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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RICHARD ARMENTA,
12 CDCR #G-39318,

13 Plaintiff,

14 vs.

15 D. PARAMO, Warden, et al.,

16 Defendants.
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Case No.: 3:16-cv-02931-BTM-KSC

ORDER:

**1) GRANTING PLAINTIFF'S
MOTION FOR LEAVE
TO FILE AN AMENDED
COMPLAINT
[ECF No. 20]**

AND

**2) DENYING DEFENDANTS'
MOTION TO DISMISS PURSUANT
TO Fed. R. Civ. P. 12(b)(6)
WITHOUT PREJUDICE
AS MOOT
[ECF No. 16]**

24 RICHARD ARMENTA ("Plaintiff"), is currently incarcerated at California State
25 Prison, Los Angeles County ("CSP-LAC") in Lancaster, California, and is proceeding
26 pro se in this civil action filed pursuant to 42 U.S.C. § 1983. In his original Complaint,
27 Plaintiff claimed prison officials at Richard J. Donovan Correctional Facility ("RJD") in
28 San Diego, California, violated his Eighth and Fourteenth Amendment rights while he

1 was incarcerated there in 2015 by charging him with, finding him guilty of, and
2 punishing him for use of a controlled substance in violation of CAL. CODE REGS., tit. 15
3 § 3016(a). Plaintiff claimed Defendants did so with “deliberate indifference” to medical
4 evidence showing he had been prescribed Tylenol with codeine, which he argued
5 accounted for the positive urinalysis results that initiated his disciplinary proceedings.
6 (ECF No. 1 at 8-15.)

7 **I. Procedural Background**

8 On April 4, 2017, the Court granted Plaintiff leave to proceed in forma pauperis
9 (“IFP”), denied his Motion to Appoint Counsel, screened his Complaint pursuant to 28
10 U.S.C. § 1915(e)(2) and § 1915A, and directed the U.S. Marshal to effect service upon
11 the Defendants pursuant to 28 U.S.C. § 1915(d) and FED. R. CIV. P. 4(c)(3) (ECF No. 4).
12 *See Puett v. Blandford*, 895 F.2d 630, 634 (9th Cir. 1990) (“An incarcerated pro se
13 plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service
14 of summons and complaint”).

15 The U.S. Marshal successfully executed service upon Defendants Stratton, Salinas,
16 Sanchez, Paramo, Frost, Covell, Zamora, Williams, and Lopez (ECF Nos. 7-15), but the
17 summons was returned unexecuted as to Defendant G. Murphy on May 18, 2017 (ECF
18 No. 6), with a note indicating that “per Litigation Coordinator, ... they are unable to
19 confirm that there is now or ever has been a G. Murphy employed at R.J. Donovan and
20 they are not authorized to accept service on his/her behalf.” (ECF No. 6). No proof of
21 service, either executed or unexecuted has yet to be entered on behalf of the remaining
22 Defendant, G. Wiley.

23 On June 19, 2017, the served Defendants filed a Motion to Dismiss Plaintiff’s
24 Complaint pursuant to FED. R. CIV. P. 12(b)(6) (ECF No. 16). Defendants served Plaintiff
25 with a copy of their Motion via U.S. Mail on the same day (ECF No. 16-1 at 25).

26 On June 22, 2017, the Court calendared Defendants’ Motion for disposition
27 without oral argument on August 18, 2017, directed Plaintiff to file his Opposition, or
28 Notice of Non-Opposition, by August 4, 2017, and granted Defendants until August 11,

1 2017 to file a Reply. (*See* ECF No. 18 at 2.)

2 On July 11, 2017, and in lieu of an Opposition, Plaintiff filed a Motion for Leave
3 to File an Amended Complaint (ECF No. 20), signed, served upon Defendants’ counsel,
4 and dated July 3, 2017. (*Id.* at 18.) Plaintiff attaches to his Motion new “Supporting
5 Facts” (*id.* at 5-9), and two new exhibits, but he also asks to “file an Amended Complaint
6 to add new information,” and “new claims for relief” as to certain Defendants and other
7 portions of his original pleading. *Id.* at 2-4. Plaintiff has also filed a copy of a letter he
8 wrote to the U.S. Marshal regarding the status of service upon Defendants Murphy and
9 Wiley. (*Id.* at 17.)

