments, dismissed all claims  
7 against Defendants Giurbino and Uribe, and denied the motion to dismiss the claims  
8 under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§  
9 2000cc, *et seq.* ("RLUIPA").

10 On November 13, 2012, Defendant Kuzil-Ruan moved for summary judgment.  
11 (ECF No. 74). On February 26, 2013, Judge Gonzalez issued an Order granting  
12 summary judgment in favor of Defendant Kuzil-Ruan. (ECF No. 96).

13 On March 27, 2013, Plaintiff filed a notice of appeal. (ECF No. 100). On  
14 August 31, 2015, the United States Court of Appeals for the Ninth Circuit issued an  
15 Order affirming in part, reversing in part, vacating in part, and remanding for further  
16 proceedings. (ECF No. 112). The Court of Appeals affirmed the dismissal of  
17 Plaintiff's eighth amendment outdoor exercise claim and Plaintiff's access to courts  
18 claim. The Court of Appeals reversed the dismissal of Plaintiff's first amendment  
19 claim. The Court of Appeals vacated the dismissal of claims against Defendants  
20 Giurbino and Uribe in their individual capacities, stating, "On remand, Rogers may  
21 request leave to amend his complaint regarding Giurbino and Uribe." *Id.* at 7. The  
22 Court of Appeals determined that Plaintiff alleged facts sufficient to pursue a cause of  
23 action for injunctive relief against Giurbino and Uribe in their official capacities. *Id.*  
24 The Court of Appeals reversed the grant of summary judgment as to Defendant Kuzil-  
25 Ruan on Plaintiff's RLUIPA claim for injunctive relief only. On remand, the Court of  
26 Appeals directed this Court to address whether Defendants are entitled to qualified  
27 immunity and whether Plaintiff's claim for injunctive relief is moot. The Court of  
28 Appeals also ordered that "the district court should allow Rogers the benefit of its grant

1 of his motion to compel discovery” on remand. *Id.* at 10.

2 On January 19, 2016, Plaintiff filed the third amended complaint, alleging claims  
3 against Defendants Giurbino, Uribe, and Kuzil-Ruan under the first amendment and  
4 RLUIPA. (ECF No. 128). On February 1, 2016, Defendants Giurbino and Uribe filed  
5 a motion to dismiss. (ECF No. 129). On February 1, 2016, Defendant Kuzil-Ruan filed  
6 a motion to dismiss. (ECF No. 131). Plaintiff filed an opposition to the motions to  
7 dismiss. (ECF No. 140). Defendants Giurbino and Uribe filed a reply. (ECF No. 132).

8 On July 22, 2016, United States Magistrate Judge Ruben B. Brooks issued the  
9 Report and Recommendation. (ECF No. 145). On September 7, 2016, the Court  
10 adopted the Report and Recommendation in its entirety. (ECF No. 150). The Order  
11 states,

12 Plaintiff’s First Amendment Claims against all Defendants in their  
13 individual capacity are dismissed with prejudice. Plaintiff’s RLUIPA  
14 claims for damages against all Defendants are dismissed with prejudice.  
15 Plaintiff’s RLUIPA and First Amendment claims for injunctive relief  
16 against all Defendants in their official capacity are dismissed with leave  
17 to amend.

18 *Id.* at 9. With regard to the RLUIPA and first amendment claims for injunctive relief,  
19 the Court found that the claims were moot but granted leave to amend. *Id.* at 8. The  
20 Court allowed Plaintiff sixty days from the date the Order was filed to file a motion for  
21 leave to amend the complaint. *Id.*

22 On October 31, 2016, Plaintiff filed the motion for leave to amend the complaint  
23 by filing a fourth amended complaint. (ECF No. 151). Plaintiff’s motion included the  
24 statement, “Plaintiff Motion for Leave to Amend the Complaint by Filing a Forth [sic]  
25 Amended Complaint. Forth [sic] Amended Complaint filed with this motion.” (ECF  
26 No. 151 at 1). The remainder of the document is the proposed fourth amended  
27 complaint. *Id.* at 2-21. Plaintiff alleges RLUIPA, first amendment and eighth  
28 amendment causes of action against Defendants Giurbino, Uribe, Kuzil-Ruan, and  
Kuzil-Ruan’s successive captains in their individual and official capacities. *Id.* at 2.

