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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MANUEL DE JESUS ORTEGA MELENDRES, JESSICA QUITUGUA RODRIGUEZ, DAVID RODRIGUEZ, VELIA MERAZ, MANUEL NIETO, JR., on behalf of themselves and all others similarly situated, and SOMOS AMERICA, Plaintiffs, vs. JOSEPH M. ARPAIO, in his official capacity as Sheriff of Maricopa County, MARICOPA SHERIFF'S OFFICE, and MARICOPA COUNTY, ARIZONA, Defendants.	No. CV 07-2513-PHX-MHM **ORDER**

Currently before this Court is Plaintiff Manuel De Jesus Ortega Melendres, et al., ("Plaintiff") Motion for Leave to Amend Complaint. (Dkt.#17). Plaintiff seeks leave of the Court under Rule 15(a) of the Federal Rules of Civil Procedure to file an amended complaint "to eliminate[] all demands for monetary damages, reduce[] the number of claims for relief, and narrow[] the scope of the definition of the proposed class." (Plaintiff's Motion, p.2). Defendants respond by stating that granting Plaintiff's motion would be "futile, as a matter of law." (Defendants' Motion, p. 2). After reviewing all of the pleadings in this case, the Court finds oral argument unnecessary and issues the following Order.

I. Background

This case arose out of an encounter between Manuel De Jesus Ortega Melendres and deputies from the Maricopa County Sheriff's Office in Cave Creek, Arizona on or about September 26, 2007. (Plaintiff's Complaint, p. 3)

On December 12, 2007, Plaintiff filed a seven-count complaint against Maricopa County, Sheriff Joseph Arpaio, and fictitiously named Sheriff's deputies. (Dkt.#1). Plaintiff's complaint alleged violations of the Equal Protection Clause, the Due Process Clause and the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution, as well as violations of the Fourth Amendment, Title VI of the Civil Rights Act of 1964, and state law claims based on concepts of Due Process and Privacy under the Arizona Constitution. (Dkt.#1). Plaintiff pled relief in the form of a declaratory judgment, a preliminary and permanent injunction, an award of compensatory, consequential and punitive damages, and attorney's fees. (Dkt.#1).

On January 3, 2008, Defendants' filed a motion to dismiss under Fed. R. Civ. P.12(b)(6), and the following day answered. (Dkt.#12,13). Plaintiff, after filing a response in opposition to Defendants' motion to dismiss, substituted its counsel of record. (Dkt.#16). On July 16, 2008, Plaintiff's new counsel moved this Court for permission to amend its complaint under Fed. R. Civ. P.15(a). (Dkt.# 17).

The proposed First Amended Complaint seeks to join as Plaintiffs, Jessica Quitugua Rodriguez, David Rodriguez, Velia Meraz, and Manuel Nieto, Jr., as well as the organization Somos America. The Amended Complaint also seeks to add as a defendant, the Maricopa Sheriff's Department (MSCO). Additionally, the First Amended Complaint eliminates all claims for monetary damages, omits three claims for relief, and changes the class definition from "all individuals of Hispanic descent who reside, are employed, attend school and travel within the borders of Maricopa County, Arizona," (Plaintiff's Complaint, p. 11), to "all Latino persons who, since January 2007, have been or will be in the future, stopped, detained, questioned or searched by MCSO agents while driving or sitting in a vehicle on a

public roadway or parking area in Maricopa County, Arizona." (Plaintiff's Proposed First Amended Complaint, p. 24)

II. Analysis

Once a responsive pleading has been filed, the Federal Rules of Civil Procedure provide that parties may amend a pleading,"only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Court's apply Rule 15(a) with "extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003). Meaning, there is a strong presumption in favor of granting a party leave to amend. See id. at 1052.

In determining the propriety of a motion for leave to amend, courts consider five factors. Manzarek v. St. Paul Fire & Ins. Co., 519 F.3d 1025, 1034 (9th Cir. 2008). These factors include (1) bad faith on the part of the moving party; (2) undue delay; (3) prejudice to the non-moving party; (4) whether the moving party has previously amended his complaint; and (5) the apparent futility of any proposed amendment. DCD Programs, Ltd. V. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). The Ninth Circuit has instructed that this "determination should generally be performed with all inferences in favor of granting the motion." Griggs v. Pace Amer. Group, Inc., 170 F.3d 877, 880 (9th Cir. 1999).

In the instant case, Defendants have not contested factors one through four, and the only issue that remains in dispute is whether Plaintiff's First Amended Complaint is futile, thereby justifying the Court's denial of its motion to amend.

"Futility can, by itself, justify the denial of a motion for leave to amend." Gentala v. City of Tucson, 213 F.3d 1055, 1061 (9th Cir. 2000) However, "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleading that would constitute a valid and sufficient claim or defense." Sweaney v. Ada County, 119 F.3d 1385, 1393 (9th Cir. 1997) (quoting Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)). The concept of futility is most frequently at issue when the original complaint, at its core, is so factually or legally flawed that it "could not be saved by any [proposed]

amendment," and where granting leave to amend the complaint would amount to nothing more than an exercise in futility by the district court. Chang v. Chen, 80 F.3d 1293, 2196 (9th Cir. 1996).

In the instant case, Defendants have put forward several arguments alleging the futility of Plaintiff's proposed First Amended Complaint. Defendants first allege that the parties added as plaintiffs in the proposed First Amended Complaint have legal defects that preclude proper amendment. For instance, Defendants argue that the party Somos America lacks Article III standing, either individually or through the concept of third-party/organizational standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Warth v. Seldin, 422 U.S. 490 (1975). Defendants further contend that the 42 U.S.C. § 1983 claims made by proposed parties David Rodriguez, Jessica Rodriguez, Velia Meraz, and Manuel Nieto, Jr. fail as a matter of law under the two-part test for qualifed immunity. Rodis v. City & County of San Francisco, 499 F.3d 1094, 1097 (9th Cir. 2007) (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).

