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Regents, for and on behalf of the University
of Arizona*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dr. Matthew Abraham, an individual,

Plaintiff,

vs.

Arizona Board of Regents, for and on
behalf of the University of Arizona,

Defendant.

NO. 4:25-cv-00656-RCC-EJM

**DEFENDANT'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

Defendant Arizona Board of Regents, for and on behalf of the University of Arizona ("Defendant"), opposes Plaintiff's Motion for Leave to File Second Amended Complaint ("Motion," Doc. 26). Plaintiff seeks leave to make two substantive amendments, both of which are untimely and futile. First, Plaintiff attempts to revive a jury demand that he knowingly waived months ago by recasting the same alleged retaliatory conduct under a new legal theory. Rule 38 does not permit a party to resurrect a waived jury right merely by amending the pleadings where, as here, the proposed amendments arise from the same operative facts. Second, Plaintiff seeks to add an entirely new Title VII retaliatory discharge claim based on his 2026 termination even though he never presented that

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employment action to the EEOC or exhausted the administrative remedies that Title VII requires before suit may be filed. The EEOC issued its right-to-sue notice months before Plaintiff's termination, leaving the agency with no opportunity to investigate the termination, evaluate the University's stated reasons for that decision, or pursue administrative conciliation. Neither proposed amendment could survive dismissal. Compounding these defects, Plaintiff offers no explanation for waiting months after learning the facts underlying both proposed amendments before seeking leave on the final day permitted under the Scheduling Order. Because the proposed amendments are both futile and inexcusably delayed, the Motion should be denied.

I. Leave to Amend Under Rule 15 is Not Automatic.

Although Rule 15(a)(2) provides that leave should be freely given when justice so requires, such leave is not automatic. Leave to amend may be denied where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Futility alone justifies denial. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

Plaintiff's proposed amendments are futile because the proposed jury demand is legally barred by Rule 38, and the proposed new Title VII retaliation claim was never administratively exhausted. Those defects alone warrant denial of the Motion. Additionally, Plaintiff delayed months after learning the facts that he relies on to seek to amend, and has no justification for his delay. This Court should deny Plaintiff's futile and untimely Motion. *See, e.g., Giddings v. Vision House Prod.*, 584 F. Supp. 2d 1222, 1227 (D. Ariz. 2008) (denying plaintiff's request to amend the pleadings in part because it was untimely asserted and would constitute an exercise in futility).

II. Plaintiff's Proposed Amendments Are Futile.

This Court has long recognized that leave to amend is properly denied "if the proposed amendment would be futile or the amended complaint would be subject to

dismissal.” *Physicians Surgery Ctr. of Chandler v. Cigna Healthcare Inc.*, 609 F. Supp. 3d 930, 941 (D. Ariz. 2022).

“[A]mendment is futile when ‘no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim.’” *Mo. Ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). The test for futility is whether the amendment can survive a motion to dismiss under Rule 12(b)(6). *See, e.g., Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir.1998), *aff’d on reh’g en banc on other grounds*, 681 F.3d 1041 (9th Cir. 2012). Plaintiff’s proposed amendments could not survive a motion to dismiss.

A. Plaintiff Cannot Revive His Waived Jury Demand Through Amendment.

Federal Rule of Civil Procedure 38(b) establishes a bright-line deadline for demanding a jury trial. A party must serve and file a jury demand no later than fourteen days after notice of the last pleading directed to the issue. Fed. R. Civ. P. 38(b). Failure to comply constitutes waiver as a matter of law. Fed. R. Civ. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed”).

Defendant answered the First Amended Complaint on February 18, 2026. Plaintiff’s jury trial demand was due by March 4, 2026. He waived his right to ask for a jury trial and his Motion to Amend does not reverse that waiver.

A party who waives a jury trial cannot revive that right simply by amending the pleadings. The Ninth Circuit recognizes that, “when a party has waived the right to a [jury] trial with respect to the original complaint and answer by failing to make a timely demand, amendments of the pleadings that do not change the issues do not revive this right.” *Lutz v. Glendale Union High School*, 403 F.3d 1061, 1066 (9th Cir. 2005) (quoting *W. Geophysical Co. of Am. v. Bolt Assocs., Inc.*, 440 F.2d 765, 769 (2d Cir. 1971)). Amendments may revive a jury right only when they introduce genuinely new factual issues – not merely new legal theories arising from the same operative facts. *Id.* (citing *Williams v. Farmers & Merchants Ins. Co.*, 457 F.2d 37, 38 (8th Cir. 1972) (once waived,

1 the jury trial right is revived by amendments to the pleadings only if new issues are raised
2 in such amendments)).

