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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL DILLMAN, et al.,
Plaintiffs,
v.
TUOLUMNE COUNTY, et al.,
Defendants.

Case No. 1:13-cv-00404-LJO-SKO
**ORDER GRANTING PLAINTIFFS'
MOTION FOR LEAVE TO FILE A
THIRD AMENDED COMPLAINT**
(Docket No. 37)

I. INTRODUCTION

On December 23, 2013, Plaintiffs Michael Dillman and Stephen Dillman ("Plaintiffs") filed a "Motion for Leave to File a Third Amended Complaint." (Doc. 37.) On January 7, 2014, Defendants Tuolumne County ("County") and Deputy David Vasquez ("Vasquez," collectively "Defendants") filed an opposition. (Doc. 41.) Plaintiffs filed a reply on January 15, 2014. (Doc. 42.) The Court reviewed the parties' briefs and all supporting materials, and finds this matter suitable for decision without oral argument pursuant to the U.S. District Court for the Eastern District of California's Local Rule 230(g). As such, the hearing set for January 22, 2014, is VACATED.

For the reasons set forth below, Plaintiffs' "Motion for Leave to File a Third Amended Complaint" is GRANTED.

1 **II. BACKGROUND**

2 **A. Factual Background¹**

3 Plaintiffs allege that on September 18, 2011, Plaintiff Pastor Michael Dillman, after
4 conducting Sunday morning service at his church in Manteca, California, and his son, Plaintiff Stephen
5 Dillman, drove to Lake Donnell in Tuolumne County, California, to go fishing. (SAC ¶ 10.) As was
6 their custom and practice over the years, Plaintiffs placed their own motor on a thirteen-foot Valco
7 aluminum boat at Lake Donnell. (SAC ¶ 11.) There was no registration, insignia, or identification on
8 the boat. *Id.* According to Plaintiffs, for the last thirty years they and other fisherman have left
9 aluminum boats moored at Lake Donnell. *Id.* It has been common practice to pack in one's own
10 motor, place it on one of the moored boats, take the boat fishing, and then return the boat to the dock.
11 *Id.* In fact, in or around 2010, Michael Dillman purchased an aluminum boat identical to the boat
12 Plaintiffs used on September 18, 2011, and left that boat at Lake Donnell for his own use and for use
13 by other fishermen. *Id.* Two aluminum boats purchased by Plaintiffs are moored currently at Lake
14 Donnell. *Id.*

15 While Plaintiffs were out on Lake Donnell on September 18, 2011, an employee of Tri-Dam
16 Project, the entity that operates the facility at Lake Donnell, called the Tuolumne County Sheriff's
17 Department to report seeing two unidentified men place a motor on an aluminum boat that allegedly
18 belonged to Tri-Dam Project. (SAC ¶ 12.) The men then took the boat out fishing. *Id.* The Tri-Dam
19 Project employee viewed these events on surveillance cameras at Lake Donnell. *Id.*

20 After returning from fishing, Plaintiffs were met by Defendant Tuolumne County Sheriff's
21 Deputy David Vasquez, who ordered them up a ladder at the dam facility and informed them they were
22 under arrest for joyriding in a boat, trespass, and vandalism. (SAC ¶ 13.) Defendant Vasquez then
23 handcuffed Plaintiffs with their hands behind their backs, in a "high, tight and painful manner." *Id.*
24 Michael Dillman explained to Deputy Vasquez that he was a pastor and community leader, and that he
25 was unarmed and posed no threat to him. *Id.* Michael Dillman also explained to Deputy Vasquez that
26 he was a Vietnam War veteran and suffered from Post-Traumatic Stress Disorder ("PTSD") and

27 _____
28 ¹ The factual background is taken from the summary of Plaintiffs' factual allegations set forth in the Court's order of
July 23, 2013, on Defendants' motion to dismiss (Doc. 24) and is based on Plaintiffs' Second Amended Complaint
("SAC"). (Doc. 15.)

