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

CHRISTINE MARTIN EPSTEIN,
Plaintiff,

v.

SECRETARY ROBERT A.
MCDONALD, *et al.*,
Defendants.

Case No. 16-cv-2929-BAS(WVG)

**ORDER GRANTING
PLAINTIFF’S MOTION FOR
LEAVE TO FILE AMENDED
COMPLAINT**

[ECF No. 14]

On December 1, 2016, Plaintiff Christine Martin Epstein, who proceeds *pro se*, commenced this action, individually and on behalf of her deceased brother, Peter Elwood Martin, against Defendants Secretary Robert A. McDonald and the Department of Veteran Affairs (collectively, the “Government”) for negligence and professional malpractice in connection with the care provided to Mr. Martin. Ms. Epstein amended her complaint twice, with the operative complaint being the Second Amended Complaint (“SAC”). Ms. Martin now moves for leave to file a Third Amended Complaint (“TAC”). The Government opposes.

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following reasons, the Court **GRANTS** Ms. Epstein’s motion.

1 **I. LEGAL STANDARD**

2 Rule 15(a) of the Federal Rules of Civil Procedure provides that after a
3 responsive pleading has been served, a party may amend its complaint only with the
4 opposing party’s written consent or the court’s leave. Fed. R. Civ. P. 15(a). “The
5 court should freely give leave when justice so requires,” and apply this policy with
6 “extreme liberality.” *Id.*; *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th
7 Cir. 1987). However, leave to amend is not to be granted automatically. *Zivkovic v.*
8 *S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (citing *Jackson v. Bank of*
9 *Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)). Granting leave to amend rests in the
10 sound discretion of the district court. *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326,
11 1331 (9th Cir. 1996).

12 The Court considers five factors in assessing a motion for leave to amend: (1)
13 bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of the
14 amendment, and (5) whether the plaintiff has previously amended the complaint.
15 *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); *see also Foman v. Davis*,
16 371 U.S. 178, 182 (1962). The party opposing amendment bears the burden of
17 showing any of the factors above. *See DCD Programs*, 833 F.2d at 186. Of these
18 factors, prejudice to the opposing party carries the greatest weight. *Eminence Capital,*
19 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). However, absent prejudice,
20 a strong showing of the other factors may support denying leave to amend. *See id.*

21
22 **II. ANALYSIS**

23 Though the Government carries the burden of demonstrating the *Forman*
24 factors, without relying on any legal authority, the entirety of the Government’s
25 argument opposing Ms. Epstein’s motion is as follows:

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1 The United States submits that it is premature for Plaintiff
2 to file a TAC as the Court has yet to rule on the United
3 States' Motion regarding the same issues of jurisdiction
4 and the immateriality of the same specific paragraphs
5 found in Plaintiff's SAC. The Court should, therefore,
6 deny Plaintiff's request for leave to file her proposed TAC.
7 In the alternative, the Court should stay ruling on
8 Plaintiff's motion for leave to amend and allow the parties
9 to supplement their respective pleadings within two weeks
10 of its ruling on the United States' Motion.

11 (Gov't's Opp'n 3:8-14.) The Government's point appears to be a practical one:
12 because the relevant facts regarding jurisdiction and immateriality are the same in
13 the SAC and proposed TAC, the Court should first rule on the Government's motions
14 to dismiss the SAC and strike non-relevant allegations before reaching Ms. Epstein's
15 motion for leave to file an amended complaint.

16 Generally, the resolution of jurisdictional issues is of the highest priority when
17 an action commences. *See, e.g., Leroy v. Great W. United Corp.*, 443 U.S. 173, 180
18 (1979) (“[N]either personal jurisdiction nor venue is fundamentally preliminary in
19 the sense that subject-matter jurisdiction is, for both are personal privileges of the
20 defendant, rather than absolute strictures on the court[.]”). Despite there being a
21 general order of priority, it is not mandatory. *See Sinochem Int'l Co. Ltd. v. Malaysia*
22 *Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). “[A] federal court has leeway to
23 choose among threshold grounds for denying audience to a case on the merits.” *Id.*
24 For example, “a district court declining to adjudicate state-law claims on
25 discretionary grounds need not first determine whether those claims fall within its
26 pendent jurisdiction.” *Id.* (citing *Moor v. Cnty. Of Alameda*, 411 U.S. 693, 715-16
27 (1973)). “Nor must a federal court decide whether the parties present an Article III
28 case or controversy before abstaining under *Younger v. Harris*[.]” *Id.* (citing *Ellis v.*
Dyson, 421 U.S. 426, 433-34 (1975)). In short, the decision to consider the
Government's motion before Ms. Epstein's, or vice versa, is within the Court's
discretion.

1 Reviewing the circumstances of this case, the Court first notes that the
2 Government fails to carry its burden of demonstrating that the *Foman* factors weigh
3 in favor of denying Ms. Epstein’s Rule 15(a) motion. *See DCD Programs*, 833 F.2d
4 at 186. Though there may be substantial similarities between the SAC and proposed
5 TAC, it is important to first resolve which complaint is operative. If the Government
6 determines that the same challenges asserted in its motion apply to the proposed
7 TAC, it may re-file its motion.

8 The Government also requests in the alternative that the Court stay ruling on
9 Ms. Epstein’s motion and “allow the parties to supplement their respective pleadings
10 within two weeks of its ruling on the United States’ Motion.” (Gov’t’s Opp’n. 3:8-
11 14.) However, Federal Rule of Civil Procedure 15(d) only permits supplemental
12 pleadings “setting out any transaction, occurrence, or event that happened *after* the
13 date of the pleading to be supplemented.” *See Eid v. Alaska Airlines, Inc.*, 621 F.3d
14 858, 874 (9th Cir. 2010). Consequently, the Government’s alternative request
15 involving supplemental pleadings would be an improper use of supplemental
16 pleadings permitted by Rule 15(d).

17 18 **III. CONCLUSION & ORDER**

19 In light of the foregoing, and exercising its discretion, the Court **GRANTS**
20 Ms. Epstein’s motion for leave to file an amended complaint based on the
21 Government’s failure to carry its burden under Rule 15(a). (ECF No. 14.)
22 Accordingly, the Court **ORDERS** Ms. Epstein to file the Third Amended Complaint
23 attached to her motion no later than **May 15, 2017**.

24 Furthermore, in anticipation of Ms. Epstein filing her Third Amended
25 Complaint, the Court **TERMINATES AS MOOT** the Government’s motions to
26 dismiss and strike (ECF No. 9). *See Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857
27 (9th Cir. 2011) (“[I]t is well-established that an amended complaint supersedes the
28 original, the latter being treated thereafter as non-existent.”); *see also Ortegoza v.*

1 *Kho*, No. 12-cv-529-L(KSC), 2012 WL 5304859, at *1 (S.D. Cal. Oct. 25, 2012)
2 (Lorenz, J.) (citing *Lacey v. Maricopa Cnty.*, 649 F.3d 1118, 1137 (9th Cir. 2011)
3 (“As a general rule, ‘[an] amended complaint supersedes the original, the latter being
4 treated thereafter as nonexistent.”). If Ms. Epstein fails to file her Third Amended
5 Complaint by the aforementioned date, the Government may file an *ex parte*
6 application requesting that the Court reinstate its motions to dismiss and strike.

7 **IT IS SO ORDERED.**

8
9 **DATED: April 21, 2017**

10 
11 **Hon. Cynthia Bashant**
12 **United States District Judge**