3 The *Lutz* Court denied the plaintiff's request for a jury trial, reasoning that there was
4 no significant difference in the facts necessary to support the plaintiff's original claim and
5 those supporting her new claims. *Id.* ("the presentation of a new *theory* does not constitute
6 the presentation of a new *issue* on which a jury trial should be granted") (emphasis in
7 original).

8 Like the plaintiff in *Lutz*, Plaintiff's proposed amendments do not introduce new
9 issues. Plaintiff's newly alleged claims advance the theory that his 2026 termination was
10 retaliatory. But Plaintiff alleged in the First Amended Complaint that the adverse
11 employment actions at issue – his exclusion from the University's Committee on Academic
12 Freedom and Tenure ("CAFT") and the English Department's Annual Performance
13 Review Committee ("APR") – resulted from his alleged protected activities between 2020
14 and 2022, including internal grievances, a demand letter, public records litigation, and
15 EEOC Charges. He now alleges in the Proposed Second Amended Complaint that his 2026
16 termination likewise resulted from those same 2020–2022 protected activities. *See* First
17 Amended Complaint, ¶¶ 15-22, 26-31, 34-36, 46, 51-52, 55, 57-58, 80-81 (identifying the
18 alleged protected activities and alleged resulting adverse employment actions); Proposed
19 Second Amended Complaint at ¶¶ 64-70, 89-92 (identifying the same alleged protected
20 activities and alleged resulting 2026 termination).

21 Indeed, Plaintiff's Second Amended Complaint confirms that he is not alleging new
22 facts. Rather, he alleges in the Proposed Second Amended Complaint that the newly
23 alleged adverse employment actions arose "from the same nucleus of operative facts as his
24 EEOC Charge [filed in 2022]." *See* Proposed Second Amended Complaint at ¶¶ 69, 70, 92.
25 Plaintiff's effort to add another theory arising from the same nucleus of operative facts is
26 insufficient to revive a waived jury demand. *See Lutz*, 403 F.3d at 1066.

27 Plaintiff's Motion also attempts improperly to use the broad language of Rule 15 to
28 skirt the fact that he waived his option to request a jury under Rule 38. Rule 15 does not

1 provide an avenue to obtain relief from Rule 38's waiver. *See Lutz*, 403 F.3d at 1066 ("The
2 district court apparently believed that the filing [of an amended complaint] 'started again
3 the time to ask for a jury,' but it was mistaken."). If Rule 15 could be used as an end-run
4 around Rule 38, every litigant who failed to comply with Rule 38 could simply attempt to
5 amend their lawsuit complaint months later to insert a jury demand, rendering Rule 38(d)'s
6 waiver provision meaningless. Because Plaintiff waived his right to a jury trial and because
7 his proposed amendment cannot revive that waived right, this Court should deny the
8 Motion as futile.

9 **B. Plaintiff's Proposed Retaliatory Discharge Claim Is Also Futile**
10 **Because Plaintiff Failed to Exhaust Administrative Remedies.**

11 Plaintiff also seeks leave to amend to include a new Title VII retaliatory discharge
12 claim, arising from his April 2026 termination. That proposed amendment is also futile
13 because Plaintiff never exhausted his administrative remedies with respect to that claim.

14 Title VII requires a party to exhaust administrative remedies before bringing suit in
15 federal court. *See Sommatino v. United States*, 255 F.3d 704, 707-08 (9th Cir. 2001) ("In
16 order to bring a Title VII claim in district court, a plaintiff must first exhaust her
17 administrative remedies." citing *Greenlaw v. Garrett*, 59 F.3d 994, 997 (9th Cir. 1995))).
18 To satisfy the requirement, a plaintiff must first present the challenged employment
19 practice to the EEOC and obtain a right-to-sue notice before filing a lawsuit. *See* 42 U.S.C.
20 § 2000e-5(e), (f). Plaintiff is well aware of this statutory requirement because he followed
21 it in this lawsuit until now. He filed two EEOC Charges, received right-to-sue notices on
22 both, timely filed this action based on only one of those Charges, and abandoned the claims
23 arising from the second EEOC Charge, in his First Amended Complaint, acknowledging
24 that he had failed to bring his lawsuit within the statutory period following receipt of the
25 EEOC's right-to-sue notice (Doc. 1; Doc. 12). Plaintiff's proposed Second Amended
26 Complaint is futile because it does not comport with Title VII.

27 Discrimination and retaliation claims not first presented to the EEOC are legally
28 barred unless they are "like or reasonably related to" the allegations in the administrative

1 charge and reasonably could be expected to fall within the scope of the EEOC's
2 investigation. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002). In
3 determining whether a plaintiff has exhausted allegations that they did not specify in their
4 administrative charge, courts consider, among other things, the alleged basis of the
5 discrimination, the dates of the challenged conduct, and the individuals involved. *Id.*

6 Here, regardless of Plaintiff's effort to characterize his termination as part of the
7 same alleged retaliatory course of conduct, the EEOC never had the opportunity to
8 investigate that employment action. Plaintiff's right-to-sue notice issued on September 2,
9 2025 – weeks before Plaintiff was even notified of his termination. Because the termination
10 had not yet occurred, it could not have been presented to, investigated by, or resolved
11 through the EEOC administrative process. Title VII's exhaustion requirement therefore
12 was never satisfied as to Plaintiff's retaliatory discharge claim.

