IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00901-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER, in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Plaintiff, by and through counsel, David A. Lane, Andy McNulty, and Helen Oh of KILLMER, LANE & NEWMAN, LLP, request that this Court accept their proposed First Amended Complaint and state in support as follows:

1. **Certification Pursuant to D.C.Colo.LCivR. 7.1**

Counsel for Plaintiff, Andy McNulty, certifies that he conferred with Mark Ratner (counsel for Defendants) on March 9, 2020. Defendants oppose the relief sought herein.

2. **Introduction and Legal Standard**

Plaintiffs seek leave to amend their Complaint in response to this Court's Order Granting In Part And Denying In Part Defendants' Motion To Dismiss, And Denying Defendants' Motion To Supplement, [Doc. #84], which dismissed Plaintiff's *Monell* claim without prejudice and with the possibility that Plaintiff could amend to state a viable claim. Plaintiff takes this Court up on that opportunity. A redlined version of Plaintiff's proposed First Amended Complaint ("FAC") is attached to this motion as **Exhibit 1** and a non-redlined version is attached as **Exhibit 2**.

"Fed. R. Civ. P. 15(a) provides for liberal amendment of pleadings" and "[a]mendment under the rule has been freely granted." *Starr v. City of Lakewood*, 2008 U.S. Dist. LEXIS 103929, at *2 (D. Colo. Dec. 16, 2008). "Generally, the Court liberally should allow for amendments to pleadings under Federal Rule of Civil Procedure 15(a)." *Harger v. Talley*, 2005 U.S. Dist. LEXIS 14509, at *6 (D. Nev. 2005). "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (internal citation omitted). Additionally, "[i]n keeping with the purposes of the rule, the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation." *Chitimacha Tribe of La. V. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982).

3. **Legal Analysis**

The facts support granting Plaintiff's Motion for Leave to Amend. First, Plaintiff has not unduly delayed submitting the amendments contained in the FAC. Plaintiff is amending very early in this case. Courts have granted leave to amend much later into litigation than this case is currently postured. *JetPay Merch. Servs., Ltd. Liab. Co. v. Merrick Bank Corp.*, No. 2:12-cv-197-RJS-BCW, 2014 U.S. Dist. LEXIS 147050, at *6 (D. Utah Oct. 10, 2014) (holding that amendment was not untimely, in part, because amendment was sought within the deadline to amend the pleadings outlined in the scheduling order); *Martinez v. City & Cty. of Denver*, 2012 U.S. Dist. LEXIS 132814, at *4-7 (D. Colo. Sep. 18, 2012) (granting leave to amend more than a year after deadline to amend pleadings passed in scheduling order, where plaintiff sought leave to amend fifty days after becoming aware of pleadings deficiencies in operative complaint); *Cuffy v. Getty Ref. & Mktg. Co.*, 648 F. Supp. 802 (D. Del. 1986) (allowing amendment to

complaint alleging racial discrimination, even though discovery has already been completed and opposing party has filed motion for partial summary judgment, because, while there will be inconvenience to opposing party, there is no prejudice); *Artman v. International Harvester Co*., 355 F. Supp. 476, 481 (W.D. Pa. 1972) (granting plaintiff's motion to amend after hearing on defendant's summary judgment motion); *Cuffy v. Getty Ref. & Mktg. Co.*, 648 F. Supp. 802 (D. Del. 1986) (allowing amendment to complaint alleging racial discrimination, even though discovery has already been completed and opposing party has filed motion for partial summary judgment, because, while there will be inconvenience to opposing party, there is no prejudice).

Second, granting Plaintiff leave to amend would not cause Defendants any cognizable prejudice. Prejudice is the "most important" factor in deciding a motion to amend. *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1207 (10th Cir. 2006). "Prejudice in this context 'means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party.'" *Qdoba Rest. Corp. v. Taylors, LLC*, No. 08-cv-01179-MSK-KLM, 2008 U.S. Dist. LEXIS 82849, at *8 (D. Colo. Sept. 25, 2008) (quoting *Taliaferro v. Kansas City, Kan.*, 128 F.R.D. 675, 678 (D. Kan. 1989)). Courts typically find prejudice only when amendment would unfairly affect defendants in terms of preparing a defense, which occurs most often when amended claims arise out of different subject matter from existing claims, which is not the case here. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204–1211 (10th Cir. 2006).

Plaintiff's amendment only seeks to cure the deficiencies in Plaintiff's already alleged municipal liability claim. This Court stated that Plaintiff could amend her Complaint to state a cognizable *Monell* claim, [Doc. #84], and "the district court should allow a plaintiff an opportunity to cure technical errors or otherwise amend the complaint when doing so would yield a meritorious claim[.]" *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001); *Foman v.*

Davis, 371 U.S. 178, 182 (1962); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006) ("The purpose of [Rule 15)(a)] is to provide litigants 'the opportunity for each claim to be decided on its merits rather than on procedural niceties."). None of the proposed amended allegations "would significantly change the case and the defense that [Defendants]…would need to prepare." *Tex. Instruments, Inc. v. Biax Corp.*, No. 07-cv-02730-WDM-MEH, 2009 U.S. Dist. LEXIS 90209, at *8-9 (D. Colo. Sep. 28, 2009) (denying leave to amend because the plaintiff sought to assert new claims that would significantly change the case, discovery was already closed, and the matter was moving towards trial). As such, Defendants will suffer no prejudice.

