IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Date: December 19, 2016

HUSCH BLACKWELL LLP

/s/ Derek T. Teeter

ALLAN V. HALLQUIST D. KAN. NO. 78356
HAYLEY E. HANSON KS BAR NO. 20087
DEREK T. TEETER KS BAR NO. 23242
MICHAEL T. RAUPP KS BAR NO. 25831
HUSCH BLACKWELL LLP
4801 Main, Suite 1000
Kansas City, Missouri 64112
(816) 983-8000
(816) 983-8080 (FAX)
allan.hallquist@huschblackwell.com
hayley.hanson@huschblackwell.com
derek.teeter@huschblackwell.com
michael.raupp@huschblackwell.com

Attorneys for Defendant Kansas State University

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules and Regulations

Additional Authorities

I. INTRODUCTION/SUMMARY OF THE ARGUMENT

K-State established in its Motion To Dismiss (Doc. 12) and Memorandum In Support (Doc. 13), that Ms. Weckhorst's Title IX, Kansas Consumer Protection Act (KCPA), and common-law negligence claims all fail as a matter of law under current U.S. and Kansas Supreme Court precedent. *See infra* at 3-4. Instead of attempting to amend her Complaint (Doc. 1) promptly, Ms. Weckhorst strategically chose to oppose K-State's motion entirely. Months after that motion became fully ripe, Ms. Weckhorst now seeks to undo her strategic decision, claiming she should be given leave to amend based on supposedly "new" information about J.G.'s alleged rape of Crystal Stroup. But the facts show that Ms. Weckhorst has known of the "new" information for months. Therefore, her and her counsel's claim that she only "recently" discovered it is simply indefensible. Further, J.G.'s alleged rape of Ms. Stroup does nothing to cure the fatal problems in Ms. Weckhorst's *own* claims. Given that Ms. Weckhorst's counsel shared a copy of her draft amended pleading with a reporter before evening filing it, it appears her recent efforts are primarily an attempt to stoke media coverage at a strategic time, rather than a serious effort to amend promptly upon receipt of "new" information.

Through her cursory, three-page Motion For Leave To File First Amended Complaint (Doc. 36) ("Motion For Leave") and proposed First Amended Complaint (Doc. 36-1) ("Amended Complaint") Ms. Weckhorst seeks to (i) without explaining this in her Motion For Leave, make numerous amendments, entirely unrelated to J.G.'s alleged rape of Ms. Stroup, that are an attempt to shore up deficiencies in Ms. Weckhorst's original Complaint; (ii) add a host of allegations relating to J.G.'s alleged rape of Crystal Stroup; and (iii) add Ms. Stroup as a plaintiff and assert entirely new claims made by Ms. Stroup against K-State.

While leave to amend should be freely given when justice so requires under Rule 15(a)(2), courts can deny leave for a host of reasons, including undue delay, undue

prejudice, and futility. Here, the Court should deny Ms. Weckhorst's Motion For Leave because her proposed amendments are untimely, prejudicial, and futile. Additionally, Ms. Weckhorst fails to satisfy Rule 20's requirements for the joinder of parties.

With respect to the various amendments intended to shore up the allegations in her original Complaint, Ms. Weckhorst has had since May 27, 2016, when K-State filed its Motion To Dismiss, either to make these amendments as a matter of right or to seek leave to make them. Doing so now, while making it appear in her Motion For Leave that all proposed amendments relate to Ms. Stroup, constitutes unexplained and undue delay—a delay that prejudices both K-State and the Court given that K-State's Motion To Dismiss is fully briefed and has been under consideration for several months. These proposed amendments are also futile, as they do nothing to remedy the legal deficiencies in Ms. Weckhorst's original Complaint that K-State identified in its Motion To Dismiss.

With respect to Ms. Weckhorst's attempt to add allegations relating to J.G.'s alleged rape of Ms. Stroup, this attempt too is untimely. As demonstrated *infra* at 11-15, Ms. Weckhorst almost certainly knew of J.G.'s arrest no later than August 31, 2016, yet Ms. Weckhorst's counsel failed to notify the Court of Ms. Weckhorst's desire to seek leave until November 11, 2016, claiming they only "recently" became aware of the information. Even then, instead of filing a motion expeditiously, Ms. Weckhorst waited until November 28, 2016, at which point her counsel shared the Amended Complaint with news media *before* finally filing it as an attachment to her Motion For Leave. There is no excuse for this delay, and Ms. Weckhorst and her counsel's focus on stoking media sensationalism shows their primarily concern is not with just and expeditious resolution of this lawsuit. *See* Fed. R. Civ. P. 1.

Moreover, J.G.'s alleged rape of Ms. Stroup does nothing to cure the fatal flaws in Ms. Weckhorst's own claims that K-State identified in its Motion To Dismiss. Indeed, the failure of Ms. Weckhorst's own claims turns on *her* allegations and admissions relating to what K-State knew at the time of *her* alleged rapes, where and in what context those rapes occurred, and how K-State responded to her reports. An alleged subsequent rape of Ms. Stroup by J.G. does nothing to salvage Ms. Weckhorst's untenable claims. Therefore, any amendment is also futile.

Finally, Ms. Weckhorst fails even to discuss the propriety of joining Ms. Stroup as a co-plaintiff under Rule 20, even though the law is clear that a plaintiff seeking to add a party by amendment must satisfy Rule 20's joinder requirements, in addition to Rule 15(a)(2)'s "freely given" standard for amendment. Because Ms. Weckhorst does not even attempt to make a Rule 20 showing, the Court should deny any amendment that would result in Ms. Stroup being joined.