The Court ordered that any response by the Defendants shall be filed by

1 November 21, 2016 and that any reply by the Plaintiff shall be filed by November 28,  
2 2016. (ECF No. 152).

3 On November 21, 2016, Defendant Kuzil-Ruan filed a response in opposition.  
4 (ECF No. 153). Kazil-Ruan contends that Plaintiff procedurally failed to comply with  
5 the Court's September 7, 2016 Order because he filed only a complaint, without filing  
6 an actual motion seeking leave to amend. *Id.* at 5. Kazil-Ruan contends that  
7 substantively, the Complaint reasserts the same claims the Court previously dismissed  
8 with prejudice and asserts new eighth amendment claims which the Court did not  
9 authorize. *Id.* at 6. Kazil-Ruan contends that Plaintiff has failed to cure the deficiencies  
10 of the two claims the Court denied without prejudice because "Plaintiff failed to plead  
11 any facts showing that he has or will be subject to future lockdowns." *Id.*

12 Defendants Giurbino and Uribe also filed a response in opposition. (ECF No.  
13 154). Giurbino and Uribe contend that Plaintiff's motion should be denied because his  
14 proposed fourth amended complaint is substantially similar to his third amended  
15 complaint and improperly re-alleges numerous claims that have been dismissed with  
16 prejudice by this Court. (ECF No. 154 at 2). Uribe and Giurbino contend that Plaintiff  
17 claims for injunctive relief are futile because Plaintiff fails to allege facts demonstrating  
18 that the claims are not moot. *Id.* Uribe and Giurbino contend that Plaintiff's new  
19 retaliation claim is futile because it fails to state a claim under the first amendment. *Id.*

20 Plaintiff filed a reply which the Court accepted nunc pro tunc on December 12,  
21 2016. (ECF No. 155). Plaintiff contends that the proposed fourth amended complaint  
22 is essentially different from his third amended complaint and unequivocally cures the  
23 defects in his previous complaint. *Id.* Plaintiff contends that he has cured the defects  
24 of the prior complaint by accusing Defendant of retaliating against the level three and  
25 four inmates. *Id.* Plaintiff contends that his fourth amended complaint is legally viable  
26 for injunctive relief. *Id.*

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28 **II. Discussion**

1 Federal Rule of Civil Procedure 15 mandates that leave to amend “be freely given  
2 when justice so requires.” Fed. R. Civ. P. 15(a). In *Foman v. Davis*, 371 U.S. 178  
3 (1962), the Supreme Court offered several factors for district courts to consider in  
4 deciding whether to grant a motion to amend under Rule 15(a):

5 In the absence of any apparent or declared reason—such as undue delay,  
6 bad faith or dilatory motive on the part of the movant, repeated failure to  
7 cure deficiencies by amendments previously allowed, undue prejudice to  
8 the opposing party by virtue of allowance of the amendment, futility of  
9 amendment, etc.—the leave sought should, as the rules require, be “freely  
10 given.” *Foman*, 371 U.S. at 182; see also *Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101  
11 (9th Cir. 2004). “Not all of the [*Foman*] factors merit equal weight. As this circuit and  
12 others have held, it is the consideration of prejudice to the opposing party that carries  
13 the greatest weight.” *Eminence Capital*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citations  
14 omitted). “The party opposing amendment bears the burden of showing prejudice.”  
15 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). “Absent  
16 prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a  
17 presumption under Rule 15(a) in favor of granting leave to amend.” *Eminence Capital*,  
18 316 F.3d at 1052. “[T]he grant or denial of an opportunity to amend is within the  
19 discretion of the District Court . . . .” *Foman*, 371 U.S. at 182. “[L]eave to amend need  
20 not be given if a complaint, as amended, is subject to dismissal.” *Moore v. Kayport*  
21 *Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). “[W]here the plaintiff has  
22 previously been granted leave to amend and has subsequently failed to add the requisite  
23 particularity to its claims, the district court’s discretion to deny leave to amend is  
24 particularly broad.” *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th  
25 Cir. 2009). “[W]e have held that a district court does not abuse its discretion in denying  
26 a motion to amend where the movant presents no new facts but only new theories and  
27 provides no satisfactory explanation for his failure to fully develop his contentions  
28 originally.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995); see also *Boehm v.*  
*Shemaria*, 478 Fed. App’x. 457, 457 (9th Cir. 2012). When amendment would be  
futile, the district court need not grant leave to amend. *Carrico v. City & Cty. of San*

1 *Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011); *Gompper v. VISX, Inc.*, 298 F.3d 893,  
2 898 (9th Cir. 2002).

