

**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.,

ECF Case

Defendants.

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

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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 memorandum of law in support of their motion for leave to file a second amended complaint. Plaintiffs seek amendment for two separate and distinct purposes: (1) supplementing the facts pled in support of certain claims, and clarifying 5BBC’s right to assert certain claims already asserted by the Individual Plaintiffs; and (2) allowing the Individual Plaintiffs to assert a claim for damages.

Relevant History and Overview

On March 27, 2007, Plaintiffs sued the City of New York (“City”), New York City Police Department (“NYPD”) and individual NYPD officers (collectively, “Defendants”) under the Constitution of the United States and New York State Law for infringement upon Plaintiffs’ right to participate in group bicycling activity that is constitutionally protected as speech, expressive conduct, association and travel.

Information concerning Defendants’ conduct has become available to Plaintiffs slowly over time. On November 16, 2007 — a time at which Defendants had produced less than 2,000 documents and only one deposition had been taken — Plaintiffs filed their Amended Complaint. Ex. 1. Based largely on public information, the Amended Complaint alleged that Defendants had amended New York City Administrative Code Section 10-110 (the “Parade Rules”) to impose unconstitutional restrictions on Plaintiffs’ right to bicycle in groups of fifty or more persons, as part of a campaign of selective enforcement and retaliation against monthly “Critical Mass” group bicycle rides. As the months after November 2007 passed, it became clear that

Defendants did not intend to enforce the Parade Rules, but instead had intensified the selective enforcement of the traffic laws against persons associated with Critical Mass rides. Only in recent depositions has the bulk of the evidence regarding Defendants' selective enforcement become available.

As a result of Defendants' conduct since November 2007 and in light of intervening discovery, Plaintiffs' needs for relief from this Court have changed in certain respects. It is now apparent that Defendants do not intend to regulate fifty-person group bicycle rides primarily through enforcement of the Parade Rules. Moreover, to the extent that Defendants have enforced the Parade Rules at all, they have done so selectively to target Manhattan Critical Mass rides, generally ignoring Plaintiffs' other fifty-person group rides. Instead of relying on the Parade Rules, Defendants use selectively-applied, "zero-tolerance" and bad faith traffic law enforcement to deliberately burden Plaintiffs' group bicycling activity.

5BBC seeks to amend the complaint to assert, on behalf of its members, the same claims for injunctive relief that the Individual Plaintiffs have asserted since November 2007. 5BBC's associational standing to assert these claims is apparent from the fact that one of the Individual Plaintiffs, Josh Gosciak ("Gosciak"), is a member of 5BBC. Defendants themselves have elicited extensive testimony from other, non-party 5BBC members establishing that they, like Gosciak, would have standing to assert the claims that 5BBC seeks to assert, and therefore cannot complain of prejudice. Defendants' conduct in selectively enforcing the traffic laws, but not the Parade Rules, against 5BBC members is good cause to grant leave to amend.

In addition, the Individual Plaintiffs seek to add claims for damages based on recently discovered evidence regarding the intentional and bad-faith character of the arrest and

summonsing activity that Defendants continue to direct against them. Plaintiffs did not appreciate the Defendants' culpability and the years of that delay that litigation against Defendants would entail. Through their proposed Second Amended Complaint, Plaintiffs seek to pursue all of their claims against Defendants based on the conduct of which Defendants have long known, but the details of which have only recently been disclosed, with Debevoise & Plimpton LLP as their counsel. The amendment would not prejudice Defendants, who have already taken extensive discovery of all the details regarding Plaintiffs' arrests and summonsing, which form the basis of their claims for damages. The greater efficiency of allowing Plaintiffs to pursue damages along with injunctive relief in a single action constitutes good cause to grant leave to amend to the Individual Plaintiffs.

Argument

I. Plaintiffs' Reasons for Submitting a Second Amended Complaint Satisfy the "Good Cause" Standard of Review Under FRCP 16(b)

A. Standard of Review

A court may grant leave to file an amended complaint "for good cause" pursuant to Federal Rule of Civil Procedure 16(b) where, as here, the time for filing an amended pleading has expired under the applicable scheduling order. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000). While "the primary consideration [in granting leave] is whether the moving party can demonstrate diligence[that] is not, however, the only consideration." *Kassner v. 2nd Avenue Delicatessen*, 496 F.3d 229, 244 (2d Cir. 2007). In exercising its discretion under Rule 16(b), the district court "consider[s] other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants."