II. PROCEDURAL HISTORY

Ms. Weckhorst filed this lawsuit on April 20, 2016. On May 27, 2016, K-State filed its Motion To Dismiss, which demonstrated that Ms. Weckhorst's claims fail as a matter of law.

With respect to Ms. Weckhorst's Title IX claim, for example, K-State demonstrated that the very crime statistics Ms. Weckhorst cited in her Complaint to show that K-State was supposedly aware of an increased risk of rape by fraternities, *actually* showed that K-State's campus and surroundings have substantially fewer reports of rape than other universities and the public generally. Faced with this fact, Ms. Weckhorst abandoned her Title IX claim that K-State was deliberately indifferent to a supposed increased risk posed by fraternities.

With regard to Ms. Weckhorst's Title IX claim that K-State was deliberately indifferent to her report of alleged rapes, K-State demonstrated that Ms. Weckhorst's claim failed under the

U.S. Supreme Court's *Davis* standard because K-State did not have substantial control over J.F., J.G., and the circumstances of the alleged rapes and because Ms. Weckhorst failed to plead facts showing K-State's alleged deliberate indifference to her reports caused her to suffer further harassment. While Ms. Weckhorst argued that Department of Education guidance *requires* institutions to investigate all reports of rape, wherever they occur, K-State cited testimony from the Department's own leaders, who swore to Congress that such "guidance" was non-binding and "does not hold the force of law." *See* Doc. 13, at 11-12.

K-State also demonstrated that Ms. Weckhorst's KCPA claim fails because she did not plead it with particularity and failed to allege she was "aggrieved" by any misrepresentation about fraternities as required by Kansas law. *See Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685 (Kan. 1993). Similarly, regarding Ms. Weckhorst's negligence count, K-State cited controlling Kansas authority holding a university does not have a duty to protect its students from criminal acts occurring off campus and that the university is immune from Ms. Weckhorst's claim in any event under the Kansas Tort Claims Act ("KTCA").

Faced with K-State's motion and briefing, Ms. Weckhorst could have immediately sought to amend her Complaint as of right under Fed. R. Civ. P. 15(a)(1)(B). She did not. Instead, Ms. Weckhorst made the strategic decision to oppose K-State's motion, arguing in her Memorandum In Opposition (Doc. 27) filed on July 1, 2016, that her Complaint was not deficient in the slightest.[1] After K-State filed its Reply (Doc. 32) on July 25, 2016, rebutting Ms. Weckhorst's arguments, she could have sought leave to amend her Complaint at that time. She did not. Instead, K-State's Motion To Dismiss became ripe, and the Court commenced its review and consideration. Months later, on November 11, 2016, Ms. Weckhorst's counsel sent

[1] She did argue that, should the Court find her Complaint deficient, she should be given leave to amend. But, as this Court has noted, such a request fails to comply with Local Rule 15.1 and is typically denied. *See, e.g., McCoy v. City of Independence, Kan.* 2013 WL 424858, at *1 n.3 (D. Kan. 2013).

her e-mail claiming that they "recently" became aware of "new" information and would be filing for leave to amend Ms. Weckhorst's original Complaint. Ms. Weckhorst then filed this Motion For Leave on November 28, 2016.

III. ARGUMENT AND AUTHORITIES

A. Standard for leave to amend

Because more than 21 days have passed since K-State filed its Motion to Dismiss, Rule 15(a)(2) requires Ms. Weckhorst to obtain leave prior to filing an amended complaint. *See* Fed. R. Civ. P. 15(a)(2). By the terms of the rule, the "court should freely give leave when justice so requires." Under this standard, the Court may deny leave to amend upon a "showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendment previously allowed, or futility of amendment." *Boardwalk Apartments, L.C. v. State Auto Property and Cas. Ins. Co.*, 2014 WL 2759570, at *1 (D. Kan. 2014) (denying motion for leave to amend based on undue delay). "Undue delay alone is sufficient to deny a motion to amend; there need not be a showing of prejudice." *Id.*

Importantly, however, where a plaintiff's proposed amendment would result in the joinder of new parties, a plaintiff must, in addition to satisfying the Rule 15(a) standard, establish that joinder of the new party complies with the permissive joinder standards in Rule 20. *White v. Graceland Coll. Ctr. For Professional Dev. & Lifelong Learning, Inc.*, 2008 WL 508908, at *2 (D. Kan. 2008) ("Rule 20(a) governs the propriety of joinder. Rule 15(a) governs the amendment of pleadings before trial."); *see also Hinson v. Norwest Fin. of S. Carolina, Inc.*, 239 F.3d 611, 618 (4th Cir. 2001) ("[A] court determining whether to grant a motion to amend to join additional plaintiffs must consider both the general principles of amendment provided by Rule 15(a) and also the more specific joinder provisions of Rule 20(a)."); *Desert Empire Bank v. Ins. Co.*, 623 F.2d 1371, 1374 (9th Cir. 1980) (same).

Rule 20 requires two elements to be shown before plaintiffs are allowed to join in one action: (i) that the plaintiffs "assert any right to relief, jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (ii) that "any question of law or fact common to all plaintiffs" will arise in the action. Fed. R. Civ. P. 20(a)(1)(A)-(B). Furthermore, even if the technical standards of Rule 20(a)(1) are satisfied, a court must still consider whether the permissive joinder would "comport with the principles of fundamental fairness or would result in prejudice to either side." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000); *see also In re EMC Corp.*, 677 F.3d 1351, 1360 (Fed. Cir. 2012) ("[E]ven if a plaintiff's claims arise out of the same transaction and there are questions of law and fact common to all defendants, 'district courts have discretion to refuse joinder in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness.").

