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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCELO LARIOS FERNANDEZ,
BOP #87515-298,

Plaintiff,

vs.

METROPOLITAN CORRECTIONAL
CENTER,

Defendant.

Case No.: 3:20-cv-01265-GPC-AHG

**ORDER GRANTING LETTER /
MOTION REQUESTING
EXTENSION OF TIME
TO FILE SECOND AMENDED
COMPLAINT**

[ECF No. 6]

Plaintiff Marcelo Larios Fernandez (“Plaintiff”), currently detained, awaiting trial at the Metropolitan Correctional Center (“MCC”) in San Diego, California,¹ is proceeding

¹ Plaintiff was arrested on September 16, 2019 at the San Ysidro Port of Entry by a Customs and Border Protection Officer (“CBPO”) and charged with importation of a controlled substance in violation of 21 U.S.C. §§ 952 and 960. *See United States v. Larios-Fernandez*, 3:19-cr-04102-BAS-1. *See* ECF No. 1 (“Complaint”). On September 23, 2019, he was ordered detained pending trial in that case. *Id.*, ECF No. 10. The case was dismissed on the government’s oral motion on January 10, 2020. *Id.*, ECF No. 26. On January 9, 2020, however, Plaintiff was indicted by a federal grand jury on one count of importation of heroin in violation of 21 U.S.C. §§ 952 and 960 in the related case entitled *United States v. Marcelo Larios-Fernandez*, 3:20-cr-0162-BAS-1. *See id.*, ECF Nos. 1, 2; *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (A court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.”) (quoting *Bennett*

1 pro se and in forma pauperis (“IFP”) in this civil action pursuant to *Bivens v. Six Unknown*
2 *Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

3 **I. Procedural History**

4 In both his original and Amended Complaints, Plaintiff sought \$840,000 in general
5 and punitive damages against the Metropolitan Correctional Center (“MCC”) based on
6 claims that unidentified correctional officers or “C/Os” there “abused their power” and
7 inflicted “cruel and unusual punishment” upon him while he was “going to court” on
8 October 14 or 15, 2019. *See* Compl., ECF No. 1 at 2–3, 5; Amend. Compl., ECF No. 3 at
9 1–3, 7.

10 On September 14, 2020, the Court granted Plaintiff’s Motion to Proceed IFP, but
11 dismissed his Amended Complaint sua sponte for failing to state a claim pursuant to 28
12 U.S.C. § 1915(e)(2) and § 1915A(b). *See* ECF No. 4. The Court granted Plaintiff forty-five
13 days leave in which to file a Second Amended Complaint that corrected his pleading’s
14 deficiencies, but cautioned that should Plaintiff fail to amend in compliance with its Order,
15 his case would be dismissed. *Id.* at 6–10. On November 12, 2020, two weeks after the time
16 to amend expired, but before the Court entered a final dismissal and clerk’s judgment,
17 Plaintiff submitted a letter requesting an extension of time in which to amend. *See* ECF
18 No. 6 at 1.

19 **II. Letter/Motion for Extension of Time**

20 While Plaintiff’s request for an extension of time is not timely, it was submitted
21 within two weeks of the Court’s deadline, he remains incarcerated, and is proceeding
22 without counsel.² *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)
23 (court has a “duty to ensure that pro se litigants do not lose their right to a hearing on the
24

25 *v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)). A Motion Hearing/Trial Setting hearing is date
26 currently set for 12/9/2020 10:30 AM in Courtroom 4B before Judge Cynthia Bashant. *See United States*
27 *v. Marcelo Larios-Fernandez*, 3:20-cr-0162-BAS-1 (ECF No. 34).

28 ² Plaintiff is represented by Leila Morgan of Federal Defenders of San Diego, Inc. in *United States v.*
Marcelo Larios-Fernandez, 3:20-cr-0162-BAS-1.

1 merits of their claim due to . . . technical procedural requirements.”). ““Strict time limits ...
2 ought not to be insisted upon’ where restraints resulting from a pro se ... plaintiff’s
3 incarceration prevent timely compliance with court deadlines.” *Eldridge v. Block*, 832 F.2d
4 1132, 1136 (9th Cir. 1987) (citing *Tarantino v. Eggers*, 380 F.2d 465, 468 (9th Cir. 1967)).

5 Pursuant to Rule 6(b)(1)(A) of the Federal Rules of Civil Procedure, the court may
6 grant an extension of time for “good cause” if the moving party requests the extension
7 before the applicable deadline expires. *Id.* Rule 6(b) must be “liberally construed to
8 effectuate the general purpose of seeing that cases are tried on the merits.” *Ahanchian v.*
9 *Xenon Pictures, Inc.*, 624 F.3d 1253, 1255 (9th Cir. 2010) (citing Fed. R. Civ. P. 1 “[The
10 Federal Rules] should be construed, administered, and employed . . . to secure the judge,
11 speedy, and inexpensive determination of every action and proceeding.”); accord *Turner*
12 *v. Tierney*, 678 F. App’x 580, 581 (9th Cir. 2017).

13 Although Plaintiff’s does not explain the circumstances preventing his timely
14 compliance with the Court’s September 14, 2020 Order, his Amended Complaint was
15 dismissed in part because he failed to name the individual officer or officers who are
16 alleged to have used unreasonable force against him as Defendants. *See* ECF No. 4 at 8
17 (citing *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) (“[A] *Bivens* action can
18 be maintained against a defendant in his or her individual capacity only.”)). Plaintiff now
19 requests an extension of time to amend so that he can “get the name of the officer that beat
20 [him] up [and] and hit [him] for no reason.” *See* ECF No. 6 at 1. Construing this request in
21 the light most favorable to him, and recognizing that a *Bivens* action cannot proceed
22 otherwise, the Court finds good cause to grant Plaintiff the extension he seeks. *See*
23 *Eldridge*, 832 F.2d at 1136.

24 **III. Conclusion and Order**

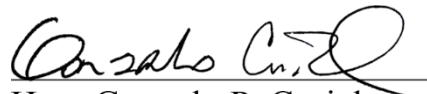
25 For the reasons discussed, the Court **GRANTS** Plaintiff’s Letter/Motion requesting
26 an extension of time in which to file his Second Amended Complaint (ECF No. 6). Plaintiff
27 must file his Second Amended Complaint with the Clerk of the Court on or before Monday,
28 **December 18, 2020**. His Second Amended Complaint must cure all the deficiencies of

1 pleading explained in the Court’s September 14, 2020 Order and must be complete by itself
2 without reference to his previous pleadings. Any Defendants not named and any claim not
3 re-alleged in the Second Amended Complaint will be considered waived. *See* S.D. Cal.
4 CivLR 15.1; *Hal Roach Studios, Inc.*, 896 F.2d at 1546 (“[A]n amended pleading
5 supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)
6 (noting that claims dismissed with leave to amend which are not re-alleged in an amended
7 pleading may be “considered waived if not repled.”)

8 If Plaintiff fails to file his Second Amended Complaint on or before **December 18,**
9 **2020**, the Court will enter a final Order dismissing the case based both on Plaintiff’s failure
10 to state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)
11 and 1915A(b), and his failure to prosecute. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th
12 Cir. 2005) (“If a plaintiff does not take advantage of the opportunity to fix his complaint,
13 a district court may convert the dismissal of the complaint into dismissal of the entire
14 action.”).

15 **IT IS SO ORDERED.**

16 Dated: November 17, 2020

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18 Hon. Gonzalo P. Curiel
19 United States District Judge
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