13 Nor can Plaintiff avoid exhaustion merely by alleging that his termination was the
14 "culmination" of the retaliation described in his 2022 EEOC Charge or arose from the
15 "same nucleus of operative facts." The exhaustion inquiry is not controlled by a plaintiff's
16 characterization of later events. Rather, the question is whether the later claim is one that
17 the EEOC actually investigated or reasonably could have been expected to investigate
18 based on the administrative charge. *See B.K.B. v. Maui Police Dep't*, 276 F.3d at 1100;
19 *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1476 (9th Cir.
20 1989) ("[T]he court inquires whether the original EEOC investigation would have
21 encompassed the additional charges.").

22 The Ninth Circuit's decision in *Ong v. Cleland* is particularly instructive. 642 F.2d
23 316 (9th Cir. 1981). There, the plaintiff attempted to recover on a constructive-discharge
24 theory that allegedly flowed from the same discriminatory promotion decision raised in her
25 administrative charge. *Id.* at 319-20. The Ninth Circuit nevertheless held that the claim was
26 unexhausted because the constructive-discharge theory "was not presented
27 administratively," was not investigated by the agency, and therefore deprived the agency
28 of the opportunity to address the issue through the administrative process. *Id.* The court

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1 explained that allowing such a claim to proceed would circumvent Title VII's
2 administrative scheme because "[t]he agency was therefore not given the opportunity to
3 consider this issue before initiation of the Title VII suit," frustrating Title VII's policies of
4 encouraging administrative conciliation and developing an administrative record. *Id.* at
5 320.

6 The same reasoning applies here. Plaintiff's retaliatory discharge claim challenges
7 an entirely separate employment decision that occurred after the EEOC had completed its
8 investigation and issued a right-to-sue notice. The EEOC never investigated Plaintiff's
9 termination, the University's stated reasons for that decision, the disciplinary proceedings
10 leading to the termination, or whether those reasons were pretextual. Because those issues
11 were never presented to the EEOC, the agency had no opportunity to investigate them,
12 develop an administrative record, or pursue voluntary conciliation before litigation
13 commenced. Plaintiff's allegation that his termination represents the final step in an
14 ongoing retaliatory course of conduct cannot substitute for exhaustion. *See Green*, 883 F.2d
15 at 1476; *Ong*, 642 F.2d at 319-20.

16 Accordingly, because Plaintiff failed to exhaust his administrative remedies with
17 respect to his April 2026 retaliatory discharge claim, that claim could not survive a motion
18 to dismiss. Amendment would therefore be futile.

19 **III. Plaintiff's Unexplained Delay Independently Warrants Denial.**

20 Even where amendment would not be futile, Plaintiff's undue delay is a basis for
21 denying his Motion for leave to amend under Rule 15(a)(2). *Foman*, 371 U.S. at 182. In
22 evaluating delay, courts focus on when the moving party became aware of the facts and
23 theories allegedly supporting the proposed amendment. *Learjet, Inc. v. Oneok, Inc. (In re*
24 *W. States Wholesale Natural Gas Antitrust Litig.)*, 715 F.3d 716, 739 (9th Cir. 2013).

25 The Ninth Circuit has repeatedly recognized that a party's unexplained delay in
26 seeking amendment may justify denial of leave, particularly where the party possessed the
27 facts underlying the proposed amendment but failed to act diligently. *Id.* ("Late
28 amendments to assert new theories are not reviewed favorably when the facts and the

theory have been known to the party seeking amendment since the inception of the cause of action”); *Acri v. International Association of Machinists and Aerospace Workers*, 781 F.2d 1393, 1398–99 (9th Cir. 1986). Here, Plaintiff knew the facts and theories underlying both proposed amendments well before filing the initial Complaint and First Amended Complaint. Yet Plaintiff waited many months before seeking leave to amend. There is no explanation for his undue delay in seeking either proposed amendment, and this Court should deny his Motion.

A. Plaintiff Unreasonably Delayed Seeking to Revive His Waived Jury Demand.

Even if Plaintiff could overcome his jury waiver under Rule 38 – which he cannot, his unjustified delay in seeking to amend warrants denial of leave.

Plaintiff omitted a jury demand from both the initial Complaint he filed on November 25, 2025, and the First Amended Complaint he filed on January 23, 2026. After Defendant answered the First Amended Complaint on February 18, 2026, Plaintiff allowed the March 4, 2026, Rule 38 deadline to expire without demanding a jury trial.