Ms. Weckhorst has failed to meet the standards under both Rule 15(a)(2) and Rule 20.

B. Amendments intended to bolster deficiencies in Ms. Weckhorst's original Complaint are untimely, prejudicial, and futile given that K-State's Motion To Dismiss has been fully briefed and ripe for months.

1. Without telling the Court, Ms. Weckhorst seeks to make a host of amendments that have nothing to do with J.G.'s alleged rape of Ms. Stroup.

The Court should deny leave for amendments that are wholly unrelated to the supposedly "new" information pertaining to Ms. Stroup and that Ms. Weckhorst fails even to identify in her Motion For Leave.

Although Ms. Weckhorst's Motion For Leave implies the only amendments Ms. Weckhorst seeks to make to her Complaint are ones related to J.G.'s alleged rape of Ms. Stroup and K-State's resulting response, this is not accurate. A redline compare of Ms. Weckhorst's proposed Amended Complaint to her original Complaint shows that Ms.

Weckhorst is attempting to make a host of other amendments to her allegations that have nothing to do with J.G.'s arrest and pending criminal prosecution. *See* Ex. 1, Redline Compare. These additional amendments, which Ms. Weckhorst's Motion For Leave fails to address *at all*, include:

- New allegations pertaining to Tessa Farmer's lawsuit (2:16 cv-02256-JAR-GEB), which was filed the same day as Ms. Weckhorst's lawsuit. *See* Ex. 1, Redline Compare ¶ 4.

- New allegations about what information concerning fraternities was "delivered" to Ms. Weckhorst. *See id.* ¶ 27.

- A shift in language between the original Complaint, which alleged K-State should have "sanctioned" J.G., to allegations in the Amended Complaint stating that K-State should have instituted "disciplinary proceedings" against J.G. *Id.* ¶ 33.

- Entirely new allegations that Ms. Weckhorst reported her alleged rapes to K-State because she "did not want what was done to her to be done to anyone else." *Id.* ¶ 50.

- Entirely new allegations about research conducted by David Lisak and Paul Miller that supposedly addresses rape recidivism. *Id.* ¶ 64.

- Entirely new allegations regurgitating complaints raised by a former disgruntled Office of Institutional Equity (OIE) employee, Danielle Dempsey-Swopes in the fall of 2015, including a verbatim quotation from Ms. Dempsey-Swopes that improperly discloses her account of privileged attorney-client communications. *Id.* ¶ 68.[2]

- New allegations vaguely described as being from a "study from the University of Oregon," claiming that sorority women are more likely to be raped then non-sorority women students. *Id.* ¶ 74.

- Allegations relating to K-State's climate assessment, which Ms. Weckhorst claims showed 198 students reported having experienced

[2] K-State has separately filed a Motion To Strike this portion of the proposed Amended Complaint.

"unwanted sexual contact while a member of the Kansas State University community." *Id.* ¶¶ 77 & 111.[3]

- New allegations, albeit conclusory ones, claiming that K-State had actual knowledge of alleged sexual violence at the fraternity where Ms. Weckhorst claims she was raped. *Id.* ¶ 84.

- New allegations relating to K-State's "policies" for working with the IFC and for interacting with the local and national chapters of fraternities. *Id.* ¶ 87.

- New allegations that Ms. Weckhorst believes "her assailants to be on campus." *Id.* ¶ 101.[4]

Nowhere in her Motion For Leave does Ms. Weckhorst address the existence of these various amendments, much less does she provide any explanation for why they are only being attempted now. Therefore, she does not even attempt to satisfy Rule 15, and leave can be summarily denied on that basis alone.

2. Ms. Weckhorst could have made these amendments months earlier and gives no explanation for her failure to do so.

Ms. Weckhorst's attempt to shore up the allegations in her original Complaint comes almost six months after the K-State moved to dismiss. This Court has repeatedly held that delays of much shorter duration are sufficient in and of themselves to deny leave. *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."); *Sprint Communications Co. L.P. v. Cable One, Inc.*, 2014 WL 588068, at *4 (D. Kan. 2014) (affirming magistrate's denial of leave to amend as unduly delayed where party waited

[3] The most recent data available on the Department of Education's statistics website indicates that K-State's Manhattan campus has an enrollment of 24,146 students. *http://nces.ed.gov/globallocator/.* 198 reported acts of "unwanted sexual contact" amounts to a rate of 0.8%, or approximately 8 in 1,000, of which only some fraction would be "rapes" as Ms. Weckhorst claims she experienced and even then are not necessarily "rapes" that occurred on K-State's campus or in areas where K-State has substantial control.

[4] Ms. Weckhorst fails to explain how she could believe J.G. is present on campus when her own proposed Amended Complaint alleges he has been "expelled" and arrested.

two months to seek leave after receipt of information supposedly necessitating amendment); *Five Rivers Ranch Cattle Feeding LLC v. KLA Environmental Servs., Inc.*, 2010 WL 2609426, at *3 (D. Kan. 2010) (**three-month** delay between receipt of information and request for amendment constituted "undue delay"); *Wilson v. Wal-Mart Stores, Inc.*, 2008 WL 2622895, at *3 (D. Kan. 2011) (affirming magistrate's conclusion that **two-month** delay between deposition and leave to amend predicated on information obtained during deposition was undue).

