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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE WILLIAM Q. HAYES)

THOMAS NGUYEN, Plaintiff, vs. SAN DIEGO POLICE DEAPRTMENT ET AL., Defendants	Case No.: 11cv2594-WQH (NLS) DATE: none TIME: none NOTICE OF REPLY AND **REPLY** TO DEFENDANT'S RESPONSE TO MOTION TO AMEND

Counsel for Plaintiff gives notice of his Reply to Defendant's Response to Plaintiff's Motion to Amend.

February 25, 2014

/s *Robert H. Rexrode*
Robert H. Rexrode, Plaintiff's Attorney

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THOMAS NGUYEN, Plaintiff, vs. SAN DIEGO POLICE DEAPRTMENT ET AL., Defendants	Case No.: 11cv2594-WQH (NLS) DATE: none TIME: none **PLAINTIFF'S REPLY** TO DEFENDANT'S RESPONSE TO MOTION TO AMEND

I. INTRODUCTION

In their Response to Plaintiff's Motion to Amend, Defendants object to Plaintiff's motion in its entirety. In this Reply, Plaintiff first addresses those proposed amendments to which Defendants object on a general basis. Plaintiff then addresses those proposed amendments to which Defendants make specific arguments against.

II. PROPOSED AMENDMETS GENERALLY OBJECTED TO

A. Additional Causes of Action

Plaintiff seeks to add three additional claims to this suit: 1) interference of Plaintiff's constitutional rights, under California Civil Code Section 52.1; 2) a state-law negligence claim; and 3) a state-law battery claim.[1] Defendants object to these amendments, it appears, solely on the grounds that they will be prejudiced by their inclusion.[2]

Defendants' claims of prejudice are conclusory and lack any specific example of prejudice they will suffer by allowing amendment to include these additional claims.[3] Defendants' lack of specificity is fatal to its assertion that they will suffer prejudice as a result of these amendments. "Bald assertions of prejudice cannot overcome the strong policy reflected in Rule 15(a) to facilitate a proper disposition on the merits."[4]

The claims that Plaintiff seeks to add also stem from the same factual foundation as those already alleged. The California Civil Code Section 52.1 claim

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[1] *See Nguyen v. San Diego Police Dept. et al.*, 11cv2594-WQH (NLS), Defendant's Response to Motion to Amend (Def's Resp.), Docket No. 62 at 2.

[2] Def's Resp. at 8-10.

[3] *Id*.

[4] *See Hern v. Retirement Fund Trust*, 648 F.2d 1252, 1254 (9ht Cir. 1981) (internal quotation omitted).

will obviously be determined by the constitutional standards applicable to Plaintiff's suit. Additionally, when claims of "negligence and battery flow from the same facts as the alleged Fourth Amendment violation for excessive force [they] are measured by the same reasonableness standard of the Fourth Amendment."[5] Given the identity of issues between the proposed additional claims and those already alleged, there is no genuine issue of additional discovery being required or delay.[6]

As a final point, Counsel disputes Defendants' assertion that: "Courts have held there is a presumption of prejudice when a motion to amend is brought late in the discovery process."[7] Counsel can find no authority for this statement in either the cases cited by Defendants,[8] or any other case. Indeed, a case relied upon by Plaintiff notes that the Ninth Circuit earlier found it an abuse of discretion to deny a motion to amend that was made five years after the filing of the complaint.[9]

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[5] *Atkinson v. County of Tulare*, 790 F.Supp2d 1188, 1211 (E. Dist. Cal. 2011) (citing *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272-73 (Cal. App. 4th Dist. 1998)).

[6] Def's Resp. at 8-10.

[7] Def's Resp. at 8 lns. 23-24.

[8] *See, e.g., Solomon v. North American Life and Cas, Ins. Co.*, 151 F.3d 1132 (9th Cir. 1998) (relied upon by Defendants for their proposition).

[9] *Hern*, 648 F.2d at 1254-55 (discussing *Howey v. U.S.*, 481 F.2d 1189 (9th Cir. 1973)).

B. Addition of Types of Damages

Similarly, Defendants posit no specific argument as to why Plaintiff should not be allowed to allege additional types of damages. Notably, to Counsel's knowledge, there has been no settlement conferences held in this case.[10] For this reason, there can be no real argument that amendment concerning the types of damages Plaintiff will seek will harm Defendants due to their earlier negotiating position.

