IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03112-RBJ-STV

SEAN SLATTON,

Plaintiff,

v.

TODD HOPKINS, in his individual capacity, *et al.*,

Defendants.

REPLY TO DEFENDANT HOPKINS' RESPONSE TO MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT [Doc. 76] AND DEFENDANTS BARNES, HUTTO, AND FORT COLLINS' JOINDER THEREIN [Doc. 77]

I. DEFENDANTS HAVE SHOWN NO 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). Because Defendants "[did] not argue they face any—let alone undue—prejudice" if this Court granted the motion to amend, "their opposition to the…motion is grievously weakened." *Stender v. Cardwell*, No. 07-cv-02503-WJM-MJW, 2011 U.S. Dist. LEXIS 38502, at *10-11 (D. Colo. Apr. 1, 2011) (refusing to consider futility because the failure to argue prejudice was a "glaring omission"). "Rule 15 was designed to facilitate the amendment of pleadings except where prejudice…would result." *Minter*, 451 F.3d at 1207. Defendants would suffer no prejudice if this Court accepted the proposed amended complaint.

II. PLAINTIFF'S MOTION TO AMEND IS NOT UNTIMELY

Defendants have not met their burden to show that Plaintiff's proposed amended complaint would cause undue delay. *See Riggs v. Johnson*, No. 09-cv-01226-WYD-KLM, 2010

U.S. Dist. LEXIS 48125, at *9 (D. Colo. Apr. 27, 2010).[1] "Lateness does not of itself justify the denial of the amendment." *Minter*, 451 F.3d at 1205. Particularly, "Rule 15(a) does not restrict a party's ability to amend its pleadings to a particular stage in the action." *Id.* No scheduling order or deadline for amendment of pleadings has entered in this case, and discovery is stayed. The cases upon which Defendants rely are distinguishable they address motions to amend filed after the deadline for amending pleadings passed. *See Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1366 (10th Cir. 1993) (four months after deadline); *Chambers v. Mosness*, 2015 U.S. Dist. LEXIS 18715, at *27-28 (D. Colo. Jan. 14, 2015) (almost six months after deadline).

Delay is only "undue," and thus a justification for denying leave to amend, "when the party filing the motion has no adequate explanation for the delay." *Frank*, 3 F.3d at 1366. Here, the recent obtaining of counsel is a reasonable explanation for the motion's timing. Several courts have found that even when there has been a longer period of time between the filing of an initial complaint and a motion to amend, a *pro se* plaintiff's obtaining of counsel is an adequate

[1] "Prejudice and timeliness are obviously closely related." *Id.* at 1205. "Delay is 'undue' only if it will place an unwarranted burden on the Court or become prejudicial to the opposing party." *Briggs v. Deutsche Bank Nat'l Tr. Co.*, No. 13-cv-02433-MSK-KLM, 2014 U.S. Dist. LEXIS 18832, *5 (D. Colo. Feb. 13, 2014). "As a general rule, a plaintiff should not be prevented from pursuing a valid claim…, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits." *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090-91 (10th Cir. 1991). Given that the proposed "amendments are substantially similar to the subject matter underlying Plaintiff's original claims and parties," and because no discovery has yet occurred, Defendants "have sufficient time to adjust" the thrust of their defense (if even necessary), and they will suffer no undue prejudice if this Court grants Plaintiff's motion to amend. *Wornicki v. Brokerpriceopinion.com, Inc.*, No. 13-cv-3258-PAB-KMT, 2016 U.S. Dist. LEXIS 6524, at *16-18 (D. Colo. Jan. 20, 2016). And, because "much of [the proposed amended complaint] attempts to describe, with more precision, the role of each Defendant in the alleged unlawful activity, the relevant witnesses and documents are within Defendants' control, further limiting prejudice." *Graff v. Aberdeen Enterprizes II, Inc.*, No. 4:17-CV-606, 2018 U.S. Dist. LEXIS 160879, at *15 (N.D. Okla Sep. 20, 2018).

explanation for the delay.[2] Likewise, Plaintiff's filing previous motions to amend does not prohibit this Court from accepting the proposed Third Amended Complaint because "the proposed amendment represents… counsel's first opportunity to set forth [P]laintiff's claims." *Barron v. McGovern*, 2008 U.S. Dist. LEXIS 83394, 6 (D. Kan. Oct. 17, 2008). "Denying leave to amend would effectively negate the [obtaining] of counsel to aid [P]laintiff." *Id.*

Defendants make much of the several months' period between Plaintiff's hiring undersigned counsel and counsel filing the motion to amend, but for the same reasons counsel needed extensions to the deadline for responding to Defendants' motions to dismiss, counsel could not turn his attention to amending the complaint until recently. By granting Plaintiff's motions for extension, this Court has already indicated that counsel had good cause for needing extra time; if that time were now to be used to deny this motion, the granting of the motions for extension would be meaningless.