1 extreme claustrophobia. *Id.* At the time of the incident, Michael Dillman was 63 and suffered from
2 arthritic shoulder pain, which was exacerbated by the high and tight handcuff placement behind his
3 back. *Id.* Upon being cuffed, he began to feel pain immediately, which escalated to "an excruciating
4 level." *Id.*

5 Michael Dillman pled with Deputy Vasquez to cite and release him and his son and to refrain
6 from placing them into the back of the police vehicle with their arms cuffed behind their backs. (SAC
7 ¶ 14.) Michael Dillman told Deputy Vasquez that he feared if he was placed in such a position in the
8 back of a vehicle with the windows rolled up, he would suffer a PTSD episode. *Id.* He pled with
9 Deputy Vasquez to loosen the cuffs to reduce the pain or to cuff him in front and to crack the window
10 in the back of the vehicle so he could get air. *Id.* Deputy Vasquez finally agreed to "double cuff"
11 Michael Dillman. *Id.* However, Michael Dillman's hands remained behind his back and the cuffs
12 were extremely tight on his wrists. *Id.*

13 Plaintiffs were "shoved" into the back of Deputy Vasquez's vehicle and immediately
14 transported to the Tuolumne County Jail in Sonora, California, over an hour drive from Lake Donnell.
15 (SAC ¶ 15.) A portion of the drive was on a bumpy road, and both men were cuffed behind their
16 backs in an extremely painful manner. *Id.* Plaintiff Michael Dillman continued to plead with Deputy
17 Vasquez to crack the window and loosen his handcuffs. *Id.* Instead of doing so, Deputy Vasquez
18 cursed Michael Dillman and threatened to "hog tie his ass!" *Id.* Michael Dillman then suffered a
19 "PTSD episode" during the transport to the Tuolumne County Jail. *Id.*

20 When Plaintiffs arrived at the Tuolumne County Jail they were cursed and humiliated by
21 Tuolumne County Sheriff's Department personnel. (SAC ¶ 17.) Michael Dillman was then called a
22 "psycho preacher" and was forced to completely undress in the presence of two female deputies, who
23 openly commented on his nakedness. *Id.* Stephen Dillman was not strip-searched. *Id.* Michael
24 Dillman was then separated from his son and placed naked in a small padded cell on cold concrete and
25 given no way to cover his nakedness or protect himself from the cold. *Id.* After approximately two
26 hours in that padded cell, Michael Dillman was returned to a holding cell with his son. *Id.*

27 Plaintiffs were released from custody at approximately 1:00 a.m. on September 19, 2011.
28 (SAC ¶ 18.) According to Plaintiffs, Jail personnel refused to return money that had been confiscated

1 from them during the booking process. *Id.* Instead, Plaintiffs were given a voucher card, which
2 required them to wait until the banks opened in the morning before they could access any money. *Id.*

3 Tuolumne County chose to prosecute Plaintiffs, and a criminal jury trial commenced on
4 February 6, 2012. (SAC ¶ 19.) Plaintiffs were acquitted of all charges. *Id.*

5 Plaintiffs' SAC alleged causes of action for (1) violation of civil rights pursuant to 42 U.S.C.
6 § 1983 against all Defendants, (2) violation of civil rights pursuant to California's Bane Civil Rights
7 Act, Cal. Civ. Code § 52.1 against all Defendants, (3) battery against Vasquez, (4) intentional
8 infliction of emotional distress against Vasquez and "Certain Yet to Be Named Individual
9 Defendants," and (5) negligence against Vasquez and "Certain Yet to Be Named Individual
10 Defendants." (Doc. 15.)

11 **B. Procedural Background**

12 Plaintiffs' first amended complaint against Defendants and Does 1-25 was filed in the
13 Tuolumne County Superior Court on February 13, 2013, and removed to this Court on March 18,
14 2013. (Doc. 1.) Defendants filed a motion to dismiss on March 19, 2013, which was granted in
15 part and denied in part on May 7, 2013. (Docs. 9, 14.)

16 On May 24, 2013, Plaintiffs filed the SAC. (Doc. 15.) On June 10, 2013, County filed a
17 motion to dismiss and Vasquez filed an answer. (Docs. 16, 17.) On July 23, 2013, the Court
18 granted County's motion without leave to amend as to Plaintiffs' claims arising under 42 U.S.C. §
19 1983, and denied the motion as to the claims arising under California's Bane Civil Rights Act, Cal.
20 Civ. Code § 52.1. (Doc. 24.)

21 A scheduling conference was held on September 24, 2013, before Magistrate Judge Sheila
22 K. Oberto, during which the parties addressed the issue of Plaintiffs' request to file a third
23 amended complaint. (Doc. 29.) On September 30, 2013, the Court issued a scheduling order that
24 set forth the following requirements regarding amendments to the parties' pleadings:

25 The parties have agreed that Plaintiffs may amend the complaint to add additional
26 facts. As such, by no later than November 22, 2013, the parties shall file a
27 stipulation requesting leave to amend to add those facts, and any proposed amended
28 complaint shall comply with the Court's prior rulings in this action.

