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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTHONY MITCHELL, LINDA MITCHELL,
AND MICHAEL MITCHELL,

Plaintiffs,

vs.

CITY OF HENDERSON, NEVADA, et al.,

Defendants.

Case No.: 2:13-cv-01154-APG-CWH

**MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

1 COME NOW the Plaintiffs, ANTHONY MITCHELL, LINDA MITCHELL, and MICHAEL
2 MITCHELL, by and through their undersigned counsel, and respectfully move this Court,
3 pursuant to Federal Rule of Civil Procedure (“FRCP”) 15(a) and Rule 15-1 of the Local Rules of
4 Civil Practice, for leave to file a Second Amended Complaint. This motion is based on FRCP 15,
5 Local Rule of Civil Practice 15-1, the documents and pleadings on file herein, and the following
6 Points and Authorities.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. BACKGROUND**

9 This case arises out the warrantless entry and search of Plaintiffs ANTHONY
10 MITCHELL, LINDA MITCHELL, and MICHAEL MITCHELL’s homes and the subsequent
11 unlawful arrests of MICHAEL and ANTHONY MITCHELL by police officers of the Henderson
12 and North Las Vegas police departments on July 10, 2011. Plaintiffs now seek leave to file their
13 Second Amended Complaint (a redacted version of which is filed herewith as Exhibit 1). The
14 Second Amended Complaint names defendants previously identified as Doe defendants and
15 deletes those claims that were previously dismissed with prejudice by the Court. An unredacted
16 copy of the proposed Second Amended Complaint will be filed under seal following leave of
17 court, which has been requested by stipulation of the parties. A copy of the redacted and
18 unredacted versions of the SAC has previously been provided to all parties.
19

20 **II. PROCEDURAL HISTORY**

21 On July 1, 2013, the Plaintiffs filed their Complaint (Dkt. #1) initiating this lawsuit
22 alleging numerous constitutional and state law causes of action. On October 14, Plaintiffs filed
23 their First Amended Complaint (“FAC”, Dkt. #3). Therein, Plaintiffs claimed violations of
24 Plaintiffs’ (1) First Amendment, (2) Third Amendment (3) Fourth Amendment, (4) Eighth
25

1 Amendment, and (5) Fourteenth Amendment rights. Plaintiffs also asserted state law claims
2 for: (1) intentional and negligent infliction of emotional distress; (2) negligent hiring, training,
3 and supervising; (3) assault (4) battery (5) false arrest; (6) civil conspiracy; (7) abuse of
4 process; (8) malicious prosecution; and (9) respondeat superior.

5 The Henderson Defendants, joined by the North Las Vegas Defendants, subsequently
6 moved to dismiss all claims against them. *See* Motion to Dismiss, Dkt. 17. On February 2, 2015,
7 this Court partially granted and partially denied the motion. *See* Order, Dkt. 48.

8 On March 14, 2016, Plaintiffs filed a Motion for Leave to File Second Amended
9 Complaint (“Motion,” Dkt. 71), attaching as an exhibit (Dkt. 71-1) a proposed Second Amended
10 Complaint (“SAC”) on the court’s public docket. Because the proposed SAC attached to the
11 Motion contravened the protective order in this case (Dkt. 62) by referencing the content of
12 confidential documents produced by Defendant City of Henderson in discovery, the parties
13 took steps to have the Motion and SAC stricken from the docket. *See* Dkt. 72, Dkt. 73, Dkt. 74.
14 Following an order by the court (Dkt. 73), the parties subsequently met and conferred and
15 reached an agreement regarding which portions of the proposed SAC violate the protective
16 order, which Plaintiffs agreed to redact. The parties subsequently stipulated (Dkt. 79) that
17 Plaintiffs would refile the Motion with the redacted SAC (filed herewith as Exhibit 1) by April 1,
18 2016, and that Plaintiffs will file the unredacted SAC with the court under seal following the
19 court’s order on the stipulation.
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21 The Plaintiffs now move for leave to file the attached redacted SAC in accordance with
22 the stipulation (Dkt. 79) between the parties.

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III. LEGAL STANDARD

Federal Rules of Civil Procedure 15 and 20 govern amendment and the permissive joinder of parties. *See Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1374 (9th Cir. 1980) (stating that a motion to add parties invokes Rules 15 and 20). The purpose of Rule 15 “is to facilitate a determination of the action on its merits.” 6 Wright, Miller & Kane, Federal Practice & Procedure § 1488 (3rd 2010); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Under Rule 15(a)(2),¹ a party may amend its pleadings only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Supreme Court directs lower “courts [to] interpret [Rule 15] liberally and permit an amendment whenever doing so will effectuate the underlying purpose of the rule.” *Brandon v. Holt*, 469 U.S. 464, 472 (1985) (citation omitted); *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995) (“[T]here is a strong policy of liberally allowing amendments pursuant to Rule 15(a)”).

However, leave to amend is not absolute. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). Among the factors weighing against allowing parties to amend are undue delay, prejudice to the opposing party, and futility. *Id.* (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)). Prejudice to the opposing party is the most important factor. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330–31 (1971) (stating that the trial court is “required” to take potential prejudice into account). A showing of the *Forman* factors overcomes the presumption in favor of granting leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

¹ Rule 15(a)(1) is inapplicable because “the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f).” *See* FED. R. CIV. P. 15, Advisory Committee Notes (2009 Amendments).

