IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SARA WECKHORST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:16-cv-02255-JAR-GEB
	)	
KANSAS STATE UNIVERSITY,	)	
an agency of the State of Kansas,	)	
	)	
Defendant.	)	

DEFENDANT'S [PROPOSED] SUR-REPLY IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Date: January 31, 2017

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

K-State files this Sur-reply to address four discrete points raised by Ms. Weckhort's Reply (Doc. 46).

First, Ms. Weckhorst repeatedly asserts in her Reply that she and her attorneys moved promptly to amend her Complaint "after [Ms. Weckhorst] learned after filing suit," that J.G. had allegedly raped Crystal Stroup. After filing its Opposition, and in the course of reviewing files for another matter, K-State discovered documents from its Office of Institutional Equity (OIE) that strongly indicate Ms. Weckhorst's attorneys knew the operative facts of Ms. Stroup's alleged rape as early as October 2015, *before* Ms. Weckhorst even filed her lawsuit and well over a year before she sought leave to amend. This is undue delay.

Second, for the first time, Ms. Weckhorst's Reply includes argument about why joinder of a new plaintiff is proper. The Court should not permit this new argument in a reply. In any event, Ms. Weckhorst erroneously claims that a Tenth Circuit case, *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015 (10th Cir. 1994), establishes that she only needs to satisfy the liberal pleading standard for amendment in Rule 15 in order to add Ms. Stroup. *Koch Industries* says no such thing. It did not even discuss whether a party seeking to add a plaintiff must also satisfy Rule 20. And at least two decisions from the District of Kansas have held, since *Koch Industries* was issued, that a plaintiff seeking to add a co-plaintiff must satisfy *both* Rule 15 and Rule 20. Because Ms. Weckhorst made no attempt to satisfy Rule 20 in her initial motion and memorandum, the Court should deny leave.

Third, and similarly, Ms. Weckhorst—for the first time in her Reply—attempts to justify the multitude of new allegations in her proposed First Amended Complaint that are *un*related to the alleged rape of Ms. Stroup. Although she failed even to tell the Court about these proposed changes in her initial motion and memorandum, Ms. Weckhorst now claims they should be

allowed because they relate to the "substance" of what was contained in her original Complaint. Far from justifying a basis for amendment, this argument is tantamount to an admission that Ms. Weckhorst could have sought to make those amendments as early as May 2016, when K-State filed its Motion To Dismiss (Doc. 12) and that Ms. Weckhorst simply failed to do so. This, again, constitutes undue delay.

Fourth, although the point is not relevant to her Motion For Leave, in her Reply, Ms. Weckhorst asserts that K-State "expel[led] . . . or otherwise dismiss[ed]" J.G. from K-State after K-State learned of J.G.'s arrest. This is not accurate. While K-State temporarily suspended J.G. pending further steps under its Critical Incident Response Team (CIRT) process, he has not been expelled or dismissed from K-State as Ms. Weckhorst claims.

II. ADDITIONAL FACTS REGARDING MS. WECKHORST'S KNOWLEDGE OF MS. STROUP'S ALLEGATIONS

In the Spring of 2015, attorneys Cari Simon and Douglas Fierberg notified K-State that they represented Ms. Weckhorst and had been engaged to conduct an "investigation concerning the sexual assaults of our client." *See* Ex. 1, Letter to Office of General Counsel. After March 2015, and through the summer of 2015, Ms. Simon and Mr. Fierberg had repeated communications with K-State's Office of General Counsel, including sending a demand letter alleging K-State violated Ms. Weckhorst's Title IX rights by failing to discipline J.F. and J.G.

As the Court is aware, Ms. Simon and Mr. Fierberg are also counsel to Tessa Farmer in the similar Title IX case *Farmer v. Kansas State University*, No. 16-cv-02256-JAR-GEB. Ms. Farmer reported in August 2015 to OIE that she was sexually assaulted. *See* Ex. 2, Declaration of Scott Jones ¶ 6. Under K-State's anti-discrimination policy (PPM 3010), complainants and respondents in sexual violence cases may be accompanied to any related meeting or proceeding by an advisor of their choice. *Id.* ¶ 7. In early September 2015, Ms. Farmer notified K-State that

her support person of choice was Ms. Simon. *Id.* ¶ 8.

