



1           Thereafter, plaintiff sought leave to file a first amended complaint (“FAC”) (#73) on  
2 September 3, 2014. Defense counsel declined to oppose the motion but requested that the court  
3 stay proceedings until it had rescreened the complaint (#88). The court rejected the motion  
4 because rescreening is discretionary (#89). Defendants then opposed plaintiff’s motion to file the  
5 FAC on the basis that it was procedurally deficient (#90). They also filed an objection with the  
6 District Court to this court’s order regarding rescreening (#91).

7           Prior to the District Court’s ruling on the objection, and as his motion for leave to file the  
8 FAC was pending, plaintiff filed a “corrected first amended complaint” (“CFAC”) without filing  
9 a motion for leave to amend (#93). Subsequently, on November 12, 2014, the District Court  
10 overruled defendant’s objections (#96). The District Court held that rescreening was  
11 discretionary and could be conducted by this court on a case-by-case basis. Therefore, on January  
12 7, 2015, this court ordered that defendants would have until January 16, 2015 to file an opposition  
13 to plaintiff’s motion to file the CFAC (#100). In response, defendants moved for a discretionary  
14 rescreening (#102). They argued that the CFAC added “new allegations, legal claims, and  
15 proposed defendants,” and rescreening was proper on that basis. (#102 at 8.) Defendants also  
16 stated that it was unclear which complaint required opposition—the FAC (#73) or the CFAC  
17 (#93).

18           To resolve these on-going matters, the court set a hearing (#105). There, it denied without  
19 prejudice plaintiff’s motion to file the FAC (#73) due to its procedural deficiencies and also  
20 defendants’ motion for discretionary rescreening (#102) based upon the length of time that had  
21 elapsed since the initial screening. The court also struck the fugitive CFAC (#93) because it was  
22 unaccompanied by a motion for leave to amend. Recognizing that the parties were  
23 understandably confused by the proceedings, however, the court ordered that plaintiff file a new  
24 motion for leave to amend, with a copy of the amended complaint as required by the Local Rules  
25 of Practice, and informed defendants of the relevant deadlines for opposing plaintiff’s motion for  
26 leave. The court also suggested that, to the extent defendants remained uncertain about when the  
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1 court may exercise its discretion to rescreen, defendants should seek clarification from the  
2 District Court (#105).<sup>1</sup>

3 Accordingly, after many rounds of motion practice relating to his amended complaint,  
4 plaintiff moved for leave to file an amended complaint (#104). Defendants opposed (#106), and  
5 plaintiff replied (#107). This order follows.

## 6 II. LEGAL STANDARD

7 Federal Rule of Civil Procedure 15(a)(2) instructs that “[t]he court should freely give  
8 leave [to amend a pleading] when justice so requires.” However, the ability to amend is not  
9 without limits. Federal courts balance five factors when considering a motion to amend: (1) bad  
10 faith; (2) undue delay; (3) prejudice to the opposing party; (4) the futility of the amendment; and  
11 (5) whether the plaintiff has previously amended his complaint. *Desertrain v. City of Los*  
12 *Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014). The factors do not weigh equally; as the Ninth  
13 Circuit has explained, prejudice receives greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*,  
14 316 F.3d 1048, 1052 (9th Cir. 2003). Defendants bear the burden of establishing prejudice, and  
15 absent its presence or a “strong showing” under the other factors, there is a presumption in favor  
16 of permitting amendment. *Id.* (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186-87  
17 (9th Cir. 1987)).

18 When considering prejudice, the court may weigh against the movant the amended  
19 pleading’s great alteration of the litigation’s nature and its effect of requiring an entirely new  
20 course of defense. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.  
21 1990). Alone, such alteration is not fatal. *Id.* In contrast, futility “alone can justify the denial of  
22 a motion for leave to amend.” *Nunes v. Ashcroft*, 375 F.3d 805, 809 (9th Cir. 2003). Futility  
23 arises when the amendment is legally insufficient, *Miller v. Rykoff-Sexon, Inc.*, 845 F.3d 209, 214  
24 (9th Cir. 1988), or “where the amended complaint would . . . be subject to dismissal[.]” *Steckman*  
25 *v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998).

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28 <sup>1</sup> Apparently, defendants did not do so.

1 **III. DISCUSSION**

2 For the following reasons, plaintiff’s motion to file an amended complaint is granted.  
3 However, as described below, plaintiff shall be allowed to proceed only on certain claims within  
4 the amended complaint.