3 The Court has reviewed the motion for leave to file a fourth amended complaint  
4 and all related filings. Plaintiff’s proposed fourth amended complaint alleges three  
5 causes of action against Defendants Giurbino, Uribe, and Kuzil-Ruan and his successive  
6 captains: first amendment, eighth amendment, and RLUIPA.

7 **A. RLUIPA and First Amendment Claims**

8 Plaintiff’s proposed fourth amended complaint alleges RLUIPA and first  
9 amendment causes of action against Defendants. This Court previously dismissed  
10 Plaintiff’s RLUIPA and first amendment claims for damages without leave to amend  
11 as to all three Defendants. The Court concludes that to the extent that Plaintiff seeks  
12 leave to amend the RLUIPA and first amendment claims for damages, Plaintiff  
13 improperly attempts to re-allege claims that have been dismissed with prejudice.<sup>1</sup>

14 In its Order dismissing the third amended complaint, the Court dismissed  
15 Plaintiff’s first amendment and RLUIPA claims for injunctive relief against Defendants  
16 in their official capacity with leave to amend. (ECF No. 150 at 5-6, 8). The Court  
17 dismissed the RLUIPA claims for injunctive relief as moot because Plaintiff failed to  
18 allege that any rolling lockdowns have occurred after 2011 and Plaintiff has been  
19 transferred from Centinela State Prison to California Men’s Colony. *Id.* at 5. The  
20 Court dismissed as moot the first amendment claims for injunctive relief against  
21 Defendants in their official capacity on the same grounds.<sup>2</sup> In Plaintiff’s proposed  
22 fourth amended complaint, Plaintiff’s RLUIPA and first amendment claims are

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24 <sup>1</sup> It is unclear whether Plaintiff seeks leave to amend the RLUIPA and first  
25 amendment claims for damages. The proposed fourth amended complaint requests  
injunctive relief and “negotiable” damages. (ECF No. 151 at 11).

26 <sup>2</sup> The Report and Recommendation on the motions to dismiss the third amended  
27 complaint states, “[T]he Court finds that Roger’s claims for injunctive relief under the  
28 First Amendment against all three Defendants in their official capacities are moot for  
the same reasons that his RLUIPA claims for injunctive relief are moot.” (ECF No. 145  
at 31 n.4). This Court adopted the Report and Recommendation in its entirety. (ECF  
No. 150 at 8).

1 premised on allegations that rolling lock downs occurred at Centinela State Prison due  
2 to the “3% + 5% Staff Redirection Plan” and caused Plaintiff “to miss schedule[d]  
3 religious services.” (ECF No. 151 at 4). Plaintiff’s proposed fourth amended complaint  
4 fails to allege any lock downs occurring after 2011. Plaintiff’s proposed fourth  
5 amended complaint alleges that Plaintiff presently resides at California Men’s Colony  
6 and that the actions complained of were directed against Plaintiff at Centinela State  
7 Prison. (ECF No. 151 at 1). Plaintiff fails to allege facts to support an inference that  
8 the mootness doctrine would not preclude the RLUIPA and first amendment claims for  
9 injunctive relief.<sup>3</sup> The Court concludes that Plaintiff’s proposed amendments fail to  
10 correct the deficiencies identified in the Court’s previous Order. *See Gompper*, 298  
11 F.3d at 898 (“leave to amend need not be granted when amendment would be futile”).

