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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FIVE BOROUGH BICYCLE CLUB, et al.

Plaintiffs,

-against-

07 CIV. 2448 (LAK)

THE CITY OF NEW YORK, et al.,

Defendants.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR  
LEAVE TO FILE A SECOND AMENDED COMPLAINT

Plaintiffs Five Borough Bicycle Club ("5BBC"), Sharon Blythe, Josh Gosciak, Madeline Nelson, Elizabeth Shura and Luke Son (The "Individual Plaintiffs," and together with 5BBC, "Plaintiffs") respectfully submit this reply memorandum of law in further support of their motion, pursuant to Federal Rule of Civil Procedure 16(b), for leave to file a Second Amended Complaint.

### Summary

In their initial moving papers, Plaintiffs have shown good cause to make two limited and discrete sets of amendments: (1) to demonstrate 5BBC's associational standing to assert claims for injunctive relief previously asserted by the Individual Plaintiffs; and (2) to allow the Individual Plaintiffs to assert claims for damages under 42 U.S.C. § 1983, based on the same events that underlie their previously-asserted claims for relief.

The conduct of Defendants and the results of recent discovery taken since the Amended Complaint was filed on November 16, 2007 warrant the proposed amendments. Instead of enforcing the Parade Rules against Plaintiffs, Defendants have expanded their campaign of bad-faith and selective enforcement of the traffic laws against them. Defendants now target Plaintiffs not only as participants in and organizers of group bicycle rides, but also to the extent they (or their members) bicycle in small groups or even as individuals near Union Square on the last Friday evening of the month. The bad-faith character of this effort is apparent from the testimony of NYPD Commissioner Raymond Kelly and other recently-deposed NYPD witnesses, which demonstrate a "zero-tolerance" law enforcement campaign that prevents bicyclists from proceeding in groups of virtually any size:

- The campaign centers on the surveillance, pursuit, summoning and arrest of groups as small as five bicyclists that are perceived to be associated with Critical Mass, while ignoring the violations of other bicyclists. Kelly admits that traffic law enforcement targeting groups *per se* is improper. Reply Declaration of Shanya Dingle, Ex. A, at 118:2-120:14; Ex. B, at 3; Ex. C, at 239:3-249:24; Ex. D, at 281:16-285:20, 311:6-318:24.

- NYPD fields scores of officers against Critical Mass each month — even though participation has dwindled and often the ride has been cancelled altogether — and follows groups as small as five (5) bicyclists for the avowed purpose of “assur[ing] that the ‘Critical Mass’ demonstrators [do] not assemble at an alternate location.” Ex. E; *see also* Ex. A, at 103:6-105:23.
- NYPD mounts a “profiling” operation against individual bicyclists headed toward Union Square on the last Friday evening of the month, in which bicyclists and others not headed toward Critical Mass are ignored, that even a ranking officer assigned to supervise the operation admitted was questionable. Ex. F, at 275:21-280:5, 284:10-290:24, 303:3-305:16.
- NYPD falsely attributes the summonses issued to individual bicyclists during its profiling operation to “Critical Mass demonstrat[ors],” apparently to impute a false record of lawlessness to Critical Mass. Ex. F, at 314:2-319:19; Ex. G, at 346:6-352:1.
- NYPD bolsters this false record of Critical Mass lawlessness by issuing summonses for conduct that is not illegal in New York City — even though the NYPD officers responsible for the summoning have admitted that it is bogus repeatedly since December 2004. Ex. H, at 315:6-318:3; Ex. D, at 277:20-281:6; Ex. I; Ex. A, at 120:20-121:18, 123:6-125:14.
- This zero-tolerance campaign apparently continues through the present, even though, as Kelly admits, Critical Mass bicyclists have no greater propensity to violate the law than any other cyclists, and Kelly can cite no other groups subject to such a campaign Ex. A, at 96:17-24, 47:7-19.

Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion to Amend (“Opp. Br.”) completely overlooks the recent testimony that justifies the proposed amendments.<sup>1</sup> Defendants instead make overblown claims of prejudice and the need for additional discovery. Defendants fail to demonstrate why prejudice or additional discovery need occur when, with the exception of facts regarding Defendants’ recent and

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<sup>1</sup> While Defendants erroneously cast their arguments within the framework of Rule 15(a), nevertheless, Plaintiffs argue that the instant motion to amend meets both the Rule 16(b) standard and that of Rule 15(a).

ongoing conduct, virtually all of the facts underlying the associational and damages claims that Plaintiffs propose adding have been in issue from the inception of this litigation and have been the subject of extensive discovery. Because any potential prejudice caused by the proposed amendments could be easily cured, the amendments should be allowed.