Notably, Ms. Weckhorst does not even argue why this subset of her proposed amendments are timely. Indeed, as noted above, she fails even to identify their existence to the Court. This is all the more reason to deny her leave. *Woolsey*, 934 F.2d at 1462 ("Woolsey offered no explanation for the delay, another factor supporting denial of leave to amend."). Furthermore, Ms. Weckhorst's failure even to mention these amendments (instead trying to slip them in under the guise of other amendments supposedly justified by J.G.'s arrest and prosecution), violates Local Rule 15.1(a)(1).

If and to the extent Ms. Weckhorst attempts to justify in her reply brief why she should be allowed to make these amendments, the Court should not allow it. The Court's consistent practice is to refuse to consider arguments that should have been made in the initial motion and supporting brief. *See, e.g., Cooper ex rel. Posey v. Old Dominion Freight Line, Inc.*, 2011 WL 1327778, at *1 (D. Kan. 2011) ("[T]he Court [] declines to consider new arguments raised for the first time in a reply . . .").

In sum, Ms. Weckhorst inexplicably and unduly delayed seeking leave to make amendments intended to shore up her original allegations. Therefore, the Court should deny leave.

3. Allowing Ms. Weckhorst to bolster her original allegations after K-State's Motion To Dismiss has been fully briefed for months prejudices K-State and the Court.

There is real prejudice to K-State and the Court from Ms. Weckhorst's late attempt to make amendments she could have made as of right once K-State filed its Motion To Dismiss. Specifically, instead of amending her Complaint as of right, Ms. Weckhorst filed a Memorandum In Opposition, which necessitated K-State incurring attorney fees and expense in filing a Reply brief. Moreover, the Court likely has already invested a significant amount of time and attention analyzing the adequacy of the original Complaint in light of K-State's arguments. K-State should not be made to re-brief its Motion To Dismiss, nor the Court to duplicate its work, where Ms. Weckhorst could have sought leave with respect to these various amendments much earlier. *See, e.g., Bay Harbor Mgmt., LLC v. Carothers*, 474 F. Supp. 2d 501, 503 (S.D.N.Y. 2007) (denying leave and finding prejudice where defendants' "motion to dismiss the amended complaint had been fully briefed and defense counsel had prepared for oral argument"); *cf. Schor v. Daley*, 563 F. Supp. 2d 893, 904 (N.D. Ill. 2008) (denying leave to amend on the basis of undue delay where motion to dismiss "had been fully briefed for almost two months"). So, for this additional reason, the Court should deny Ms. Weckhorst leave to make the amendments in question.

4. Ms. Weckhorst's proposed amendments regarding issues unrelated to Ms. Stroup are futile.

Even if the Court were to consider the merits of Ms. Weckhorst's proposed amendments intended to shore up her original Complaint, it should deny the motion for leave to amend because the proposed amendments are futile. *See Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239 (10th Cir. 2001). The proposed amendments do nothing to cure the core legal deficiencies found in Ms. Weckhorst's claims. Most notably, these allegations do not even

purport to establish that K-State had substantial control over J.F. and J.G. *and* the context in which the alleged rapes of Ms. Weckhorst occurred. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-41 (1999). Further, these proposed amendments do nothing for Ms. Weckhorst's KCPA claim, as they do not allege that she was "aggrieved" by any supposed representation. *Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685 (Kan. 1993). Finally, these amendments cannot save Ms. Weckhorst's negligence claim, because K-State has no duty, as a matter of law, to protect students from criminal activity off campus, and several provisions of the KTCA provide K-State with immunity from these claims.[5] Therefore, futility is a third basis to deny Ms. Weckhorst leave to make allegations she could have made months ago in an attempt to amend her original (deficient) allegations.

C. Amendments arising from Ms. Stroup's alleged rape are untimely and futile.

As discussed above, the Court should reject all of the allegations Ms. Weckhorst attempts to add to cure deficiencies in her original Complaint. Separately, though for related reasons, this Court should also reject Ms. Weckhorst's request to add allegations in the proposed Amended Complaint related to Ms. Stroup.

1. Ms. Weckhorst has known about J.G.'s arrest for months. Her and her counsel's representations that she "just" "recently" learned of this information are not accurate.

As noted above, undue delay alone is a sufficient basis in and of itself to deny leave to amend under Rule 15(a)(2)'s standard. *Boardwalk Apartments*, 2014 WL 2759570, at *1. And this Court has held that unexplained delays of two or three months are "undue" and a basis upon which to deny leave to amend. *Cable One, Inc.*, 2014 WL 588068, at *4; *Five Rivers*, 2010 WL 2609426, at *3; *Wilson*, 2008 WL 2622895, at *3.

[5] K-State reserves its right to challenge in full the legal sufficiency of Ms. Weckhorst's allegations through Rule 12(b)(6), should the Court allow amendment.

Ms. Weckhorst did not communicate with K-State (or, to K-State's knowledge, the Court) from the time the Motion to Dismiss was fully briefed, July 25, 2016, until November 11, 2016—a period of 109 days—when her counsel sent an unsolicited email to chambers stating:

> We represent Plaintiffs Sara Weckhorst and Tessa Farmer in the above referenced related matters against Defendant Kansas State University. We have *recently* been made aware of significant *new* relevant information, and intend to move for leave to file a First Amended Complaint in the Weckhorst matter within the next 10 business days. As you know, Defendant's Motion to Dismiss for Failure to State a Claim and Defendant's Motion to Join Additional Parties are pending before the court, and have been fully briefed. We respectfully request that the court refrain from ruling on these motions until we have been able to seek leave to amend to file the First Amended Complaint.

Ex. 2, Email to Chambers from Ms. Simon (emphasis added).

