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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MARSIAL LOPEZ, et al.,	)	1:07cv0474 DLB
	)	
	)	
Plaintiffs,	)	ORDER GRANTING PLAINTIFF’S MOTION
	)	FOR LEAVE TO FILE SECOND AMENDED
	)	COMPLAINT
	)	(Document 71)
v.	)	
	)	
DONNY YOUNGBLOOD, et al.,	)	
	)	
	)	
Defendants.	)	

On November 12, 2008, Plaintiffs filed the instant joint motion for leave to file a second amended complaint. The matter was heard on December 19, 2008, before the Honorable Dennis L. Beck, United States Magistrate Judge. Barrett Litt and Donald Cook appeared on behalf of Plaintiffs. Jennifer Thurston and Terence Cassidy appeared on behalf of Defendants Kern County, the Kern County Sheriff’s Office, Sheriff Donny Youngblood (individually and in his official capacity) and Former Sheriff Mack Wimbish (individually) (“Defendants”).

**BACKGROUND**

Plaintiff Marsial Lopez, individually and as class representative, filed the instant civil rights action on March 27, 2007. On June 21, 2007, Plaintiffs Marsial Lopez, Sandra Chavez, and Theodore Medina, individually and as class representatives, filed a First Amended Complaint (“FAC”) against Kern County, the Kern County Sheriff’s Department, Kern County Sheriff Donny Youngblood (officially and individually) and former Kern County Sheriff Mack

1 Wimbish (individually). Plaintiffs seek injunctive relief and damages resulting from the strip  
2 and/or visual body cavity searches of prisoners by the Kern County Sheriff's Department.

3 The FAC contains six causes of action: (1) damages pursuant to [42 U.S.C. § 1983](#)  
4 premised on unreasonable searches and seizures in violation of the Fourth and Fourteenth  
5 Amendments of the U.S. Constitution; (2) damages pursuant to [42 U.S.C. § 1983](#) premised on  
6 violation Fourteenth Amendment equal protection guarantees; (3) violation of their equal  
7 protection rights pursuant to Article I, § 7 of the California Constitution and unreasonable search  
8 and seizure in violation of Article I, § 13 of the California Constitution; (4) damages pursuant to  
9 [California Civil Code § 52.1\(b\)](#) and § 52(b) premised on violations of their rights under the  
10 Fourth, Eighth and Fourteenth Amendments, Article I, §§ 1, 7, 13 and 17 of the California  
11 Constitution, and [California Penal Code § 4030](#); (5) violation of [California Penal Code § 4030](#);  
12 and (6) violation of mandatory duties under [California Government Code § 815.6](#).

13 On November 12, 2008, Plaintiffs filed the instant motion for leave to file a second  
14 amended complaint.<sup>1</sup> Plaintiffs seek to add a seventh cause of action under Article I, §1 of the  
15 California Constitution for violations of their privacy rights. Plaintiffs argue that the proposed  
16 cause of action was “mistakenly omitted” from the original complaint.

17 Defendants filed a joint opposition on December 2, 2008. Plaintiffs filed a reply on  
18 December 5, 2008.

### 19 DISCUSSION

20 [Federal Rule of Civil Procedure Rule 15\(a\)](#) provides that the court “should freely give  
21 leave when justice so requires.” [Fed. R. Civ. P. 15\(a\)\(2\)](#). The United States Supreme Court has  
22 stated:

23 [i]n the absence of any apparent or declared reason – such as undue delay, bad faith or  
24 dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
25 amendments previously allowed, undue prejudice to the opposing party by virtue of  
26 allowance of the amendment, futility of amendment, etc. – the leave sought should, as the  
27 rules require, be “freely given.”

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28 <sup>1</sup>Plaintiffs' motion for partial summary judgment, Defendants' two joint motions for summary adjudication,  
Plaintiffs' motion to certify the class and Plaintiffs' motion to strike also are pending before the Court.

1 [Foman v. Davis, 371 U.S. 178, 182 \(1962\)](#). The Ninth Circuit has summarized these factors to  
2 include the following: (1) undue delay; (2) bad faith; (3) prejudice to the opponent; and (4)  
3 futility of amendment. [Loehr v. Ventura County Cmty. Coll. Dist., 743 F.2d 1310, 1319 \(9th Cir.](#)  
4 [1984\)](#). Leave to amend rests in the sound discretion of the trial court. [Swanson v. United States](#)  
5 [Forest Serv., 87 F.3d 339, 343 \(9th Cir. 1996\)](#). Despite the policy favoring amendment under  
6 Rule 15, leave to amend may be denied if the proposed amendment is futile or would be subject  
7 to dismissal. [Saul v. United States, 928 F.2d 829, 843 \(9th Cir. 1991\)](#).

