IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, PAULETTE BOSCH, DENISE VOS, CRISA BROWN, LATRECE BAKER, TAMMY SPEERS, LONDORA KITCHENS, STASHIA COLLINS, ANDREA DORN, JUDY PAULEY, and DELILAH WICKLIFFE individually and on behalf of all similarly situated persons,

Plaintiffs,

vs.

MUSKEGON COUNTY, a municipal corporation; DEAN ROESLER, in his official capacity as Muskegon County Sheriff; LT. MARK BURNS, in his official capacity as Jail Administrator; CORRECTIONAL OFFICERS IVAN MORRIS, GRIEVES, DEYOUNG, and DAVID GUTOWSKI, in their individual capacities; and UNKNOWN CORRECTIONAL OFFICERS, in their individual capacities,

Defendants.
_____/

Case No. 1:14-cv-01245-JTN

HON. JANET T. NEFF

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

I. Procedural History

Plaintiffs filed their Complaint on December 4, 2014. Dkt 1. Pursuant to Federal Rule of Civil Procedure 15, which allows a party to amend it pleadings once as a matter of course, Plaintiffs filed a First Amended Complaint on February 6, 2015. Dkt 18. Defendants filed an Answer responding to the initial Complaint on February 11, 2015. The same day Defendants filed a Motion to Strike Plaintiffs' First Amended Complaint on the grounds that it was filed pursuant to Fed. R. Civ. P. 15, and that plaintiffs had not sought leave of the court under Fed. R.

Civ. P. 21 to add additional plaintiffs. On February 20, 2015, Defendants filed an Answer to the First Amended Complaint. Dkt. 24.

II. Overview of Rules 15 and 21

Fed. R. Civ. P. 15(a)(1) allows a party to "amend its pleading once as a matter of course" in the initial stages of litigation. "[I]f the pleading is one to which a responsive pleading is required" such amendment must occur within "21 days after service of a responsive pleading." Fed. R. Civ. P. 15(a)(1)(B). In addition, Fed. R. Civ. P. 15 provides a very liberal standard for the amendment of pleadings even in later stages of litigation. A party may amend its pleadings with leave of the court or the consent of the opposing party. Fed. R. Civ. P. 15(a)(2). "The court should freely grant leave [to amend] when justice so requires." *Id.*

Fed. R. Civ. P. 21 provides, in relevant part, that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party."

III. New Parties May Be Added When an Amended Complaint Is Filed Pursuant to Fed. R. Civ. P. 15(a)(1).

Rule 15(a)(1) does not specify whether a plaintiff may add new parties when amending her complaint. However, in *Broyles v. Correctional Medical Services*, No. 08-1638, 2009 WL 3154241 (6th Cir. Jan 23, 2009), the Sixth Circuit addressed this issue, albeit in an unpublished opinion. There the plaintiff amended his complaint within the time permitted under Rule 15(a)(1), but the district court struck the amended complaint because it added new parties and the plaintiff had not previously sought leave of court pursuant to Rule 21. *Id.* at *3. The Sixth Circuit reversed, holding that the district court abused its discretion in striking the amended complaint because Rule 15(a) is interpreted liberally and provides plaintiffs with an absolute right to amend. *Id.*

The Sixth Circuit's holding that a plaintiff may add parties in conjunction with an amendment by right under Rule 15(a)(1) is in accord with the majority of courts across the country.[1] At least five other Courts of Appeals have concluded that Rule 15 allows parties to be added as a matter of course.[2] *See, e.g., Galustian v. Peter*, 591 F.3d 724, 730 (4th Cir. 2010) (noting circuit split on whether Rule 15 or Rule 21 governs addition of parties prior to filing of a responsive pleading, but noting that most courts, including the Fourth Circuit, have held Rule 15 applies); *Bibbs v. Early*, 541 F.3d 267, 275 n. 39 (5th Cir. 2008) ("Rule 15 takes precedence over Rule 21 where a party falls within Rule 15 confines—for example, where the party attempts to drop or add parties by an amended pleading filed before a responsive pleading is served.")

[1] The cases cited by the defendants are not on point. *Keller v. University of Michigan*, 411 F. Supp. 1055 (E.D. Mich. 1974), predates *Broyles*. And *Dura Global Technologies Inc. v. Magna Donnelly Corp.*, 2011 WL 4532875, at *2 (E.D. Mich., Sept 30, 2011), and *Kunin v. Costco Wholesale Corp.*, 2011 WL 6090132, at *2 (E.D. Mich., Dec. 7, 2011), both concern the addition of parties **after** filing of a responsive pleading under Rule 15(a)**(2)**, not **prior** to filing of a responsive pleading under Rule 15(a)**(1)**.