In her Motion For Leave, filed seventeen days later on November 28, 2016, Ms. Weckhorst repeated the claim that her request to amend is predicated on fresh information, asserting that there is "*newly discovered* information that J.G., one of the K-State students who raped Sara, was *recently* arrested for raping another K-State student and criminally charged for raping both that student and Sara." Motion For Leave at 1 (emphasis added).

According to Ms. Weckhorst, "[f]ollowing J.G.'s arrest, K-State exercised disciplinary control over J.G. for his sexual assault of Crystal, which, like the rape of Sara, occurred off campus." *Id.* Ms. Weckhorst claims that "[t]hese [are] *newly discovered* facts" and represents that she "only *recently* learned about these facts, suffered additional emotional injury, and moved promptly to amend her Complaint." *Id.* at 3 (emphasis added).

Despite Ms. Weckhorst's claims that J.G. was just "recently" arrested, public records from the Riley County District Court reflect that J.G. was charged by information on July 25, 2016, that a warrant for his arrest was issued on July 27, 2016, and that he was released on bond August 2, 2016. *See* Ex. 3, Riley County Docket. There are **118 days** between August 2, 2016

and November 28, 2016, the date Ms. Weckhorst made her representation that J.G. was "recently arrested."

Records from the Riley County District Court also reflect that an amended criminal information was filed against J.G. on August 31, 2016, which included not only the charges pertaining to the alleged rape of Ms. Stroup, but also the additional counts pertaining to J.G.'s alleged rape of Ms. Weckhorst. *Id.* Given the widespread practice of prosecutors notifying alleged victims before criminal charges are brought, it is almost certain Ms. Weckhorst was notified of these new charges at the time they were filed, if not before. Thus, at the very latest, Ms. Weckhorst was aware of the information upon which she predicates her need for amendment by August 31, 2016, some **72 days** before her counsel wrote they just "recently" learned of these facts.[6]

That Ms. Weckhorst would notify the Court of her desire to move for leave on November 11, but indicate she needed additional time to prepare the actual motion, was perplexing in light of all of the time she had available after learning of the supposed "new facts." As the situation developed, however, it became clear that Ms. Weckhorst was at least partially preoccupied with generating media interest for her upcoming filing.

Specifically, after this Court acknowledged Ms. Simon's November 11 e-mail, there were no further communications or developments until 6:34 am CST on November 28, 2016—nearly 5 hours *before* Ms. Weckhorst would file her motion—when K-State's Vice-President for Communications and Marketing received an unsolicited email from a reporter from "BuzzFeed News." The email stated, in pertinent part:

[6] Moreover, the Riley County District Court held a preliminary hearing on October 21, 2016, during which Ms. Weckhorst testified extensively about her alleged encounter with J.G., after Ms. Stroup testified about her encounter. It is inconceivable that prosecutors, Ms. Weckhorst, and her counsel were not in communication about the subject matter of the hearing well in advance of the hearing.

> I am working on a story about how Kansas State University has handled sexual assault cases, based off of interviews and a new court filing today. I am giving the university the opportunity to respond.
>
> This new information comes in light of the two ongoing lawsuits over K-State's refusal to investigate sexual assault cases that happen off campus.
>
> Crystal Stroup says in a new court filing that she was raped in October 2015 by [J.G.], a student who had previously been accused of raping Sara Weckhorst. Crystal says that she at first did not report to K-State, because her roommate, Tessa Farmer, told her the school wouldn't act on it. When Stroup did tell someone at the CARE center, no one offered her options about a disciplinary process, or about getting a no contact order against [J.G.]

See Ex. 4, BuzzFeed Email Exchange.

Because Ms. Weckhorst had not, by this time, filed her Motion For Leave and Amended Complaint, K-State responded at 11:24 am CST that it was unaware of any new court filing and requested the reporter send a copy of the document he referenced. *Id.* The reporter then responded, stating "My understanding is that this will be filed as an amended complaint in the next hour for 2:16-cv-02255-JAR-GEB Weckhorst v. Kansas State University." *Id.* Because only Ms. Weckhorst's counsel would know what time Ms. Weckhorst was filing her Motion For Leave and Amended Complaint, it is safe to assume the reporter had received his copy of the Amended Complaint directly from Ms. Weckhorst's counsel and was in communication with Ms. Weckhorst's counsel about it and his planned news story.

Then, at 11:26 am CST (according to the CM/ECF entry), Ms. Weckhorst finally filed her Motion For Leave and proposed Amended Complaint. *See* Doc. 36 and 36-1. Only thirty minutes later, by 12:06 pm CST, the BuzzFeed reporter published an article on the proposed Amended Complaint that included a quote from a "statement" submitted by Ms. Weckhorst's attorney who editorialized that she was "devastated to learn that after K-State refused to investigate Sara [Weckhorst's] report of rape, the same unpunished perpetrator went on to rape

Crystal [Stroup]." *See* Ex. 5, BuzzFeed Article.[7] Given that there were only thirty minutes between the filing of the proposed Amended Complaint and publication of the 1,200-word article, it is reasonable to assume the article was already written and incorporated the attorney's comments even before the Motion for Leave was filed.