Id. In this instance, as set forth below, Plaintiffs have good cause for seeking leave to amend, and Defendants would not be prejudiced by the proposed amendments. Attached to the Declaration of Shanya Dingle in support of the instant motion, as Exhibit 2, is Plaintiffs' proposed Second Amended Complaint, in blackline format, showing changes from Plaintiffs' 2007 Amended Complaint.

B. *The Proposed Amendments*

In both the Amended Complaint and the proposed Second Amended Complaint, Plaintiffs allege that Defendants violated their Constitutional rights and state-law rights, by selectively arresting and ticketing Plaintiffs and others in retaliation for their exercise of constitutional rights in a manner that systematically deprived them of their right to travel in the road under New York State Vehicle & Traffic Law Section 1231 ("VTL 1231"). The Second Amended Complaint makes the following two separate and independent sets of amendments to the existing complaint:

- Inclusion of facts, adduced almost entirely by Defendants, showing that 5BBC members have the same standing as the Individual Plaintiffs to pursue the claims for injunctive relief that the Individual Plaintiffs have long pursued.
- Inclusion of allegations of Defendants' knowledge of the unlawful nature of their conduct against the Individual Plaintiffs, and inclusion of a claim for damages by the Individual Plaintiffs pursuant to 42 U.S.C. § 1983 in light of that conduct.

Plaintiffs find that these two amendments are now necessary, based upon the record that has been created over the course of discovery conducted in recent months, as well as to promote judicial efficiency as this matter approaches trial. Given that the essential facts and the gravamen of this action – Defendants' unlawful conduct directed against Plaintiffs – remain

unchanged in the Second Amended Complaint, Defendants would not be prejudiced by the proposed amendment.

II. Recent Testimony and Conduct of Defendants Post-Filing of the Amended Complaint Support Amendments Reflecting 5BBC's Associational Standing to Bring Claims on Behalf of its Members Identical to Those of Individual Plaintiffs

Under the doctrine of associational standing, an organization “has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

Defendants have long been aware of the basis for 5BBC’s associational standing under *Hunt*. As set forth in the 2007 Amended Complaint, 5BBC promotes group bicycling trips in New York City and such rides constitute expressive associational activity. Ex. 1 ¶¶ 15, 42-43, 49-50. Gosciak, a 5BBC member, has been chilled from participating in Manhattan Critical Mass rides as a result of Defendants’ unlawful enforcement of the Parade Rules and traffic laws against participants in those rides. Ex. 1 ¶¶ 70, 119, 121, 124. The claims for injunctive relief that 5BBC seeks to assert do not require joinder of its individual members, because they concern a course of conduct by Defendants that is directed generally against every individual perceived to be associated with Critical Mass. The allegations in Plaintiffs’ original complaint concerning 5BBC and Gosciak are a sufficient basis to allow 5BBC to assert claims on behalf of its

members, for injunctive relief under the First Amendment and VTL § 1231. 5BBC seeks to add those claims now.

The discovery taken by Defendants only further buttresses 5BBC's right to assert associational standing. When Defendants began noticing and taking the depositions of non-party 5BBC members, they learned that many of them, like Gosciak, had been subjected to the same conduct by Defendants, depriving them of rights under the First Amendment and VTL § 1231. For instance, Peter Engel, a 5BBC member, testified on September 24, 2008, that he was summonsed while attending a Manhattan Critical Mass ride in February 24, 2006. Ex. 3, at 50. Engel's summons was issued pursuant to the NYPD's policy of "zero tolerance" law enforcement against Manhattan Critical Mass participants, revealed in the depositions of NYPD officer Kenneth Wagner on October 7, 2008, and NYPD Inspector Dennis DeQuatro on January 9, 2009. Ex. 4 at 135-36; Ex. 5 at 160-61. A brief description of the NYPD's bad-faith "zero tolerance" law enforcement policy is set forth in the Second Amended Complaint. Ex. 2 ¶¶ 72-74.¹

Defendants closely examined nonparty 5BBC member deponents, eliciting testimony that they have been chilled from attending Manhattan Critical Mass rides by Defendants' course of conduct. When asked whether he planned on participating in future Manhattan Critical Mass rides, Lieberman answered "Not at this time . . . I do not want to be arrested." Ex. 6, at 129. 5BBC member Jim Zisfein stated on July 23, 2008, that he continues to refrain from

¹ Likewise, Daniel Lieberman, another 5BBC member, testified on November 20, 2008, that he was "aware of 5BBC members being issued summonses," presumably under the same NYPD policy. Ex. 6, at 136.

participating in Critical Mass out of concerns about “police activity, arrests, summonses.” Ex. 7, at 174.