1 Similarly, Rule 20(a)(2) permits permissive joinder of defendants if “(A) any right to
2 relief is asserted against them jointly, severally, or in the alternative with respect to or arising
3 out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any
4 question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P.
5 20(a)(2). There is no bright-line definition of “transaction,” “occurrence,” or “series.” *See*
6 *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). Courts assess the facts of each case
7 individually to determine whether joinder is sensible in light of the underlying policies of
8 permissive party joinder. *Id.* Joinder in a single case may be appropriate—even though there
9 might be different occurrences—if the claims involve enough related operative facts. *Mosley v.*
10 *Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (“‘Transaction’ is a word of flexible
11 meaning. It may comprehend a series of many occurrences, depending not such much upon the
12 immediateness of their connection as upon their logical relationship.”). Rule 20 “is to be
13 construed liberally in order to promote trial convenience and to expedite the final
14 determination of disputes, thereby preventing multiple lawsuits.” *League to Save Lake Tahoe*
15 *v. Tahoe Reg’l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977).

17 IV. ARGUMENT

18 Pursuant to the stipulated discovery deadlines (Dkt. #68), Plaintiffs had until March 14,
19 2016 to amend their First Amended Complaint to add facts and parties sufficient to state
20 plausible claims for causes of action not dismissed by the Court with prejudice on February 2,
21 2015. The proposed Second Amended Complaint was attached as an exhibit to a motion to
22 amend that was timely filed on March 14, 2016, but which was withdrawn and is now refiled.
23 For the reasons previously described in the procedural history, *supra*, the parties stipulated to
24 “waive their right to challenge the timeliness of the Refiled Motion as it relates to the necessity
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1 to refile the Motion [...]” while “reserv[ing] all of their rights to challenge the timeliness of the
 2 relief sought in the Refiled Motion in all other respects.” *See* Dkt. 79. Because the contents of
 3 the proposed SAC are materially unchanged and the original document was timely served on
 4 all parties on March 14, 2016, this motion is timely under the operant discovery deadlines (Dkt.
 5 68).

6 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits amendments and provides
 7 that the “court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). *See*
 8 *also Foman v. Davis*, 371 U.S. 178, 182 (U.S. 1962); *DCD Programs, Ltd., et. al. v. Leighton*,
 9 833 F.2d 183, 186 (9th Cir. 1987).

10 In *Davis*, the Supreme Court set forth the standard to be applied in determining
 11 whether leave to amend a complaint should be granted, stating:

12 In the absence of any apparent or declared reason – such as undue
 13 delay, bad faith or dilatory motive on the part of the movant,
 14 repeated failure to cure deficiencies by amendments previously
 15 allowed, undue prejudice to the opposing party by virtue of
 allowance of the amendment, futility of amendment, etc. – the leave
 sought should, as this rule requires, be “freely given.”

16 *Davis*, 371 U.S. at 182. *See also Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th
 17 Cir. 2008).

18 Of the pertinent factors identified by the courts, prejudice to the opposing party is the
 19 most important to consider in determining whether leave to amend should be granted:

20 However, unlike amendments as of course, amendments under
 21 Rule 15(a)(2) may be made at any stage of the litigation. The only
 22 prerequisites are that the district court have jurisdiction over the
 23 case and an appeal must not be pending. If these two conditions are
 24 met, the court will proceed to examine the effect and the timing of
 the proposed amendments to determine whether they would
 prejudice the rights of any of the other parties to the suit. If no
 prejudice is found, then leave normally will be granted.

1 6 C. Wright et al., Federal Practice and Procedure § 1484 (2010).

2 There is no prescribed “time limit within which a party may apply to the court for leave
3 to amend.” *Id.* at § 1488. Indeed:

4 [T]he courts have not imposed any arbitrary timing restrictions on
5 requests for leave to amend and permission has been granted under
6 Rule 15(a) at various stages of the litigation. These include:
7 following discovery; after a pretrial conference; at a hearing on a
8 motion to dismiss or for summary judgment; when the case is on
the trial calendar and has been set for a hearing by the district
court; at the beginning, during, and at the close of trial; after a
judgment has been entered; and even on remand following an
appeal.

9 *Id.* (citations omitted).

10 In the case at bar, the criteria for joinder under Rule 20(a) plainly are met because
11 Plaintiffs, through the various causes of action set forth in their pleading, have raised facial
12 constitutional and state tort claims against now known and specifically named defendants. *See*
13 Fed. R. Civ. P. 20(a). The claims against these additional defendants are essentially the same as
14 against the Doe Defendants named in the First Amended Complaint. Thus, the legal issues at
15 stake are common to all the defendants.

16 Moreover, none of the other recognized *Davis* factors that might weigh against allowing
17 a requested amendment applies to the present case. Most importantly, Defendants would not
18 be prejudiced by allowing joinder of the named defendants, especially since the information
19 identifying these defendants has been obtained from discovery materials produced by the
20 defendant municipalities. Defendants will not be put to any additional burden or expense. Nor
21 has there been any undue delay, bad faith or dilatory motive, or repeated failure to cure
22 deficiencies by previous amendment.
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24
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V. CONCLUSION

For the reasons state above, Plaintiffs respectfully request that this Honorable Court grant their Motion for Leave to File Second Amended Complaint, and deem the proposed redacted Second Amended Complaint (attached hereto as Exhibit 1) and the proposed unredacted Second Amended Complaint (which will be promptly filed under seal if and when leave is granted by the Court pursuant to the stipulation of the parties in Dkt. 79) as effectively filed.

DATED this 1st day of April, 2016.

/s/ Frank Cofer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of April, 2016, a true and correct copy of the foregoing document:

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

was served via the Court's CM/ECF system upon the following persons:

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