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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 FRAYNO CRUMB,
12 CDCR #H-20376,

13 Plaintiff,

14 vs.

15 MARK HASSELBLAD, Correctional
16 Officer, DAVID STRAYHORN,
17 Correctional Officer; J. RAMERO,
18 Correctional Officer; R. OLSON,
19 Correctional Counselor II Inmate Appeals,

20 Defendants.
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Case No.: 3:16-cv-00581-BTM-NLS

ORDER:

**1) GRANTING PLAINTIFF'S
MOTION TO DISMISS
COMPLAINT AND FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT [ECF No. 26]**

**2) DENYING DEFENDANTS'
MOTION TO DISMISS AS MOOT
[ECF No. 16]; AND**

**3) DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT
AND FOR COURT ORDER
REGARDING U.S. MARSHAL
SERVICE UPON DEFENDANT
J. RAMERO
[ECF Nos. 21, 24]**

27 FRAYNO CRUMB ("Plaintiff"), is currently incarcerated at Kern Valley State
28 Prison ("KVSP") in Delano, California, and is proceeding in pro se in this civil action filed

1 pursuant to 42 U.S.C. § 1983. He claims Defendants Strayhorn, Hasselblad, and Ramero,
2 all Correctional Officers at Richard J. Donovan Correctional Facility (“RJDCF”), used
3 excessive force and refused medical treatment for his injuries while he was incarcerated
4 there on January 27, 2015. Plaintiff further contends Defendant Olson thwarted his efforts
5 to file an administrative complaint following the incident. (ECF No. 1 at 1-2, 10-11.)

6 **I. Procedural Background**

7 On November 11, 2016, the Court granted Plaintiff leave to proceed in forma
8 pauperis (“IFP”), screened his Complaint (ECF No. 1) pursuant to 28 U.S.C. § 1915(e)(2)
9 and § 1915A, and directed the U.S. Marshal to effect service upon the Defendants pursuant
10 to 28 U.S.C. § 1915(d) and FED. R. CIV. P. 4(c)(3) (ECF No. 8). *See Puett v. Blandford*,
11 895 F.2d 630, 634 (9th Cir. 1990) (“An incarcerated pro se plaintiff proceeding in forma
12 pauperis is entitled to rely on the U.S. Marshal for service of summons and complaint”).
13 The U.S. Marshal successfully executed service upon Defendants Hasselblad, Strayhorn,
14 and Olson (ECF Nos. 11-13), but the summons was returned unexecuted as to Defendant
15 J. Ramero on December 28, 2016 (ECF No. 10), with a note indicating that “per Litigation
16 Coordinator, RJDCF has no employee by the name of J. Ramero.” (ECF No. 10).

17 After requesting and being granted an extension of time in which to respond (ECF
18 Nos. 14, 15), on March 14, 2017, Defendants Hasselblad, Strayhorn, and Olson filed a
19 Motion to Dismiss portions of Plaintiff’s Complaint pursuant to FED. R. CIV. P. 12(b)(6)
20 (ECF No. 16). Defendants served Plaintiff with a copy of their Motion via U.S. Mail on
21 the same day (ECF No. 16-1 at 7).

22 After the Court set a briefing schedule (ECF No. 17), Plaintiff requested an extension
23 of time in which to respond (ECF No. 19). On April 12, 2017, the Court granted Plaintiff’s
24 request (ECF No. 22), and on the same day, Plaintiff filed a “Motion to Petition the Court
25 to Order the CDCR [California Department of Corrections and Rehabilitation] to Give
26 Forwarding Address for Correctional Officer J. Ramero” so that the U.S. Marshal may re-
27 attempt service (ECF No. 21).

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1 Two days later, on April 14, 2017, Plaintiff filed a Motion for Leave to file an
2 Amended Complaint (ECF No. 24 at 1-4), attached to which is his proposed First Amended
3 Complaint (“FAC”) (ECF No. 24 at 5-70). Both Plaintiff’s Motion to Amend, as well as
4 his proposed FAC, were signed by him on April 7, 2017. (*Id.* at 2, 25.) In a separate
5 “Declaration of Service” (ECF No. 24 at 4), Plaintiff swears under penalty of perjury to
6 have placed his Motion and Proposed FAC in the institutional mail at KVSP on April 9,
7 2017. (*Id.* at 3.) Then, on April 26, 2017, before the Court could rule on Plaintiff’s Motion
8 to File a First Amended Complaint, and in lieu of an Opposition to Defendants’ Motion to
9 Dismiss, he filed a “Motion to Dismiss” his own original Complaint, and requesting leave
10 to file a Second Amended Complaint (“SAC”) re-alleging his Eighth Amendment
11 excessive force claims against Defendants Strayhorn and Hasselblad only (ECF No. 26).

