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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

MATS JARLSTROM, an individual, Plaintiff, v. **CITY OF BEAVERTON,** an Oregon municipal corporation, Defendant.	Case No.: 3:14-cv-00783-AC **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

I. INTRODUCTION

Without demonstrating the requisite undue prejudice, defendant City of Beaverton objects to plaintiff Mats Jarlstrom's timely proposed amendments in this case -- amendments that neither seek to add a new party or new theory, or that would delay the case in any meaningful way. The City simply wants to rehash its motion to dismiss the original Complaint, a Complaint which was sufficient in its own right. Because plaintiff's amendments are not unduly prejudicial, made in bad faith, or futile, leave should be freely given.

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II. ARGUMENT

A. Legal Standard.

Federal Rule of Civil Procedure 15 provides that "leave shall be freely given when justice so requires." That policy is "to be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). In determining whether to grant leave to amend, the district court shall consider the presence of any four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility. *Id.* at 712. Not all of the factors merit equal weight. Prejudice is the "'touchstone of the inquiry under rule 15(a).'" *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001)). Absent prejudice, or a "strong showing" of the other factors, "there exists a presumption under Rule 15 in favor of granting leave to amend." *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 957 (9th Cir. 2006). Dismissal with prejudice and without leave to amend is not appropriate unless it is clear that the complaint could not be saved by amendment. *Id.*

B. The City Has Failed to Demonstrate Undue Prejudice from Mr. Jarlstrom's Proposed Amendments.

The party opposing amendment bears the burden of showing prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). A party may suffer undue prejudice by belatedly adding a new claim or new party, or causing the need to reopen discovery and therefore delaying the proceedings. *See, e.g., Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (a need to reopen discovery and therefore delay proceedings supports a finding of prejudice); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989) (to put a party through the time and expense of continued litigation expenses on a new theory,

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with the possibility of additional discovery, would cause undue prejudice); *DCD Programs*, 833 F.2d at 187 ("[a]mending a complaint to add a party poses an especially acute threat of prejudice to the entering party").

Here, Mr. Jarlstrom's proposed amendments do not add a new claim or a new party, nor would require additional discovery or a delay in the proceedings. Nonetheless, the City argues that it will be prejudiced because it will "once again have to file another Motion to Dismiss." Def.'s Opp'n to Pl.'s Mot. for Leave to File Am. Compl. (Def.'s Opp'n.) at 5. However, filing a responsive pleading to an amended complaint is ubiquitous. *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 148 F.3d 1231, 1257 (11th Cir. 1998) ("Any amendment to an original pleading necessarily involves *some* additional expense to the opposing party" (emphasis in original)). The City simply does not establish the kind of *undue* prejudice warranting denial of Mr. Jarlstrom's motion to amend. *See Durlam v. Am. Equity Inv. Life Ins. Co.*, No. 08-6179-AA, 2008 WL 5262780, *3 (D. Or. Dec. 17, 2008) (granting motion to amend because parties had spent minimal resources on discovery and trial preparation and amendments would not result in undue delay).

C. Mr. Jarlstrom's Proposed Amendments Are Made in Good Faith.

Bad faith in filing a motion for leave to amend exists when the addition of new legal theories are baseless and presented for the purpose of prolonging the litigation, *see Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 881 (9th Cir.1999), or when the adverse party offers evidence that shows "wrongful motive" on the part of the moving party. *See DCD Programs*, 833 F.2d at 187.

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Here, the City contends that Mr. Jarlstrom moves to amend his Complaint for a wrongful motive -- that is, to necessitate "needless motion practice." Def.'s Opp'n at 4. However, Mr. Jarlstrom had no such wrongful motive in filing this Motion. Mr. Jarlstrom and his counsel are confident that the original complaint is sufficient to overcome the City's pending motion to dismiss and filed his Memorandum in Opposition to the City's motion to dismiss in good faith. Decl. of Michael E. Haglund, ¶ 2. However, in an abundance of caution, and in case this Court does not agree, Mr. Jarlstrom moved to amend his Complaint to provide the Court with additional facts in support of his allegations of standing and his claim for relief under Section 1983 of the Civil Rights Act. *Id.* ¶ 3.

Furthermore, the City provides no authority that requires a plaintiff to concede that his or her original Complaint is defective before seeking leave to file an amended complaint. In fact, it is proper to provide a District Court with a proposed amended complaint during a motion to dismiss as additional evidence that a plaintiff can successfully state a claim. *See McMullen v. Fluor Corp.*, 81 Fed. Appx. 197, 199-200 (9th Cir. 2003) (determining that district court erred in denying leave to amend based on bad faith when the plaintiffs provided district court the amended complaint as additional evidence of their ability to successfully state a claim).

In conclusion, the City has not established that Mr. Jarlstrom brought this Motion in bad faith.

C. Mr. Jarlstrom's Proposed Amendments Are Not Futile.

The City contends that Mr. Jarlstrom's proposed amendments are futile because, according to the City, he still fails to adequately (1) allege the "injury in fact" prong of standing

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and (2) state a claim for relief under Section 1983 of the Civil Rights Act. The City's contentions fail on both fronts.

1. Mr. Jarlstrom's proposed amendments buttress his original complaint's sufficient standing allegations.

The City contends that Mr. Jarlstrom's proposed amendments are futile because they fail to cure the alleged inadequacies in his original complaint regarding the "injury in fact" prong of standing. Def.'s Opp'n. at 2-3. In response to the City's argument, Mr. Jarlstrom relies on and incorporates his arguments made in opposition to the City's motion to dismiss his original complaint. *See* Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 2-7.

