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 MOTION FOR LEAVE TO FILE SUR-REPLY IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND MEMORANDUM IN SUPPORT

Pursuant to D. Kan. Local Rule 15.1, Defendant Kansas State University ("K-State") respectfully moves this Court for leave to file the attached sur-reply (with its exhibits) in opposition to Plaintiff's Motion For Leave To File First Amended Complaint (Doc. 36). In support of its motion, K-State offers the following:

1. On November 28, 2016, Ms. Weckhorst filed a three-page motion seeking leave to amend her Complaint, to which she appended her proposed First Amended Complaint.

2. In the motion, Ms. Weckhorst explained only that she wished to make certain amendments related to supposedly "new" information about the alleged rape of Crystal Stroup by J.G. and that she wished to join Ms. Stroup as a plaintiff.

3. On December 19, 2016, K-State filed its Memorandum In Opposition (Doc. 39), in which K-State explained, among other things, that:

- The proposed First Amended Complaint actually contained a host of other amendments unrelated to the alleged rape of Ms. Stroup, and Ms. Weckhorst

nowhere discussed or sought to justify these additional amendments in her motion.

- Ms. Weckhorst's assertions that she just "recently" learned of the alleged rape of Ms. Stroup were inaccurate; and
- Ms. Weckhorst's motion failed to discuss the substantive grounds for joinder under Fed. R. Civ. P. 20, much less satisfy her burden to establish the joinder of Ms. Stroup was proper under the rule.

4. In its opposition, K-State specifically argued that Ms. Weckhorst should not be allowed to interject new arguments in her reply brief to make up for these deficiencies in her original motion. *See 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 . . .").

5. However, Ms. Weckhorst did just that, attempting to justify, for the first time in her Reply (Doc. 46), the proposed amendments that were unrelated to Ms. Stroup's alleged rape and arguing for the first time in her Reply that she did not have to comply with Rule 20's substantive joinder provisions.

6. In addition, Ms. Weckhorst doubled-down on the notion she only "recently" became aware of Ms. Stroup's alleged rape, claiming in her Reply, among other things, that she learned of Ms. Stroup's alleged rape "after filing suit" and that she "diligently worked to investigate and research the new information and its impact on her case." *See* Reply at 1, 2, and 6.

7. While the Court's local rules do not contemplate the filing of sur-replies as of right, the Court retains discretion to permit them in particular circumstances, including when a

moving party improperly includes new arguments for the first time in a reply and when there is newly discovered information that bears on the motion in question. *See Mike v. Dymon, Inc.*, 1996 WL 427761, at *2 (D. Kan. 1996) (noting that the court may ignore arguments raised for the first time in a reply or "[i]t may instead grant leave to file a surreply when new arguments are improperly raised in the reply"); *Robinson v. City of Arkansas City, Kan.*, 2012 WL 1721999, at *1 (D. Kan. 2012) ("The Court finds that, in the unique procedural posture of this case, a surreply and a surresponse are warranted based on newly discovered evidence.").

8. Here, Ms. Weckhorst has raised new arguments for the first time in her Reply. Her original motion did not even mention the various amendments she seeks to make that are unrelated to Ms. Stroup, yet, her Reply contains some three pages of new argument (pages 14-16) attempting to justify these proposed amendments. Further, although Ms. Weckhorst's motion never even discussed Rule 20, her reply contains some three pages of argument in which she claims (incorrectly) that Rule 20 does not apply and then argues, in the alternative, that she has met the rule's substantive requirements. K-State has had no opportunity to address these arguments; fundamental fairness dictates it should have that opportunity.

9. In addition, while Ms. Weckhorst's original motion asserted only in cursory terms that Ms. Weckhorst only "recently" became aware of the circumstances of Ms. Stroup's alleged rape, in her Reply, Ms. Weckhorst dramatically expanded on this assertion, claiming she had no knowledge of Ms. Stroup's alleged rape until *after* she filed the lawsuit, that she diligently worked to investigate and research the new information, and that she and Ms. Stroup would have filed their lawsuits "together initially had they been aware J.G. had assaulted both of them." *See* Reply at 1, 2, and 10.

10. However, on December 20, 2016, *after* K-State filed its Opposition, the undersigned counsel was alerted to certain documentation in separate plaintiff Tessa Farmer's Office of Institutional Equity and Office for Student Life files strongly suggesting that Ms. Weckhorst's attorneys learned of the operative facts of Ms. Stroup's alleged rape as early as October 2015, when one of them was representing Ms. Farmer (then Ms. Stroup's roommate) in K-State's processing of Ms. Farmer's own report of sexual assault. This documentation was identified through work on an entirely separate matter, yet it bears directly on numerous assertions made by Ms. Weckhorst in her Reply. The interests of justice dictate that the Court review the information and consider it in determining whether Ms. Weckhorst unduly delayed seeking leave to amend.

11. In addition, Ms. Weckhorst implies in her Reply that K-State itself should have notified the Court at the time that, according to Ms. Weckhorst, K-State expelled or dismissed J.G. However, K-State did not expel or dismiss J.G. As documented by evidence attached to K-State's proposed sur-reply, J.G. is currently on interim suspension, pending further procedural steps under K-State's Critical Incident Response Team (CIRT) process. K-State should be allowed to correct this significant misstatement of fact.

12. K-State's proposed sur-reply is narrowly focused on the points noted above and contains only twelve pages of argument. K-State respectfully suggests it has shown good cause for filing the document and that allowing it to do so would further the best interests of justice and assist the Court in its determination of the pending Motion For Leave To Amend.

Wherefore, K-State respectfully moves the Court to grant it leave to file the proposed sur-reply, with its exhibits, attached hereto.

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.

/s/ Derek T. Teeter
Attorney for Defendant