12 **II. Plaintiff’s Motions to Dismiss and For Leave to Amend**

13 Pursuant to FED. R. CIV. P. 15(a), a party “may amend its pleading once as a matter
14 of course ... within 21 days after service of a motion under Rule 12(b)...” FED. R. CIV. P.
15 15(a)(1)(B). “In all other cases, a party may amend its pleading only with the opposing
16 party’s written consent or the court’s leave.” FED. R. CIV. P. 15(a)(2).

17 In this case, Plaintiff requires leave to amend because, even under the prison
18 “mailbox rule,” his Motion seeking leave to file a FAC was constructively filed on April
19 9, 2017—the date he placed it in the U.S. Mail at KVSP—and more than 21 days after
20 March 14, 2017, when he was served with Defendants’ Motion to Dismiss his original
21 Complaint pursuant to FED. R. CIV. P. 12(b)(6). *See* ECF No. 24 at 3; ECF No. 16-1 at 7;
22 *Houston v. Lack*, 487 U.S. 266, 270-72 (1988) (notice of appeal filed by a pro se prisoner
23 is deemed to be “filed” when it is delivered to prison authorities for forwarding to the
24 district court); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) (“*Houston* mailbox
25 rule applies to § 1983 suits filed by pro se prisoners.”). His most recent Motion seeking
26 leave to file a SAC, was filed a week later—on April 16, 2017—the date he swears to have
27 deposited it in the institutional mail at KVSP. *See* ECF No. 26 at 5.

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1 However, Rule 15(a)(2) further provides that “[t]he court should freely give leave
2 when justice so requires,” and “this mandate is to be heeded.” *Foman v. Davis*, 371 U.S.
3 178, 182 (1962) (internal quotation marks omitted); *Sharkey v. O’Neal*, 778 F.3d 767, 774
4 (9th Cir. 2015). The intent of the rule is to “facilitate decision on the merits, rather than on
5 the pleadings or technicalities,” *Chudacoff v. Univ. Med. Center of S. Nev.*, 649 F.3d 1143,
6 1152 (9th Cir. 2011), and this policy is “to be applied with extreme liberality.” *Owens v.*
7 *Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (citation omitted).

8 When evaluating a motion to amend under Rule 15, the Court considers: (1) whether
9 there has been undue delay, bad faith, or dilatory motive on the part of the moving party;
10 (2) whether there have been repeated failures to cure deficiencies by previous amendments;
11 (3) whether there has been undue prejudice to the opposing party “by virtue of the
12 allowance of the amendment”; and (4) whether amendment would be futile. *Sharkey*, 778
13 F.3d at 774 (quoting *Foman*, 371 U.S. at 182). Prejudice is the “touchstone of the inquiry
14 under rule 15(a),” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.
15 2003) (citation omitted), but “[a]bsent prejudice, or a strong showing of any of the
16 remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting
17 leave to amend.” *Id.* (emphasis original).

18 Here, the Court finds no delay, bad faith or dilatory motive on Plaintiff’s part. In
19 fact, amendment would have been proper “as a matter of course” had he filed his Motion
20 to file his FAC just a few days earlier. *See* FED. R. CIV. P. 15(a)(1)(a); *Sharkey*, 778 F.3d
21 at 774. The Court further finds no named Defendant would be prejudiced at this stage of
22 this proceedings by Plaintiff’s amendment, for his Motion seeking leave to file a FAC
23 sought to merely to “chang[e] [the] statement of jurisdiction,” (ECF No. 24 at 1), and his
24 proposed FAC (ECF No. 24 at 5-25) sought to simply re-allege and/or supplement his
25 previously alleged causes of action against the same four RJDCF officials named in his
26 original Complaint, one of whom has yet to be served. *Id.*; *see also DCD Programs LTD*
27 *v. Leighton*, 833 F.2d 183, 187-88 (9th Cir. 2006) (finding amendment proper when
28 discovery has not closed, no pending trial date had yet to be set, and case as a whole