Further, Plaintiffs indicated that they will be seeking to add additional defendants.
If the parties agree to this amendment, the additional defendants shall be included

1 in the stipulation amending the complaint to add the additional facts which shall be
2 filed by no later than November 22, 2013. If the parties do not agree to the allow
3 Plaintiffs to amend the complaint to add additional defendants, any motions
4 requesting leave to amend the pleadings must also be filed by no later than
5 November 22, 2013.

6 The parties are advised that filing motions and/or stipulations requesting leave to
7 amend the pleadings by November 22, 2013, does not reflect on the propriety of the
8 amendment or imply good cause to modify the existing schedule, if necessary. All
9 proposed amendments must (A) be supported by good cause pursuant to Fed. R.
10 Civ. P. 16(b) if the amendment requires any modification to the existing schedule,
11 *see Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992), and
12 (B) establish, under Fed. R. Civ. P. 15(a), that such an amendment is not
13 (1) prejudicial to the opposing party, (2) the product of undue delay, (3) proposed
14 in bad faith, or (4) futile, *see Foman v. Davis*, 371 U.S. 178, 182 (1962).

15 (Doc. 30, 3:9-26.)

16 On November 19, 2013, Plaintiffs filed an ex parte application to extend time to file their
17 third amended complaint, which Defendants opposed on November 21, 2013. (Docs. 31, 33.) On
18 November 27, 2013, the Court granted Plaintiffs' ex parte application for an extension of time to
19 file a motion to amend and ordered that Plaintiffs either file a stipulated amended complaint or a
20 motion to amend by no later than December 23, 2013. (Doc. 34.)

21 On December 23, 2013, Plaintiffs filed the instant motion to amend. (Doc. 37.) On
22 December 26, 2013, Plaintiffs filed the Declaration of Joseph L. Wright in Support of the Motion
23 to Amend, revising the proposed third amended complaint and removing certain identified Doe
24 Defendants. (Doc. 39.) Defendants filed an opposition on January 7, 2014, and Plaintiffs' reply
25 was filed on January 15, 2014. (Docs. 41, 42.)

26 **III. DISCUSSION**

27 The Court issued a scheduling order on September 30, 2013, advising the parties that "[a]ll
28 proposed amendments must (A) be supported by good cause pursuant to Fed. R. Civ. P. 16(b) if
the amendment requires any modification to the existing schedule, . . . and (B) establish, under
Fed. R. Civ. P. 15(a), that such an amendment is not (1) prejudicial to the opposing party, (2) the
product of undue delay, (3) proposed in bad faith, or (4) futile." (Doc. 30, 3:19-26 (citations
omitted).)

1 Here, Plaintiff is seeking to file a third amended complaint that (1) adds additional facts,
2 and (2) identifies and adds Doe Defendants 1-5 as Paul Harrison, Kim Quincy, Eric Roberts,
3 Amanda Roos, and Troy Silva (collectively, "Identified Doe Defendants"). (Docs. 37, 39.)
4 Defendants do not oppose the addition of the facts, but oppose amending the complaint to add the
5 Identified Doe Defendants. (Doc. 41.)

6 **A. Plaintiffs Exhibited Diligence and Good Cause as Required under Federal Rule of**
7 **Civil Procedure 16(b)**

8 **1. Legal Standard**

9 Federal Rule of Civil Procedure 16(b) provides that the district court must issue a
10 scheduling order that limits the time to join other parties, amend the pleadings, complete
11 discovery, and file motions. Fed. R. Civ. P. 16(b)(1)-(3). Once in place, "[a] schedule may be
12 modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The "good
13 cause" requirement of Rule 16 primarily considers the diligence of the party seeking the
14 amendment. *Johnson*, 975 F.2d at 609. "The district court may modify the pretrial schedule if it
15 cannot reasonably be met despite the diligence of the party seeking the extension." *Id.* (internal
16 citation and quotation marks omitted).

