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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEREK E. TURNER,

No. C 09-00683 MHP

Plaintiff(s),

MEMORANDUM & ORDER

v.

**Re: Plaintiff's Motion for Leave to Amend
Complaint**KRIS LAFOND, MEG PLANKA, and Does 1
through 20,

Defendant(s).

On February 17, 2009, plaintiff Derek Turner (“Turner”) filed this action against defendants, Officer Kris Lafond (“Lafond”) and Sergeant Margaret Planka (“Planka”), both of the California Highway Patrol (“CHP”). Turner alleges that while he was on the Golden Gate Bridge, defendants forcibly seized a sign he was holding which expressed disapproval of Chinese human rights violations in Darfur. Turner claims that defendants’ conduct violated his rights under the United States Constitution, the California Constitution, and various California statutory and common law provisions. In the instant motion, Turner seeks to amend his complaint to add Mari Toban Blome (“Blome”) as a plaintiff, to add J.A. Farrow, the Commissioner of the California Highway Patrol (“the Commissioner”), and the Golden Gate Bridge Highway and Transportation District (“the Bridge District”) as defendants and to add a new claim for injunctive relief. Having considered the arguments and submissions of the parties, the court enters the following memorandum and order.

1 BACKGROUND

2 Turner alleges that on April 9, 2008, he was standing on a public sidewalk near the Golden
3 Gate Bridge. Docket No. 20 (Nazer Dec.), Exh. A (First Am. Compl.) ¶ 41. He was attempting to
4 express a political message as the Olympic Torch Relay passed through San Francisco. Id. ¶ 42. He
5 was wearing a T-shirt with the message “SAVE DARFUR” and carrying a sign stating “China:
6 Extinguish the flames of genocide in Darfur.” Id. ¶¶ 41-42. After Turner had been standing on the
7 sidewalk for a short period of time, a group of at least five CHP officers, including defendants
8 Lafond and Planka approached him and told him that he needed a permit to hold a sign. Id. ¶¶ 44-
9 46. Turner replied that he did not need a permit. Id. ¶ 46. Lafond, Planka and other officers then
10 surrounded Turner and seized his sign by force, injuring Turner’s wrist in the process. Id. ¶¶ 46-47.

11 The officers were enforcing the policies and rules of the Bridge District. At the time, the
12 Bridge District had an ordinance providing that “No person shall conduct or participate in
13 assemblies, or demonstrations, or distribute written pamphlets or other materials without a permit . .
14 . [on] the sidewalks leading to the Gift Shop [or] the pedestrian or bicycle walkways on the Bridge.”
15 Id. ¶ 17. It was the unwritten but consistent practice of the Bridge District and the California
16 Highway Patrol to issue only one permit per calendar day for expressive conduct on or around the
17 Golden Gate Bridge. Id. ¶ 21. It was also the practice of the Bridge District and the CHP to prohibit
18 the carrying of any signs with handles on or around the Golden Gate Bridge. Id.

19 On February 27, 2009 this ordinance was amended. Id. ¶ 22. The amended ordinance
20 continued to require a permit for expressive activity on or near the Golden Gate Bridge and officially
21 codified the practice of issuing only one permit per calendar day. Id. ¶ 23. The new amendments
22 also prohibited the use of 50 or more signs in a permitted protest, and instituted a six-month ban on
23 expressive activity for persons violating the ordinance. Id. ¶¶ 27-28.

24 Blome was not named as a plaintiff in the original complaint. See Docket No. 1 (Complaint).
25 According to the proposed first amended complaint, Blome is a resident of California and regularly
26 visits the Golden Gate Bridge to express anti-war messages. First Am. Compl. ¶ 30. She regularly
27 applies to the Bridge District for permits to engage in expressive conduct. Id. ¶ 32.

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1 On September 21, 2006, Blome joined an expressive march of fewer than 50 persons on the
2 Bridge sidewalk. Id. ¶ 36. During this march, a Bridge District officer forcibly removed a small
3 patch of cloth, labeled with a single letter, that was pinned to Blome’s clothing. Id. The CHP
4 officer confiscated this patch of cloth as a “sign.” Id. The officer was enforcing the pre-amendment
5 version of the Bridge District’s expressive activity ordinance.

6 During an expressive gathering at the Bridge in early 2008, a law enforcement officer forced
7 Blome to remove a small handle from a sign she was carrying. Id. ¶ 37. Blome had to snap the
8 handle from the sign, which made the sign much more difficult to carry. Id.