### Argument

#### **I. Good Cause has been Shown for the Proposed Amendments Concerning 5BBC**

There is good cause to add 5BBC as a claimant to the claims already asserted by the Individual Plaintiffs. 5BBC already has associational standing under the facts set forth in the Amended Complaint, and Defendants have clearly been put on notice of the facts in support of 5BBC's assertion of such claims by the Amended Complaint. No additional discovery whatsoever is needed concerning these claims, as Defendants have already inquired at length about facts regarding the impact of Defendants' policies on 5BBC members, as described in Plaintiffs' moving papers. Pls.' Br., at 5-7.

5BBC seeks to add these claims due to NYPD's shift in strategy, from one focused on groups of fifty or more, to one focused on selective zero-tolerance law enforcement and consequent denial of the right to the road against small groups and individual bicyclists, including 5BBC members. Following Defendants' production of summonses, in November 2008, Plaintiffs' expert Andrew Beveridge concluded that non-commercial bicyclists riding in the 13th Precinct on evenings of Critical Mass rides held between February 1, 2006 and February 1, 2008 were *337 times more likely to be*

*summonsed* than other, similarly situated bicyclists. Ex. J, at 1. This disparity reflects NYPD's policy of summoning individuals or small groups of bicyclists perceived as potential Critical Mass participants, while ignoring traffic violations by others. In fact, Winski admitted to the issuance of summonses under just these circumstances by officers working under his immediate supervision.<sup>2</sup>

Defendants should not be permitted to moot 5BBC's claims for relief through a shift in tactics when 5BBC clearly has associational standing to challenge the new tactics. The change in Defendants' conduct forms an appropriate basis for making the amendments now. 5BBC members, like the Individual Plaintiffs, have been and continue to be subject to this conduct and are entitled to relief under the same claims.

Defendants' assertion that they will have to depose *all* 5BBC members who were arrested or summonsed at Critical Mass is entirely without merit or support in the applicable case law. By definition, 5BBC's assertion of associational standing on behalf of its members for injunctive relief renders the participation of individual members in the lawsuit unnecessary. *Nat'l Assoc. of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 914 (2d Cir. 1988) (“[T]he plaintiffs have requested injunctive relief [and] there is no requirement of participation by individual members of [the plaintiff association] in this lawsuit.”) (quotations omitted); *Rent Stabilization Ass'n v. Dinkins*, 805 F. Supp. 159,

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<sup>2</sup> Winski was present at one of the “profiling operations” described above. Ex. F, at 260:11-261:5. He could not explain why apparently unoccupied officers did not issue summonses for violations by motorists in the bike lane or bicyclists not heading towards the Critical Mass ride. *Id.* at 275:21-280:5, 284:10-290:24, 298:3-300:5. Winski conceded that bicyclists apparently summonsed for riding outside of the bike lane had been justified in doing so because a car obstructed the lane. *Id.* at 303:3-305:16.

164 (S.D.N.Y. 1992) (“[W]here injunctive relief is sought, individualized proof is ordinarily unnecessary.”). Accordingly, no further depositions of 5BBC members are needed.

**II. There is Good Cause to Allow the Individual Plaintiffs’ Proposed Amendments**

*A. Recent Discovery of Defendants’ Bad Faith is a Basis for Amendment of the Complaint*

Plaintiffs’ motion to amend the complaint follows from recent discovery in which high-ranking NYPD officers have revealed a policy and practice of harassing and selectively enforcing the law against individuals and small groups of bicyclists suspected of being potential Critical Mass participants, for the express purpose of preventing them from assembling as a group. These revelations are good cause to allow Plaintiffs to pursue damages in this action with the counsel of their choice, rather than forcing them to wait, likely for years, to pursue damages in duplicate litigation.

Inspector DeQuatro testified on January 9, 2009 that during the Critical Mass Rides for which he was Incident Commander, beginning in 2007, NYPD personnel were instructed to apply a “zero tolerance” traffic law enforcement policy. Ex. C, at 165:7-168:22. Pursuant to this policy, DeQuatro asked a lieutenant to “pick up” a “handful” of bicyclists, only relenting when the lieutenant advised him that “they don’t look like Critical Mass.” *Id.*, at 239:3-249:24. Commissioner Kelly at first questioned the standing zero-tolerance policy, but ultimately maintained that DeQuatro would have authority to implement such a policy. Ex. A, at 38:19-47:19. Kelly did admit, however,

that a policy of issuing traffic violations to bicyclists based on their being part of a group of five or more — a Critical Mass law enforcement policy that has been memorialized in writing — was improper. Ex. A, at 118:3-120:14; Ex. B, at 3. The Individual Plaintiffs were subject to this policy, resulting in their arrests and summons. Pls.' Br., at 7-10; Ex. B, at 3. These actions were taken although, as Commissioner Kelly acknowledged, Critical Mass bicyclists are not as a general matter less law-abiding than other cyclists. Ex. A, at 96:17-24. Collectively, these policies have the purpose and effect of depriving bicyclists of their rights based on their potential association with Critical Mass — not for their actual conduct, but for their perceived affiliation with a group.

