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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Dr. Matthew Abraham, an individual, Plaintiff, v. Arizona Board of Regents, for and on behalf of the University of Arizona, Defendant.	No. 4:25-cv-25-00656-RCC-EJM **PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Plaintiff Dr. Matthew Abraham ("Abraham"), through the undersigned counsel, respectfully files the instant Reply to Defendant Arizona Board of Regents' ("ABOR") Response in Opposition to Abraham's Motion for Leave to File Second Amended Complaint ("Motion," Dkt. 26).

I. Introduction.

ABOR's Opposition is a case study in misdirection. Struggling to identify a cognizable basis to deny leave under the governing standard, ABOR asks this Court to conduct a merits trial on exhaustion, adjudicate a contested jury-trial question that is not

yet ripe, and penalize a plaintiff for meeting a deadline that both parties jointly proposed. None of these arguments are well-founded. Worse, they are advanced by a party that jointly proposed the very deadline it now seeks to weaponize against its opponent. The Motion should be granted.

II. The Governing Legal Standard Strongly Favors Amendment.

Rule 15(a)(2) directs that leave to amend shall be "freely give[n] when justice so requires." Fed. R. Civ. P. 15(a)(2). The U.S. Supreme Court identified five factors relevant to the denial of leave: bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the plaintiff has previously amended. *Foman v. Davis*, 371 U.S. 178, 182 (1962). None of these factors weighs against Abraham—and ABOR does not seriously argue otherwise.

The Ninth Circuit applies this standard with "extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (per curiam). The presumption runs in favor of granting leave: "absent a showing of any of these factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Id.* at 1052. The burden of overcoming that presumption rests entirely on ABOR. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). This means it is not Abraham's burden to justify the amendment—it is ABOR's burden to demonstrate a concrete basis to deny it.

ABOR cannot carry that burden. It does not argue bad faith, and it does not argue prejudice—a silence that speaks volumes. ABOR has known about Abraham's termination since it occurred, has been litigating this case throughout, and faces no disruption from an amendment filed months before any trial date has been set. ABOR's opposition rests entirely on undue delay and futility. As demonstrated below, both arguments fail. The presumption of extreme liberality compels granting leave.

III. Abraham Filed on the Court-Ordered Deadline—That is Not a Delay.

Abraham filed this Motion on June 30, 2026—the last day of the amendment deadline jointly proposed by the parties in their Rule 26(f) Report and formally adopted by the Court in its Scheduling Order. A filing made on the deadline is, by definition, timely.

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See Rivers v. Florence Crittenton Servs. of Ariz., Inc., 2025 U.S. Dist. LEXIS 39232, at *4 (D. Ariz. 2025) (granting motion to amend filed on the final day of the scheduling order deadline; denying motion to strike as moot). A court-ordered deadline is not a suggestion to file sooner—it is the outer boundary within which a party may act as of right. To hold that filing on the last authorized day is a delay would be to punish a litigant for following the Court's own order. ABOR's argument does not just fail—it would turn every amendment deadline in this District into a trap for the diligent.

A. The retaliatory discharge claim could not reasonably have been added earlier.

ABOR contends that Abraham should have sought to amend sooner because the University of Arizona's ("UA") dismissal proceedings were underway before the amendment deadline. This argument ignores both the facts and the law. Abraham's dismissal did not become final and effective until April 1, 2026—less than three months before this Motion was filed. Prior to that date—as discovery will show and ABOR full well knows—the termination was the subject of a contested, multi-step internal process that UA itself requires as a precondition to terminating a tenured faculty member—a process that included Abraham's timely internal appeal and a formal review by UA's own Committee on Academic Freedom and Tenure ("CAFT"). Abraham was not waiting passively—he was actively exercising the procedural rights that UA's own governance framework affords to tenured faculty facing dismissal. UA's own academic tribunal—the very body charged under UA's governance structure with evaluating the propriety of a tenured faculty dismissal—unanimously recommended that UA's president reject the termination, concluding that termination was a disproportionate response. The administration nonetheless upheld the termination over that unanimous recommendation.