In addition to resources and various support services that K-State offered in response to Ms. Farmer's report, OIE processed her report under the anti-discrimination policy. As part of processing Ms. Farmer's report, Danielle Dempsey-Swopes[1], the OIE investigator assigned to Ms. Farmer's report, sent to Ms. Farmer a list of questions for her to answer to aid the Administrative Review Team (ART) in making a determination under the PPM 3010 policy. *Id.* ¶ 9. On October 18, 2015, Ms. Farmer sent an email to Daniel Dempsey-Swopes. *Id.* ¶ 10 Attached to the email was a document in Microsoft Word format in which Ms. Farmer responded to that series of questions posed by OIE.[2] *Id.*

In the Word document, Ms. Farmer listed her then address as "2215 College Avenue, Apt. ***[3], Manhattan, Kansas." *Id.* ¶ 11. 2215 College Avenue is the listed address for a private apartment complex in Manhattan, Kansas named "University Crossing." *See* www.liveuc.com. *Id.* ¶ 11. As discussed below, this is the same apartment complex where Ms. Stroup apparently claims she was raped.

Among others, the Word document contained the following question: "Do you feel safe in your current living situation?" Ms. Farmer responded, in pertinent part:

> *I live with my friends and they help me feel as safe as I can. But my roommate was recently sexually assaulted by a guy, another student who lives in our building. Actually, he lives downstairs from us. We both had horrible, victim blaming experiences over at Riley County Police Department, and now have to live here knowing he is in the building. . . .*

[1] This is the same Danielle Dempsey-Swopes who supplied K-State's attorney-client privileged communications to Ms. Weckhorst's counsel, which are the subject of K-State's pending Motion To Strike (Doc. 40).

[2] Due to the information contained in the document about students other than Ms. Farmer, K-State has redacted those portions that do not bear on the instant motion. K-State can make a complete version of the document available for *in camera* review, should the Court so request.

[3] K-State has redacted the actual apartment number.

Id. ¶ 12.

According to the metadata contained in the Word document itself, the Word document was created on October 18, 2015, with the "author" listed as an individual named "Sarah Alexander." *Id.* ¶ 14. A publicly-available LinkedIn profile identifies that one "Sarah Alexander" has worked as "Legal Assistant and Communications Director" for "School Violence Law" since February 2015. *See* Ex. 3, LinkedIn Printout. The website www.schoolviolencelaw.com, is a website that lists a "team" of attorneys who specialize in "Fraternity Hazing Law," "School Violence Law," and "School Injury and Death Law," including Ms. Simon and Mr. Fierberg.

Additionally, in October 2015, a "Sarah Alexander" sent an e-mail to K-State transmitting a letter related to a different individual represented by Ms. Simon and Mr. Fierberg.[4] The signature block of that e-mail identified Ms. Alexander as "Legal Assistant, Communications Director, School Violence Law." *See* Ex. 4, Alexander Email. Copied on the email were Ms. Simon and Mr. Fierberg. *Id.* The inference, of course, is that the "Sarah Alexander" listed in metadata as the author of Ms. Farmer's "Answers To OIE Questions" documents is the same Sarah Alexander who served as a legal assistant to Ms. Simon, Mr. Fierberg, and the team of attorneys at www.schoolviolencelaw.com.

This sequence of events, together with allegations in Ms. Weckhorst's own proposed

[4] Specifically, the Court may recall the repeated references Ms. Weckhorst has made in her pleadings to the fact that K-State has been subject to four pending investigations by the Office for Civil Rights. Those respective investigations were prompted by complaints made by Ms. Farmer, Ms. Weckhorst, Ms. Dempsey-Swopes, and a fourth individual, E.B., the mother of K-State student F.B. *See* Doc. 35 at 9. For some time, E.B. and F.B. were also represented by Ms. Simon and Mr. Fierberg. However, in October 2015, after E.B. sent an email to OCR investigators repudiating her own daughter's veracity and honesty, Ms. Simon and Mr. Fierberg sent K-State's Office of General Counsel a letter withdrawing their representation of E.B. and F.B.

First Amended Complaint, strongly indicate that Ms. Weckhorst's attorneys were aware of the circumstances of Ms. Stroup's rape long before the instant lawsuit was filed, contrary to Ms. Weckhorst's claims in her Reply. Specifically, in the proposed First Amended Complaint, Ms. Weckhorst alleges:

- "Crystal [Stroup] lived at University Crossing, an apartment complex across from campus." Doc. 36-1, ¶ 2.
- On October 6, 2015, "Crystal and her roommates, all K-State students, had a small gathering at their University Crossing apartment at 2215 College Avenue."[5] *Id.* ¶ 51.
- One of Ms. Stroup's three roommates was "Tessa Farmer." *Id.*
- Ms. Stroup was allegedly "raped" by J.G. in the apartment after the party the evening of October 6. *Id.* ¶ 52.
- "J.G., the student who previously raped Sara [Wechhorst], lived at University Crossing as well." *Id.* ¶ 51.

