

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Magistrate Judge Boyd N. Boland

Civil Action No. 10-cv-02913-WYD-BNB

CHRISTOPHER JON MILLER,

Plaintiff,

v.

MARGARET HEIL, in her official capacity as Program Administrator of the SOTMP and Chief of Rehabilitation Programs,

RICHARD G. LINS, individual, and in his official capacity as SOTMP therapist, and litigation coordinator,

CHRISTINA ORTIZ-MARQUEZ, individually, and in her official capacity as SOTMP therapist, SAMUEL MICHAEL DUNLAP, in his official capacity as SOTMP Phase II Program Coordinator,

BURL MCCULLAR, in his official capacity as SOTMP Program Manager,

ARISTEDES ZAVAR[A]S, in his official capacity as Executive Director,

CHRISTINE TYLER, individually, and in her official capacity as SOTMP therapist, and

JAYLYNNE CHUPP, in her official capacity as SOTMP therapist,

Defendants.

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**ORDER**

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This matter arises on the following motions (the “Motions”):

1. **Plaintiff’s Motion for Substitution of Parties** [Doc. #20, filed 02/23/2011] (the “Motion to Substitute”);

2. **Plaintiff’s Motion for Leave to Amend His Complaint** [Doc. #28, filed 03/18/2011] (the “Motion to Amend”); and

3. **Motion for Extension of Time to Answer or Otherwise Respond** filed by the defendants [Doc. #30, filed 04/04/2011] (the “Motion for Extension”).

The Motions are GRANTED.

### **Motion for Substitution**

Plaintiff seeks leave to replace defendant Aristedes Zavaras, Executive Director of the Department of Corrections, with his successor, Tom Clements. Zavaras is sued in his official capacity only. Therefore, Clements is automatically substituted for Zavaras under Rule 25(d), Fed.R.Civ.P.

### **Motion to Amend**

Rule 15, Fed.R.Civ.P., provides that a complaint may be amended once as a matter of right within 21 days after serving it or, “if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” Fed.R.Civ.P. 15(a)(1). “In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Id. at 15(a)(2).

The plaintiff filed his Prisoner Complaint on December 1, 2010 [Doc. #1] (the “Complaint”). The Complaint was served on all defendants except Zavaras on February 1, 2011. Zavaras was served on March 3, 2011 [Doc. #27]. The plaintiff filed his Motion to Amend on March 18, 2011, more than 21 days after the Complaint was served on all defendants except Zavaras. The defendants have not filed a responsive pleading or a motion under Rule 12(b), (e), or (f), Fed.R.Civ.P. Therefore, except as to defendant Zavaras, the plaintiff may not amend his Complaint as a matter of right; he must either obtain consent from the defendants or file a motion seeking leave of court.<sup>1</sup>

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<sup>1</sup>The defendants conclude that because they have not served a responsive pleading, the plaintiff may amend as a matter of right. *Motion for Extension*, ¶ 3. This conclusion overlooks section (a)(1)(A) of Rule 15.

The Federal Rules of Civil Procedure provide that a party may amend a pleading by leave of court, and that leave shall be given freely when justice so requires. Fed.R.Civ.P. 15(a)(2). A motion to amend may be denied on the grounds of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment. Foman v. Davis, 371 U.S. 178, 182 (1962).

It does not appear that the proposed amendment is the result of any undue delay, bad faith or dilatory motive on the part of the plaintiff, or repeated failure to cure deficiencies by amendments previously allowed. Nor does it appear that the amendment is futile or that it will result in any undue prejudice to the opposing parties. Foman v. Davis, 371 U.S. 178, 182 (1962). Accordingly, the plaintiff's Motion to Amend is granted.

#### **Motion for Extension**

The defendants seek an extension of time until April 25, 2011, to respond to the Amended Complaint. The Motion for Extension is granted.

IT IS ORDERED:

1. Plaintiff's Motion for Substitution of Parties [Doc. #20] is GRANTED. The Clerk of the Court shall substitute Tom Clements for defendant Aristedes Zavaras;
2. Plaintiff's Motion for Leave to Amend His Complaint [Doc. #28] is GRANTED. The Clerk of the Court is directed to accept the proposed amended complaint for filing; and
3. The defendants' Motion for Extension is GRANTED. The defendants shall answer or otherwise respond to the Amended Complaint on or before April 25, 2011.

Dated April 7, 2011.

BY THE COURT:

s/ Boyd N. Boland  
United States Magistrate Judge