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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY \_\_\_\_\_ *mp*

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

THE ESTATE OF BERNARD  
VICTORIANNE by and through its  
successor-in-interest ZELDA  
VICTORIANNE, BERNARD  
VICTORIANNE II, and ZELDA  
VICTORIANNE,  
  
Plaintiffs,  
  
vs.  
  
COUNTY OF SAN DIEGO,  
WILLIAM GORE, and DOES 1 - 50,  
  
Defendants.

CASE NO. 14cv2170-WQH-  
BLM  
  
ORDER

HAYES, Judge:

The matters before the Court are the Plaintiffs' Ex Parte Motion to Amend the Complaint (ECF No. 72), the Plaintiffs' Ex Parte Application to File Second Amended Complaint Under Seal (ECF No. 73), Defendants' Motion to Dismiss and Strike Parts of the FAC pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(f) (ECF No. 42), and Plaintiffs' Ex Parte Motion to Hold Defendants' Motion to Dismiss and Strike Parts of the FAC in Abeyance (ECF No. 50).

**I. Background**

On September 11, 2014, Plaintiffs, The Estate of Bernard Victorienne by and through its successor-in-interest Zelda Victorienne, Bernard Victorienne II, and Zelda Victorienne initiated this action by filing the Complaint against Defendants County of San Diego and William Gore. (ECF No. 1). Plaintiffs' Complaint asserts the following claims for relief: (1) deliberate indifference to serious medical needs, 42 U.S.C. section

1 1983; (2) wrongful death, 42 U.S.C. section 1983; (3) right of association, 42 U.S.C.  
2 section 1983; (4) failure to properly train, 42 U.S.C. section 1983; (5) failure to  
3 properly supervise and discipline, 42 U.S.C. section 1983; (6) failure to properly  
4 investigate, 42 U.S.C. section 1983; and (7) *Monell* municipal liability civil rights  
5 action, 42 U.S.C. section 1983. (ECF No. 1).

6 On February 9, 2015, Plaintiffs filed the First Amended Complaint (“FAC”).  
7 (ECF No. 37). Plaintiffs’ FAC asserts three additional claims: (1) wrongful death  
8 California Code of Civil Procedure 377.60 *et seq.*; (2) negligence; and (3) violation of  
9 California Civil Rights section 52.1.

10 On February 23, 2015, Defendants filed the Motion to Dismiss and Strike Parts  
11 of the FAC pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(f). (ECF No.  
12 42). On March 10, 2015, Plaintiffs filed a response in opposition of Defendants’  
13 motion. (ECF No. 53). On March 16, 2015, Defendants filed a reply. (ECF No. 55).

14 On March 5, 2015, Plaintiffs filed the Ex Parte Motion to Hold Defendants’  
15 Motion to Dismiss and Strike Parts of the FAC in Abeyance. (ECF No. 50). On March  
16 27, 2015, Defendants filed a response in opposition to Plaintiffs’ motion. (ECF No.  
17 61).

18 On April 30, 2015, Plaintiffs filed a Second Ex Parte Motion to Amend the  
19 Scheduling Order requesting a deadline of May 11, 2015 to file a motion for leave to  
20 file a second amended complaint. (ECF No. 68). On May 6, 2015, Defendants filed  
21 an opposition to the motion. (ECF No. 70). On May 8, 2015, United States Magistrate  
22 Judge Barbara L. Major issued an order stating that “[h]ere, the Court finds good cause  
23 to GRANT Plaintiffs’ motion. Any motion to join other parties, to amend the  
24 pleadings, or to file additional pleadings shall be filed on May 11, 2015. All remaining  
25 dates and deadlines set forth in the Court’s December 17, 2014 Case Management  
26 Conference Order Regulating Discovery and Other Pretrial Proceedings [ECF No. 31]  
27 are hereby VACATED pending a ruling on the pending motion to dismiss [ECF No.  
28 42] and soon-to-be-file motion to amend the pleadings.” (ECF No. 71 at 2-3).

1 On May 11, 2015, Plaintiffs filed the Ex Parte Motion to Amend the Complaint  
2 along with an attached proposed second amended complaint. (ECF No. 72). On the  
3 same day, Plaintiffs filed the Ex Parte Application to File Second Amended Complaint  
4 Under Seal. (ECF No. 73). On May 20, 2015, Defendants filed a response opposing  
5 Plaintiff's Ex Parte Motion to Amend the Complaint. On May 22, 2015, Defendants  
6 filed a Conditional Non-Opposition to Plaintiffs' Ex Parte Motion to File Second  
7 Amended Complaint Under Seal. (ECF No. 79). On May 22, 2015, Plaintiffs' filed  
8 a reply in support of the Ex Parte Motion to Amend the Complaint. (ECF No. 80).

## 9 **II. DISCUSSION**

### 10 **A. Ex Parte Motion to Amend the Complaint (ECF No. 72)**

11 Defendants contend that Plaintiffs' motion causes confusion and prejudice.  
12 Defendants contend that the "piecemeal approach Plaintiffs are using in this matter  
13 with multiple complaint submissions is potentially prejudicial to all defendants, current  
14 and prospective, who have the right to challenge a complaint directed against them, to  
15 formulate their respective defenses and to fully participate in discovery that all parties  
16 may conduct." (ECF No. 77 at 4).

17 Plaintiffs contend that there is no prejudice and no delay that can result from the  
18 filing of a second amended complaint. Plaintiffs contend that the denial of the filing  
19 of the amended complaint would result in substantial harm to Plaintiffs. Plaintiffs  
20 contend that because Defendants withheld critical information regarding Bernard's  
21 death, Plaintiffs did not become aware of the exact nature of the medical staff's  
22 misconduct until they received discovery.

23 Federal Rule of Civil Procedure 15 provides: "A party may amend its pleading  
24 once as a matter of course...." Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may  
25 amend its pleading only with the opposing party's consent or the courts leave." Fed.  
26 R. Civ. P. 15(a)(2). Federal Rule of Civil Procedure 15 mandates that leave to amend  
27 "be freely given when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be  
28 applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d

1 1048, 1051 (9th Cir. 2003) (quotation omitted). In determining whether to allow an  
2 amendment, a court considers whether there is “undue delay,” “bad faith,” “undue  
3 prejudice to the opposing party,” or “futility of amendment.” *Foman v. Davis*, 371 U.S.  
4 178, 182 (1962). “Not all of the [*Foman*] factors merit equal weight... [I]t is the  
5 consideration of prejudice to the opposing party that carries the greatest weight.”  
6 *Eminence Capital*, 316 F.3d at 1052 (citation omitted). “The party opposing  
7 amendment bears the burden of showing prejudice.” *DCD Programs, Ltd. v. Leighton*,  
8 833 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong showing of any of  
9 the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of  
10 granting leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

11 After review of the Ex Parte Motion to Amend the Complaint and the filings of  
12 the parties, the Court concludes that Defendants have not made a sufficiently strong  
13 showing of the *Foman* factors to overcome the presumption under Rule 15(a) in favor  
14 of granting leave to amend. *See Eminence Capital*, 316 F.3d at 1052. The Court will  
15 defer consideration of any challenge to the merits of the proposed second amended  
16 complaint until after the amended pleading is filed. *See Netbula v. Distinct Corp.*, 212  
17 F.R.D. 534, 539 (N.D. Cal. 2003) (“Ordinarily, courts will defer consideration of  
18 challenges to the merits of a proposed amended pleading until after leave to amend is  
19 granted and the amended pleading is filed.”). The Ex Parte Motion to Amend the  
20 Complaint is granted.

21 **B. Ex Parte Application to File Second Amended Complaint Under Seal**  
22 **(ECF No. 73)**

23 Plaintiffs move the court for an order permitting Plaintiffs to file portions of the  
24 proposed second amended complaint under seal. Plaintiffs assert that they have  
25 redacted portions of the second amended complaint that address any discipline of  
26 County officials. Plaintiffs explain that they “do not believe that the redacted portions  
27 of the second amended complaint are subject to the protective order currently in  
28 place...,” but “those are typically areas that are designated privileged and confidential.”

1 (ECF No. 73 at 2). Defendants do not oppose Plaintiffs filing portions of the proposed  
2 second amended complaint under seal.

3 “Historically, courts have recognized a ‘general right to inspect and copy public  
4 records and documents, including judicial records and documents.’” *Kamakana v. City  
5 and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v.  
6 Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). In the Ninth Circuit, there  
7 is “a strong presumption in favor of access to court records.” *Foltz v. State Farm Mut.  
8 Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *see also Kamakana*, 447 F.3d at  
9 1178-79. The right of access to judicial records is a common law right. *See Foltz*, 331  
10 F.3d at 1135. “A narrow range of documents is not subject to the right of public access  
11 at all because the records have ‘traditionally been kept secret for important policy  
12 reasons.’” *Kamakana*, 447 F.3d at 1178 (quoting *Times Mirror Co. v. United States*,  
13 873 F.2d 1210, 1219 (9th Cir. 1989)). The Ninth Circuit has identified two categories  
14 of documents that fall into this category: grand jury transcripts and warrant materials  
15 in the midst of a pre-indictment investigation. *Id.*

16 “A party seeking to seal a judicial record then bears the burden of overcoming  
17 this strong presumption by meeting the compelling reasons standard. That is, the party  
18 must articulate compelling reasons supported by specific factual findings ... that  
19 outweigh the general history of access and the public policies favoring disclosure, such  
20 as the public interest in understanding the judicial process.” *Kamakana*, 447 F.3d at  
21 1178-79 (citations and quotation marks omitted). “The factors relevant to a  
22 determination of whether the strong presumption of access is overcome include the  
23 ‘public interest in understanding the judicial process and whether disclosure of the  
24 material could result in improper use of the material for scandalous or libelous  
25 purposes or infringement upon trade secrets.’” *Hagestad v. Tragesser*, 49 F.3d 1430,  
26 1434 (9th Cir. 1995) (quoting *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir.  
27 1990)); *see also Kamakana*, 447 F.3d at 1179 (“In general, ‘compelling reasons’  
28 sufficient to outweigh the public’s interest in disclosure and justify sealing court

1 records exist when such ‘court files might have become a vehicle for improper  
2 purposes,’ such as the use of records to gratify private spite, promote public scandal,  
3 circulate libelous statements, or release trade secrets.”). “[T]he court must  
4 ‘conscientiously balance [ ] the competing interests’ of the public and the party who  
5 seeks to keep certain judicial records secret.” *Id.* (quoting *Foltz*, 331 F.3d at 1135).  
6 “After considering these interests, if the court decides to seal certain judicial records,  
7 it must ‘base its decision on a compelling reason and articulate the factual basis for its  
8 ruling, without relying on hypothesis or conjecture.’” *Kamakana*, 447 F.3d at 1179  
9 (quoting *Hagestad*, 49 F.3d at 1434).

10 The presumed right to access to court proceedings and documents can be  
11 overcome “only by an overriding right or interest ‘based on findings that closure is  
12 essential to preserve higher values and is narrowly tailored to serve that interest.’”  
13 *Oregonian Publ’g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990)  
14 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985)).

15 In Plaintiffs’ Ex Parte Application to File Second Amended Complaint Under  
16 Seal, Plaintiffs specifically state that “Plaintiffs do not believe that the redacted  
17 portions of the second amended complaint are subject to the protective order currently  
18 in place....” (ECF No. 73 at 2). Plaintiffs further state that “[w]hile Plaintiffs do not  
19 believe the standard has been met, as a precaution, Plaintiffs respectfully move this  
20 Court for an order permitting Plaintiffs to file the Second Amended Complaint under  
21 seal.” *Id.* at 3. The Court finds Plaintiffs have failed to meet their burden of  
22 overcoming the strong presumption in favor of access to court records by meeting the  
23 compelling reasons standard. Plaintiffs’ Ex Parte Application to File Second Amended  
24 Complaint Under Seal is denied.

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1 **III. Conclusion**

2 IT IS HEREBY ORDERED that Plaintiffs' Ex Parte Motion to Amend the  
3 Complaint (ECF No. 72) is GRANTED and Plaintiffs' Ex Parte Application to File  
4 Second Amended Complaint Under Seal is DENIED. Plaintiffs' shall file the attached  
5 proposed Second Amended Complaint no later than ten (10) days from the date this  
6 order is issued with the caption "Second Amended Complaint."

7 IT IS FURTHER ORDERED that Defendants Motion to Dismiss and Strike  
8 Parts of the FAC pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(f) (ECF  
9 No. 42) and Plaintiffs' Ex Parte Motion to Hold Defendants' Motion to Dismiss and  
10 Strike Parts of the FAC in Abeyance (ECF No. 50) are DENIED as moot.

11 DATED: 5/3/11

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14 **WILLIAM Q. HAYES**  
15 United States District Judge

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