[2] The vast majority of lower court decisions also hold that parties may be added under Rule 15 (a)(1). *See, e.g., Anderson v. USAA Cas. Ins. Co.*, 218 F.R.D. 307, 309 (D.D.C. 2003) (holding that "Rule 15(a) allows a party to amend its pleading to add a new party"); *Mills v. Mills*, 790 F. Supp. 172, 174 (S.D. Ohio 1992) (holding that plaintiff was entitled, pursuant to Rule 15(a), "as a matter of course" to amend her complaint to add a defendant); *First City Nat'l Bank & Trust Co. v. Federal Deposit Ins. Co.*, 730 F.Supp. 501 (E.D.N.Y.1990) (while question whether additional parties "may be added as a matter of right under Rule 15 or whether leave of Court must be granted under Rule 21 is obscure," recent decisions "favor liberal application of Rule 15 to permit joinder" of additional parties); *No Cost Conference, Inc. v. Windstream Commc'ns, Inc.*, 940 F. Supp. 2d 1285, 1297 (S.D. Cal. 2013) (allowing amendment as of right to add new defendants); *Adams v. Lederle Laboratories*, 569 F. Supp. 234, 240 (E.D. Mo. 1983) ("[U]nder the federal rules the addition or dropping of parties, if accomplished by an amendment (or a new complaint) which is filed within the time frame covered by Rule 15(a), does *not* require an order of court."); *Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc.*, 186 F.R.D. 581, 582 (N.D. Cal. 1999) ("Rule 21 of the Federal Rules of Civil Procedure can correctly be viewed as a general provision dealing with adding and dropping parties, while Rule 15(a) is a more specific provision dealing with the particular means by which a party may do so by an amendment to the pleadings."); *Wappler v. Kleinsmith*, 2009 WL 734675, at *2 (W.D. Mich. Mar. 12, 2009) (Brenneman, J.) (relying on *Broyles* to reject defendants' argument that plaintiff could not add parties under Rule 15(a)).

(citation omitted); *U.S. ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1019 (10th Cir. 1994) (holding Rule 15(a), not Rule 21, governs addition of new plaintiffs where no responsive pleading has been filed); *Wash. v. N.Y. City Bd. of Estimate*, 709 F.2d 792, 795 (2d Cir.1983) (holding that the plaintiff's motion to amend should have been granted because he could have amended his complaint to add defendants as a matter of right); *Miller v. Conway*, 331 Fed. App'x 664, 665 (11th Cir. 2009) (holding that district court erred when it refused to allow plaintiff to amend complaint to add new defendants since amendment was filed within the time period allowed as a matter of right by Rule 15(a)); 3 Moore's Federal Practice § 15.16[1] (3d ed. 2010) ("[t]he more persuasive cases hold that a party's right to amend as a matter of course, if accomplished within the deadlines set by Rule 15(a), extends to all amendments including amendments to drop or add parties"); *but see Moore v. State of Indiana*, 999 F.2d 1125, 1128 (7th Cir. 1993) (requiring leave from court to add defendants even where amended complaint is filed before a responsive pleading).

Defendants argue that decisions allowing the addition of parties under Rule 15(a), including the Sixth Circuit's decision in *Broyles*, apply only to the addition of new defendants, not new plaintiffs. But defendants provide no reason why this should be so, particularly where, as here, the allegations of the new plaintiffs are identical to those of the original plaintiffs. Unsurprisingly, courts have allowed the addition of new plaintiffs under Rule 15(a)(1), just as they have allowed the addition of new defendants. *See, e.g.*, *Koch Indus., Inc.*, 31 F.3d at 1019 (holding district court erred in finding that Rule 21, rather than Rule 15(a) applied to addition of new plaintiffs); *Ocean Breeze Park Festival v. Reich*, 853 F. Supp. 906, 918 (E.D. Va. 1994) (addition of plaintiffs allowed under amendment as of right under Rule 15(a)); *Klein v. Director of U.S. Patent and Trademark Office*, 2010 WL 2793940, *1 n. 1 (D. Conn. July 12, 2010)

(holding that if new parties, including new plaintiffs, are added prior to the deadline set forth in Rule 15(a)(1)(B), no leave of court is required).