Numerous other print or online media entities published articles on the proposed Amended Complaint that same day, many of which included various quotes from Ms. Weckhorst's attorney. One, a story on Channel 13, quoted Ms. Weckhorst's counsel as stating "K-State took no corrective action in response to her (Weckhorst) report of rape and the student (Weckhorst's assailant) went on to rape another student Crystal," *see* Ex. 6, WIBW Article, despite the fact that Ms. Weckhorst's original Complaint outlined a number of measures that K-State took to assist Ms. Weckhorst.[8] Articles published the following day, November 29, 2016, also included a number of additional remarks from Ms. Weckhorst's attorney that were highly inflammatory and falsely suggest K-State does not have a desire to protect its students.[9]

Apart from the sheer number of days between her receipt of the supposedly "new" information and her filing of the Motion For Leave (at least 72 days, as noted above),

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[7] Such a statement would not be allowed at trial because it represents counsel's personal opinion about the justness of a cause. *See* Kan. R. P. Conduct 3.4(e). While such a comment in isolation likely does not implicate a violation of rules governing *pretrial* publicity, K-State does have serious concerns that the cumulative content and effect of counsel's numerous media statements could be to materially prejudice any trial of this case. K-State reserves its right to seek relief from the Court, including a protective order, governing counsel's comments to the media.

[8] These included: (1) K-State's student health center treated Ms. Weckhorst the day after the alleged rapes, providing her with emergency contraception; (2) K-State's Women's Center (the predecessor to the CARE office) assisted Ms. Weckhorst in drafting a complaint against J.F. and J.G. for evaluation by K-State's "affirmative action office"; (3) K-State's investigator met with Ms. Weckhorst and evaluated her complaint but concluded it was beyond K-State's jurisdiction because Ms. Weckhorst did not allege that the rapes occurred in K-State's education programs and activities, and she did not allege that any sexual harassment occurred on campus; (4) despite the lack of jurisdiction to conduct a full investigation, K-State offered to provide Ms. Weckhorst with resources such as student escorts on campus and a ride service for weekends; and (5) numerous administrators met with Ms. Weckhorst and filed a complaint with the Interfraternity Council ("IFC"), which regulates Greek organizations. Doc. 1, ¶¶ 19, 21, 22, 37, 48.

[9] *http://www.kstatecollegian.com/2016/11/29/former-k-state-student-joins-in-title-ix-lawsuits-filed-against-university/*; *http://www.startribune.com/lawsuit-kansas-state-s-inaction-led-to-another-rape/403481906/.*

Ms. Weckhorst's preoccupation with orchestrating a media blitz during the ten business days she supposedly needed to prepare her filings, is further evidence that the delay is "undue" and that this Court should deny leave. This is doubly true here, because the actions Ms. Weckhorst took during that period of delay prejudiced K-State through the inaccuracies furthered by Ms. Weckhorst.

The parties are charged with securing a "just, speedy, and inexpensive determination" of this case, which is greatly complicated by these continued distractions. *See* Fed. R. Civ. P. 1. The timing of all events leading up to Ms. Weckhorst's request that she be given leave to amend illustrates that she had ample opportunity to raise the issue well before she did. She failed to approach the Court in a timely manner, when she did, she used inaccurate terminology such as "recently" to describe when she learned of the information supposedly justifying the need to amend, and then, after notifying the Court of her desire to amend, she appeared more concerned with setting up media stories than promptly proposing her amendments. Given the unjustified delay on Ms. Weckhorst's part in presenting her Motion For Leave, the Court should deny it on the basis of undue delay.

2. Ms. Weckhorst's proposed amendments relating to Ms. Stroup are futile.

None of the proposed amendments Ms. Weckhorst seeks to make relating to the alleged rape of Ms. Stroup cures the fatal deficiencies in Ms. Weckhorst's *own* claims, and it is black-letter law that a court should deny leave to amend where the proposed amendments are futile. *See Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239 (10th Cir. 2001). Therefore, the Court should deny Ms. Weckhorst leave to make amendments relating to the alleged rape of Ms. Stroup.

In her proposed Amended Complaint, Ms. Weckhorst alleges that she was raped by J.G. in April 2014. *See* Amended Complaint ¶ 16. Notably, she does not claim that J.G. raped any other K-State student prior to April 2014, let alone that he was accused of any such conduct. Instead, relevant to J.G.'s alleged rape of Ms. Stroup, Ms. Weckhorst's proposed Amended Complaint alleges that J.G. raped Ms. Stroup at an off-campus apartment complex in October 2015, well over a year *after* Ms. Weckhorst claims she was raped. J.G.'s alleged subsequent rape of Ms. Stroup simply has no relevance to any of the elements of Ms. Weckhorst's claims, all of which are predicated on K-State's knowledge of events prior to and during Ms. Weckhorst's alleged rape and K-State's response to Ms. Weckhorst's alleged rape.

Under the *Davis* standard set by the Supreme Court and as applied by the Tenth Circuit, Ms. Weckhorst can prevail on her Count I for violation of Title IX only by showing that K-State was (i) deliberately indifferent to; (ii) known acts of sexual harassment; (iii) occurring in circumstances where K-State had substantial control over the alleged harasser and the context of the harassment[10]; and (iv) where K-State's deliberate indifference *caused* Ms. Weckhorst to suffer exclusion from K-State's programs and activities. *See Davis*, 526 U.S. at 640-41; *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1123 (10th Cir. 2008); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155-56 (10th Cir. 2006).