#### 12 **B. Eighth Amendment and Retaliation Claims**

13 Plaintiff’s proposed fourth amended complaint alleges an eighth amendment  
14 cause of action against Defendants, which was not present in the third amended  
15 complaint. Plaintiff alleges that the Defendant Giurbino, Director of the Division of  
16 Adult Operation for California Prison System, devised a 3% + 5% Staff Redirection  
17 Plan to retaliate the federal courts improperly intruding on the State’s authority to  
18 administer its criminal justice system.” (ECF No. 151 at 4). Plaintiff alleges that  
19 “Giurbino knew his retaliation 3% to 5% Staff Redirection Plan would interrupt  
20 Rogers’ RLUIPA and First Amendment rights by causing Rogers to miss schedule[d]  
21 religious services such as group: worship, study, and prayer due to the 24 hour rolling  
22 lockdowns that either occurred every two or four days.” *Id.* Plaintiff alleges that,  
23 “Giurbino’s retaliation 3% to 5% Staff Redirection Plan is an Eighth Amendment  
24 violation infringed upon Rogers [sic] RLUIPA and First Amendment Rights.” *Id.*  
25 Plaintiff alleges, “Not only did Giurbino cause Uribe, Centinela State Prison’s warden,  
26 to accept and further his retaliation scheme because the federal courts improperly

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28 <sup>3</sup> Defendant Kuzil-Ruan also states that she is retired from the CDCR and it is thus impossible for her to provide the injunctive relief Plaintiff seeks. (ECF No. 153 at 14-15).

1 intruded on the State’s authority to administer its criminal justice system . . . and  
2 knowing it would interrupt Rogers’ RLUIPA and First Amendment rights, . . . Giurbino  
3 encouraged Centinela State Prison’s Captain Kuzil-Ruan to inflict constitutional  
4 injury.” *Id.* at 5.

5 Plaintiff’s previous complaints similarly alleged facts about a Staff Redirection  
6 Plan that resulted in rolling lock downs which allegedly violated Plaintiff’s rights under  
7 RLUIPA and the first amendment. (ECF No. 128). In previous complaints, Plaintiff  
8 alleged an eighth amendment cause of action based on the denial of outdoor exercise  
9 as a result of the lock downs. This Court dismissed Plaintiff’s prior eighth amendment  
10 claims without leave to amend. (ECF No. 9 at 5). Plaintiff now attempts to bring a new  
11 eighth amendment claim by adding language to his proposed fourth amended complaint  
12 to describe the Staff Redirection Plan as a retaliatory eighth amendment violation.  
13 (ECF No. 151). Plaintiff fails to allege new facts in support of his new theory of  
14 liability under the eighth amendment and does not provide any explanation for his  
15 failure to develop these contentions in his previous four complaints. *See Bonin*, 59 F.3d  
16 at 846 (“[W]e have held that a district court does not abuse its discretion in denying a  
17 motion to amend where the movant presents no new facts but only new theories and  
18 provides no satisfactory explanation for his failure to fully develop his contentions  
19 originally.”).

20 To the extent that Plaintiff attempts to bring a retaliation claim under the first  
21 amendment, Plaintiff’s proposed fourth amended complaint is futile and fails to state  
22 a claim. “Within the prison context, a viable claim of First Amendment retaliation  
23 entails five basic elements: (1) An assertion that a state actor took some adverse action  
24 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such  
25 action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the  
26 action did not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*,  
27 408 F.3d 559, 567-68 (9th Cir. 2005).

28 In this case, Plaintiff fails to allege that he engaged in any protected conduct that

1 caused Defendants to retaliate by implementing the Staff Redirection Plan. Plaintiff  
2 alleges that the Staff Redirection Plan “retaliates the federal courts improperly intruding  
3 on the State’s authority to administer its criminal justice system.” (ECF No. 151 at 5).  
4 Plaintiff’s proposed amended complaint fails to state a claim for a first amendment  
5 retaliation cause of action. *See Moore*, 885 F.2d at 538 (“[L]eave to amend need not  
6 be given if a complaint, as amended, is subject to dismissal.”).

7 Defendants have made a sufficiently strong showing of the *Foman* factors to  
8 overcome the presumption in favor of granting leave to amend under Rule 15(a).  
9 Plaintiff has been provided multiple opportunities to amend claims in his complaint and  
10 has failed to remedy the deficiencies alleged by this Court. Plaintiff continues to allege  
11 claims that have been previously dismissed with prejudice. The Court concludes that  
12 any further amendment to the complaint would be futile.

13 **III. Conclusion**

14 IT IS HEREBY ORDERED that Plaintiff’s motion for leave to file a fourth  
15 amended complaint (ECF No. 151) is DENIED. The Clerk of the Court shall close the  
16 case.

17 DATED: February 2, 2017

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19 **WILLIAM Q. HAYES**  
United States District Judge

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