Finally, defendants argue that *Broyles* is distinguishable because it recognized an absolute right to amend a complaint before a "responsive pleading" is served, whereas in this case defendants had already filed responses to plaintiffs' motions for class certification and for a preliminary injunction at the time plaintiffs' amended complaint was filed. According to defendants, although they had not filed an answer prior to the filing of the amended complaint, their responses to plaintiffs' motions should be considered "responsive pleadings." This argument is meritless for two reasons. First, the Sixth Circuit has explained that the "term 'responsive pleading' is defined by reference to Fed. R. Civ. P. 7(a), which . . . provides an *exclusive* list of pleadings." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 569 (6th Cir. 2003) (emphasis added). That "exclusive list" includes "an answer to a complaint." Fed. R. Civ. P. 7(a)(2). It does not include responses to motions. Therefore, as in *Broyles*, plaintiffs here amended their complaint before a responsive pleading was served.

Second, even if defendants' pre-answer responses to plaintiffs' motions qualified as "responsive pleadings," plaintiffs were still entitled to amend their complaint as matter of course (i.e., without seeking leave) within 21 days after the so-called responsive pleadings were served. *See* Fed. R. Civ. P. 15(a)(1)(B). Defendants' responses were filed on February 2, 2015, and plaintiffs' Amended Complaint was filed on February 20, 2015, well within the time frame established by Rule 15.

IV. If the Court Concludes that Leave Was Required to Amend the Complaint To Add Parties, the Court Should Grant Leave.

For the reasons set out above, plaintiffs proceeded properly in amending their complaint to add new parties under Rule 15(a)(1)(B). However, if this Court believes that Rule 21 governs

the amendment of a complaint that adds a party, plaintiffs ask that the Court allow the amendment and addition of the new plaintiffs.[3]

As the Supreme Court has explained regarding the amendment of a complaint,

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. . . . In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). The "thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than technicalities of pleadings." *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir.1986). Accordingly, before denying leave to amend, the district court must find both undue delay by the party seeking the amendment and substantial prejudice to the non-movant if leave is granted. *Id.* at 559-62.

Where the amendment concerns the addition or removal of a party, "the same basic standard … will apply whether the pleader moves under Rule 15(a) or Rule 21." 6 Fed. Prac & Proc. 2d § 1474. As the Tenth Circuit noted in reversing a lower court that had failed to allow amendment under either Rule 15(a) or Rule 21, the purpose of the Federal Rules to facilitate decisions is not furthered "by denying the addition of a party who has a close identity of interest with the old party when the added party will not be prejudiced. The ends of justice are not served when forfeiture of just claims because of technical rules is allowed." *Koch Indus., Inc.*, 31 F.3d at 1018-19.

Here, plaintiffs sought to amend their complaint to add new parties at the very outset of the litigation. The addition of three new plaintiffs, whose claims exactly mirror those of the prior

[3] Rule 21 allows the court to add a party "[o]n motion *or on its own*." Fed. R. Civ. P. 21 (emphasis added).

plaintiffs, in no way prejudices the defendants. Defendants' motion to strike does not claim they have suffered prejudice. Rather, defendants object to the amended complaint because it makes it more likely that this Court will make a decision on the merits.

If this Court finds itself uncertain about whether Rule 15(a) or Rule 21 applies, the Court can respond just as did the Southern District of Ohio in *Pethtel v. Washington County Sheriff's Office*, 2007 WL 2359765, *4 (S.D. Ohio Aug. 16, 2007), where the judge found the defendants' arguments about the proper rule to be something of a tempest in a teapot. In that case (which predates the Sixth Circuit's decision in *Broyles*), the defendants sought dismissal of an amended complaint on the basis that plaintiffs had added a party under Rule 15(a), rather than under Rule 21. Noting that the Sixth Circuit had not yet decided the question, the court reasoned:

> Assuming *arguendo* that Defendants are correct that Rule 21 required [plaintiff] to seek leave of court prior to filing an amended complaint adding … a defendant, the Court nevertheless denies Defendants' motion to dismiss the Amended Complaint on these procedural grounds…. [The] Defendants fail to explain how [Plaintiff's] failure to seek leave of court or Defendants' written consent unfairly prejudices them. Under these circumstances, had [plaintiff] filed a motion for leave to file the Amended Complaint, the Court would have granted that motion since Rule 15(a) requires that leave to amend be "freely given when justice so requires."

Id. The same analysis applies here.

V. Relief Requested

WHEREFORE, Plaintiffs respectfully request that this Court deny Defendants' Motion to Strike Plaintiffs' Amended Complaint. In the alternative, Plaintiffs ask that the Court grant leave for filing of the Amended Complaint (Dkt 18) under Rule 15(a)(2) and/or Rule 21.

Respectfully submitted,

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