In arguing that Mr. Jarlstrom fails to allege injury in fact, the City relies only on Mr. Jarlstrom's proposed amendment that he has been a resident of the City of Beaverton for 19 years. *See* Def.'s Opp'n. at 3; Proposed First Am. Compl. (attached as Ex. A to Pl.'s Mot. for Leave to File First Am. Comp.) ¶ 7. The City all but ignores additional amendments to Mr. Jarlstrom's complaint, including the *frequency* with which Mr. Jarlstrom drives through signalized intersections, his plan to continue to drive through those intersections in the future, his experience as an engineer, and his good faith belief that "the short duration of yellow light intervals is the direct cause of a significant number of accidents at signalized intersections within the City of Beaverton." Proposed First Am. Compl. ¶¶ 8-13, 18. Those are facts which must be taken as true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

The City argues that Mr. Jarlstrom "has not been in a traffic accident" nor even "*seen* an accident." Def.'s Opp'n at 4 (emphasis in original). As plaintiff explained in his Memorandum in Opposition to the City's Motion to Dismiss, Mr. Jarlstrom is not required to establish that he has suffered actual injury; rather, he must demonstrate a "credible threat of future injury." Pl.'s

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Mem. in Opp'n to Def.'s Mot. to Dismiss at 3-4. Mr. Jarlstrom's allegations sufficiently allege such a credible threat: Mr. Jarlstrom drives through signalized intersections on a regular basis and intends to continue to do so in the future, Proposed First Am. Compl. ¶¶ 10-11, 13, to which the City has set the yellow light intervals, *id.* ¶ 14, the duration of the yellow light intervals are unsafe because there is insufficient time for drivers, who are too close to the intersection to stop safely when the yellow light illuminates, to drive cautiously through the intersection, *id.* ¶¶ 1, 17, the intervals cause a significant number of accidents, *id.* ¶ 18, and the intervals expose Mr. Jarlstrom to a serious risk of injury and death due to an increased risk of a traffic accident, *id.* ¶ 19.

For all of the reasons stated above, and previously described in Mr. Jarlstrom's opposition memorandum to defendant's motion to dismiss, Mr. Jarlstrom adequately alleges the "injury in fact" prong of standing.

2. Mr. Jarlstrom continues to state a claim under Section 1983.

The City contends that Mr. Jarlstrom's proposed amendments fail to state a claim under the state-created danger exception because he fails to adequately allege that the City affirmatively places Mr. Jarlstrom in a position of danger which he would not otherwise face. Def.'s Opp'n at 3-4.

Plaintiff adequately has alleged affirmative conduct on behalf of the City. *See Johnson v. City of Seattle*, 474 F.3d 634, 639 (9th Cir. 2007) (plaintiff must demonstrate that state action affirmatively places plaintiff in position of danger). First, plaintiff alleges that the City has affirmatively acted in setting the yellow-light durations. Proposed Am. Compl. ¶ 14. (The City "operates multiple traffic control devices throughout its jurisdiction and has the final authority

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over the timing of yellow light and red light intervals at signalized intersections within its boundaries."). In contrast to the City's contention, Mr. Jarlstrom does not merely allege that the City has *failed* to do something. Rather, he alleges that it *acted* in setting the particular yellow-light duration at issue. *See Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1090 (9th Cir. 2000) (state actor has duty to protect once it takes affirmative steps that increase the risk of danger to an individual).

Second, the City's conduct is affirmative because it "creates or exposes" Mr. Jarlstrom to a danger which he would not otherwise face. *Johnson*, 474 F.3d at 639 (state action affirmatively places the plaintiff in a position of danger if it "creates or exposes" an individual to danger which he or she would not have otherwise faced). Because of the City's affirmative action in setting the short duration of the yellow lights, Mr. Jarlstrom is exposed to a "serious risk of physical injury or death" because there is "an increased risk" that a third party will enter the intersection while plaintiff is still in the intersection, or vice versa. Proposed Am. Compl. ¶ 19. Because Mr. Jarlstrom drives through these signalized intersections on a regular basis, at least ten times per week, *see id.* ¶¶ 10-11, the City's affirmative action creates or exposes Mr. Jarlstrom to a danger -- an "increased risk" of being hit in the intersection -- that he would not otherwise face.[1]

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[1] The City contends that it has not found a single instance of such a claim arising under the United States Constitution. Plaintiff admits that this case is an extraordinary one and that he has not found a published case nationwide where a plaintiff has challenged yellow-light durations. However, just because plaintiff may be the first individual to challenge such a system *at all* does not mean such challenges are not viable under the United States Constitution.

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In conclusion, Mr. Jarlstrom's proposed First Amended Complaint adequately alleges standing and states a claim under Section 1983 of the Civil Rights Act. Therefore, his proposed amendments are not futile.

III. CONCLUSION

For the reasons stated above, plaintiff respectfully requests that this Court grant plaintiff's Motion for Leave to File First Amended Complaint.

DATED this 4th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2014, I served the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**, on the following:

Gerald L. Warren
Law office of Gerald Warren
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by the following indicated method(s):

☐ by **mail** with the United States Post Office at Portland, Oregon in a sealed first-class postage prepaid envelope.

☐ by **email**.

☐ by **hand delivery**.

☐ by overnight mail.

☐ by **facsimile**.

☒ by the court's Cm/ECF system.

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