Third, Plaintiff does not have a bad faith, or dilatory, motive in submitting the amendments set out in the FAC. The reason Plaintiff seeks to amend are issues raised by the Court. *See* [Doc. #84]. As Judge Hegarty stated in this type of procedural circumstance,

> [d]ismissal of a case under Fed. R. Civ. P. 12(b)(6) is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice. As such, in this jurisdiction, the Court typically does not dismiss a claim under Rule 12(b)(6) until the plaintiff has been provided notice and an opportunity to amend the complaint to cure the defective allegations.

Douglas v. City of Fort Collins, 2013 WL 5609350 *6 (D. Colo. Oct. 11, 2013) (citations omitted); *see also Greenway Nutrients v. Blackburn*, 2014 U.S. Dist. LEXIS 40153, * 70-71 (D. Colo. Feb. 10, 2014) (recommending that defendants' motions to dismiss be granted, but also noting that District Court could permit plaintiff to attempt to cure pleading deficiencies by an amended complaint because no judgment had entered).

Finally, Plaintiff's proposed amendments to cure the deficiencies highlighted by the Court are not "clearly frivolous or legally insufficient on [their] face. . . if the proposed claim sets forth facts and circumstances which may entitle the plaintiff to relief, then futility is not a proper basis on which to deny the amendment." *Gallegos v. Brandeis Sch.*, 189 F.R.D. 256, 259

(E.D.N.Y. 1999) (internal quotation marks omitted). Under the rule 12(b)(6) standard, "dismissal without affording the plaintiff notice or an opportunity to amend is proper *only when it is patently obvious that the plaintiff could not prevail on the facts alleged*, and allowing him an opportunity to amend would be futile." *Curley v. Perry*, 246 F.3d 1278, 1281-82 (10th Cir. 2001) (emphasis added). In other words, "[e]ven where the possibility of relief is remote, amendment must be permitted because it is the possibility of recovery, not its likelihood, that guides the court's analysis." *Id*. (citing *Vermont Plastics, Inc. v. Brine, Inc.*, 79 F.3d 272 (2d Cir. 1996)).

Plaintiff's amendments are not futile because they contain over thirty revised or new factual allegations that sufficiently describe the underlying constitutional violation and Defendant City of Fort Collins' ("the City") policies, customs, and practices which gave rise to the constitutional violation. This includes, but is not limited to detailed allegations of the City's ratification of excessive force by its police officers through its failure to train and supervise officers, the City's well-known and widespread custom and practice of allowing excessive force by finding no wrongdoing in internal investigations and failing to discipline officers, Defendant Klamser's deposition testimony stating that the actions he took with respect to the Plaintiff were in accordance with the training he was given by the City, and examples of other excessive force lawsuits against the City which repeatedly put the city on notice that its customs, practices, and insufficient training and supervision lead to unconstitutional police use of force, including that used against Plaintiff. Plaintiff's amendments for her *Monell* claim sufficiently give rise to a likelihood of relief and should not be denied as futile. [1]

[1] In any event, a motion to amend is not the proper procedure for resolving the merits of Plaintiffs additional allegations. Judge Ebel previously addressed the futility issue in the case of *General Steel Domestic Sales, LLC v. Steel Wise, LLC*, 2008 U.S. Dist. LEXIS 111978 (D. Colo. June 20, 2008). In *General Stee*l, Judge Ebel stated, in pertinent part: "Defendants' futility argument seems to place the cart before the horse. Rather than force a Rule 12(b)(6) motion into

Accordingly, there is no sound reason here to depart from the longstanding presumption that a plaintiff "ought to be afforded an opportunity to test h[er] claim on the merits" if "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief[.]" *See Foman*, 371 U.S. at 182.

4. Conclusion

WHEREFORE, Plaintiffs respectfully request that the Court grant their Motion for Leave to File A First Amended Complaint, and therefore enter their proposed FAC as the operative complaint in this case.

Dated this 12th day of March 2020.

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a Rule 15(a) opposition brief, the defendant may be better served by waiting to assert Rule 12 motions until the operative [pleading] is in place." *Id*. at *11. *See also Trans-High Corp. v. Brohl*, 2014 U.S. Dist. LEXIS 114324 (D. Colo. Aug. 18, 2014) (Watanabe, J.) (granting plaintiffs' motion for leave to amend complaint and citing *General Steel* with approval). This Court should adopt Judge Ebel's and Judge Watanabe's sound reasoning and grant Plaintiff's leave to amend.