Even after the dismissal became final on April 1, 2026, Abraham had every reason to believe the decision might be reversed through judicial review before the amendment deadline expired. On April 30, 2026, Abraham timely filed a Notice of Appeal in the Superior Court of the State of Arizona, Pima County, Case No. C20263380, challenging

the dismissal on constitutional and administrative law grounds, including violations of due process, failure to engage in mandatory conciliation, structural conflicts of interest, and misapplication of the common law doctrine of incompatibility of public offices. Abraham simultaneously moved the Superior Court to stay the dismissal and reinstate him pending appeal. That proceeding remains pending. Had the Superior Court reversed the dismissal or ordered interim reinstatement, the retaliatory termination claim before this Court would have been materially affected—if not mooted entirely. Abraham cannot be faulted for giving that judicial process a reasonable opportunity to run its course before committing to a permanent amendment adding a termination claim to this matter.

Abraham filed this Motion within three months of the dismissal becoming final, while the Superior Court appeal was pending, and within the Court's authorized amendment period. That is not delay—that is the careful, considered exercise of a plaintiff's right to amend within the time the Court has allowed. But even assuming there was delay, that is insufficient to deny leave without resulting prejudice—and ABOR does not even claim prejudice. "To deny a motion to amend based on delay, bad faith or prejudice must also exist." *Labair v. TA Operating LLC*, 2026 U.S. Dist. LEXIS 113525, at *4 (D. Nev. May 22, 2026) (citing *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981)).

B. Abraham's decision to await the outcome of parallel proceedings was reasonable and prudent.

The Ninth Circuit does not penalize plaintiffs for conducting a prudent litigation strategy. Abraham's decision to monitor the internal dismissal process and the subsequent state court appeal before filing an amended pleading that would place the termination before this Court was not an inexcusable or unexplained delay—it was prudence. A plaintiff is under no obligation to amend preemptively before an adverse action becomes final, and a plaintiff who continues to pursue parallel avenues of relief—including judicial review that could render an amendment unnecessary—acts reasonably in deferring amendment until those proceedings reach sufficient resolution. Amending a complaint to

add a termination claim before that dismissal was final—and while a reinstatement motion in a parallel proceeding remained pending—would itself have been procedurally premature and wasteful of judicial resources. ABOR proclaims that Abraham's amendments are "inexcusably delayed" and "unexplained." (Dkt. 30 at 2, 9). The facts say otherwise. Inexcusable and unexplained would have been missing the deadline to amend. Abraham did not—he met it, and he has now explained why he filed when he did, despite the burden being on ABOR to show why there should be no amendment.

Moreover, ABOR jointly proposed the June 30, 2026 amendment deadline. It did so already knowing Abraham had been dismissed, knowing he had appealed to the Superior Court, and knowing that reinstatement remained a live possibility. ABOR cannot simultaneously propose a deadline and then argue that any amendment within the agreed deadline is untimely. ABOR set the clock, watched it run, and now complains that Abraham used every minute. That is not a legal argument—it is a grievance.

IV. The Proposed Amendment is Not Futile.

ABOR urges the Court to deny leave on grounds that Abraham's retaliatory discharge claim is unexhausted and therefore futile. This argument misreads the governing exhaustion doctrine, ignores the EEOC charge, and asks the Court to conduct a merits inquiry that is inappropriate at the pleading stage.

A. The retaliatory discharge is reasonably related to the EEOC charge.

As a threshold matter, Abraham's termination is not a new *legal theory*—it is a new *fact*. The retaliatory discharge claim does not introduce a novel legal framework—it pleads the culminating factual event of the same retaliatory course of conduct already alleged in the EEOC charge. ABOR's exhaustion argument ignores this distinction entirely.

Title VII plaintiffs may bring claims not explicitly stated in their EEOC charge so long as those claims are "like or reasonably related to" the allegations in the administrative charge and "can reasonably be expected to grow out of the charge of discrimination." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002). In determining whether a plaintiff has exhausted allegations not specified in the charge, courts consider, among

other things, the alleged basis of the discrimination, the dates of the challenged conduct, and the individuals involved. *Id.* This standard is construed broadly in recognition of the remedial purposes of Title VII and the lay persons who typically file charges. *Id.*

Abraham's retaliatory discharge claim satisfies this standard. EEOC Charge No. 540-2022-02125 alleged retaliation by UA based on Abraham's internal grievances, public records litigation, prior EEOC activity, and specifically identified his exclusion from the CAFT and the English Department Annual Performance Review Committee ("APR") as retaliatory adverse actions. The proposed Second Amended Complaint adds a retaliatory discharge claim arising from the same nucleus of operative facts—the same protected activity and the same institutional actors. The discharge is the direct continuation, escalation, and culmination of the retaliation alleged in the charge, not a distinct or unrelated employment action.

