HONORABLE BARBARA LINDE

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

OMAR ABDUL ALIM, an individual; MICHAEL THYNG, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; a New York non-profit association; Plaintiffs, v. CITY OF SEATTLE, a municipality; JENNY DURKAN, Mayor of the City of Seattle, in her official capacity; SEATTLE POLICE DEPARTMENT, a department of the City of Seattle; and CARMEN BEST, Chief of Police, in her official capacity, Defendants.	No. 18-2-18114-3 SEA **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**

I. INTRODUCTION

Plaintiffs' Motion for Reconsideration ("Motion") boils down to two simple issues: First, when the Court granted the motion to dismiss, the Court dismissed Plaintiffs' claim with prejudice. Plaintiffs ask the Court to reconsider that decision in light of the legal standard and the

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facts alleged in the proposed amended complaint. Second, Plaintiffs ask the Court to grant Plaintiffs leave to amend because the proposed amended complaint alleges a justiciable dispute. The proposed amended pleading is not futile, and Defendants have not identified a whit of prejudice. Defendants' Opposition to Motion for Reconsideration ("Opposition") does little more than confuse the issues, mischaracterize the procedural posture, and change arguments again as to why Plaintiffs' claim should be dismissed. The Court should grant reconsideration.

II. ARGUMENT

A. The Court Should Reconsider Dismissal "With Prejudice"

Plaintiffs' respectfully request that the Court reconsider its Order dismissing Plaintiffs' Complaint with prejudice. By dismissing Plaintiffs' unamended complaint with prejudice, the Court denied Plaintiffs the opportunity to test the preemption claim on the merits by alleging additional facts through a proposed amended complaint.[1]

In opposition to the motion to dismiss, Plaintiffs requested that the Court dismiss the complaint with leave to amend (*i.e.*, without prejudice) should the Court find merit in Defendants' contentions. Dkt. No. 32 at 20. Defendants now argue that the Court should deny this Motion because Plaintiffs' request somehow amounted to a procedurally-defective Rule 15 Motion. This is a straw man argument, and is contrary to common practice, common sense, and the civil rules.

First, non-moving parties routinely and reasonably request that they be allowed "leave to amend" the pleadings if a court should disagree with its legal arguments and order dismissal of

[1] Under the analogous federal rule, "[d]ismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

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claims. This request helps preserve meritorious claims from premature procedural dismissal and enables decisions on the merits. *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 167, 736 P.2d 249, 254 (1987) ("When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits."). For sound practical reasons, the civil rules and accepted practice do not require litigants to submit a proposed amended pleading every time they oppose a motion to dismiss in order to avoid dismissal *with prejudice*. *See, e.g.*, *El Centro De La Raza v. State*, No. 16-2-18527-4 SEA, 2016 WL 11513329, at *3 & n.2 (Wash. Super. 2016) (dismissing organization without prejudice based on standing and granting leave to amend where plaintiffs "essentially request[ed] leave to amend if further allegations are required" in the opposition brief); *see also Contreras v. Toyota Motor Sales U.S.A. Inc.*, 484 Fed. App'x 116, 118 (9th Cir. 2012) (holding that the district court should have allowed plaintiffs the opportunity to submit an amended complaint, even though plaintiffs did not proffer any facts on economic harm, because it "might not be futile"); *M.M.T. v. United States*, --- F. Supp. 3d ---, C16-5682 BHS, 2018 WL 4144444, at *6 (W.D. Wash. Aug. 30, 2018) (granting plaintiffs leave to amend after plaintiff summarily requested at the end of their brief "leave to amend in the event the Court grants either motion for judgment on the pleadings.").

Second, Defendants mistakenly rely upon *Hook v. Lincoln County Noxious Weed Control Board* to argue that Plaintiffs were obligated to attach an amended pleading to its opposition brief. In *Hook*, after litigating for two years, the trial court granted summary judgment to defendants, and denied Mr. Hook's cross-motion. Mr. Hook submitted a motion for reconsideration, raising new theories. 166 Wn. App. 145, 158–59, 269 P.3d 1056, 1063 (2012). But Mr. Hook never

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submitted an amended complaint, and the court of appeals affirmed the trial court's Rule 59 denial. *Id.* & 159 n.1 (observing that the new theories were likely futile). *Hook*, however, demonstrates that Plaintiffs' Motion is procedurally correct. Here, unlike Mr. Hook, Plaintiffs submitted a proposed amended complaint along with its Rule 59 motion. *See also Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 470–71 (4th Cir. 2011).

Third, Defendants fail to identify any prejudice. Instead, Defendants ascribe alleged bad faith motives and decisions to Plaintiffs in an attempt to argue that unprofessional gamesmanship justifies dismissal with prejudice. These insinuations are unfounded and unsupported, and Plaintiffs did not act with any bad faith or dilatory motive. In any event, this is a red herring: if there is no prejudice to the opposing party, a plaintiff should be freely allowed to amend the complaint. *Herron*, 108 Wn.2d at 166 ("The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party." (internal quotation omitted)). This is especially true here, where Defendants have not answered and no discovery has been undertaken. *See Culpepper v. Snohomish Cnty. Dep't of Planning & Cmty. Dev., Cmty. Dev. Div.*, 59 Wn. App. 166, 176, 796 P.2d 1285, 1291 (1990) (allowing plaintiff to amend the complaint after dismissal).[2]

B. Plaintiffs' Allegations Are Not Futile

Next, Defendants argue that Plaintiffs' proposed amended complaint is futile. But the

[2] Defendants rely upon *McKee* and *Miller* on Page 9 of their brief. Both cases are unpublished court of appeals opinions filed before March 1, 2013. Defendants' citation of these cases violates GR 14.1. "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court." *Id.* Plaintiffs move to strike these citations. And even if those cases had any precedential value, they are simply distinguishable from this case; in one the plaintiff had fair warning he sued the wrong party, and in the other the futile amendment came after a grant of summary judgment.