17 Good cause may be found to exist where the moving party shows, for example, that it:
18 (1) diligently assisted the court in recommending and creating a workable scheduling order, *see In*
19 *re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 228 (1st Cir. 1997), (2) is unable to
20 comply with the deadlines contained in the scheduling order due to issues not reasonably
21 foreseeable at the time of the scheduling order, *see Johnson*, 975 F.3d at 609, and (3) was diligent
22 in seeking an amendment once the party reasonably knew that it could not comply with the
23 scheduling order, *see Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1233 (E.D. Cal. 1996);
24 *see also Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999). "If [the] party was not
25 diligent, the inquiry should end." *Johnson*, 975 F.2d at 609. If the court finds that there is good
26 cause to modify the schedule, the court then turns to Rule 15(a) to determine whether the
27 amendment sought should be granted. *Jackson*, 186 F.R.D. at 607 ("As the Ninth Circuit
28 explained in [*Johnson*], once the district court has filed a pretrial scheduling order pursuant to

1 Rule 16 which establishes a timetable for amending pleadings, a motion seeking to amend
2 pleadings is governed first by Rule 16(b), and only secondarily by Rule 15(a).").

3 **2. Analysis**

4 As a scheduling order was issued in this action (Doc. 30), the "schedule may be modified
5 only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Whether good cause
6 exists to modify a scheduling order rests on whether the party seeking the modification has been
7 diligent. *See Johnson*, 975 F.2d at 609.

8 Here, Plaintiffs do not request a modification to the schedule. (Doc. 37.) Pursuant to the
9 September 30, 2013, scheduling order, the non-expert discovery deadline is September 19, 2014,
10 the expert disclosure deadline is September 26, 2014, the supplemental expert disclosure deadline
11 is October 10, 2014, and the expert discovery deadline is November 14, 2014. (Doc. 30.) As
12 such, there are nearly eight (8) months remaining until the first discovery deadline for non-expert
13 discovery. However, as Defendants rightly contend, the newly Identified Doe Defendants have
14 not yet been served, may have different defense counsel, and may require additional time for
15 discovery. Thus, although Plaintiffs have not requested that the Court modify the scheduling
16 order, allowing Plaintiffs to add the Identified Doe Defendants may require modification.

17 As such, the Court must consider whether Plaintiffs have been diligent in seeking to amend
18 the complaint. *Johnson*, 975 F.2d at 609. The Court has previously considered the issue of
19 Plaintiffs' diligence, and determined that Plaintiffs were diligent. (Doc. 34, 3:17.) In granting the
20 Plaintiffs' ex parte application to modify the scheduling order to allow Plaintiffs an extension of
21 time to file the instant motion to amend the complaint, the Court found that:

22 Plaintiffs have been diligent. Plaintiffs are seeking to amend the complaint to add
23 Doe Defendants, and indicate that they believed those names would be disclosed by
24 Defendants in their Rule 26(a)(1) initial disclosures. (Doc. 31, 2:21-23.) The
25 initial disclosures were ordered to be completed on or before October 31, 2013,
26 (Doc. 30, 4:3), and names of the Doe Defendants were not disclosed. (Doc. 31,
2:22.) Defendants indicate that such disclosure was not required. (Doc. 33,
8:24-25.) Plaintiffs subsequently propounded discovery to learn the identities of
the Doe Defendants. (Doc. 31, 2:19-20.)

27 Defendants contend that Plaintiffs failed to act diligently by waiting to propound
28 discovery in this action. (Doc. 33, 4:21-5:5.) However, since this case's removal
from Tuolumne County Superior Court on March 18, 2013, there were two motions
to dismiss pending, which were not resolved until July 23, 2013. (Docs. 9, 16, 24.)

1 Further, the scheduling order was not issued until September 30, 2013. (Doc. 30.)
2 As such, discovery in this action did not open until that time, and the parties were
3 precluded from propounding discovery requests. Fed. R. Civ. P. 26(d)(1) ("A party
4 may not seek discovery from any source before the parties have conferred as
5 required by Rule 26(f), except in a proceeding exempted from initial disclosure
under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by
court order.") Therefore, Plaintiffs' propounding of discovery requests seeking the
identities of the Doe Defendants within less than two months of discovery being
opened in this action, and less than one month after realizing that the Doe
Defendants would not be identified in the initial disclosures, is diligent.

6 (Doc. 34, 3:17-4:7.)

7 As the Court previously determined, Plaintiffs were precluded from propounding discovery
8 requests until discovery opened in this action, and they propounded discovery requests within less
9 than two months of discovery being opened and less than one month after determining that the
10 Doe Defendants were not identified in Defendants' initial disclosures. (Doc. 34, 4:4-7.) As such,
11 Plaintiffs did not delay in bringing discovery requests seeking the identities of the Identified Doe
12 Defendants and have been diligent in seeking to amend the complaint once the identities were
13 discovered.