ABOR's central exhaustion argument is that the EEOC "never had the opportunity to investigate" Abraham's termination because the right-to-sue letter issued on September 2, 2025, purportedly before any relevant conduct occurred (Dkt. 30 at 6.) That argument is directly contradicted by the timeline ABOR conveniently omits. UA's Provost formally issued the recommendation for Abraham's termination based on concurrent employment on August 20, 2025—thirteen days before the EEOC closed the file. Am. Compl. ¶ 50 (Dkt. 12). As the record reflects—and as ABOR well knows—Abraham appealed that recommendation on August 25, 2025—eight days before the right-to-sue letter issued. The very conduct forming the basis of the termination—the same concurrent employment pretext invoked to remove Abraham from CAFT—was already in motion, on the record, and administratively contested while the EEOC charge was still active. The EEOC accordingly had a full opportunity to take note of and investigate the emerging dismissal proceedings before it closed its file. Whether it did so is beside the point. The *B.K.B.* standard asks whether the claim "can reasonably be expected to grow out of the charge of discrimination"—a test that is satisfied when the EEOC had the opportunity to investigate the conduct, regardless of whether it exercised that opportunity. *B.K.B.*, 276 F.3d at 1100.

The exhaustion requirement exists to give the agency that opportunity—it does not demand proof that the agency seized it. *See, e.g., Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006) (exhaustion satisfied where claims grow out of conduct the agency had occasion to investigate).

ABOR's reliance on *Ong v. Cleland*, 642 F.2d 316 (9th Cir. 1981), is misplaced. In *Ong*, the constructive discharge theory arose entirely from conduct occurring after the administrative charge had been closed—the EEOC had no exposure to those facts whatsoever. Here, UA had already taken concrete adverse action—removing Abraham from CAFT on the basis of the concurrent employment pretext that would later serve as the stated grounds for his termination—before the EEOC closed its file. UA's own termination process was a foreseeable outgrowth of that same conduct, and the Provost's formal recommendation for just cause termination was issued on August 20, 2025, thirteen days before the right-to-sue letter. The EEOC closed its file while the retaliatory course of conduct it had been investigating was actively escalating toward its ultimate conclusion. *Ong* is inapposite. This matter is the opposite of *Ong* in every relevant respect.

B. A shifting pretext does not break the chain of retaliation.

ABOR appears to also argue that the concurrent employment basis for the 2025 and 2026 actions is factually distinct from the 2022 exclusions, which were grounded in a different stated rationale—labeling Abraham as "problematic" for filing grievances and challenging DEI hiring practices. This argument fails because exhaustion doctrine does not require that each iteration of retaliatory conduct be grounded in an identical pretext. The question is whether the claims share a common nucleus of operative facts and can "extend[] over all allegations of discrimination that either 'fell within the scope of the EEOC's *actual* investigation or an EEOC investigation which *can reasonably be expected* to grow out of the charge of discrimination." *B.K.B.*, 276 F.3d at 1100 (emphasis in original); *see also Sosa v. Hiraoka,* 920 F.2d 1451, 1456 (9th Cir. 1990) (incidents of discrimination not included in an EEOC charge may be considered by a federal court if the new claims are "like or reasonably related to the allegations contained in the EEOC charge.") (internal

citations omitted).

Retaliatory animus frequently operates through a series of evolving pretexts as a plaintiff continues to engage in protected activity and as an employer's stated justifications are exposed. Here, the evidence demonstrates a continuous, multi-year campaign: UA excluded Abraham from committees in 2022 using conflict-of-interest and problematic-faculty language; pivoted to concurrent employment to remove him from CAFT and recommend his employment termination in August 2025; and then invoked that same concurrent employment rationale to ultimately terminate his employment entirely in April 2026. The pretext evolved—the retaliatory animus did not. Under *B.K.B.*, these claims share the same nucleus of operative facts of the 2022 charge. But there is more.

ABOR's own litigation conduct forecloses its exhaustion argument. The concurrent employment pretext—the very rationale ABOR now proclaims as a new, unexhausted basis—was expressly alleged in the First Amended Complaint as a pretextual adverse action. (Dkt. 12, ¶¶ 50–52, 68(d) (alleging that UA removed Abraham from CAFT in August 2025 invoking a purported concurrent employment issue as a pretext.)) ABOR *stipulated* to the filing of the First Amended Complaint and did not object to those allegations. It cannot now suddenly argue that the concurrent employment pretext is a surprise development when that precise rationale was already before this Court—with ABOR's consent—in the operative pleading. The link between the concurrent employment pretext used to oust Abraham from CAFT and the same pretext used to terminate him is not some new theory—it is the already-pleaded and downstream conclusion of a retaliatory course of conduct that ABOR had already accepted as properly pleaded. ABOR cannot stipulate to the predicate and then disavow the conclusion. It blessed the allegation when it was convenient and now cries foul when it is not.

