UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, E.T., et al., ***Plaintiffs,*** **v.** **DANIEL DEFENSE, LLC, et al,** ***Defendants*.**	§ § § § § § § § § § § § § § §	Case No. 2:22-CV-00059-AM

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO AMEND

To the Honorable Chief U.S. District Court Judge Moses:

Sandra C. Torres, individually and as mother and representative of the estate of decedent, E.T., and as next friend of E.S.T., Minor Child; Eli Torres, Jr.; and Justice Torres (collectively "Plaintiffs") file this brief in further support of their Motion to Amend the Complaint and in reply to the opposition filed by Defendants Joel Betancourt, Juan Maldonado, and Christopher Kindell (collectively, the "TDPS Defendants"). The Court should grant Plaintiffs' motion for the reasons set forth below

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On June 14, 2024, Plaintiffs moved to amend their complaint to add additional facts and allegations regarding the May 24, 2022, mass shooting at Robb Elementary School in Uvalde, Texas, that have surfaced in recent months. ECF No. 146. The proposed amendments include additional allegations as to the appalling failures in the law enforcement response to the shooting, including by the TDPS Defendants. Plaintiffs' motion to amend should be granted. Given the early stage of this case, with discovery being stayed pending motions to dismiss, Plaintiffs' proposed amendments are not unduly delayed or futile and would cause no prejudice to the TDPS Defendants.

ARGUMENT

I. LEGAL STANDARD

"The language of [Fed. R. Civ. P. 15(a)(2)] evinces a bias in favor of granting leave to amend," *Marucci Sports, LLC v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014),[1] and "[a]mendments should be liberally allowed." *Halbert v. City of Sherman*, 33 F.3d 526, 529 (5th Cir. 1994); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Where "discovery has not begun, no scheduling order has been issued, and no rulings on Defendants' motions to dismiss have been entered, the Court [should] allow leave to amend based on Rule 15(a)'s liberal standard." *Gonzalez v. Cnty.*, No. 22-CV-00116, 2023 WL 9280528, at *4 (S.D. Tex. Nov. 6, 2023)

II. PLAINTIFFS' PROPOSED AMENDMENTS WERE NOT UNDULY DELAYED

Plaintiffs' proposed amendments were not unduly delayed. "Delay alone is insufficient basis to deny a motion for leave to amend. The delay must be undue, meaning it would result in unwarranted burdens on the court or prejudice to the non-moving party." *McConnell v. Sw. Bell Tel. L.P.*, No. 20-CV-01457-X, 2021 WL 1561435, at *4 (N.D. Tex. Apr. 21, 2021).

Under Fifth Circuit precedent, "denying a motion for leave to amend on the basis of undue delay is appropriate only after the court has rendered a decision on a motion to dismiss, or when there is ample evidence showing that leave would delay trial or otherwise prejudice the defendant, or when

[1] All citations have been "cleaned up."

the amendment would not add any substance to the original complaint." *Id.* (collecting cases). These circumstances are absent here. Discovery is stayed pending the TDPS Defendants' and the other Defendants' motions to dismiss, none of which have been decided. *See id.*; *see also Robbins v. XTO Energy, Inc.*, No. 16-CV-00793, 2018 WL 3130605 (N.D. Tex. June 26, 2018) (allowing amendment in case pending for two years with no discovery having taken place). Courts have even found a lack of undue delay in cases where discovery has actually begun but where the discovery deadline had not yet elapsed. *See Chambers v. Soc. Sec. Admin.*, No. 19-CV-01062, 2019 WL 5697200, at *2 (N.D. Tex. Nov. 4, 2019) (no undue delay "especially since there are almost two months left until the discovery deadline elapses."). "Rather, the usual case in which 'undue delay' supports a court's denial of leave to amend is where a party waits until the eve of trial to assert a new claim." *OnAsset Intel., Inc. v. Freightweight Int'l (USA), Inc.*, No. 11-CV-03148, 2012 WL 5409660, at *2 (N.D. Tex. Nov. 6, 2012) (collecting cases). There is no undue delay in this case's current posture, as the TDPS Defendants cannot show that leave would "unreasonably delay a trial or other proceeding." *McConnell*, 2021 WL 1561435, at *4.