5 **A. Count I: Due Process and Retaliation Claims**

6 In count I of the amended complaint (#104-1 at 7-13), plaintiff alleges intentional  
7 deprivation of property by defendants Wagner and Murguia, in violation of the Fourteenth  
8 Amendment, and also their retaliation against him for his use of the grievance system, in violation  
9 of the First Amendment. These claims are substantially similar to the original First and  
10 Fourteenth Amendment claims, which the District Court allowed to proceed in its screening order  
11 (#3 at 3-4.) Plaintiff’s amended complaint simply updates the complaint with new factual  
12 allegations about and surrounding the operability of his confiscated television, of which he  
13 learned only after the commencement of this action.

14 The court grants plaintiff’s motion because the Desertrain factors weigh in his favor.  
15 First, he has not updated count I’s facts in bad faith. Second, any delay in amendment owes not  
16 to plaintiff, but instead, to the actions of defendants and/or other prison officials. Third,  
17 defendants will not be prejudiced, as the factual allegations are similar and the claims are  
18 identical to those in the original complaint. Fourth, amendment is not futile, for the amended  
19 complaint states colorable First and Fourteenth Amendment claims, as identified in the original  
20 screening order. Finally, plaintiff has not previously been granted leave to amend. Accordingly,  
21 plaintiff may proceed on count I under the First and Fourteenth Amendments.

22 **B. Count II: Retaliation and Due Process Claims**

23 In a new count II, plaintiff alleges retaliation under 42 U.S.C. § 1997d and the First  
24 Amendment, and also denial of visitation without due process of law under the Fourteenth  
25 Amendment. Plaintiff avers that he complained about the alleged maltreatment of a female  
26 inmate with “mental and/or learning disabilities” at NNCC; she was purportedly held in a male  
27 area of the prison and faced sexual harassment and threats of sexual abuse by male inmates and  
28 male prison staff. (#104-1 at 15-16). Plaintiff alleges that these on-going incidents would have

1 required the prison to report violations under the Prison Rape Elimination Act, 42 U.S.C. § 15601  
2 et seq. (Id.) He reported them to prison officials who allegedly took no action to rectify the  
3 situation; therefore, he provided the information to his wife by written notes during a December  
4 21, 2013 visitation. (Id. at 16-19.)

5         Thereafter, plaintiff contends that prison officials began disciplinary proceedings for his  
6 transmission of the notes, and imposed as a punishment his loss of his job as an inmate law clerk  
7 and visitation privileges (Id. at 20-21.) Plaintiff continued to seek redress of the issue with prison  
8 officials until spring 2014. (See id. at 22-23.) He names Murguia, NNCC Warden Isidro Baca,  
9 and NNCC correctional officer Peter Garibaldi as defendants in count II.<sup>2</sup> Defendants oppose  
10 plaintiff’s motion to amend on the basis that count II “would alter the scope of the case . . . and  
11 only bears a tangential relation to [his] original claims . . . . Therefore, Count II is unduly  
12 prejudicial.” (#106 at 8.)

13         Plaintiff will be permitted to proceed on the constitutional claims but not the statutory  
14 claim. 42 U.S.C. § 1997d does not provide a private right of action. *McRorie v. Shimoda*, 795  
15 F.2d 780, 782 n.3 (9th Cir. 1986); *Price v. Brittain*, 874 F.2d 252, 262-64 (5th Cir. 1989);  
16 *O’Haire v. Napa State Hosp.*, No. C 07-0002-RMW-PR, 2009 WL 2447752 at \*5 (N.D. Cal.  
17 Aug. 7, 2009) (citing *McRorie*, 795 F.2d at 782 n.3). Accordingly, the statutory claim is futile.  
18 *Nunes*, 375 F.3d at 809.

19         In contrast, the *Desertrain* factors balance in plaintiff’s favor as to the constitutional  
20 claims. First, there is no suggestion—and defendants make no argument—that plaintiff seeks to  
21 amend in bad faith. Second, regarding delay, the court concludes the factor is neutral. The record  
22 does not readily indicate that plaintiff has unduly delayed in attempting to add the claims. The  
23 alleged infringements of his rights did not occur until the end of 2013, and as such, the earliest he  
24 might have amended his complaint was early 2014—a period of time in which plaintiff and  
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26 <sup>2</sup> Plaintiff also states that “other prison officials” participated in these violations (see #104-1 at  
27 21), but he does not specifically state that these individuals are the John and Jane Does identified  
28 in the opening of his amended complaint (see id. at 3-4). As such, the court recommends that the  
claim proceed only against the above-named defendants. Plaintiff should seek leave to amend to  
add new defendants he identifies in discovery if, in fact, there are additional defendants to these  
claims.