In other words, the narrative in Ms. Farmer's "Answers to OIE Questions" document referring to the rape of Ms. Farmer's "roommate"—a document whose metadata lists Ms. Simon and Mr. Fierberg's legal assistant as its "author" and that was submitted to K-State on October 18, 2015—was referring to the alleged rape of Ms. Stroup by J.G. Thus, the evidence strongly suggests that the same attorneys who are representing Ms. Weckhorst in this case knew the circumstances of Ms. Stroup's alleged rape, through Ms. Simon's work with Ms. Farmer in October 2015, some six months before Ms. Weckhorst even filed her lawsuit.

[5] This is the same address Ms. Farmer listed on her "Answers to OIE Questions" document.

III. ARGUMENT AND AUTHORITIES

A. Counsel for Ms. Weckhorst (and Ms. Stroup) Likely Had Substantial Information Regarding Ms. Stroup's Alleged Assault in October 2015.

The primary, if not sole justification provided by Ms. Weckhorst for her request to file a proposed First Amended Complaint is that she and her counsel were unaware of J.G.'s alleged rape of Ms. Stroup until J.G.'s arrest in the summer of 2016 and then moved "promptly" to seek leave to amend. Despite K-State establishing in its Opposition that, at a minimum, Ms. Weckhorst waited well over two months after she learned of J.G.'s arrest to file her Motion For Leave, in her Reply, Ms. Weckhorst doubled down on her assertion she did not engage in undue delay, claiming she sought leave to amend based on "shocking and devastating new information which she learned after filing suit" that she "diligently worked to investigate and research the new information and its impact on her case," and that when she filed her lawsuit (in April 2016), she had "no idea as K-State did at that time that J.G. had by then already raped another K-State student."[6] *See* Doc. 46 at 1, 2, and 6. She further asserted in her Reply that her "counsel diligently investigated the new information, collected additional facts, and evaluated the information's relevance to her case." *Id.* at 18.

However, as set forth above and established through the Declaration of Scott Jones and related exhibits, it now seems clear that Ms. Weckhorst's counsel likely learned of the operative facts of Ms. Stroup's alleged rape in October 2015, through Ms. Simon's representation of Ms. Farmer. At the time Ms. Weckhorst's counsel gained this knowledge, she was actively representing Ms. Weckhorst, having already made a demand to K-State on Ms. Weckhorst's

[6] It is not clear what basis Ms. Weckhorst has to assert that K-State was aware of a second "rape" by J.G. Ms. Farmer did not provide the name of her roommate to K-State in the "Answers to OIE Questions" document and, as Ms. Weckhorst herself alleges, Ms. Stroup made her report to the Center for Advocacy, Response, and Education (CARE), which is a confidential resource option.

behalf.

An attorney has an agency relationship with his or her client and, therefore, an attorney's knowledge on matters within the scope of the representation are imputed to the client. *See* Restatement (Third) of the Law Governing Lawyers, § 28A(1) (2016) ("Information imparted to a lawyer during and relating to the representation of a client is attributed to the client for the purpose of determining the client's rights and liabilities in matters in which the lawyer represents the client . . . ."); *see also Long v. Bd. of Gov. of the Fed. Reserve Sys.*, 117 F.3d 1145, 1153 (10th Cir. 1997). Thus, when an attorney representing a client learns facts that would trigger a limited time period for the client to take action, that time period commences from the moment the attorney learns of the operative facts, not the client. *See, e.g., Veal v. Garaci*, 23 F.3d 722, 725 (2d Cir. 1994) (statute of limitations for constitutional claim began to run when attorney had information sufficient to trigger claim).

Numerous cases hold that undue delay *alone* is a sufficient basis to deny leave to amend. *See Woolsey v. Marian Laboratories, Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991); *Sprint Commc'ns Co. L.P. v. Cable One, Inc.*, 2014 WL 588068, at *4 (D. Kan. 2014); *Five Rivers Ranch Cattle Feeding LLC v. KLA Envtl. Servs., Inc.*, 2010 WL 2609426, at *3 (D. Kan. 2010); *Wilson v. Wal-Mart Stores, Inc.*, 2008 WL 2622895, at *3 (D. Kan. 2011). Ms. Weckhorst's efforts to distinguish these cases (Doc. 46 at 17) ring hollow, particularly in light of the new information discussed above.