Further, the additional facts in the proposed amended complaint stem primarily from the U.S. Department of Justice's report following its investigation into the law enforcement response to the shooting at Robb Elementary School, published in mid-January 2024, less than six months prior to Plaintiffs' motion to amend.[2] The report post-dated Plaintiff's original complaint and thus "'obviously could not have been included in that pleading.'" *Gonzalez*, 2023 WL 9280528, at *3 (granting leave to amend to add facts regarding incident ten months before motion to amend and two months prior to initial complaint, as well as incident five months prior to motion to amend). Courts allow amendments in similar circumstances, particularly where additional facts post-date the initial complaint's filing, and may even allow amendments based on "some facts known to Plaintiff at the time he filed his earlier pleadings, and some facts that arose after." *Id.*; *see also Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982)

[2] *See* United States Department of Justice, *Critical Incident Review: Active Shooter at Robb Elementary School (2024)*, available at https://www.documentcloud.org/documents/24366209-critical-incident-review-active-shooter-at-robb-elementary-school.

("[m]erely because a claim was not presented as promptly as possible . . . does not vest the district court with authority to punish the litigant."). With discovery not yet underway, "there is little to no harm done in allowing [Plaintiffs] to amend the Complaint." *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, No. MDL 07-01873, 2008 WL 5480571, at *3 (E.D. La. Dec. 30, 2008) (granting amendment over objection that plaintiffs knew about information for "years" and despite moving to amend "several months after the original Complaint was filed with little reason offered for the delay").

III. PLAINTIFFS' MOTION IS NOT FUTILE

Plaintiffs' proposed amendments are not futile, which, in any case, is an analysis the Court should reserve for its decision on the pending motions to dismiss. Texas district courts' "almost unvarying practice when futility is raised [in response to a motion for leave to amend] is to address the merits of the claim or defense in the context of a Rule 12(b)(6) or Rule 56 motion . . . where the procedural safeguards are surer." *Garcia v. Overnight Cleanse, LLC*, No. 18-CV-3386, 2019 WL 5578565, at *2 (N.D. Tex. Oct. 29, 2019). "Because the defendants have already moved to dismiss the plaintiff's claims for the same reasons they oppose the proposed second amended complaint, their arguments regarding its failure to state a claim will be considered in the Rule 12(b) context." *Chambers*, 2019 WL 5697200, at *2; *see also Gonzalez*, 2023 WL 9280528, at *4 ("[B]ecause of the clear preference in granting leave to amend, a finding of futility often comes only after a pleading was already dismissed and attempts to resuscitate it are baseless.") (collecting cases). The TDPS Defendants make no new arguments as to futility, referring instead to their motion to dismiss. *See* ECF No. 154-1 at 4. The Court should therefore consider the TDPS Defendants' arguments on their motion to dismiss, rather than on the instant motion.

In any case, the Court should err on the side of amendment even if it is uncertain as to the viability of the proposed amendment on the merits. *See Jaraba v. Blinken*, 568 F. Supp. 3d 720, 740 (W.D. Tex. 2021) (considering new facts in motion to dismiss opposition as proposed amendments and granting leave to amend as to new allegations that were not "'clearly futile,'" even though "the

Court cannot be certain at this stage that" they state "a viable claim"). Where, as here, the proposed amendments do not "lack[] legal foundation," *Jamieson By & Through Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985), those amendments are not futile. The additional facts as to the TDPS Defendants include but are not limited to Kindell's "de facto supervisory authority of TDPS, UPD, UCISD, and County law enforcement officers," ECF No. 146-2 at 70; the fact that "other officers deferred to Defendant Kindell [at approximately 12:10 p.m.] as he had taken command," *id.* at 71; that instead of trying to engage and neutralize the shooter, Kindell "instructed the UPD Sergeant that it was acceptable to wait until [additional] resources arrived before engaging the shooter, in violation of ALERRT protocols," *id.* at 67, "ordered TDPS troopers to prevent desperate parents and family members from trying to save their children," *id.* at 68, "told other officers that he had someone in the building who would handle going into the classrooms," *id.* at 69, and planned to "negotiate with the shooter" while knowing that doing so "rather than attempting to engage and neutralize him, would continue to trap the students and teachers still alive in classrooms 111 and 112 with the shooter," *id.* at 71. These allegations bolster, for example, Plaintiffs' claim under the Fourth Amendment, particularly in how the TDPS Defendants took steps to place Plaintiffs in a situation which provided "no realistic means of voluntarily terminating" their confinement in the classrooms, and to deprive the students and their parents "of the ability or opportunity to provide for [their] own care and safety." *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995); *see also* ECF No. 137 (opposition to TDPS Defendants' motion to dismiss). The amendments do not "lack[] legal foundation," *Jamieson By & Through Jamieson*, 772 F.2d at 1208, and are—at very least—not "clearly futile."