1 defendants were focused upon defendants' pending motion to dismiss (#31). Plaintiff attempted  
2 to amend his complaint in September 2014 (#73) and notably did not attempt to include these  
3 claims at that time. Nevertheless, and as described, defendants delayed his filing of an amended  
4 complaint in this case by motion practice around the rescreening issue. In sum, the delay factor  
5 does not conclusively balance against either party.

6 Third, the court is unpersuaded that defendants will be unduly prejudiced by amendment.  
7 Here, defendants rest their entire argument on the claims' alteration of this action's scope.  
8 Although their characterization is accurate, such alteration alone is an insufficient basis for  
9 denying plaintiff leave to amend. *Morongo Band of Mission Indians*, 893 F.2d at 1079. In light  
10 of this Ninth Circuit precedent, defendants' reliance on district-court authority from other circuits  
11 (see #106 at 7-8) is unavailing. Moreover, because defendants have not yet filed an answer, and  
12 no discovery has occurred in this case, any prejudice to defendants is minimal. They may need to  
13 raise new defenses and discover evidence related thereto, but the management of this case can  
14 easily reflect the presence of these new claims upon the court's entry of an initial scheduling  
15 order. The defendants added in this claim also will be no more prejudiced by being parties to this  
16 lawsuit than they would be were plaintiff to file a new action. Because defendants bear the  
17 burden of demonstrating prejudice, *Eminence Capital, LLC*, 316 F.3d at 1052, but have offered  
18 only one unpersuasive argument regarding the same, the court concludes that this factor weighs in  
19 plaintiff's favor.

20 As to futility, the court finds that count II's constitutional claims are colorable. Plaintiff  
21 has alleged that defendants imposed punishment in response to his allegedly lawful First  
22 Amendment activity, and his allegations, if true, are sufficient under the factors identified in  
23 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004). As to his related, but separate,  
24 Fourteenth Amendment due process claim, plaintiff has no constitutional right to visitation with  
25 his wife. See *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989); *Dunn v. Castro*,  
26 621 F.3d 1196, 1202-03 (9th Cir. 2010). Yet he may have a state-created liberty interest in such  
27 visitation, see *Thompson*, 490 U.S. at 461, subject to restrictions that serve legitimate penological  
28 interests, see *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). At this stage, his claims are not

1 futile; therefore, Desertrain counsels in favor of granting him leave to amend. Because he has  
2 not previously been granted leave to amend, and none of the other factors balance against him,  
3 plaintiff shall proceed on the First and Fourteenth Amendment claims in count II.

4 **C. Count III: Conspiracy Claim**

5 In a new count III, plaintiff alleges that Wagner, Deputy Attorney General Chaz Lehman  
6 (“Lehman”), and an unidentified person who acted at Lehman’s instruction, conspired against  
7 plaintiff “to [conceal] and further the constitutional violations set forth . . . in count I . . . .”  
8 (#104-1 at 30-31.) In short, he contends that defendants prepared and submitted the factually  
9 false affidavit regarding the inoperability of his television with knowledge of its falsity, for the  
10 purpose of effecting the alleged constitutional infirmities previously described. Defendants  
11 oppose amendment on the basis that plaintiff’s contentions state not a legal claim, but instead  
12 already resolved by Rule 11 of the Federal Rules of Civil Procedure. (#106 at 8.)

14 This claim is dismissed because, as stated, it is futile. Nunes, 375 F.3d at 809. Although  
15 the amended complaint does not specify a legal basis for the conspiracy claim, it fails under either  
16 possibility. First, only the first clause of subsection (3) is applicable as a basis for conspiracy  
17 under 42 U.S.C. § 1985. See *Kush v. Rutledge*, 460 U.S. 719, 724-25 (1983) (describing the “five  
18 broad classes of conspiratorial activity” contained within the statute). That provision provides a  
19 federal cause of action against persons who have conspired to deprive a person of federally-  
20 protected rights.