C. Addition of Defendants Channel 4 and Dennis Morginio

As Counsel Defendants do not represent Channel 4 or Dennis Morgino, it is unsurprising that he does not specifically address Plaintiff's request to add these two defendants. Given this, Counsel candidly informs the Court that Counsel foresees that both of these potential defendants would likely argue that the statute of limitations bars their inclusion in this suit. Additionally, Counsel also foresees the need for additional discovery being conducted if these defendants were added to this suit.

That being said, it is very important to Plaintiff that Channel 4 and Denis Morginio be added to his complaint. In short, it is Plaintiff's contention that Denis

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[10] *See Nguyen v. San Diego Police Dept. et al.*, 11cv2594-WQH (NLS), Docket No. 36 (Order vacating mandatory settlement conference).

Morgino, working at the time for Channel 4, initiated the series of events that led to him being confined for over two days. Even given the above difficulties with adding these defendants to this suit, Counsel urges the Court to allow the amendment.

III. PROPOSED AMENDMETS SPECIFICALLY OBJECTED TO

A. Addition of Sgt. Jesus Cesena

Defendants object to adding San Diego Police Sargent Jesus Cesena to this suit on the basis of futility. Specifically, Defendants argue that Sargent Cesena's liability is subject to a now-run statute of limitations and that any claim against Sargent Cesena would not "relate back" for purposes of Federal Rule of Civil Procedure 15.[11] Defendants have a point here, but allowing Plaintiff's amendment to include Sargent Cesena is nonetheless proper.

It is nonetheless proper because Plaintiff's proposed amendment does indeed relate back for purposes of Federal Rule of Civil Procedure 15. Here is how. Plaintiff's claims against Sargent Cesena all stem from "the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading."[12] For

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[11] Def's Resp. at 3-5.
[12] Fed. R. Civ. P. 15 (c)(1)(B).

this reason, Plaintiff meets the first requirement of Rule 15's requirements for relation back when adding a defendant.[13]

If the Court were to allow for the addition of Sergeant Cesena as a defendant, he would not be prejudiced by adding him as a defendant[14]—as discussed above, there is no aspect of discovery or evidence that would have been lost to Sergeant Cesena regarding this suit.

And Sergeant Cesena "should have known that the action would have been brought against [him], but for a mistake concerning the proper party's identity."[15] As noted by Defendants, Plaintiff noted in his opposition to Defendants' Motion for Summary Judgment that he wished to add Sergeant Cesena to his complaint.[16] The reason Plaintiff had not originally named Sergeant Cesena was due to him being actively told by police officers that they would not give Plaintiff the names of those officers involved in this incident.[17] Compound the Police Department's refusal to provide Plaintiff with the names of officers involved in his arrest, when

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[13]*See* Fed. R. Civ. P. 15 (c)(1)(C).

[14]*See* Fed. R. Civ. P. 15 (c)(1)(C)(i).

[15]*See* Fed. R. Civ. P. 15 (c)(1)(C)(ii).

[16]Def's Resp. at 3 lns. 22-26 (citing *Nguyen v. San Diego Police Dept. et al.*, 11cv2594-WQH (NLS), Plaintiff's Response to Motion For Summary Judgment (SJ Resp.), Docket No. 33.).

[17]SJ Resp. at 17 lns 7-15.

Plaintiff actually received a copy of the police report related to arrest, Sergeant Cesena was not listed as an officer involved.[18] From this, and Plaintiff's original complaint naming all other officers involved in his arrest, Sergeant Cesena was on notice that if not for a mistake, he would have been named as a defendant.[19]

The only real potential bar to Plaintiff amending his complaint to include Sergeant Cesena is Rule 15's requirement of notice "within the period provided by Rule 4(m) for serving the summons and complaint."[20] Defendants take this language to mean that Sergeant Cesena needed to have been "served within 120 days after [Plaintiff] filed this action."[21] Defendants are incorrect.

All Rule 15 requires is that a defendant being added by amendment have actual or constructive notice of the action itself within the period provided by Rule 4(m) for serving the summons and complaint."[22] As the Ninth Circuit has stated:

> the district court determined that before a new party could be brought in under an amended complaint, actual notice of the filing of the lawsuit—accomplished by service of process—must have been effected on the originally named defendant prior to the running of the relevant

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[18] SJ Resp. at 17 lns 7-15.

[19] *See* Fed. R. Civ. P. 15 (c)(1)(C)(ii).

[20] *See* Fed. R. Civ. P. 15 (c)(1)(C).

[21] Def's Resp. at 5 lns. 7-10. Defendants are also incorrect that Rule 4(m) sets a time-frame of only 120 days. On a showing of "good cause," a court must extend that deadline "for an appropriate period." *See* Fed. R. Civ. P. 4 (m).