Defendants have created an extensive record that the rights of numerous 5BBC members have been affected by the Defendants’ conduct, as described in the 2007 Amended Complaint. That conduct has been the subject of nearly full discovery by Plaintiffs and Defendants alike. 5BBC’s assertion of claims for injunctive relief against that conduct does not raise any new issues for discovery. Given Defendants’ shift in strategy away from the Parade Rules and toward “zero-tolerance” law enforcement, apparent only with the passage of time, 5BBC has shown good cause to amend the complaint.

III. Recent Testimony and the Interests of Judicial Efficiency and Justice Support Amendment of the Complaint to Add Claims by the Individual Plaintiffs Under 42 U.S.C. § 1983

Plaintiffs seek the Court’s leave to add claims for the Individual Plaintiffs for damages pursuant to 42 U.S.C. Section 1983. First, Plaintiffs have learned, through depositions held in recent months, of facts bearing upon the arrests, summonses, imprisonment and detainer of the Individual Plaintiffs indicating Defendants’ intentional and bad faith efforts to infringe upon their Constitutional rights. Second, adding such claims would prevent the needless delay and expense to both parties of allowing duplicate claims to proceed in a separate lawsuit. Third, it is in the interest of justice to allow the Individual Plaintiffs to have their damages claims resolved in short order before a single forum, rather than subjecting them to possible *res judicata* and certain delay. As Defendants have already conducted discovery regarding the events that form

the basis for Plaintiffs' damages claims, they would not be prejudiced by this proposed amendment.

Specifically, at the depositions, it has been established that

- For months prior to August 2004, NYPD facilitated and encouraged the conduct by Critical Mass participants that it now invokes as a basis for zero-tolerance law enforcement. Ex. 4, at 104; Ex. 8, at 227-29.
- At the RNC, NYPD essentially entrapped Critical Mass participants by arresting them for conduct that NYPD had condoned at prior rides, without any warning Ex. 4, at 148.
- At rides following the RNC, NYPD further entrapped Critical Mass participants by proposing a route, but then diverting participants from the route and then arresting them for having done so. Ex. 9, at 64, 71-72; Ex. 8, at 294-95.
- Officers were directed to arrest participants in Critical Mass rides for disorderly conduct based on their proximity to the group, rather than their having committed the offense of disorderly conduct. Ex. 10, at 199-200.
- A bad-faith summoning policy was employed in which Critical Mass bicyclists were systematically issuing summonses for conduct that NYPD knows is not illegal, or based on plainly incorrect interpretations of the traffic laws. Ex. 11, at 163-65; Ex. 4, at 278-80; Ex. 12, at 33-37; Ex. 5, at 30-36.

In light of this evidence, the Individual Plaintiffs wish to add a claim for damages against Defendants that will not be subject to further delay. Litigation of the claims arising out of Defendants' conduct with regard to Manhattan Critical Mass rides has proven to be a multi-year process, subject to interminable discovery delays. Allowing the Individual Plaintiffs' damages claims to proceed in this action – which is approaching resolution on the merits – will significantly promote judicial efficiency. Since the August 2004 Republican National Convention, at least four federal cases have been filed concerning Defendants' unlawful law enforcement efforts against Manhattan Critical Mass ride participants. As of today, nearly five

years later, none of these cases have even reached the summary judgment stage, as this matter will on March 30, 2009 – less than two months from now.² In this case alone, eight scheduling orders have been filed in order to accommodate Defendants’ reluctance to proceed with a reasonable schedule for production of documents and depositions. *See* Ex. 13. To require the Individual Plaintiffs to pursue their claims in another lawsuit on claims that resulted from the same events at issue here would only frustrate the aim of efficient resolution of claims by requiring duplicative discovery efforts and motion practice by Defendants, the Individual Plaintiffs and the District Court.