9 On June 7, 2009, Blome was walking along the Golden Gate Bridge sidewalk with one other
10 person while holding a hand made peace sign constructed from an ordinary hula hoop with small
11 flowers around its edge. Id. ¶ 38. A CHP officer passed by in a patrol car and ordered Blome
12 through a loudspeaker to put down the sign. Id. Soon afterwards, the officer pulled over his vehicle
13 and confiscated the sign. Id. Shortly after this incident, Blome applied to the Bridge District for a
14 permit for expressive activity to be conducted on June 12, 2009. Id. ¶ 39. The Bridge District
15 denied the permit and informed Blome that she was denied because she had come to the Bridge
16 without a permit on June 7, 2009. Id.

17
18 LEGAL STANDARD

19 A party may amend a pleading once as a matter of course and thereafter only by consent of
20 the opposing party or by leave of the court. Fed. R. Civ. P. 15(a)(2). Leave should be freely given
21 when justice so requires. Fed. R. Civ. P. 15(a)(2). In determining whether to grant leave to amend,
22 the court considers five factors: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party;
23 (4) futility of amendment; and (5) whether the plaintiff has previously amended his complaint.
24 Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). Not all of the factors merit equal
25 consideration; prejudice is the “touchstone of the inquiry under rule 15(a)” and “carries the greatest
26 weight.” Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003); Owens v.
27 Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001). The Ninth Circuit has construed
28 Rule 15(a) broadly, requiring that leave to amend be granted with “extraordinary liberality.”

1 Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990); Poling v. Morgan,
2 829 F.2d 882, 886 (9th Cir. 1987).

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4 DISCUSSION

5 Plaintiff moves to amend the original complaint to (1) add Blome as a plaintiff, (2) add
6 California Highway Patrol Commissioner J.A. Farrow (“the Commissioner”) in his official capacity
7 and the Bridge District as defendants and (3) add a new claim for injunctive relief against the
8 Commissioner. See First Am. Compl. Defendants oppose plaintiff’s motion for leave to amend on
9 grounds that (1) the joinder of Blome will unduly prejudice the defendants (2) the addition of the
10 Commissioner as a defendant is futile because plaintiff’s claims for relief against the Commissioner
11 are barred by the Eleventh Amendment and (3) Turner does not have standing for the newly added
12 eleventh claim requesting injunctive relief.

13 I. Addition of Blome as Plaintiff

14 Defendants first oppose plaintiff’s motion to amend on the ground that Turner and Blome’s
15 allegations are so disparate that adding Blome as a plaintiff would unduly prejudice defendants.
16 Essentially, defendants argue that joinder of Blome is improper under Federal Rule of Civil
17 Procedure 20(a).

18 Rule 20(a) governs the permissive joinder of parties. It states that persons may be joined in
19 one action as plaintiffs if (1) a right to relief is asserted by each plaintiff relating to or arising out of
20 the same transaction, occurrence or series of transactions or occurrences and (2) some question of
21 law or fact common to the parties will arise in the action. Fed. R. Civ. P. 20(a). Generally, this rule
22 “is to be construed liberally in order to promote trial convenience and to expedite the final
23 determination of disputes, thereby preventing multiple lawsuits.” League to Save Lake Tahoe v.
24 Tahoe Reg’l Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977). “Under the Rules, the impulse is
25 toward entertaining the broadest possible scope of action consistent with fairness to the parties;
26 joinder of claims, parties and remedies is strongly encouraged.” United Mine Workers of Am. v.
27 Gibbs, 383 U.S. 715, 724 (1966).

1 Claims arise out of the “same transaction or occurrence” if they share similar factual
2 backgrounds. Coughlin v. Rogers, 130 F.3d 1348, 1350 (9th Cir. 1997). Claims possess sufficient
3 factual similarity if they “arise out of a systematic pattern of events.” Bautista v. Los Angeles
4 County, 216 F.3d 837, 842-43 (9th Cir. 2000) (quoting Coughlin, 130 F.3d at 1350). Typically this
5 requirement will be met where plaintiffs collectively challenge a widely-held practice or policy. See
6 U.S. ex rel. Anthony v. Burke Eng’g, 356 F. Supp. 2d 1119, 1120 (C.D. Cal. 2005) (“Allegations of
7 a system of decision making, or widely-held policy of discrimination, constitute a single transaction
8 for Rule 20(a) purposes”) (quoting Hawkins v. Groot Indus., Inc., 210 F.R.D. 226, 230 (N.D. Ill.
9 2002)); see also Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333-34 (8th Cir. 1974) (holding that
10 a “company-wide policy purportedly designed to discriminate against blacks in employment” arises
11 out of the same series of transactions or occurrences).