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proposed amended complaint alleges conduct that presents an actual and existing conflict with the Ordinance, even when taking into account the second sentence of SMC 10.79.020. October 29, 2018 Lindberg Decl., Ex. 3, ¶¶ 17–20. When ruling, the Court zeroed in on the importance of alleging "an intent or a desire to allow the firearm[s] to be anything other than under the control of the owner," and that because of the second sentence of the ordinance, the absence of such allegations was "very critical to the Court's ruling here that there is not a justiciable controversy." *Id.*, Ex. 1, 28:25–29:8. Defendants do not address these critical new allegations, which show that Mr. Alim is currently in stark violation of the Ordinance, even though the "crux" of Defendants' argument at the hearing was the significance of such allegations to the four-part *Diversified Industries* test.[3] Defendants' silence on this now is telling.

Instead, Defendants revert back to their original "intent to violate" argument, claiming that "[i]t was and is absolutely clear that Plaintiffs had to plead" intent to violate to have standing. Opposition 6–7. No such bright-line test exists under state or federal pleading requirements. Mr. Alim has alleged a desire to continue his storage practices—putting him in direct conflict with the Ordinance now and into a dilemma in the future—unlike the plaintiffs in *Forbes* who did not allege any adverse effect and did not allege a desire to engage in the conduct proscribed by the law. *Forbes v. Pierce Cnty.*, 427 P.3d 675, 682–83 (Wash. Ct. App. Sept. 18, 2018); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15–16 (2010); *Jackson v. City & Cty. of San*

[3] *See* Lindberg Decl., Ex. 1, 5:24–25 ("crux" of the dispute was absence of such allegations); 7:5–8:22 ("critical" that plaintiffs had not yet plead a violation or that they were in conflict); 10:23–11:4 (describing plaintiffs' current practices as insufficient); 25:8–15 (arguing plaintiffs have not plead facts showing violation of second sentence).

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Francisco, 829 F. Supp. 2d 867, 871–72 (N.D. Cal. 2011).[4]

Finally, Defendants continue to ignore Plaintiffs' argument that the organizational plaintiffs have associational standing. Mr. Thyng is a member of SAF and the NRA, and Mr. Alim is a member of the NRA. Because one or more of the individual plaintiffs have standing and state a justiciable claim, the organizational plaintiffs may participate in this litigation. *Washington Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 791, 613 P.2d 769, 774 (1980). Nothing more is required for SAF and NRA to participate on behalf of them and other members who are similarly-situated and who live in the City of Seattle.

C. The Amended Complaint is Consistent with the Original Complaint

Plaintiffs' proposed amended complaint clarifies and specifically alleges conduct that is consistent with the original complaint. Because Plaintiffs' amended complaint presents a justiciable dispute, the Court need not address the original complaint. But Defendants' arguments regarding Rule 12 are incorrect and internally inconsistent,[5] and if the Court reaches this issue, Plaintiffs respectfully request reconsideration of the order granting the motion to dismiss.

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[4] Defendants appear to argue that Plaintiffs present "new theories of the case that could have been raised" earlier, relying on *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). This is baseless; *Wilcox* concerned new theories raised after trial, and Plaintiffs raise no new theories in the Motion or the amended complaint. *See also* Opposition 1 ("[Plaintiffs'] motion raises no new facts and no new law"). Even so, the Court has discretion to consider both new facts and new theories under Rule 59. *See, e.g.*, *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 230, 272 P.3d 289, 294 (2012); *Snoqualmie Police Ass'n v. City of Snoqualmie*, 165 Wn. App. 895, 906, 273 P.3d 983, 989 (2012).

[5] Defendants claim that Plaintiffs only argued under Rule 12(b)(1) and that the pleading rules are analytically distinct between Rule 12(b)(1) and 12(b)(6). Opposition 4. During the hearing (Ex. 1 at 15), however, Defendants admitted that Plaintiffs' were making arguments under Rule 12(b)(6), and that it makes no difference which Rule applies. Here, even in the context of a Rule 12(b)(1) challenge to jurisdiction, many of the Rule 12(b)(6) pleading rules would still apply to Plaintiffs' allegations. *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119, 147 P.3d 1275, 1282 (2006).

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III. CONCLUSION

Defendants respectfully request that the Court reconsider dismissal with prejudice, and grant Plaintiffs leave to file the proposed amended complaint.

DATED: November 16, 2018.

I certify that this memorandum contains 1746 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Plaintiffs herein.

2. On November 16, 2018, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: November 16, 2018, at Seattle, Washington.

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