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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 David Isabel,

10 Plaintiff,

11 v.

12 Michele Reagan, et al.,

13 Defendants.  
14

No. CV-18-03217-PHX-DWL

**ORDER**

15 Pending before the Court is Plaintiff's motion for leave to file a first amended  
16 complaint ("FAC"). (Doc. 55). Defendant Reagan opposes the motion (Doc. 57) but the  
17 County Defendants don't oppose it (Doc. 55 at 2).

18 The motion will be granted. Rule 15(a)(2) provides that courts "should freely give  
19 leave when justice so requires." The Supreme Court has identified several factors courts  
20 should consider in determining whether to grant leave to amend: (1) undue delay, (2) bad  
21 faith or dilatory motive on the movant's part, (3) repeated failure to cure deficiencies by  
22 previous amendments, (4) undue prejudice to the opposing party if the amendment is  
23 allowed, and (5) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Not  
24 all of the factors merit equal weight," however. *Eminence Capital, LLC v. Aspeon, Inc.*,  
25 316 F.3d 1048, 1052 (9th Cir. 2003). "[P]rejudice to the opposing party . . . carries the  
26 greatest weight." *Id.*

27 Here, Reagan's sole basis for opposing the motion is futility. Although it is true  
28 that "the test for futility is whether the amendment can survive a motion to dismiss under

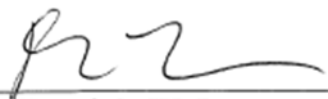
1 Rule 12(b)(6),” *Fulton v. Advantage Sales & Mktg., LLC*, 2012 WL 5182805, \*3 (D. Or.  
2 2012), “[o]rdinarily, courts will defer consideration of challenges to the merits of a  
3 proposed amended pleading until after leave to amend is granted and the amended pleading  
4 is filed.” *Fair Hous. Council of Cent. California, Inc. v. Nunez*, 2012 WL 217479, \*4 (E.D.  
5 Cal. 2012); *see also Green Valley Corp. v. Caldo Oil Co.*, 2011 WL 1465883, \*6 (N.D.  
6 Cal. 2011) (noting “the general preference against denying a motion for leave to amend  
7 based on futility”).

8 The Court thus concludes that it would be most efficient, and create the cleanest  
9 record, to grant Plaintiff’s request for leave to file the FAC and then consider any motions  
10 to dismiss after it has been filed. *Williams v. Keybank Nat’l Ass’n*, 2016 WL 7107765, \*3  
11 (D. Or. 2016) (granting leave to amend and “find[ing] that it would be preferable to  
12 consider the futility arguments in the context of a motion to dismiss for failure to state a  
13 claim, whereby the parties could fully brief the sufficiency of plaintiffs’ allegations under  
14 the appropriate briefing schedule, through a procedural mechanism that would allow  
15 optimal focus on those arguments (instead of their being first raised only in opposition  
16 briefing)”); *Bentley v. Arizona Dep’t of Child Safety*, 2018 WL 8262769, \*2 (D. Ariz. 2018)  
17 (finding that defendants’ “arguments to the sufficiency of the proposed amendment, even  
18 if merited, remain better left for full briefing on a motion to dismiss”). This is a purely  
19 procedural decision that should not be viewed as an implicit rejection of Reagan’s  
20 substantive arguments. After Plaintiff files the FAC, Reagan may refile and restyle her  
21 response as a motion to dismiss the FAC and the County Defendants may file a motion to  
22 dismiss the FAC.

23 Accordingly, **IT IS ORDERED** that:

- 24 (1) Plaintiff’s motion for leave to file an FAC (Doc. 55) is **granted**; and  
25 (2) Plaintiff shall file his FAC by **July 8, 2019**.

26 Dated this 27th day of June, 2019.

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Dominic W. Lanza  
United States District Judge