1 remained in its early stages.). Moreover, in Plaintiff’s latest Motion seeking leave to file a
2 SAC, he concedes he cannot “cure” the pleading deficiencies in his original Complaint as
3 to Defendants R. Olson and J. Ramero, and therefore, does not oppose Defendants’ Motion
4 to Dismiss and instead seeks to dismiss it himself—provided he is granted leave to file a
5 SAC “alleging that Hasselblad and Strayhorn violated the Eighth Amendment by using
6 excessive force against him on January 27, 2015, at Donovan prison.” (ECF No. 26 at 2).

7 Based on this concession, the Court further finds that amendment as to Strayhorn
8 and Hassleblad would not be futile—for it has already determined Plaintiff’s excessive
9 force allegations were pleaded sufficient to survive the sua sponte screening required by
10 28 U.S.C. § 1915(e)(2) and § 1915A(b), and the “low threshold” justifying U.S. Marshal
11 service, *see* ECF No. 8 at 5; *Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir. 2012), and
12 neither Strayhorn nor Hasselblad sought to dismiss Plaintiff’s Eighth Amendment claims
13 pursuant to FED. R. CIV. P. 12(b)(6). *See* ECF No. 16-1 at 3-6.

14 Thus, because all four *Foman* factors weigh in Plaintiff’s favor, his Motion to
15 Dismiss and/or for Leave to File a Second Amended Complaint, alleging Eighth
16 Amendment excessive force claims against Defendants Strayhorn and Hasselblad *only*
17 (ECF No. 26) is GRANTED.

18 Consequently, Plaintiff’s Motions for Leave to file a FAC (ECF No. 24) and his
19 Motion for a Court Order regarding U.S. Marshal Service as to Defendant J. Ramero (ECF
20 No. 21) are DENIED as moot, as is Defendants’ Motion to Dismiss Plaintiff’s original
21 Complaint (ECF No. 16-1). *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896
22 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”).

23 **III. Conclusion and Order**

24 Accordingly, the Court hereby:

- 25 1) **GRANTS** Plaintiff’s Motion to Dismiss Complaint with leave to Amend
26 pursuant to FED. R. CIV. P. 15(a)(2) (ECF No. 26);
- 27 2) **DISMISSES** Defendants R. Olson and J. Ramero as parties in this matter;
- 28 3) **DENIES** Plaintiff’s Motions for Leave to File his proposed First Amended

1 Complaint (ECF No. 24), and for a Court Order to the CDCR Regarding U.S. Marshal
2 Service upon Correctional Officer J. Ramero (ECF No. 21) as moot;

3 4) **DENIES** Defendants' Motion to Dismiss Plaintiff's original Complaint
4 pursuant to FED. R. CIV. P. 12(b)(6) (ECF No. 16), and **VACATES** the hearing date
5 previously set on July 7, 2017 as to that Motion (ECF No. 22) without prejudice as moot
6 and in light of Plaintiff's anticipated amendment; and

7 5) **DIRECTS** Plaintiff to file a Second Amended Complaint, alleging Eighth
8 Amendment excessive force claims arising on January 27, 2015, at RJDCF against
9 Defendants D. Strayhorn and M. Hasselblad *only*, and to serve it upon their counsel of
10 record, no later than **Monday, July 10, 2017**. Plaintiff is cautioned that his Second
11 Amended Complaint must be complete by itself without reference to either his original or
12 his proposed first amended pleading (ECF Nos. 1, 24). *See* S.D. CAL. CIVLR 15.1; *Hal*
13 *Roach Studios*, 896 F.2d at 1546; *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.
14 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an
15 amended pleading may be "considered waived if not repled."). If Plaintiff fails to file and
16 serve his Second Amended Complaint by **July 10, 2017**, the Court will enter a final Order
17 dismissing this civil action based on his failure to prosecute. *See Lira v. Herrera*, 427 F.3d
18 1164, 1169 (9th Cir. 2005) ("If a plaintiff does not take advantage of the opportunity to fix
19 his complaint, a district court may convert the dismissal of the complaint into dismissal of
20 the entire action.").

21 **IT IS SO ORDERED.**

22 Dated: May 22, 2017

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24 Barry Ted Moskowitz, Chief Judge
25 United States District Court
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