By April 2026, Plaintiff indisputably knew he had missed the deadline to request a jury. During the parties’ Rule 26(f) discussions, Plaintiff requested that Defendant stipulate to a jury trial and advised that he would seek relief from the Court if Defendant declined. Defendant declined on April 23, 2026. Yet Plaintiff chose to delay nearly three additional months before untimely and improperly demanding a jury trial in a futile Second Amended Complaint. The Ninth Circuit has affirmed denial of leave to amend where, as here, a party waited months after learning the facts supporting amendment. *See, e.g., Rooney v. Sierra Pac. Windows* (concluding that plaintiff failed to act diligently when he waited three months after obtaining “sufficient information to amend the complaint” to file his motion for leave to amend). *Rooney*, No. 10-CV-00905-LHK, 2011 U.S. Dist. LEXIS 117294, at *19 (N.D. Cal. Oct. 11, 2011), *aff’d* 566 F. App’x 573 (9th Cir. 2014). Plaintiff’s unexplained delay to seek to demand a jury trial independently warrants denial of leave to amend.

B. Plaintiff Also Delayed Seeking Leave to Add a Retaliatory Discharge Claim.

Plaintiff also has provided no justification why he delayed seeking to amend the Complaint with a retaliatory discharge claim. Plaintiff received notice of his termination on September 24, 2025. The termination decision became final on March 10, 2026, and the University President affirmed that decision on April 1, 2026. Yet Plaintiff, who filed his initial Complaint on November 25, 2025, and his First Amended Complaint on January 23, 2026, waited until June 30, 2026 – the last day permitted by the Scheduling Order to seek leave to amend. This Court should deny leave to amend.

The relevant inquiry is not whether Plaintiff filed the Motion to Amend by the Scheduling Order deadline, but whether he acted diligently after learning the facts that he relies upon to support the proposed amendments. *Learjet*, 715 F.3d at 738–39. Plaintiff identifies no newly discovered evidence, no intervening change in law, and no other circumstance explaining his delay. Plaintiff’s unexplained delay is not excused by Rule 15.

IV. The Scheduling Order Did Not Authorize Plaintiff to File an Amended Complaint

Plaintiff’s Motion is apparently based on his fundamental misinterpretation of the Court’s Scheduling Order. He asserts that the Scheduling Order “expressly authorizes” amendment through June 30, 2026. (Doc. 26 at 2). It does no such thing.¹

The Scheduling Order states that, “[a]ll parties are granted until June 30, 2026, *to move* to join additional parties or to amend their pleadings.” (Doc. 22 at 1) (emphasis added). The Order established the deadline for filing a motion under Rule 15; the Order did not eliminate Rule 15(a)(2)’s independent requirement that, after amendment of right has been exhausted, which occurred on December 23, 2025 under Fed. R. Civ. P. 15(a)(1), a party must obtain either the opposing party’s written consent or leave of Court before

¹ Defendant has separately moved to strike Plaintiff’s improperly filed Second Amended Complaint because Plaintiff simply filed it as a matter of record without obtaining leave of Court as required by Rule 15(a)(2). (Doc. 27).

1 filing an amended pleading.

2 Plaintiff acknowledges that Defendant did not consent to amendment. (Doc. 26 at
3 2). Accordingly, Plaintiff is required to obtain leave from this Court before filing the
4 Second Amended Complaint. Rather than explaining why the proposed amendments would
5 not be futile or could not have been asserted earlier, Plaintiff merely recites the *Foman*
6 factors before arguing (without support) that none of those factors applies to him. Those
7 factors do apply and this Court's Scheduling Order did not excuse him from the legal
8 requirements to Amend his Complaint. This Court should deny the Motion to Amend.

9 **V. Conclusion**

10 Plaintiff conflates the purpose of the Scheduling Order to attempt to add belated and
11 futile amendments to his Complaint. His proposed jury demand was long ago barred by
12 Rule 38, and his proposed retaliatory discharge claim is barred because Plaintiff failed to
13 exhaust Title VII's administrative remedies. Because Plaintiff's proposed amendments
14 would not survive a motion to dismiss under Rule 12(b)(6), and because he has not acted
15 diligently, Defendant respectfully requests that this Court deny Plaintiff's Motion.

16
17 RESPECTFULLY SUBMITTED this 14th day of July, 2026.

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19 By: /s/ Jay A. Zweig

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27
28

CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2026, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Court, using the CM/ECF electronic filing system. A complete copy of the foregoing was sent via CM/ECF to all parties who have appeared in this case, and paper copies will be sent to those indicated as nonregistered participants.

I further certify that a copy of the foregoing was sent via e-mail this same date to:

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