Ms. Weckhorst may claim that, although her counsel was generally aware of the roommate rape incident when it was reported on Ms. Farmer's "Answers To OIE Questions," in October 2015, Ms. Farmer never shared the specifics of the roommate's name (Ms. Stroup) or the identity of the attacker (J.G.). Such a claim would be hard to believe, given that Ms. Farmer

and Ms. Weckhorst have both alleged K-State systemically failed to investigate off campus rapes, and because the two plaintiffs have collaborated since their lawsuits were filed by, among other things, filing substantially similar pleadings and appearing in television interviews together, as early as April 25, 2016, where each discussed her respective claims.[7]

In any event, Ms. Weckhorst's description and emphasis on the *Fiver Rivers* case is especially poignant now: "In *Five Rivers Ranch Cattle Feeding LLC v. KLA Envtl. Servs.*, plaintiff had in its possession at the time it filed its original complaint evidence that *should have led it to the information* upon which the amended complaint was based . . . ." Doc. 46 at 17 (emphasis added). Here, it seems apparent that Ms. Farmer and Ms. Stroup had substantive discussions regarding Ms. Stroup's alleged rape, and that Ms. Weckhorst's counsel learned of the operative facts of that alleged rape through serving as Ms. Farmer's support person. Thus, it appears Ms. Weckhorst's counsel had, at a minimum, evidence that should have led to the information on which the proposed amendments are based, if not the entirety of the information itself. Thus, the Court should deny leave on the basis of undue delay.

B. Ms. Weckhorst Must Satisfy Rule 20's Substantive Standards For Joinder.

Although she never mentioned Rule 20 in her Motion For Leave, Ms. Weckhorst now cites *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1018 (10th Cir. 1994), claiming it absolves her any requirement to establish that the joinder of Ms. Stroup complies with the substantive joinder provisions in Rule 20. *Koch Industries* says nothing of the sort. To begin, that case involved a dispute as to whether the *procedural* standard for amendment found in Rule 15 (the so-called "freely given" standard) should apply when a party seeks leave to amend to include a new party, or whether the more restrictive *procedural* standard

[7] *http://abcnews.go.com/US/kansas-state-students-sue-university-allegedly-sexual-assaults/story?id=38642385.*

from Rule 21 for the court to join or drop parties—"on just terms"—should apply. *Koch Industries* never mentions, much less discusses whether the *substantive* grounds for joinder in Rule 20 must be met in such a circumstance. Here, K-State has never contested that the procedural standard governing Ms. Weckhorst's amendment is that found in Rule 15.

Indeed, if it were true that a plaintiff seeking to add a party by amendment did not have to satisfy the substantive joinder grounds in Rule 20, Rule 20 would have no practical purpose at all. Instead of joining parties in its initial complaint, a plaintiff would simply file a complaint and immediately amend as of right under Rule 15(a)(1)(A), thereby avoiding entirely application of Rule 20 and joining parties and claims that have nothing whatsoever to do with the claims that initiated the lawsuit in the first place. This cannot be the law, and this Court has recently recognized as much, applying Rule 20, in addition to Rule 15, in circumstances such as this. *See Mann v. Con-Way Freight, Inc.*, 2016 WL 6476548, at *2 (D. Kan. Nov. 2, 2016) ("Because Mann's proposed amended complaint would add additional party plaintiffs, Fed. R. Civ. P. 20(a)(1) also comes into play."); *see also Triple-I Corp. v. Hudson Assocs. Consulting, Inc.*, 2008 WL 338993, at *4 (D. Kan. 2008).

In short, because Ms. Weckhorst seeks to join Ms. Stroup as a co-plaintiff, asserting her own claims, Ms. Weckhorst must satisfy the substantive requirements of Rule 20. She failed to do so at all in her opening papers, and she should not be allowed to do so in her reply. *Cooper ex rel. Posey v. Old Dominion Freight Line, Inc.*, 2011 WL 1327778, at *1 (D. Kan. 2001) (Robinson, J.) ("[T]he Court [] declines to consider new arguments raised for the first time in a reply . . .").