Ms. Weckhorst has already abandoned her claim that, *before* J.F. and J.G. allegedly assaulted her, K-State had actual knowledge of an increased risk of rape posed by fraternities. With respect to her remaining Title IX theory that K-State was deliberately indifferent to Ms. Weckhorst's own report of rapes, K-State demonstrated that Ms. Weckhorst's claim failed because the alleged rapes occurred in private settings where K-State did not have substantial

[10] As the Supreme Court explained in *Davis*, this element of "substantial control" is closely tied to, and derives from the fact that, Title IX only prohibits sex discrimination in an institution's education programs and activities. *See Davis*, 526 U.S. at 645.

control and because Ms. Weckhorst did not allege facts showing K-State's action caused her to suffer *further harassment*. While Ms. Weckhorst argued K-State's ability to discipline J.F. and J.G. *after the fact* amounted to substantial control, K-State cited cases holding precisely the opposite. *See, e.g.*, *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014); *Samuelson v. Oregon State Univ.*, 2016 WL 727162 (D. Or. 2016). Additionally, K-State showed the Court rulings issued by the Department of Education itself, holding that institutions do not have a Title IX obligation to investigate reported acts of sexual harassment occurring in private residences, even when persons living there are participants in an institution-recognized club or sport. *See* Doc. 35-7 and 35-8.

Likewise, while Ms. Weckhorst alleges that K-State "expelled" J.G. after K-State learned J.G. was arrested for raping Ms. Stroup and claims this shows K-State had "control" over J.G., as a matter of law, K-State did not. *See Roe*, 746 F.3d at 884 (explicitly rejecting the notion that the ability to discipline a perpetrator *ex post* satisfies the *Davis* standard of substantial control). Therefore, J.G.'s alleged rape of Ms. Stroup, even if true, does nothing to cure these fatal problems with Ms. Weckhorst's claims.

Further, while Ms. Weckhorst claims she suffered additional *emotional distress* when she learned J.G. had raped Ms. Stroup, this allegation, even if true, is entirely irrelevant to the question of substantial control. *See Rost*, 511 F.3d at 1123. Nor does it establish that *Ms. Weckhorst* suffered further harassment. *Id.* To the extent Ms. Stroup claims that she suffered further sexual harassment as a result of K-State's response to Ms. Weckhorst's reports of rape, that is a claim for Ms. Stroup to make, not Ms. Weckhorst.[11]

[11] Indeed, there are myriad problems with any causation argument Ms. Stroup might make, not the least of which is that she was allegedly raped at an off-campus apartment, and even if K-State had expelled J.G. after Ms. Weckhorst made her complaints, K-State could not have done anything to prevent J.G. from staying in Manhattan and living in the apartment complex where Ms. Stroup apparently alleges she was raped.

As K-State demonstrated in its Motion To Dismiss, Ms. Weckhorst's KCPA claim also fails because it is not pled with specificity as required by Rule 9(b) and because Ms. Weckhorst does not plead any facts to establish she was "aggrieved" by a false or misleading statement on K-State's part; in other words, she does not allege that she heard or saw any statement that was causally related to any injury she claims. *See Finstad*, 845 P.2d at 687-88. While Ms. Weckhorst has never explained what representations on K-State's part about fraternities or safety she saw that were causally connected to her alleged rapes by J.F. and J.G., she certainly cannot claim that J.G.'s alleged rape of Ms. Stroup at an off-campus *apartment complex* is relevant to determining whether Ms. Weckhorst relied on statements about fraternities that were allegedly made *prior* to Ms. Weckhorst's alleged rapes. *Cf. Denny v. Barber*, 576 F.2d 465, 470 (2d 1978) (rejecting the notion of "fraud by hindsight") (Friendly, J.).

Finally, with respect to Ms. Weckhorst's negligence claims, K-State showed the claims are barred because: (i) K-State does not have a tort-law duty to protect its students from the criminal acts of others on or off campus absent the existence of a special relationship; and (ii) because K-State is immune from any suit based on multiple provisions of the KTCA, including those that provide immunity for the "enforcement of or failure to enforce a law" and for "discretionary function[s.]" *See* Doc. 13, at 24-29. Even if J.G. did subsequently rape Ms. Stroup, that fact has no bearing on these dispositive issues.

In short, *even if* J.G. raped Ms. Stroup in 2015 (which has yet to be proven), and *even if* K-State "expelled" J.G. upon learning of his arrest (it did not), these facts do nothing to cure the fatal deficiencies presently existing in Ms. Weckhorst's claims as fully identified in K-State's Motion To Dismiss. Thus, Ms. Weckhorst's attempt to amend her pleadings to include them is futile.

Ms. Weckhorst may argue that the proposed Amended Complaint also purports to include new claims that would be asserted by Ms. Stroup directly against K-State, and which Ms. Weckhorst would argue are not futile. However, as noted below, Ms. Weckhorst has not established a basis to join Ms. Stroup under Rule 20. And because Ms. Stroup has not entered an appearance and has yet to file any claims in the first instance, it is premature for K-State to address the merits of her claims.[12] However, K-State notes that, according to Ms. Weckhorst, Ms. Stroup was raped by J.G. at an off-campus apartment complex that K-State does not own. If this is true, then Ms. Stroup's alleged rape did not occur in K-State's substantial control, as cases like *Roe* and *Samuelson* make clear, and any Title IX claim would fail. *See Roe*, 746 F.3d at 884 ("On the facts of this case, there was no evidence that the University had control over the student conduct at the off campus party."); *Samuelson*, 2016 WL 727162, at *6 ("OSU had no control over an off-campus party at an apartment that simply happened to be located in the same city as the university.").[13]

D. Ms. Weckhorst fails to establish that Ms. Stroup can be joined as a plaintiff under Rule 20.

Because Ms. Weckhorst's proposed Amended Complaint seeks to add a new party—namely, Ms. Stroup as a co-plaintiff—it is not enough that Ms. Weckhorst simply meet Rule 15(a)'s general standard for amendment (which she does not even meet). For Ms. Stroup to join this case as a co-plaintiff, Ms. Weckhorst also must satisfy the rules for joinder under Rule 20. But here, Ms. Weckhorst's Motion For Leave does not even mention Rule 20.