12 The second prong of the test requires that claims share a common question of law or fact. Id.
13 The fact that plaintiffs' claims arise under the same general law does not necessarily satisfy this
14 prong. Id. at 1351.

15 Although Turner and Blome’s claims arise out of disparate factual circumstances, the
16 primary thrust of their allegations is identical: the Bridge District’s policies requiring a permit before
17 an individual may express themselves and granting only one such permit per day violate the First
18 Amendment of the United States Constitution. See First Am. Compl. ¶ 57-58. Accordingly, their
19 claims arise out of the same transaction or occurrence—the same “widely-held” policy—and share a
20 common question of law—does the Bridge District’s ordinance violate the First Amendment.
21 Therefore, joinder of Blome is proper under Rule 20(a) and leave to amend the complaint in this
22 regard is granted.

23 II. Addition of the Commissioner as Defendant

24 Defendants oppose plaintiffs’ motion to amend the complaint to add the Commissioner as a
25 defendant on grounds that claims against the Commissioner in his official capacity are barred by the
26 Eleventh Amendment.

27 Futility of amendment, by itself, can justify the denial of a motion to amend. Bonin v.
28 Calderon, 59 F.3d 815, 845 (9th Cir. 1995). Generally, a proposed amendment is futile only if no set

1 of facts can be proven under the amendment that would constitute a valid and sufficient claim or
2 defense. Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Therefore, the court must
3 determine if the amended complaint would be subject to dismissal for failure to state a claim. See
4 Fed. R. Civ. P. 12(b)(6); Miller, 845 F.2d at 214.

5 Generally, the Eleventh Amendment prohibits an individual from suing a state or a state
6 official acting in his or her official capacity for damages. U.S. Const., amend XI; see Pennhurst
7 State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984); Will v. Mich. Dep’t of State Police, 491
8 U.S. 58, 71 (1989). The Eleventh Amendment does not, however, “bar a federal court action
9 seeking prospective injunctive relief under federal law, even if the action [is] brought against the
10 state or its officials acting in their official capacity.” Pena v. Gardner, 976 F.2d 469, 473 n.5 (9th
11 Cir. 1992). This exception to the Eleventh Amendment for injunctive relief is limited to claims
12 asserting federal rights; the Eleventh Amendment provides an absolute bar to suits against the state
13 brought under state law, whether they seek damages or injunctive relief. Pennhurst, 465 U.S. at 106.

14 The Commissioner is named as a defendant in only four of the eleven counts in the
15 complaint: Count I for violation of plaintiffs’ free speech rights under the First and Fourteenth
16 Amendments of the United States Constitution; Count II for violation of plaintiffs rights to freedom
17 of speech under Article 1, section 2 of the California Constitution; Count X for declaratory relief;
18 and Count XI for injunctive relief. Plaintiffs concede that Count II, which asserts only claims under
19 California law, is precluded by the Eleventh Amendment. Docket No. 23 (Reply) at 5. Plaintiffs
20 seek leave of the court to file a Corrected First Amended Complaint to remedy this oversight. The
21 court grants this request.

22 With that concession in hand, the addition of the Commissioner as a defendant presents no
23 Eleventh Amendment problems. Even though he is being sued in his official capacity, plaintiffs
24 seek only prospective relief based on asserted federal constitutional rights in the first, tenth and
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1 eleventh causes of action. Accordingly, plaintiffs' motion is also granted to add the Commissioner
2 as a party. III. Addition of New Claim

3 Defendants contend that Turner has not sufficiently shown that he has standing to bring the
4 newly added eleventh claim for injunctive relief. Plaintiffs concede that Turner was inadvertently
5 added as a plaintiff in the eleventh claim and seek leave to remove him from that cause of action in a
6 Corrected First Amended Complaint. Reply at 6. The court also grants this request. With Blome as
7 the only plaintiff seeking injunctive relief, the court does not see (and defendants do not present) any
8 additional reasons why the amendment to add the eleventh claim should be denied.

9
10 CONCLUSION

11 Plaintiffs' motion for leave to amend is GRANTED to permit the addition of Mari Toban
12 Blome as plaintiff, the addition of the Commissioner and the Bridge District as defendants, and the
13 addition of the eleventh claim for injunctive relief by plaintiff Blome. The court also GRANTS the
14 plaintiffs' request to file a Corrected First Amended Complaint to remove the Commissioner as a
15 defendant in the second cause of action and to clarify that the eleventh claim for relief is brought
16 solely by Blome.

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18 IT IS SO ORDERED.

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21 Dated: 10/19/09



MARILYN HALL PATEL
United States District Court Judge
Northern District of California