10 **II. Plaintiff’s Motion for Leave to Amend**

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

15 In this case, Plaintiff did not require the Court’s leave to amend because at the time
16 he filed and served his Motion on July 3, 2017, the 21-day period for amending as a
17 matter of course, after having been served with Defendants’ Motion to Dismiss pursuant
18 to FED. R. CIV. P. 15(a)(1)(B), had yet to expire. *See* ECF No. 20 at 1, 18; ECF No. 16-1
19 at 25; *Houston v. Lack*, 487 U.S. 266, 270-72 (1988) (notice of appeal filed by a pro se
20 prisoner is deemed to be “filed” when it is delivered to prison authorities for forwarding
21 to the district court); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) (“*Houston*
22 mailbox rule applies to § 1983 suits filed by pro se prisoners.”).

23 However, the Court notes that the documents attached to Plaintiff’s Motion, while
24 some pages are captioned as his “Proposed Amended Complaint,” *see* ECF No. 20 at 5-
25 10, do not constitute an Amended Complaint which is complete in itself. *See* S.D. Cal.
26 CivLR 15.1 (requiring that “[e]very pleading to which amendment is permitted as a
27 matter of right or has been allowed by court order, must be complete in itself without
28 reference to the superseded pleading.”). It is well-established that an “amended complaint

1 supersedes the original, the latter being treated thereafter as non-existent.” *Valadez-Lopez*
2 *v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011) (citations omitted). Once Plaintiff amends,
3 his original pleading no longer serves any function in the case. *Loux v. Rhay*, 375 F.2d
4 55, 57 (9th Cir. 1967).

5 Therefore, in an amended complaint, as in an original complaint, each claim and
6 the involvement of each defendant must be alleged; each pleading must include a “short
7 and plain statement of the grounds for the court’s jurisdiction,” a “short and plain
8 statement of the claim showing that the pleader is entitled to relief,” and “a demand for
9 the relief sought.” FED. R. CIV. P. 8(a)(1)-(3); *see also Ashcroft v. Iqbal*, 556 U.S. 662,
10 677-78 (2009); *Landers v. Quality Communications, Inc.*, 771 F.3d 638, 640-41 (9th Cir.
11 2014).

12 As currently submitted, Plaintiff’s Motion for Leave to Amend (ECF No. 20) does
13 not, without more, qualify as an Amended Complaint pursuant to Local Rule 15.1; nor
14 does it comply with FED. R. CIV. P. 8. For example, Plaintiff does not include the names
15 of the Defendants he seeks to sue, nor does he indicate the capacity in which he seeks to
16 sue them. *See* FED. R. CIV. P. 10(a) (“The title of the complaint must name all the
17 parties.”); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992) (noting that an earlier
18 complaint “cannot have the effect of filling in the names of the defendants in [a] later ‘et
19 al.’ pleading.”). Moreover, while Plaintiff apparently seeks to *add* an additional statement
20 of facts and two exhibits to his original complaint, and refers to a list of “paragraphs” he
21 wishes to intersperse into that pleading involving “new information,” and “new claims
22 for relief,” (ECF No. 20 at 2-4), he may not amend by interlineation, and instead may
23 amend pursuant to Rule 15 only by filing and serving upon Defendants one single
24 Amended Complaint, which is complete by itself, and without reference to any previous
25 pleading. *See Flood v. Nat’l Football League*, No. CIV-S-08-0091 GEB-JFM-PS, 2008
26 WL 942664, at *1 (E.D. Cal. Apr. 1, 2008) (rejecting Plaintiff’s attempts to “interlineate
27 changes to the original complaint,” and instead advising him to submit an amended
28 complaint that was “complete in and of [itsel[f].”).

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

9 When evaluating a motion to amend under Rule 15, the Court considers: (1)
10 whether there has been undue delay, bad faith, or dilatory motive on the part of the
11 moving party; (2) whether there have been repeated failures to cure deficiencies by
12 previous amendments; (3) whether there has been undue prejudice to the opposing party
13 “by virtue of the allowance of the amendment”; and (4) whether amendment would be
14 futile. *Sharkey*, 778 F.3d at 774 (quoting *Foman*, 371 U.S. at 182). Prejudice is the
15 “touchstone of the inquiry under rule 15(a),” *Eminence Capital, LLC v. Aspeon, Inc.*, 316
16 F.3d 1048, 1052 (9th Cir. 2003) (citation omitted), but “[a]bsent prejudice, or a strong
17 showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule
18 15(a) in favor of granting leave to amend.” *Id.* (emphasis original).