[12] K-State has not located any case where a Court engaged in a futility analysis with respect to a putative *new* party's claims that have yet to be pled in the first instance. Futility arguments are typically made *after* a claim is pled (or allowed to be pled), a motion to dismiss is filed, and amendments are then proposed.

[13] Any negligence claim Ms. Stroup might assert would fail for the same reasons Ms. Weckhorst's negligence claim currently fails—namely, lack of duty and KTCA immunity.

Ms. Weckhorst wholly fails to satisfy her burden to establish the viability of joinder under Rule 20 because she does not even make any arguments pertaining to the subject. *See, e.g.*, *Dolan v. Safeco Ins. Co. of Indiana*, 297 F.R.D. 210, 211 (E.D.N.Y. 2014) ("Plaintiffs bear the burden of demonstrating that joinder is proper under Rule 20(a).") ; *cf. Chambers v. Roberts*, 2013 WL 6670521, at *2 (D. Kan. 2013) ("[T]he court finds that plaintiffs do not satisfy Rule 20 of the Federal Rule of Civil [Procedure] and may not be permitted to bring this action jointly."). She fails to show that her and Ms. Stroup's claims are one and the same, and she does not identify what issues of law and fact the two incidents have in common. Moreover, Ms. Weckhorst makes no attempt to explain how joinder could be accomplished consistent with fundamental fairness and without prejudice to K-State, given the myriad evidentiary and jury confusion issues implicated by asking the same jury to determine whether two separate rapes occurred and, if so, what those facts mean for two separate sets of civil claims.

In addition, Ms. Weckhorst fails to demonstrate even the basic proposition that Ms. Stroup *wants* to join this suit. Indeed, Ms. Weckhorst does not submit any declaration or affidavit from Ms. Stroup indicating her desire to be a plaintiff. Moreover, the docket does not reflect that any attorney has entered his or her appearance on behalf of Ms. Stroup. Nor do Ms. Weckhorst's attorneys expressly state in any pleading that they represent Ms. Stroup. Without such a showing, it would be wholly improper to join Ms. Stroup, even if Ms. Weckhorst had attempted to satisfy Rule 20(a)(1). *See The 198 Trust Agreement v. CAAMS, Inc.*, 2015 WL 1529274, at *6 (D. Colo. 2015) ("[I]t would be inequitable for the Court to join a non-party to this matter as a plaintiff when the Court does not know if the [non-party] seeks to vindicate any

alleged rights" and noting the absence of any declaration or affidavit substantiating the non-party's desire to join).[14]

Assuredly, Ms. Weckhorst will attempt to explain for the first time in her reply brief why joinder of Ms. Stroup under Rule 20 is proper. And she may well, along with her reply brief, submit some basis to establish that Ms. Stroup actually wants to join in this case. But the Court should, consistent with its standard practice, reject any such attempt to satisfy such basic burdens in a reply brief. *See Cooper*, 2011 WL 1327778, at *1.

Indeed, Ms. Weckhorst has known the details of Ms. Stroup's alleged rape since *at least* August 31, 2016. Ms. Weckhorst had ample opportunity to research the required standards under Rule 15 and Rule 20 and she had more than ample time to prepare a suitable motion; instead, she was apparently more concerned with setting up media stories intended to inflame public sentiment. She should not be allowed to correct these deficiencies in a reply brief.

Because Ms. Weckhorst has not even attempted to satisfy Rule 20 and gives no indication Ms. Stroup has affirmatively agreed to be joined, this Court should deny any attempt to add Ms. Stroup as a party. If Ms. Stroup wishes to assert her own claims against K-State, she should do so in a separate lawsuit, as Tessa Farmer has done.

IV. CONCLUSION

Ms. Weckhorst's various proposed amendments are untimely, prejudicial, and futile. With respect to those amendments intended to shore up Ms. Weckhorst's original allegations, Ms. Weckhorst could have made them as of right as soon as K-State filed its Motion To Dismiss. She made a strategic decision not to, which prompted K-State to file a Reply and the Court to

[14] *CAAMS* goes so far as to hold that only the non-party herself is permitted to file a joinder motion under Rule 20(a)(1). *See id.* at *7. This Court need not resolve that question, given that Ms. Weckhorst has not even established that Ms. Stroup wants to join this case.

consider the Motion To Dismiss once ripe. There is simply no justification for her late, prejudicial, and futile attempt to make these amendments.

With respect to the various amendments relating to Ms. Stroup, these amendments too are unduly delayed—by over two months. They do nothing to cure the deficiencies in Ms. Weckhorst's own allegations, and Ms. Weckhorst does not even attempt to establish the propriety of joining Ms. Stroup as a co-plaintiff under Rule 20. As such, the Court should deny the Motion To Amend in its entirety.

Date: December 19, 2016

HUSCH BLACKWELL LLP

/s/ Derek T. Teeter
ALLAN V. HALLQUIST D. KAN. NO. 78356
HAYLEY E. HANSON KS BAR NO. 20087
DEREK T. TEETER KS BAR NO. 23242
MICHAEL T. RAUPP KS BAR NO. 25831
HUSCH BLACKWELL LLP
4801 Main, Suite 1000
Kansas City, Missouri 64112
(816) 983-8000
(816) 983-8080 (FAX)
allan.hallquist@huschblackwell.com
hayley.hanson@huschblackwell.com
derek.teeter@huschblackwell.com
michael.raupp@huschblackwell.com

Attorneys for Defendant Kansas State University

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, 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.

/s/ Derek T. Teeter
Attorney for Defendant