14 Plaintiffs have brought this motion within the time period authorized by the Court (*see*
15 Doc. 34) and have been diligent in seeking the identities of the Doe Defendants and in moving to
16 amend of the complaint. As such, Plaintiffs show good cause to request amendment. Thus the
17 Court turns to Rule 15(a) to determine whether the amendment sought should be granted.
18 *Jackson*, 186 F.R.D. at 607.

19 **B. Plaintiffs' Amendment is Warranted Under Federal Rule of Civil Procedure 15(a)**

20 **1. Legal Standard**

21 Federal Rule of Civil Procedure 15 provides that a party may amend its pleading only by
22 leave of court or by written consent of the adverse party and that leave shall be freely given when
23 justice so requires. Fed. R. Civ. P. 15(a)(1)-(2). The Ninth Circuit has instructed that the policy
24 favoring amendments "is to be applied with extreme liberality." *Morongo Band of Mission*
25 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

26 The factors commonly considered to determine the propriety of a motion for leave to
27 amend are: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and (4) futility of
28 amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Ninth Circuit has held that it is the

1 consideration of prejudice to the opposing party that carries the greatest weight. *Eminence*
2 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Absent prejudice, or a strong
3 showing of any of the remaining *Foman* factors, a presumption in favor of granting leave to
4 amend exists under Rule 15(a). *Id.* Further, undue delay alone is insufficient to justify denial of a
5 motion to amend. *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). Finally, "liberality in
6 granting leave to amend is not dependent on whether the amendment will add causes of action or
7 parties." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *contra Union Pac.*
8 *R.R. Co. v. Nev. Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991) ("Amendments seeking to add
9 claims are to be granted more freely than amendments adding parties.").

10 **2. Analysis**

11 Plaintiffs are seeking to amend the complaint to add additional facts and the Identified Doe
12 Defendants. (Doc. 37.) Defendants do not oppose the addition of the facts, but oppose amending
13 the complaint to add the additional defendants. (Doc. 41.) Defendants contend that they will be
14 prejudiced by the amendment and Plaintiffs unduly delayed in seeking amendment.

15 **a. Prejudice to the Opposing Parties**

16 As consideration of prejudice to the opposing party carries the greatest weight, the Court
17 considers this factor first. *Eminence Capital, LLC*, 316 F.3d at 1052. The existing Defendants
18 contend that the proposed third amended complaint "will effectively add an entirely new set of
19 claims, based on an entirely separate incident than that which is currently pending between the
20 parties." (Doc. 41, 3:17-18.) Defendants assert that County and Vasquez are only potentially
21 liable for the acts committed at the dam and in the police car, and that they have nothing to do
22 with the allegations regarding misconduct at the jail. (Doc. 41, 3:18-21.) Defendants further
23 assert that the newly named Defendants will also be prejudiced because they do not share similar
24 interests as County and Vasquez and will require additional discovery.

25 Plaintiffs contend that Defendants were on notice from the beginning that there were
26 unknown Doe Defendants that had yet to be ascertained and who were allegedly liable for the
27 incident occurring at the jail. (Doc. 42, 4:9-11.) As such, Plaintiffs assert that existing Defendants
28 cannot show that they will be prejudiced by the amendment.

1 While Defendants assert that Plaintiffs are seeking to add an entirely new set of claims
2 based on a separate incident at the jail, as opposed the incidents at the dam and in the police car
3 that are currently before the Court, Defendants have been on notice of these allegations. Plaintiffs'
4 prior complaints have set forth allegations regarding the incident at the jail, and alleged that there
5 were "Certain Yet to Be Named Individual Defendants" who were allegedly liable for their actions
6 at the jail. (*See, e.g.*, Doc. 1, First Amended Complaint, pp. 6-39, ¶¶ 16, 17, 37, 38, 54, 55, 56, 59,
7 60, 64, 66; Doc. 15, Second Amended Complaint, ¶¶ 17, 18, 42, 43, 60, 61, 62, 63; Doc. 39.) As
8 such, Plaintiffs are not seeking to add "an entirely new set of claims," as Defendants contend, but
9 are instead seeking to name the Doe Defendants whose identities were not know at the time of the
10 filing of the complaint.