Permitting Plaintiffs to amend the complaint to add their damages claims is in the interest of justice. As described above, allowing such claims to proceed will permit the Individual Plaintiffs to have the merits of their claims for both injunctive and legal relief addressed immediately, rather than requiring them to wait needlessly for years between when their claims – which arise out of identical events – are resolved.

Defendants will not be significantly prejudiced by this amendment, as Plaintiffs have already produced all documents pertaining to the arrests, summonses and any other law enforcement activity directed at the individual Plaintiffs by Defendants. Plaintiffs are not aware of any documents not already produced in this litigation concerning the nature and scope of their

² Three of the Individual Plaintiffs – Nelson, Shura and Blythe – assert Section 1983 damages claims, arising out of the same events described in the Amended Complaint, in *Callaghan v. City of New York*, No. 07-CV-9611 (S.D.N.Y. filed Oct. 29, 2007). Although *Callaghan* was filed only a few months after the instant matter, defendants in that case submitted their answer only two weeks ago, and discovery has not yet begun. Should the Court grant Plaintiffs leave to file the Second Amended Complaint, Nelson, Shura and Blythe will withdraw their claims in *Callaghan*.

damages. Defendants have deposed all of the Individual Plaintiffs concerning the facts relating to Defendants' law enforcement efforts against them:³

- Blythe testified that, while attending a Manhattan Critical Mass ride and obeying all traffic regulations, she was arrested. Blythe, who was five months pregnant at the time, was also pushed by an NYPD officer, handcuffed so tightly that she suffered pain, and held in police custody for an entire night. Blythe also testified as to dismissal of the disorderly conduct and parading without a permit charges against her. Ex. 14, at 47-72. Blythe no longer participates in Manhattan Critical Mass rides. Ex. 14, at 20.
- Nelson described two arrests by the NYPD in connection with her participation in Manhattan Critical Mass rides. In one instance, she was stopped at an intersection by an NYPD supervisor who subsequently handed her off to a different officer for arrest. The charges against Nelson, for disorderly conduct and parading without a permit, were dismissed. Ex. 15, at 102-11. On a second occasion, while serving as a legal observer at a Critical Mass ride, she was grabbed from behind by an officer while walking her bicycle. The officer who grabbed Nelson then handed her off to a different officer for arrest. Nelson was found not guilty on the relevant charges, disorderly conduct and parading without a permit. Ex. 15, at 112-15.
- Shura described her arrest in connection with a Manhattan Critical Mass ride that took place after she was diverted from the NYPD-created-route set by an NYPD barricade. Upon deciding to leave the ride and go home, Shura dismounted from her bicycle and walked it. Nevertheless, an officer placed Shura under arrest and charged her with disorderly conduct and parading without a permit. Shura was acquitted of both charges. Ex. 9, at 57-77, 91-95. Shura no longer participates in Manhattan Critical Mass rides because "its still risky." Ex. 9, at 117.
- Son testified that, while stopped at a traffic light while participating in a Manhattan Critical Mass ride, he was grabbed from behind by an NYPD officer. Son was given a summons, which was subsequently dismissed, for failing to stop at a red light. Ex. 16, at 78-86, 92.
- Gosciak testified that he, along with his minor daughter, have ceased participating in Manhattan Critical Mass rides, due to his fear of being ticketed or arrested. Ex. 17, at 120-22.⁴

³ The Individual Plaintiffs would consent to brief, additional depositions to the extent necessary, limited to damages issues, if needed to cure the possible prejudice to Defendants.

In sum, equity and efficiency weigh in favor of allowing the Individual Plaintiffs to add their Section 1983 claims.

Conclusion

For the reasons stated herein, Plaintiffs respectfully request that the Court grant leave to file a Second Amended Complaint pursuant to Rule 16.

Dated: New York, New York
February 6, 2009

Respectfully submitted,

BY: DEBEVOISE & PLIMPTON LLP

/s/ Shanya Dingle

Shanya Dingle
919 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Plaintiffs

⁴ The Individual Plaintiffs would consent to brief, additional depositions to the extent necessary, limited to damages issues, if needed to cure the possible prejudice to Defendants.