Defendants also state that the First Amended Complaint attempts to improperly add the MCSO, which is non-jural entity, having no legal identity separate and apart from that of Maricopa County. (Defendant's Response in Opposition to Motion for Leave to Amend, p. 8)

Lastly, Defendant's re-iterate an argument made in their Motion to Dismiss. Defendant's allege that municipal liability under § 1983, see Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978), cannot attach to Maricopa County because Sheriff Arpaio is not an official policy maker for the County and that in any event the County did not have a policy to deprive Plaintiffs of a constitutional right. (Defendants' Motion to Dismiss, p. 2-4; Defendants' Response in Opposition to Motion for Leave to Amend, p. 8)

Defendants have over-stated the scope of inquiry engaged in by the Court when evaluating the "futility" of a motion requesting leave to amend. This Court is not inclined to use Rule

15(a) as a vehicle for hearing arguments that are clearly more properly suited to a 12(b)(1), 12(b)(6) or Summary Judgment Motion.

On this point, the case of Sweaney v. Ada County, Idaho, 119 F.3d 1385 (9th Cir. 1997), is instructive. Sweaney involved § 1983 claims brought by the parent of a child against a county, a sheriff, and various sheriff's deputies, after the parent was arrested for striking her child with a belt on school grounds. Sweaney, 119 F.3d at 1387-88. The suit alleged that defendants had deprived the parent of a substantive due process right to impose corporal punishment on her child. Id. After defendants moved for summary judgment on the basis of qualified immunity, the child's parent moved the court for leave to amend her complaint. Id. at 1388. The district court denied the motion for leave to amend, but granted the defendant's motion for summary judgment. Id. On appeal, the Ninth Circuit affirmed the district court's determination that the defendant's were entitled to qualified immunity on the ground that even if the Constitution protected a parent's right to strike their child on school grounds such a right was in no sense "clearly established" under Harlow v. Fitzgerald, 457 U.S. 800 (1982). Id. at 1390. The court went on to uphold the district court's denial of plaintiff's motion of leave to amend.

The proposed amendments in Sweaney attempted to add a claim alleging that the county had in place a municipal policy of failing to train its deputies to adequately investigate matters involving the exercise of a constitutional right, and facts which indicated that sheriff's deputies were purposefully targeting the plaintiff for criminal charges. Id. at 1393. With respect to these changes, the Ninth Circuit held that claims contained in the *original complaint* were so legally flawed that any attempt to amend them was essentially futile, despite the liberal standard for amendment embodied by the Federal Rules of Civil Procedure. See id. The court noted that because the defendants in Sweaney did not violate clearly established federal law, it was useless for the plaintiff to propose to amend her complaint to add allegations of a municipal wrongdoing. Id. Whatever the county policy, plaintiff's rights were not violated. Id. As to the subjective misgivings of the deputies, the

court reasoned that the defendants' subjective intent was not relevant to the qualified immunity test. Id.

The instant case is distinguishable from a case like Sweaney. Here, Plaintiffs have not merely sought to add additional claims or legally insignificant facts to a complaint filed by a single plaintiff. Instead, multiple parties have been added as plaintiffs, claims for monetary damages have been eliminated, and the nature of the proposed class has been altered. Furthermore, unlike Sweaney, Defendants' Response in Opposition does not focus on the underlying merit of the original complaint, nor why any of the initial claims brought by Melendres were futile and should not proceed. Even if this Court were to deny this motion on the grounds of qualified immunity–with respect to claims made by J. Rodriguez, D. Rodriguez, Meraz and Nieto–this Court would still need to conduct a qualified immunity analysis for claims made by Melendres. In fact, the only argument put forward by the Defense that would have any effect on the original claims made by Melendres is that of municipal liability under § 1983 and Monell.

In order to avoid piecemeal adjudication, this Court would rather address these and other substantive issues when they are squarely presented to the Court in the form of a dispositive motion addressed to a single amended complaint, where the standard of review on appeal would be de novo rather than an abuse of discretion. See Plumeau v. Sch. Dist. No. 40, County of Yamhill, 130 F.3d 432, 439 (9th Cir. 1997) ("Leave to amend is generally within discretion of district court"); Ove v. Gwinn, 264 F.3d 817(9th Cir. 2001) (stating that a motion to dismiss is reviewed de novo).

The parties should take note that after amendment the original pleading is treated as nonexistent. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus, the original 12(b)(6) motion filed by Defendants will be treated as moot and there will be another opportunity to file Rule 12 motions and a responsive pleading.

While it is generally disfavored for a plaintiff to seek leave of the court to amend after dispositive motions have been fully briefed–when they might feel the impending doom of a

motion to dismiss–Plaintiffs have sought to amend only after counsel of record had been substituted, and no allegations of bad faith or undue delay have been made by the non-moving party.

Accordingly,

IT IS HEREBY ORDERED granting Plaintiff's Motion for Leave to Amend Complaint. (Dkt.#17);

IT IS FURTHER ORDERED denying Defendant's 12 (b)(6) Motion to Dismiss as moot. (Dkt.#12).

IT IS FURTHER ORDERED vacating the Motion Hearing set on September 24, 2008 at 3:30 p.m.

DATED this 5th day of September, 2008.

Mary H. Murguia
United States District Judge