22 Claims of conspiratorial activity under 42 U.S.C. § 1985 must meet several requirements.  
23 The plaintiff must tender specific factual allegations that support the alleged conspiracy, *Burns v.*  
24 *Cnty. of King*, 883 F.2d 819, 821 (9th Cir. 1989); *Karim-Panahi v. Los Angeles Police Dep’t*, 839  
25 F.2d 621, 626 (9th Cir. 1988), including factual allegations regarding defendants’ conspiratorial  
26 “agreement or meeting of the minds,” *Woodrum v. Woodward Cnty.*, 866 F.3d 1121, 1126 (9th  
27 Cir. 1989). In addition, the plaintiff must specifically allege that defendants’ racial or class-based  
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1 animus caused the conspiracy. *Usher v. City of Los Angeles*, 828 F.3d 556, 561 (9th Cir. 1987);  
2 *Kush*, 460 U.S. at 725-26. For this reason, the statute is not an “open-ended federal tort law  
3 applicable ‘to all tortious, conspiratorial interferences with the rights of others.’” *Kush*, 460 U.S.  
4 at 725 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971)). Because the alleged  
5 conspiracy in this case lacks allegations that speak to these elements, the claim is futile and  
6 amendment to add this claim is not merited.  
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8 Second, the allegations fail to state a state-law conspiracy claim. “In Nevada, an  
9 actionable civil conspiracy ‘consists of a combination of two or more persons who, by some  
10 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,  
11 and damage results from the act or acts.’” *Chavez v. Cal. Reconveyance Co.*, No. 2:10-cv-00325-  
12 RLH-LRL, 2010 WL 2545006, at \*4 (D. Nev. June 18, 2010) (quoting *Hilton Hotels v. Butch*  
13 *Lewis Productions*, 109 Nev. 1043, 1048 (1993)). Damage is a necessary element. See *Shafer v.*  
14 *City of Boulder*, 896 F. Supp. 2d 915, 939-40 (D. Nev. 2012).

15 Plaintiff’s claim fails in absence of damages. Plaintiff alleges not that Wagner, Lehman,  
16 and the unnamed official conspired to carry out the underlying violations set forth in count I, but  
17 instead to prepare the false affidavit by which these alleged actions might be concealed.  
18 Accordingly, the affidavit, rather than the deprivation of his television, must be the source of his  
19 harm. As defendants argue, Lehman withdrew the affidavit and the motion to dismiss based  
20 thereupon when the television’s operational status came to light. (#106 at 8.) Hence, the effect of  
21 the affidavit was only to delay this case, and although plaintiff “disagrees” with defendants’  
22 contention that no injury occurred (#107 at 9), he fails to identify any particular injury he suffered  
23 as a result of the affidavit. As such, the prior proceedings regarding the affidavit itself provide no  
24 basis for a state-law civil conspiracy claim.

#### 25 IV. CONCLUSION

26 The court has considered the motion and the parties’ papers. For good cause appearing,  
27 the court grants plaintiff’s motion for leave to amend. Plaintiff’s amended complaint will be  
28 filed, and he shall proceed on count I against Murguia and Wagner, and count II against Muguia,

1 Baca, and Garibaldi. However, count II's claim under 42 U.S.C. § 1997d shall not proceed, and  
2 count III is dismissed with leave to amend. See Cato v. United States, 70 F.3d 1103, 1106 (9th  
3 Cir. 1995) (citation omitted).

4 **V. RECOMMENDATION**

5 **IT IS THEREFORE ORDERED** that plaintiff's motion to amend (#104) is  
6 **GRANTED;**

7 **IT IS FURTHER ORDERED** that the Clerk shall **FILE** the amended complaint (#104-  
8 1);

9 **IT IS FUTURE ORDERED** that count I shall **PROCEED** under the First and  
10 Fourteenth Amendments;

11 **IT IS FURTHER ORDERED** that count II shall **PROCEED** under the First and  
12 Fourteenth Amendments;

13 **IT IS FURTHER ORDERED** that count II's claim under 42 U.S.C. § 1997d is  
14 **DISMISSED;**

15 **IT IS FURTHER ORDERED** that count III is **DISMISSED WITH LEAVE TO**  
16 **AMEND.** Plaintiff has **thirty (30) days** from the date of this order within which to file an  
17 amended complaint remedying, if possible, the defects identified above. Any allegations, parties,  
18 or requests for relief from prior papers that are not carried forward in the amended complaint will  
19 no longer be before the court.

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21 **DATED:** May 26, 2015.

22   
23 **UNITED STATES MAGISTRATE JUDGE**