III. PLAINTIFF'S PROPOSED AMENDMENTS ARE NOT FUTILE

A motion to amend is not the proper vehicle for resolving the plausibility of Plaintiff's claims. As Judge Ebel has explained, "[a] futility argument…place[s] the cart before the horse." *General Steel Domestic Sales v. Steel Wise*, 2008 U.S. Dist. LEXIS 111978, *11 (D. Colo. June 20, 2008).[3] When no scheduling order has entered and discovery has not commenced, "the Tenth

[2] *See, e.g.*, *Devins v. N.Y.C. Housing Auth.*, 2011 U.S. Dist. LEXIS 53804, at *1-2, 14 (S.D.N.Y. May 19, 2011) (granting a motion to amend a *pro se* complaint almost 1½ years after the complaint was filed, and concluding that "[t]he delay between the filing of the complaint by the plaintiff while proceeding *pro se* and the motion to amend the complaint, made promptly once the plaintiff was able to engage counsel, is not inordinate and is justified"); *Johnson v. Cheryl*, No. 2:11-cv-291-JCM, 2013 U.S. Dist. LEXIS 106437, at *2-6 (D. Nev. July 29, 2013) (granting a motion to amend over two years after the plaintiff filed a *pro se* complaint).

[3] *See also, e.g.*, *Pollack v. Boulder Cty.*, No. 17-cv-02444-CMA-NRN, 2019 U.S. Dist. LEXIS 47037, at *11 (D. Colo. Mar. 21, 2019) (issues raised as to futility "would be better and more efficiently addressed after Plaintiff's amended complaint is in place and Defendant has had an opportunity to revise her motion to dismiss to address the revised allegations"); *Faircloth v.*

Circuit has expressed that, 'the preferred practice is to accord a plaintiff…an opportunity to amend his complaint before acting upon a motion to dismiss.'" *Briggs*, 2014 U.S. Dist. LEXIS 18832, at *7-8 (quoting *McKinney v. Okla.*, 925 F.2d 363, 365 (10th Cir. 1991)).[4]

Defendants barely raise any arguments on futility. In fact, this Court cannot deny the motion to amend on futility grounds as to Defendants Hutto, Barnes, and Fort Collins, because they did not file a separate response to the motion to amend and Defendant Hopkins' response does not contend that the proposed amended claims against them would be futile. Defendant Hopkins' futility objection to the motion to amend consists almost entirely of referencing his previous motion to dismiss. But to show futility, a defendant must establish that "the complaint, ***as amended***, would be subject to dismissal." *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) (emphasis added). Defendant Hopkins makes no argument why the proposed amended complaint would not withstand a motion to dismiss, even assuming *arguendo* that the Second Amended Complaint would be vulnerable to the previous motion (which it is not). Thus, to decide the futility argument, this Court "would be required to determine whether the [proposed amended complaint] cured the [asserted] defects of the [Second Amended Complaint] without the benefit of…extensive briefing." *Graff*, 2018 U.S. Dist. LEXIS 160879, at *20.

Defendant Hopkins' argument that this Court should view the proposed amended complaint as opinions of counsel is entirely inconsistent with the standards of review this Court must apply. "In ascertaining whether [a] plaintiff's proposed amended complaint is likely to

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Hickenlooper, No. 18-cv-01249-RM-STV, 2019 U.S. Dist. LEXIS 33013, at *7 (D. Colo. Mar. 1, 2019) (same).

[4] Relatedly, as a policy of judicial economy, the Federal Rules of Procedure contemplate "that a plaintiff may amend his complaint in response to a motion to dismiss." *Graff*, 2018 U.S. Dist. LEXIS 160879, at *12-13 (quoting Fed. R. Civ. P. 15 Comm. Notes on Rules—2009 Amendment for the proposition that amending in response to a motion to dismiss "may avoid the need to decide the motion or reduce the number of issues to be decided and will expedite determination of issues").

survive a motion to dismiss,…the allegations in the complaint must be accepted as true." *Murray v. Sevier*, 156 F.R.D. 235, 238 (D. Kan. 1994). Defendant Hopkins is also incorrect that this Court should decide futility by reviewing the video he filed with his motion to dismiss. When ruling on a Rule 12(b)(6) motion to dismiss, a court may not look beyond the contents of the complaint unless extrinsic material attached to the motion is "central" or "integral" to the plaintiff's claims. *MacArthur v. San Juan County*, 309 F.3d 1216, 1221 (10th Cir. 2002); *accord Brann v. Daddi*, No. 05-cv-00023-WYD-CBS, 2005 U.S. Dist. LEXIS 43373, at *8 n.3 (D. Colo. Aug. 22, 2005). Extrinsic material is integral to a complaint only when "the complaint relies…upon its terms and effect." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Plaintiff's claims do not rely on the video attached to Defendant Hopkins' motion to dismiss, and this Court thus may not review the video in deciding Plaintiff's motion to amend.

The only substantive argument Defendant Hopkins makes in his response to the motion to amend, that he is not liable because he did not personally arrest Plaintiff or sign the arrest warrant, fails. "For liability under section 1983, direct participation is not necessary." *Buck v. Albuquerque*, 549 F.3d 1269, 1279 (10th Cir. 2008). "The requisite causal connection is satisfied if the defendant set in motion a series of events that [he] knew or reasonably should have known would cause others to deprive the plaintiff of [his] constitutional rights." *Id.* at 1279-80. Because, as alleged in the proposed amended complaint, the information Defendant Hopkins provided to other officers set in motion the series of events that resulted in Plaintiff's arrest without probable cause, Defendant Hopkins is liable for the consequent Fourth Amendment violation.

IV. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court grant the motion to amend.

Respectfully submitted this 20th day of November 2019.

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CERTIFICATE OF SERVICE

I certify that on this 20th day of November 2019, I filed a true and correct copy of the foregoing via CM/ECF which will generate e-mailed notice to the following:

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