To the extent the Court considers Ms. Weckhorst's untimely arguments under Rule 20, it should reject them. Her central argument is that the two cases are similar because "K-State's

action after the arrest of J.G." supposedly demonstrates K-State had substantial control over J.G. with respect to Ms. Weckhorst's alleged rapes. This is wrong as a matter of law, as K-State has already demonstrated in prior briefing. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 645 (1999) requires that the institution have *contemporaneous* control over *both* the harasser and the context in which the harassment occurs; the *ex post* ability of an institution to levy discipline or other measures is not control. *Roe v. St. Louis University*, 746 F.3d 874 (8th Cir. 2014); *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003); *Samuelson v. Oregon State University*, 2016 WL 727162 (D. Or. 2016).

Moreover, Ms. Weckhorst's assertion that joinder would create efficiencies is simply untrue. As this Court is aware, the companion case *Farmer v. Kansas State University* (No. 2:16-cv-02256-JAR-GEB) is currently pending before this Court and is ready for ruling on multiple motions. The *Farmer* case was originally pending before Chief Judge Marten. On K-State's motion, the Chief Judge reassigned *Farmer* to this Court (and to the same Magistrate Judge) to achieve efficiencies in the discovery process and to resolve the similar legal issues involved in each case; but the cases would be tried, if at all, separately.

Allowing Ms. Weckhorst to add Ms. Stroup as a co-plaintiff in *this* case will further delay disposition of the pending motions, necessitating either a corollary delay in *Farmer* or the *Weckhorst* and *Farmer* cases being put on different discovery and trial tracks, losing whatever efficiencies that otherwise would have existed. Further, even as between Ms. Weckhorst and Ms. Stroup's claims, combining the two into a single case would likely create more *inefficiencies* through a host of evidentiary and trial problems associated with asking the same jury to hear evidence that is relevant to one plaintiff's claims but wholly irrelevant (and likely, unfairly prejudicial) with respect to the other plaintiff. Put simply, if Ms. Stroup wants her allegations to

be adjudicated (something that is still not clear, despite K-State pointing this out in its opposition), Ms. Stroup should be made to file her own lawsuit.

C. Ms. Weckhorst's Amendments Unrelated to Ms. Stroup Are Untimely.

As K-State demonstrated in its opposition, Ms. Weckhorst included several amendments in her proposed First Amended Complaint that are wholly unrelated to Ms. Stroup's alleged assault. *See* Doc. 39 at 6-8. Ms. Weckhorst does not contest that her original papers failed to even notify the Court of these proposed amendments.[8] This alone violates D. Kan. Rule 15.1(a)(1). More importantly, in her Reply, Ms. Weckhorst provides no justification whatsoever for waiting for *six months* after K-State filed its Motion To Dismiss to seek leave to make these amendments.

Ms. Weckhorst's only response is that there is no prejudice to K-State because the "substance" of those amendments is contained in the original complaint. *See* Doc. 46 at 14-16. But undue delay is a ground to deny leave, whether there is prejudice or not. *See Woolsey v. Marian Laboratories, Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991) ("Untimeliness alone may be a sufficient basis for denial of leave to amend. Prejudice to the opposing party need not also be shown."). In fact, Ms. Weckhorst's admission that these new proposed amendments are related to the substance of her original Complaint is essentially an admission she could have made them far earlier, and simply failed to do so.

IV. RESPONSE TO MS. WECKHORST'S FALSE STATEMENTS REGARDING J.G.'S STATUS

As noted above, Ms. Weckhorst asserts in her Reply that K-State expelled or dismissed J.G. after it learned of his arrest. This is false. While this point has no particular relevance to

[8] Once again, this Court should ignore Ms. Weckhorst's attempt to justify them now, for the first time, in a reply brief. *Cooper*, 2011 WL 1327778, at *1.

whether Ms. Weckhorst has established a basis to amend her Complaint, K-State must correct the record: K-State has not expelled or dismissed J.G. Ex. 2, Jones Dec. ¶ 5. Instead, on August 11, 2016, J.G. was no longer enrolled for the fall 2016 semester and was placed on interim suspension pursuant to K-State's CIRT process, pending further procedural steps under the CIRT process, with which J.G. has yet to engage. *Id.*

V. CONCLUSION

Ms. Weckhorst's pattern of undue delay is unmistakable, and it now appears to stretch back to six months *before* she filed her original Complaint. In addition, Ms. Weckhorst must satisfy Rule 20's substantive standards for joinder, and she has not. The Court should deny her leave to amend.

Date: January 31, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, I filed the foregoing document via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

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