19 Here, the Court finds no delay, bad faith, or dilatory motive on Plaintiff’s part. In
20 fact, he has not previously amended, and amendment would have been proper “as a
21 matter of course” had he simply filed and served a complete Amended Complaint on July
22 3, 2017, instead of filing the instant Motion seeking leave to do so. *See* FED. R. CIV. P.
23 15(a)(1)(B); *Sharkey*, 778 F.3d at 774. The Court further finds no previously named
24 Defendant would be prejudiced at this stage of this proceeding, and amendment would
25 not be futile, for it appears Plaintiff seeks leave to simply re-allege and/or supplement his
26 previously alleged causes of action, which the Court has already found sufficiently
27 pleaded to survive initial screening, against the same RJD officials named in his original
28 Complaint, two of whom have yet to be served. *Id.*; *see also DCD Programs LTD v.*

1 *Leighton*, 833 F.2d 183, 187-88 (9th Cir. 2006) (finding amendment proper when
2 discovery has not closed, no pending trial date had yet to be set, and case as a whole
3 remained in its early stages.).

4 Thus, because all four *Foman* factors weigh in Plaintiff's favor, his Motion for
5 Leave to File an Amended Complaint (ECF No. 20) is GRANTED. Consequently,
6 Defendants' Motion to Dismiss Plaintiff's original Complaint (ECF No. 16) pursuant to
7 FED. R. CIV. P. 12(b)(6) is DENIED without prejudice as moot in light of Plaintiff's
8 anticipated amendment. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896
9 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”).

10 **III. Conclusion and Order**

11 Accordingly, the Court hereby:

12 1) **GRANTS** Plaintiff's Motion for Leave to file an Amend Complaint
13 pursuant to FED. R. CIV. P. 15(a)(2) (ECF No. 20);

14 2) **DENIES** Defendants' Motion to Dismiss Plaintiff's original Complaint
15 pursuant to FED. R. CIV. P. 12(b)(6) (ECF No. 16), and **VACATES** the hearing date
16 previously set for **Friday, August 18, 2017**, as to that Motion (ECF No. 18) without
17 prejudice as moot and in light of Plaintiff's anticipated amendment; and instead,

18 3) **DIRECTS** Plaintiff to file an Amended Complaint, and to serve it upon
19 Defendants no later than **Friday, August 18, 2017**. Plaintiff is cautioned that his
20 Amended Complaint must be complete by itself without reference to his original pleading
21 (ECF No. 1). *See S.D. CAL. CIVLR 15.1; Hal Roach Studios*, 896 F.2d at 1546; *Lacey v.*
22 *Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with
23 leave to amend which are not re-alleged in an amended pleading may be “considered
24 waived if not repled.”). Plaintiff is cautioned that if he fails to file and serve his Amended
25 Complaint upon Defendants by **August 18, 2017**, the Court may dismiss his case based

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1 on his failure to prosecute.¹ *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If
2 a plaintiff does not take advantage of the opportunity to fix his complaint, a district court
3 may convert the dismissal of the complaint into dismissal of the entire action.”).

4 **IT IS SO ORDERED.**

5 Dated: July 21, 2017

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7 Barry Ted Moskowitz, Chief Judge
8 United States District Court
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24 ¹ Plaintiff is further advised that he must correct the deficiencies of service already noted
25 as to Defendants Murphy and Wiley, (*see* ECF No. 18 at 2 n. 2), and provide the U.S.
26 Marshal with information sufficient to identify and serve those parties with his Amended
27 Complaint within the time provided by FED. R. CIV. P. 4(m). *See Walker v. Sumner*, 14
28 F.3d 1415, 1421-22 (9th Cir. 1994) (noting that while an incarcerated IFP plaintiff is
entitled to rely on the U.S. Marshal for service of the summons and complaint, where he
fails to provide the Marshal with accurate information sufficient to effect that service,
dismissal for failure to prosecute pursuant to FED. R. CIV. P. 4(m) may be warranted).