

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALLEN HAMMLER,

Plaintiff,

v.

ALVAREZ, ET AL.,

Defendants.

Case No.: 18-CV-326-AJB(WVG)

(1) ORDER GRANTING MOTION TO WITHDRAW COUNT THREE [Doc. No. 8], and

(2) ORDER DENYING MOTION TO PROVIDE ADVISORY OPINION ON COUNT TWO [Doc. Nos. 8, 10]

Plaintiff Allen Hammler, currently incarcerated and proceeding *pro se*, has filed a motion to withdraw count three and requests an advisory opinion on the sufficiency of count two of his complaint. (Doc. No. 8 at 1, Doc. No. 10 at 1.)

I. BACKGROUND

On February 9, 2018, Plaintiff filed a civil rights complaint of three counts pursuant to 42 U.S.C. § 1983 against Defendants Alvarez, Dies, Barrientos, and Hough. (Doc. No. 1 at 2-16.) Under count one, Plaintiff claims Defendants violated his Eighth Amendment rights through use of unnecessary and excessive force. (Doc. No. 1 at 3.) Under count two, Plaintiff claims Defendants violated his First Amendment rights through use of retaliation and selective enforcement. (Doc. No. 1 at 12.) Under count three, Plaintiff

1 claims Defendants violated his Fourteenth Amendment right to due process through use of
2 libel and slander. (Doc. No. 1 at 15.)

3 Plaintiff failed to pay the civil filing fee required by 28 U.S.C. § 1914(a), and, on
4 February 26, 2018, filed a motion for leave to proceed *in forma pauperis* under 28 U.S.C.
5 § 1915(a), claiming he could not pay the fee due to poverty. (Doc. No. 3 at 1.) On April
6 25, 2018, his motion was granted and a U.S. Marshal was ordered to effect service upon
7 Defendants on Plaintiff's behalf. (Doc. No. 5 at 5-6.) Defendants were served on that
8 same day. (Doc. No. 6 at 1.)

9 II. DISCUSSION

10 On May 14, 2018 and May 18, 2018, Plaintiff filed motions to withdraw count three
11 and for an advisory opinion on count two of his Complaint. (Doc. No. 8 at 1, Doc. No. 10
12 at 1.) Plaintiff's motion to withdraw is construed as a motion to amend his pleading under
13 Rule 15 of the Federal Rules of Civil Procedure.

14 A. Motion to Withdraw Count Three

15 Under Rule 15(a), a party has the right to amend his pleading "as a matter of course"
16 within twenty-one days of serving it, or alternatively, with either the opposing party's
17 written consent or "the court's leave." Fed. R. Civ. P. 15(a)(1), (2). Leave should be freely
18 given when justice so requires, Fed. R. Civ. P. 15(a)(2), and Rule 15's policy of favoring
19 amendments of pleadings "should be applied with extreme liberality." *United States v.*
20 *Webb*, 655 F.2d 977, 979 (9th Cir. 1981). However, this extreme liberality is subject to
21 four limitations. A motion for leave to amend pleadings should be denied where the
22 amendment would cause undue delay, is sought in bad faith, constitutes an exercise in
23 futility, or would cause the opposing party undue prejudice. *See Foman v. Davis*, 371 U.S.
24 178, 182 (1962). While all four factors are relevant, whether the amendment would cause
25 undue prejudice to the opposing party is most crucial. *Howey v. United States*, 481 F.2d
26 1187, 1190 (9th Cir. 1973).

27 Under Rule 15(a)(2), the Court finds that Plaintiff's requested amendment to
28 withdraw count three of the Complaint would not cause undue delay, is not sought in bad

1 faith, does not constitute an exercise in futility, and does not cause undue prejudice to the
2 opposing party. *See Foman*, 371 U.S. at 182.

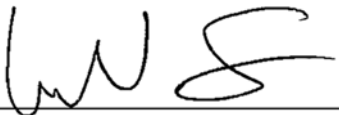
3 Therefore, as leave to amend should be given liberally, *see Webb*, 655 F.2d at 979,
4 the Court GRANTS Plaintiff's motion to amend his pleading to withdraw count three.
5 (Doc. No. 8 at 1.) Accordingly, the original Complaint in this case—filed as Docket No.
6 1—minus count three shall be construed as the First Amended Complaint.

7 **B. Motion to Provide Advisory Opinion on Count Two**

8 Courts do not provide advisory opinions. *See Maldonado v. Lynch*, 786 F.3d 1155,
9 1165 (9th Cir. 2015) (Gould, C.J., dissenting) (citing *Flast v. Cohen*, 392 U.S. 83, 96 n.14
10 (1968) (“The rule against advisory opinions was established as early as 1793.”).
11 Defendants must file either a motion to dismiss or an Answer within 60 days of June 6,
12 2018. (*See* Doc. Nos. 11-14.) As Defendants have the opportunity to challenge or accept
13 count two of the Complaint, the Court DENIES Plaintiff's motion for an advisory opinion.
14 (Doc. No. 10 at 1.)

15 IT IS SO ORDERED.

16 DATED: July 9, 2018

17 
18 _____
19 Hon. William V. Gallo
20 United States Magistrate Judge
21
22
23
24
25
26
27
28