[22] *See* Fed. R. Civ. P. 15 (c)(1)(C).

> statute of limitation. The court believed that this notice was necessary to fulfill the requirements of Fed.R.Civ.P. 15(c). Based on our understanding of the law of this circuit, we disagree.[23]

Or as one district court put the matter:

> The notice to the defendant does not have to be formal. It is sufficient if it puts defendant on actual or constructive knowledge that there may be a claim against him, and this knowledge is sufficient to encourage the defendant to prepare a defense. Knowledge can be imputed to a new defendant through his attorney who also represented the party or parties originally sued.[24]

Rule 15's notice requirement "whether formal or informal, is one way of assuring that the party to be added has received ample opportunity to pursue and preserve the facts relevant to various avenues of defense."[25] The notice require contained in Rule 15 is not a "log to hide behind."[26] It has as its purpose the avoidance of prejudice to a defendant added by amendment.[27] Sergeant Cesena will not be prejudiced by allowing Plaintiff's amendment.

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[23]*Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1399 (9th Cir. 1984); *see also Clark v. Universal Builders, Inc.*, 501 F.2d 324, 339-34 (7th Cir. 1973) (defendants sought to be added "were on constructive notice of the action and indeed were active participants in it since its inception.").

[24]*Williams v. Ward*, 553 F.Supp 1024, 1026 (W. Dist. N.Y. 1983).

[25]*Korn*, 724 F.2d at 1400.

[26]*Id*. at 1401.

[27]*Id*. at 1400.

Sergeant Cesena has been on notice of this action since its inception.[28] If brought into this action, Sergeant Cesena will (undoubtedly) be represented by counsel currently representing Police Officers Lopez and Valdez.[29] There is nothing to indicate that Sergeant Cesena will suffer prejudice, as that term is used in Rule 15, by being added as a defendant. Amendment is thus proper.

As for any potential prejudice to Defendants based on naming Sergeant Cesena as a defendant, Plaintiff incorporates his earlier discussion on this issue.[30]

B. Additional Claims Against San Diego Police Department

Plaintiff may have been less than clear (and probably used a poor choice of words) in his Motion to Amend when it comes to "re-alleging" the liability of the San Diego Police Department. Plaintiff does *not* intend to re-allege the Department's liability as to the already existing claims. Plaintiff intends to allege "the liability [] the San Diego Police Department *as to the amended claims*."[31] For this reason, Defendants' argument that Plaintiff is seeking to circumvent the

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[28] *See, e.g., Nguyen v. San Diego Police Dept. et al.*, 11cv2594-WQH (NLS), Docket No. 28-6 (declaration of Jesus Cesena, dated December 13, 2013).

[29] *C.f. Williams*, 553 F.Supp at 1026 ("Knowledge can be imputed to a new defendant through his attorney who also represented the party or parties originally sued.").

[30] *See infra*, 3-5.

[31] *Nguyen v. San Diego Police Dept. et al.*, 11cv2594-WQH (NLS), Plaintiff's Motion to Amend, Docket No. 58 at 5 lns. 12-13 (emphasis added).

Court's earlier summary judgment order is not relevant.[32] Counsel sincerely apologizes to Defendants' Counsel for causing unnecessary work.

As for Plaintiff's requests to allege the San Diego Police Department's liability as to the additional claims of battery, negligence and under California Civil Code Section 52.1, it is a request that should be granted. "California does not follow *Monell* and imposes liability on counties under the doctrine of respondeat superior for acts of county employees."[33] This type of liability is premised on California Government Code Section 815.2. That section "provides that '[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.'"[34] To be clear, Plaintiff intends to allege the San Diego Police Department's (or San Diego County's, if that is the more proper defendant) liability under the additional state-law claims based on a theory of resondeat superior.[35]

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[32] Def's Resp. at 7-8.
[33] *Atkinson*, 790 F.Supp2d at 1211.
[34] *Id*. (citing Cal/ Gov't Code § 815.2 (a)).
[35] *See id*.

As for any potential prejudice to Defendants based on alleging this vicarious liability, Plaintiff incorporates his earlier discussion on this issue.[36]

IV. CONCLUSION

Mr. Nguyen requests that the Court consider this Reply when ruling on his Motion to Amend.

February 25, 2014

/s *Robert H. Rexrode*
Robert H. Rexrode, Plaintiff's Attorney

CERTIFICATE OF SERVICE

The preceding has been served on all parties via ECF.

Date: February 25, 2014

/s *Robert H. Rexrode*
ROBERT H. REXRODE

[36] *See infra*, 3-5.