11 The Ninth Circuit has held that "where the identity of the alleged defendant is not known
12 prior to the filing of a complaint, the plaintiff should be given an opportunity through discovery to
13 identify the unknown defendants, unless it is clear that discovery would not uncover the identities,
14 or that the complaint would be dismissed on other grounds." *Wakefield v. Thompson*, 177 F.3d
15 1160, 1163 (9th Cir. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637 (9th Cir. 1980) (quotation
16 and citation marks omitted). "A district court abuses its discretion by denying leave to amend
17 where the complaint's deficiencies could be cured by naming the correct defendant." *Crowley v.*
18 *Bannister*, 734 F.3d 967, 978 (9th Cir. 2013).

19 In ruling on Defendants' motion to dismiss Plaintiffs' First Amended Complaint, this Court
20 noted that "Defendants do not address the viability of the strip search-related constitutional claims
21 against the Doe Defendants," but informed the parties that "Doe Defendants are permitted where
22 federal question jurisdiction lies." (Doc. 14, 24:6-7.) Additionally, the Court cited *Wakefield*,
23 177 F.3d at 1163, and informed the parties that Plaintiffs "should be given an opportunity through
24 discovery to identify the unknown defendants, unless it is clear that discovery would not uncover
25 the identities." (Doc. 14, 24:8-10.)

26 Here, Plaintiffs have now ascertained the identities of the Doe Defendants and are seeking
27 to name them in the complaint. Although Defendants County and Vasquez may not be liable for
28 the alleged actions brought against the Identified Doe Defendants, the allegations at the dam, in

1 the police car, and at the jail all arise from the same incident and set of circumstances -- Plaintiffs'
2 arrest at the dam and subsequent transport and incarceration at the jail. Further, both Plaintiffs'
3 first and second amended complaints contained allegations concerning the Identified Doe
4 Defendants and the incident at the jail. Defendants have not shown how they would be prejudiced
5 by defending against claims that have been identified in Plaintiffs' prior pleadings.

6 Rule 15 provides that leave to amend "shall be freely granted when justice so requires."
7 Fed. R. Civ. P. 15(a). "Rule 15 reflects the limited role assigned to pleadings in federal court,
8 which can be described as providing the parties involved with fair notice of the general nature and
9 type of the pleader's claim or defense." *Grier v. Brown*, 230 F. Supp. 2d 1108, 1111 (N.D. Cal.
10 2002) (citation and quotation marks omitted). Here, Defendants had fair notice of the allegations
11 against the Identified Doe Defendants (*see* Docs. 1, 15), and were aware that Plaintiffs were
12 permitted to conduct discovery to ascertain the identities of the Doe Defendants. (Doc. 14,
13 24:6-10.) Further, the Ninth Circuit has held that it is an abuse of discretion for the district court
14 to deny leave to amend when a complaint's deficiencies could be cured by naming the correct
15 defendant. *Crowley*, 734 F.3d at 978. As such, Defendants' contention of prejudice lacks merit
16 and does not support denying Plaintiffs' motion to amend.

17 **b. Undue Delay**

18 Defendants contend that Plaintiffs have failed to act diligently in seeking to identify the
19 Doe Defendants and amendment should be denied due to Plaintiffs' undue delay. (Doc. 41,
20 4:18-6:6.) As discussed above, the Court previously found that Plaintiffs were diligent in
21 propounding discovery requests regarding the identities of the Doe Defendants once the discovery
22 period was opened in this action. (*See* Doc. 34.) Further, undue delay alone is insufficient to
23 justify denial of a motion to amend. *Bowles*, 198 F.3d at 758 (9th Cir. 1999). As such, this factor
24 does not weigh against granting Plaintiffs' motion.

25 Defendants do not contend that Plaintiffs acted in bad faith or that the proposed
26 amendment would be futile, and the Court finds that these factors do not weigh against allowing
27 Plaintiffs to amend the complaint. *See Foman v. Davis*, 371 U.S. at 182. Plaintiffs have thus
28 shown that amendment is warranted under Rule 15(a).

1 **C. Courts Have Discretion Under Rule 4(m) to Grant an Extension of Time to Serve**
2 **Complaint**

3 Defendants contend that the Plaintiffs failed to comply with Federal Rule of Procedure
4 4(m), and serve the Doe Defendants in a timely manner. Defendants assert that the complaint
5 should not be amended to name the Doe Defendants.