IV. PLAINTIFFS' MOTION DOES NOT PREJUDICE THE TDPS DEFENDANTS

The TDPS Defendants are not prejudiced for the same reasons underlying the lack of undue delay—*i.e.*, there is no prejudice at this "early stage," with discovery stayed and pending decision on various motions to dismiss. *See Garcia*, 2019 WL 5578565, at *2 (no prejudice with "almost two months left until the discovery deadline elapses"); *Venzor v. Collin Cnty., Texas*, No. 20-CV-318, 2021 WL

708611, at *5 (E.D. Tex. Jan. 29, 2021), *report and rec. adopted*, No. 20-CV-318, 2021 WL 694550 (E.D. Tex. Feb. 23, 2021) (no prejudice in "early stages" with no discovery having taken place); *McConnell*, 2021 WL 1561435, at 4 (same); *Chambers*, 2019 WL 5697200, at *2 (same); *In re FEMA Trailer*, 2008 WL 5480571, at *3 (no prejudice where "action has not entered the merits phase of litigation").

Finally, the Court should reject TDPS Defendants' attempt to manufacture prejudice through their qualified immunity defense. First, for the reasons stated in Plaintiffs' opposition to their motion to dismiss, the TDPS Defendants are not entitled to qualified immunity. *See* ECF No. 137 at 6-7, 10-11, 19. But in any case, simply invoking qualified immunity does not result in prejudice—in fact, as noted in one of the cases the TDPS Defendants cite, the opposite is true: "[o]rdinarily, when a complaint does not establish a cause of action in a case raising the issue of immunity, a district court should provide the plaintiff an opportunity to satisfy the heightened pleading requirements of these cases." *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986); *see also Bradyn S. v. Waxahachie Indep. Sch. Dist.*, 407 F. Supp. 3d 612, 631 (N.D. Tex. 2019) (allowing amendment as to "why Defendants are not entitled to qualified immunity"); *Jones v. Gammage*, No. 20-CV-00220, 2022 WL 601034, at *4 (N.D. Miss. Feb. 28, 2022) ("the Court rejects the Defendants' contention that the qualified immunity protections would be rendered moot if leave to amend is granted"); *Venzor*, 2021 WL 708611, at *5 ("where a civil rights plaintiff could be clearer and more specific . . . the court may defer ruling on the issue of qualified immunity and grant leave to amend."). Further, *Jones v. Greninger*, the other case relied on in support of the TDPS Defendants' argument, discussed only whether a dismissal with or without prejudice was appropriate. 188 F.3d 322, 326 (5th Cir. 1999). And it did so at the motion to dismiss stage, bolstering Plaintiffs' argument that there is no prejudice in granting Plaintiffs' motion at the "early stage" of this case, before any discovery, and that no prejudice would result should the Court appropriately decide to adjudicate issues as to qualified immunity at the motion to dismiss stage.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion to Amend the Complaint.

Dated: New York, New York
July 12, 2024

Respectfully submitted,

By: */s/ Laura Keeley*
Laura Keeley

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[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO AMEND

The Court is in receipt of Plaintiffs' Motion for Leave to Amend Complaint. For good cause shown, the motion is GRANTED.

SIGNED and ENTERED this _____ day of _____, 2024.

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Chief U.S. District Judge Alia Moses