C. Futility cannot be decided on a motion for leave.

Even if ABOR's exhaustion arguments had merit, the Court should decline to adjudicate them on a motion for leave to amend. In the Ninth Circuit, a claim is considered futile "if there is no set of facts which can be proved under the amendment which would

constitute a valid claim or defense." *Netbula v. Distinct Corp*., 212 F.R.D. 534, 539 (N.D. Cal. 2003) (citing *Miller v. Rykoff-Sexton, Inc*., 845 F.2d 209, 214 (9th Cir. 1988)). That is a high bar, and ABOR does not come close to meeting it. Exhaustion under *B.K.B.* is a contested legal question that turns on the specific content of the EEOC charge and the factual record of the conduct alleged—not a question that can or should be resolved against a plaintiff at the amendment stage, without a developed record and without the benefit of a fully briefed motion to dismiss. "Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed." *Netbula*, 212 F.R.D. at 539. ABOR's exhaustion argument is not a futility showing—it is an attempt to litigate the merits of a claim that has not yet been filed, on a record that does not yet exist, in a motion that does not authorize such inquiry. The Court should decline the invitation.

V. The Jury Demand is Preserved, and ABOR's Objection is Premature.

ABOR objects to the jury demand included in the proposed Second Amended Complaint, arguing that Abraham waived his right to a jury trial on Count II. This objection is premature, and the underlying waiver argument is without merit. As a threshold matter, a motion for leave to amend is not the appropriate vehicle for adjudicating whether a specific claim is triable to a jury.

On the merits, ABOR's waiver argument fails. Count II—the retaliatory discharge claim—is a new claim that did not exist in any prior version of the complaint. It arises from Abraham's April 2026 termination and was first pleaded in the proposed Second Amended Complaint filed June 30, 2026. Because this claim is new, Abraham's jury demand within the Second Amended Complaint is timely as to Count II. *See Newport Yacht Club v. City of Bellevue,* 2012 U.S. Dist. LEXIS 9598, at *4 (W.D. Wash. 2012) (citing *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045 (9th Cir. 1974)) (a jury demand is timely when filed with an amended pleading that introduces a new issue). The jury demand is timely under Rule 38(b) as to Count II, and no Rule 39(b) motion is required.

ABOR's reliance on *Lutz v. Glendale Union High School,* 403 F.3d 1061, 1066 (9th

Cir. 2005) confirms this result. *Lutz* held that amendments may revive a jury right when they introduce new factual issues. 403 F.3d at 1066. That is precisely what the proposed Second Amended Complaint does: it introduces a distinct termination claim based on facts not before the Court in the First Amended Complaint. The retaliatory discharge claim is not a new legal theory grafted onto the same operative facts—it is a new claim arising from new events. *Lutz* supports Abraham—not ABOR.

As to Count I—the committee exclusion claims carried forward from the First Amended Complaint—the Court retains discretion under Rule 39(b) to grant a jury trial even if a technical waiver occurred. Abraham respectfully preserves that request and will address it, to the extent necessary, by separate motion. The only relevant question now is whether the Second Amended Complaint may be filed—and the answer is yes.

VI. Conclusion.

For the foregoing reasons, Abraham respectfully requests that the Court grant the Motion for Leave to File the Second Amended Complaint. In the alternative, if the Court deems it necessary, Abraham is prepared to withdraw the Second Amended Complaint filed at Dkt. 25 and respectfully requests that the Court grant the Motion for Leave (Dkt. 26), whereupon Abraham will file the Second Amended Complaint as a separate docket entry within whatever time the Court directs. The substantive result is identical, and no prejudice to ABOR results from the sequencing. ABOR's Opposition asks the Court to penalize a plaintiff for following the Court's own deadlines. The Court should decline that invitation.

CERTIFICATE OF SERVICE

It is hereby certified that the undersigned attorney electronically filed the foregoing with the Clerk of Court using the CM/ECF system that will send notification of such filing to all parties and attorneys of record.

DATED this 21st day of July, 2026.

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