In addition, the NYPD has continued, as recently as August 2008, to issue summonses to Critical Mass participants pursuant to New York Vehicle and Traffic Law Section 1234, which does not apply in New York City. Officer Kenneth Wagner testified that summonses had been improperly issued for months under this Section. Ex. D, at 277:20-280:24. Captain Edward Winski stated that he instructed officers under his supervision not to apply this Section, yet numerous such summonses were issued to bicyclists at events he was assigned to supervise. Ex. F, at 160:19-164:15, Ex. I, at 1-11. That is likely because NYPD continues to the present day to provide officers policing Critical Mass with a list of bicycling-related offenses, on which VTL § 1234 appears as an applicable offense. Ex. M; Ex. F, at 144:23-147:12. While some versions of this document distributed by NYPD have VTL § 1234 crossed out, others do not. Ex. N, at 89:16-94:2; Ex. O. Commissioner Kelly testified that corrective measures were needed to remedy this situation. Ex. A, at 124:17-125:8. No such measures have been taken,

although Defendants have been notified about this issue repeatedly since 2004. Ex. K, at 86; Ex. L.

In sum, the Defendants' intentional campaign to target for selective law enforcement individuals and small groups of bicyclists based on the mere fact that they are proceeding in the Union Square vicinity on the last Friday evening of the month, has become clear only following Defendants' shift in tactics, the passage of time, and discovery taken since the Amended Complaint was filed. It would be a waste of judicial resources to require identical document discovery, depositions and trial testimony in two separate lawsuits from these Plaintiffs regarding the same set of facts. Furthermore, the Individual Plaintiffs should not be subject to years of additional delay in having their damages claims resolved after a decision has been reached on their claims for injunctive relief.

B. *Plaintiffs' Proposed Amendments are Based Upon the Same Facts as set Forth in the Amended Complaint and Therefore "Relate Back"*

Defendants claim that the Individual Plaintiffs' proposed amendments would be futile because they are untimely, but those amendments relate back to the date of the original pleading. Under Federal Rule of Civil Procedure Rule 15(c)(1)(B), an amendment "relates back" where it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Where, as here, the plaintiffs seek to add only related claims arising out of the same events, rather than adding parties, courts have found adequate notice and "relation back" of claims. *See, e.g., Buran v. Coupal*, 661 N.E.2d 978, 981 (N.Y. 1995) (Kaye,

C.J.) (“[A]llowing the relation back of amendments adding new defendants implicates more seriously . . . policy concerns than simply the relation back of new causes of action since, in the latter situation, the defendant is already before the court.”).

In this instance, the proposed damages claims plainly arise out of the exact same conduct and occurrences set forth in the previous complaint. The Amended Complaint clearly articulates that the Individual Plaintiffs were arrested, summonsed and chilled by Defendants in relation to their participation in Critical Mass rides. Declaration of Shanya Dingle (Feb. 6, 2009), Ex. 1 ¶¶ 70, 119, 120, 121, 124 and 132. In fact, these descriptions provided sufficient notice that Defendants deposed the Individual Plaintiffs, at length, on these subjects.<sup>3</sup> Pls.’ Br., at 7-10; Exs. 9, 14, 15, 16 & 17.

Defendants attempt to create a distinction where there is none. The claims proposed by Plaintiffs are unquestionably connected directly to the identical issues and events set forth in the Amended Complaint. No additional facts must be added to the complaint in order for Plaintiffs to assert the proposed Section 1983 causes of action. Accordingly, the proposed amendments “relate back” and any assertion that adding such claims would be futile must fail.

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<sup>3</sup> Defendants’ assertion that they lacked notice of the relevant events because the Amended Complaint omitted information such as the names of the arresting officers has no bearing on the instant motion. Plaintiffs do not assert charges against the individual officers and do not seek to add new defendants. Defendants’ gripe that “the original complaint did not give defendants notice that plaintiffs were allegedly falsely arrested,” is belied by Paragraph 119 of the Amended Complaint, which states that “[a]t the time of their arrests and/or receipt of these summonses, these Plaintiffs were not violating any law.”

C. *Defendants Will not be Prejudiced by the Proposed Amendments*

Finally, given the detailed explications of their arrests and summoning by Defendants that the Individual Plaintiffs provided in their deposition testimony (Pls.' Br., at 7-10; Exs. 9, 14, 15, 16 & 17), there is no basis for Defendants' contention that they must re-depose the Individual Plaintiffs regarding "the alleged impropriety of the arrests or summonses." Opp. Br., at 6. Defendants exhaustively deposed the Individual Plaintiffs regarding the basis of their proposed damages claims. Pls.' Br., at 7-10 & Exs. 9, 14, 15, 16 & 17. If Defendants believe they need to rehash this testimony, Plaintiffs will allow them a reasonable opportunity to do so.

**Conclusion**

For all the foregoing reasons, and for the reasons set forth in its initial moving papers, Plaintiffs respectfully request that this Court grant leave to file a Second Amended Complaint.

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February 23, 2009

Respectfully submitted,

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