6 Rule 4(m) states in pertinent part:

7 **Time Limit for Service.** If a defendant is not served within 120 days after the
8 complaint is filed, the court--on motion or on its own after notice to the plaintiff--
9 must dismiss the action without prejudice against that defendant or order that
service be made within a specified time. But if the plaintiff shows good cause for
the failure, the court must extend the time for service for an appropriate period.

10 Fed. R. Civ. P. 4(m).

11 The 120-day period for service of the summons and complaint applies to Doe defendants.
12 *See Morris v. Barra*, No. 10CV2642-AJB BGS, 2012 WL 1059908, at *2 (S.D. Cal. Mar. 28,
13 2012). However, Rule 4(m) "*requires* the district court to grant an extension of time when the
14 plaintiff shows good cause for the delay" but "*permits* the district court to grant an extension even
15 in the absence of good cause." *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007). "On its
16 face, Rule 4(m) does not tie the hands of the district court after the 120-day period has expired.
17 Rather, Rule 4(m) explicitly permits a district court to grant an extension of time to serve the
18 complaint *after* that 120-day period." *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003).

19 Here, Defendants assert that Plaintiffs should not be allowed to amend the complaint to
20 add the Identified Doe Defendants because the additional Defendants were not served within
21 120 days of the filing of the SAC on May 24, 2013. (Doc. 41, 8:1-9:15.) Defendants urge the
22 Court to deny Plaintiffs' motion, because "Plaintiffs cannot show good cause for their undue delay
23 in bringing the present motion, nor for their failure to comply with Rule 4(m)." (Doc. 41, 9:2-4.)

24 As discussed above and previously decided by the Court, Plaintiffs did not unduly delay in
25 bringing the present motion and seeking to amend the pleadings. (*See* Doc. 34.) Once discovery
26 opened in this action, Plaintiffs timely sought the identities of the Doe Defendants. Further, the
27 Court had previously informed the parties that Plaintiffs were permitted to conduct discovery to
28 ascertain the identities of the Doe Defendants. (*See* Doc. 14, 24:6-10 ("Defendants do not address

1 the viability of the strip search-related constitutional claims against the Doe Defendants. Doe
2 defendants are permitted where federal question jurisdiction exists. *Wakefield v. Thompson*,
3 177 F.3d 1160, 1163 (9th Cir. 1999) (holding that 'the plaintiff should be given an opportunity
4 through discovery to identify the unknown defendants, unless it is clear that discovery would not
5 uncover the identities'.") As Plaintiffs were diligent in seeking the identity of the Doe
6 Defendants, the Court has discretion to permit an extension of time under Rule 4(m) to allow
7 service of the Identified Doe Defendants. *See Efaw*, 473 F.3d at 1040; *Mann*, 324 F.3d at 1090.
8 As such, Plaintiffs shall be permitted to effectuate service on the Identified Doe Defendants.

9 **D. Plaintiffs' Proposed Amended Complaint**

10 Plaintiffs shall file their third amended complaint within two (2) days from the date of this
11 order. The Court notes, however, that in several places Plaintiffs' proposed third amended
12 complaint refers to the Identified Doe Defendants as "Does 1 through 6" instead of by their names.
13 (*See, e.g.*, Doc. 39, pp. 8-22, ¶¶ 30, 49, 50, 52, 54, 55, 55f, prayer for relief no. 4). Plaintiffs shall
14 revise the third amended complaint so that the Identified Doe Defendants are identified by their
15 actual names and not referred to as Does 1 through 6.

16 **IV. CONCLUSION AND ORDER**

17 Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that:

- 18 1. The hearing on Plaintiffs' motion to amend scheduled for January 22, 2014, is
19 VACATED;
- 20 2. Plaintiffs' "Motion for Leave to File a Third Amended Complaint" is GRANTED;
- 21 3. Within two (2) days of the date of this order, Plaintiffs shall file a revised third
22 amended complaint that comports with the requirements set forth in this order;
- 23 4. Plaintiffs are directed to procure summonses from the Clerk of the Court for the
24 newly Identified Doe Defendants;
- 25 5. Plaintiffs shall serve the newly Identified Doe Defendants within forty-five (45)
26 days of the issuance of the summonses; and

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6. Defendants' responsive pleadings shall be due within the time period set forth under Federal Rule of Civil Procedure Rule 12.

IT IS SO ORDERED.

Dated: January 21, 2014

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE