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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 GREGORY D. FOLEY,

12 Plaintiff,

13 v.

14 COREY KALDENBACH, et al.,

15 Defendant.  
16

Case No.: 15cv1627-CAB-AGS

**ORDER ADOPTING REPORT AND  
RECOMMENDATION [Doc. No. 79]  
AND PROVIDING PLAINTIFF  
WITH SPECIFIC INSTRUCTIONS  
REGARDING FURTHER  
PROCEEDINGS**

17 **REPORT AND RECOMMENDATION**

18 On April 18, 2016, Plaintiff Gregory D. Foley filed a first amended complaint.  
19 [Doc. No. 28.] On August 31, 2016, Defendant City of Oceanside filed a motion to  
20 dismiss. [Doc. No. 46.] On November 16, 2016 Defendant Ronald Nevares filed a  
21 motion to dismiss. [Doc. No. 60.] On November 17, 2016, Plaintiff filed a motion to  
22 amend the complaint. [Doc. No. 62.] Finally, on November 28, 2016, Plaintiff filed a  
23 motion for default judgment. [Doc. No. 66.]

24 On January 30, 2017, Magistrate Judge Andrew G. Schopler prepared a Report and  
25 Recommendation (“Report”) recommending that Plaintiff’s motion to amend be granted,  
26 Plaintiff’s motion for default judgment be denied, Defendant City of Oceanside’s motion  
27 to dismiss be denied as moot, and Defendant Nevares’ motion to dismiss be denied as  
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1 moot. [Doc. No. 79.] The Report also ordered that any objections were to be filed within  
2 the time limits set forth in Federal Rule of Civil Procedure 72. [Report at 3.] To date,  
3 while Plaintiff has filed several other documents, no objection has been filed, nor have  
4 there been any requests for an extension of time in which to file an objection.

5 A district court’s duties concerning a magistrate judge’s report and  
6 recommendation and a respondent’s objections thereto are set forth in Rule 72(b) of the  
7 Federal rules of Civil Procedure and 28 U.S.C. § 636(b)(1). When no objections are  
8 filed, the district court is not required to review the magistrate judge’s report and  
9 recommendation. The Court reviews *de novo* those portions of the Report and  
10 Recommendation to which objections are made. 28 U.S.C. § 636(b)(1). The Court may  
11 “accept, reject, or modify, in whole or in part, the findings or recommendations made by  
12 the magistrate judge.” *Id.* However, “[t]he statute makes it clear that the district judge  
13 must review the magistrate judge's findings and recommendations de novo if objection is  
14 made, but not otherwise.” *United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th  
15 Cir.2003) (en banc) (emphasis in original). “Neither the Constitution nor the statute  
16 requires a district judge to review, de novo, findings and recommendations that the  
17 parties themselves accept as correct.” *Id.* In the absence of timely objection, the Court  
18 “need only satisfy itself that there is no clear error on the face of the record in order to  
19 accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s note (citing  
20 *Campbel v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974)).

21 Here, neither party has timely filed objections to the Report. Having reviewed it,  
22 the Court finds that it is thorough, well-reasoned, and contains no clear error.  
23 Accordingly, the Court hereby (1) **ADOPTS** Magistrate Judge Schopler’s Report and  
24 Recommendation [Doc. No. 79]; (2) **GRANTS** Plaintiff’s motion to amend [Doc. No.  
25 62]; (3) **DENIES** Plaintiff’s motion for default judgment [Doc. No. 66]; (4) **DENIES AS**  
26 **MOOT** Defendant City of Oceanside’s motion to dismiss [Doc. No. 46]; and (5)  
27 **DENIES AS MOOT** Defendant Nevares’ motion to dismiss [Doc. No. 60].

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1                   **INSTRUCTIONS TO PLAINTIFF AS TO HOW TO PROCEED**

2           **A. Background**

3           On July 14, 2015, Plaintiff filed the original complaint which named the following  
4 defendants: City of Oceanside, Oceanside Police Department, and Does 1-12. The  
5 complaint was filed on a form provided for state prisoners suing under 42 U.S.C. §1983.  
6 The original complaint also contained factual allegations. [See Doc. No. 1.] On  
7 November 20, 2015, the Court granted Plaintiff’s motion to amend to substitute a named  
8 defendant for a Doe defendant. [Doc. No. 18.] Plaintiff was instructed that, if he wanted  
9 to add the named defendants, he needed to file an Amended Complaint by December 21,  
10 2015, that named *all* the defendants and contained sufficient “factual matter” to show: (1)  
11 how and why he believes his constitutional rights were violated; and (2) what *each*  
12 individual Defendant did to cause him injury. [Doc. No. 18 at 6-7.]

13           December 21, 2015, came and went, but Plaintiff did not file an Amended  
14 Complaint. On February 9, 2016, however, Plaintiff filed a motion requesting the  
15 issuance of a summons and U.S. Marshal Service. [Doc. No. 23.] Therefore, the Court  
16 assumed Plaintiff wanted to stand on his original complaint and conducted its mandatory  
17 screening of that pleading pursuant to 28 U.S.C. §§1915e(2) and 1915A before  
18 determining whether U.S. Marshal service was warranted. The Court determined that  
19 Defendant Oceanside Police Department is not subject to suit under Section 1983 and  
20 therefore dismissed that defendant from the action. [Doc. No. 25.] The Court then  
21 ordered the U.S. Marshal to serve the complaint on the City of Oceanside, which was the  
22 only defendant in the action at that time. Thus, at this point, the original complaint was  
23 still the operative complaint, but with only one defendant.

24           On April 18, 2016, Plaintiff filed a motion to amend the complaint [Doc. No. 29]  
25 as well as what appeared to be a proposed First Amended Complaint (“FAC”). [Doc. No.  
26 28]. On September 14, 2016, Magistrate Judge Ruben Brooks granted the motion to  
27 amend and deemed the FAC to be the operative pleading. [Doc. No. 49 at 1.] Upon  
28 further review, however, it is apparent that the FAC is **NOT** a viable complaint. First, the

1 FAC appears to name the individual defendants, but it omits the City of Oceanside as a  
2 defendant.<sup>1</sup> In addition, the FAC does not contain **ANY** factual allegations. Instead, it  
3 merely attaches a proposed summons for each individual defendant. It also has no  
4 identifiable claims and no prayer for relief. The FAC is simply not a viable complaint  
5 and is therefore **DISMISSED** without prejudice.

6 Plaintiff is **ADVISED** that, at this point in time, there is **NO** operative complaint in  
7 this action. However, Plaintiff will be given one **FINAL** opportunity to file a Second  
8 Amended Complaint as set forth below.

9 **B. Recent Filings by Plaintiff**

10 After Judge Schopler issued the Report, Plaintiff filed several additional  
11 documents. [Doc. Nos. 81, 83 and 85.] One of the documents is 79 pages long, appears  
12 to be a motion requesting leave to file a Second Amended Complaint, and even  
13 references a “Second amended complaint for defendants . . . as per ordered by the court  
14 in, Report and Recommendation.” [Doc. No. 83 at 1.] However, in 79 pages, there is  
15 nothing that resembles a Second Amended Complaint. Rather, it appears to be a  
16 narrative of past events as well as a discussion of the current litigation; it also provides  
17 occasional legal citations, and attaches some police reports from the underlying event.  
18 However, it does not contain the necessary components of a complaint. Therefore, the  
19 documents that have been submitted to date by Plaintiff do **NOT** constitute a viable  
20 Second Amended Complaint.

21 The last filing by Plaintiff appears to be a motion regarding service of summons on  
22 the individual defendants. [Doc. No. 85.] Plaintiff is **ADVISED** that the Court will not  
23 address any issues regarding the issuance of summons or service on defendants **unless**  
24 **and until** Plaintiff files a viable Second Amended Complaint as set forth below.

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28 <sup>1</sup> Unless Plaintiff intended to dismiss the City of Oceanside, by not naming the City of Oceanside in the  
FAC, Plaintiff may waive his claims against the City.



1 (4) **DENIES AS MOOT** Defendant City of Oceanside’s motion to dismiss [Doc.  
2 No. 46];

3 (5) **DENIES AS MOOT** Defendant Nevares’ motion to dismiss [Doc. No. 60];

4 (6) **DISMISSES WITHOUT PREJUDICE** the FAC [Doc. No. 28];

5 (7) **GRANTS** Plaintiff forty-five (45) days from the date of this Order in which to  
6 file his Second Amended Complaint. Plaintiff’s pleading must be identified as his Second  
7 Amended Complaint, include Civil Case No. 15cv1627 (CAB)(AGS) in its caption, name  
8 the all parties he wishes to sue, and allege all the claims he wishes to pursue in one  
9 single, clear, and concise pleading. In order to assist him, and to encourage his timely  
10 compliance, the Court also **DIRECTS** the Clerk of Court to provide Plaintiff with  
11 *another* copy of its form Civil Rights Complaint pursuant to 42 U.S.C. § 1983, and  
12 strongly suggests that he use it. Plaintiff’s Second Amended Complaint must also comply  
13 with S.D. Cal. CivLR 8.2(a); therefore, *he may attach no more than fifteen (15)*  
14 *additional pages*; and,

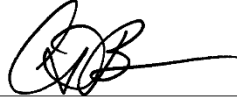
15 (8) **CAUTIONS** Plaintiff that, should he fail to comply with the directions set  
16 forth in this Order by filing a Second Amended Complaint within the 45 days provided,  
17 the Court will dismiss his entire civil action without prejudice based on his failure to  
18 prosecute and/or comply with the Court’s Orders permitting amendment. *See Lira*, 427  
19 F.3d at 1169 (“If a plaintiff does not take advantage of the opportunity to fix his  
20 complaint, a district court may convert the dismissal of the complaint into dismissal of  
21 the entire action.”); *Edwards v. Marin Park*, 356 F.3d 1058, 1065 (9th Cir. 2004) (“The  
22 failure of the plaintiff eventually to respond to the court’s ultimatum—either by

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1 amending the complaint or by indication to the court that it will not do so—is properly  
2 met with the sanction of a Rule 41(b) dismissal.”).

3 **IT IS SO ORDERED.**

4 Dated: March 13, 2017



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6 Hon. Cathy Ann Bencivengo  
7 United States District Judge  
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