8 Defendants object to the proposed amendment on two grounds: (1) prejudice and (2)  
9 futility. To demonstrate prejudice, Defendants point out that the instant motion follows the filing  
10 of dispositive motions. Defendants contend that Plaintiffs attempted to assert this new claim in  
11 their Opposition to Defendants first motion for summary adjudication regarding strip searches.  
12 Defendants noted this impropriety in their reply of October 3, 2008. Defendants then filed a  
13 second summary adjudication motion on November 7, 2008, regarding qualified immunity,  
14 Eleventh Amendment immunity and court returnees. Defendants argue that Plaintiffs did not  
15 seek to amend their complaint until November 12, 2008, “some six weeks after Defendants first  
16 called attention to their omission and after two dispositive motions were filed.” (Defs.’ Joint  
17 Opp. to Plaintiffs’ Mot. to Amend Complaint 2).

18 Defendants argue that the delay and related expense constitute prejudice, citing [Ansam](#)  
19 [Assocs., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 446 \(2d Cir. 1985\)](#) and [Campbell v. Emory](#)  
20 [Clinic, 166 F.3d 1157, 1162 \(11th Cir. 1999\)](#). Defendants citations are not instructive. In  
21 [Ansam](#), the court upheld the denial of leave to amend due to prejudice associated with the close  
22 of discovery and the filing of a motion for summary judgment. However, the proposed claims in  
23 [Ansam](#) involved an entirely new set of operative facts, a different period of time and a different  
24 statute from the operative pleading. [Id. at 446](#). Here, Plaintiffs propose to add a claim regarding  
25 the right to privacy under the California Constitution. This claim does not involve a new set of  
26 facts, a different time period or even a different statute from the operative pleading. For instance,  
27 Plaintiffs partially base their fourth cause of action under [Civil Code § 52.1\(b\)](#) on an underlying  
28 violation of Article I, § 1 of the California Constitution. FAC, at ¶ 50.

1 The instant case also differs from Campbell. In that case, the court found prejudice and  
2 undue delay inherent in an amendment asserted after the close of discovery and after dispositive  
3 motions were filed, briefed, and decided. Campbell, 166 F.3d at 1162. The motions for leave to  
4 amend in Campbell were filed more than one year after discovery had ended, after dispositive  
5 motions had been filed, between five-and-six years after the lawsuits had begun and after the  
6 plaintiff had been twice granted leave to amend. In this case, the dispositive motions have not  
7 been decided, this case has been pending for two years and Plaintiffs have not requested leave to  
8 amend at any other time.

9 Defendants further contend that the original complaint did not “reasonably” place them  
10 on notice that Plaintiffs intended to assert an independent § 1 claim. Although Defendants  
11 objected to the assertion of the section 1 claim in Plaintiffs’ cross-motion for summary judgment,  
12 Defendants responded to it in their opposition to Plaintiffs’ cross-motion. (Doc. 75). Defendants  
13 argued, in part, that just as Plaintiffs’ Fourth Amendment claim must fail, their Section 1 claim  
14 must fail because the right of privacy established by Section 1 is not a broader protection than  
15 that provided under the Fourth Amendment. (Defs.’ Opp. Cross-Mot. Sum. Adjud. 18.)

16 Several courts have indicated that in the search and seizure context, the Article I, § 1  
17 privacy clause of the California Constitution has not been held to establish a broader protection  
18 than that provided by the Fourth Amendment of the United States Constitution. See, e.g., Quon  
19 v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 903 (9th Cir. 2008) (the privacy protected by  
20 Article I, Section 1 of the California Constitution is no broader in the area of search and seizure  
21 than the privacy protected by the Fourth Amendment) (quoting Hill v. Nat’l Collegiate Ath.  
22 Ass’n, 7 Cal.4th 1, 30 n.9 (1994)), reh’g denied, 554 F.3d 769 (2009); Sanchez v. County of San  
23 Diego, 464 F.3d 916, 943 (9th Cir. 2006) (in search and seizure context, the Article I, Section 1,  
24 privacy clause of the California Constitution has never been held to establish a broader protection  
25 than that provided by the Fourth Amendment). Accordingly, the Court finds no prejudice to the  
26 proposed amendment as Defendants fully briefed their contentions under the Fourth Amendment.  
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1 Insofar as Defendants argue that the proposed amendment is futile because of the  
2 reasonable nature of the searches at issue, the Court defers such determination until resolution of  
3 the pending summary judgment motions.

4 Based on the above, Plaintiffs' motion for leave to file a second amended complaint is  
5 GRANTED.

6  
7 IT IS SO ORDERED.

8 **Dated: March 31, 2009**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE

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