

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

KEVIN N. BASS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 5:25-cv-00244-H-BV
v.	§	
	§	
TEXAS TECH UNIVERSITY HEALTH	§	
SCIENCES CENTER, <i>et al.</i> ,	§	
	§	
Defendants.	§	

**PLAINTIFF’S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT**

Use of Generative Artificial Intelligence (N.D. Tex. LR 7.2(f))

Plaintiff used generative artificial intelligence as a research and drafting aid in preparing this reply. Plaintiff has reviewed the content and accepts full responsibility for it.

TO THE HONORABLE UNITED STATES MAGISTRATE JUDGE:

Plaintiff Kevin N. Bass replies to Defendants’ Response in Opposition to Plaintiff’s Motion for Leave to File a Second Amended Complaint (Doc. 48). This reply is filed within the period set by N.D. Tex. LR 7.1(f) and complies with the 10-page limit of LR 7.2(c).

I. INTRODUCTION

Defendants do not contest that the proposed Second Amended Complaint (Doc. 43-1) cures the Rule 8 deficiency this Court identified in Doc. 42. Defendants do not argue undue delay. Defendants do not argue bad faith. Defendants do not argue undue prejudice. The opposition rests almost entirely on futility — and that argument depends on the legal sufficiency of a pleading the Court has not yet adjudicated, against a Motion to Dismiss (Doc. 27) that has not been ruled on.

The Court already considered and chose not to reach that argument. In Doc. 42, the Court stated that Defendants’ merits-futility position “would supply one reason to deny amendment” but ruled instead “for a more fundamental reason—the proposed amendment violates Rule 8.” Doc. 42 at 5. Defendants now retread the same merits-futility arguments against a pleading that cures the only defect the Court did identify.

The standard is undisputed. Rule 15(a)(2) requires that leave be “freely give[n] when justice so requires.” Unless there is “a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.” *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981); accord *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004). Defendants have not identified one.

The relief sought is procedural: leave to file a Rule-8-compliant pleading that pleads qualified immunity for each Section 1983 count. Whether it ultimately survives dismissal is a separate question for a renewed motion. Rule 15 does not require it to be resolved here.

A. Procedural Posture Confirms Diligence and Forecloses the “Delay” Premise

The docket forecloses Defendants’ delay premise. The PI and expedited-discovery tracks are closed: the Court denied expedited discovery (Doc. 23); Plaintiff voluntarily withdrew his PI request and disclaimed any reconsideration of Doc. 23 (Doc. 24 at 1–2); and the Court denied the PI motion as moot (Doc. 28). Plaintiff has been diligent at every Rule 15 step: leave for the original SAC was sought “one day” before Defendants’ Motion to Dismiss (Doc. 42 at 1; Docs. 26, 27); a substitute motion with newly developed FERPA materials followed within twenty-six days (Doc. 32); and the present Rule-8-compliant motion followed within four days of the Court’s order (Docs. 42, 43). Plaintiff substantively responded to the Motion to Dismiss the same day he filed Doc. 32. *Compare* Doc. 33 *with* Doc. 32.

II. DEFENDANTS HAVE NOT BRIEFED THE NON-FUTILITY *FOMAN* FACTORS

The Supreme Court’s enumeration of denial grounds — undue delay, bad faith, repeated failure to cure, undue prejudice, and futility — controls. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004).

Defendants do not argue undue delay (the record shows the opposite, Section I.A *supra*); they do not argue bad faith (the record rebuts the inference — Plaintiff filed unopposed motions to seal Doc. 27-7 (Doc. 30) and to seal/redact Docs. 27-3, 27-6, and 27-8 (Doc. 35), and the Court granted that relief in relevant part (Docs. 34, 44)); and they do not separately argue undue prejudice as a *Foman* factor (none would arise from briefing a renewed motion to dismiss against the proposed pleading). Defendants having declined to develop those factors, no record supports denial on those grounds; on the existing record (Section I.A *supra*), none would succeed.

That leaves futility and “repeated failure to cure.” Both fail.

III. THE PROPOSED AMENDMENT IS NOT FUTILE

A. *Futility analysis applies to the proposed pleading.* The Fifth Circuit requires the court to “evaluate the sufficiency of the proposed complaint” — not the operative one. *Pena v. City of Rio Grande City*, 879 F.3d 613, 619 (5th Cir. 2018). An amendment is futile only when it “would fail to state a claim upon which relief could be granted.” *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000). Defendants instead argue the operative First Amended Complaint will not survive the pending Motion to Dismiss (Doc. 27) and treat that as dispositive of futility. The Court has not ruled on Doc. 27, and the proposed SAC re-presents the §1983 claims (and their qualified-immunity allegations) in the Rule-8-compliant short-and-plain form the Court required, restructured into seven counts, while adding Defendant Trotter and a discrete count against Defendant Gibson on quasi-judicial-immunity grounds. Doc. 43-1 ¶¶ 10, 18, 71–76, 77–83, 84–88, 93–96. The futility question cannot be answered by importing arguments targeting a different pleading.

B. *Defendants' theories-versus-sufficiency argument fails.* Defendants treat Plaintiff's statement that the SAC "does not add new legal theories" as a concession of futility. (Doc. 48 at 3–4.) The premises do not connect. Plaintiff said only that the SAC pleads the same statutory and constitutional theories — but pleads them with materially different content: a 26-page Rule-8-compliant pleading restructured into seven counts; the addition of Defendant Trotter; and a discrete count against Defendant Gibson on quasi-judicial-immunity grounds. Doc. 43-1 ¶¶ 10, 18, 38–96. The Court has not yet adjudicated whether those claims, as pleaded, survive the qualified-immunity analysis Defendants advance in their Motion to Dismiss (Doc. 27 at 12–18).

C. *The Fifth Circuit cases Defendants cite do not control.* *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003), is post-judgment; *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 321 (5th Cir. 1991), reviewed denial of an amendment filed after summary judgment and past the scheduling-order deadline; *Herrmann Holdings Ltd. v. Lucent Technologies Inc.*, 302 F.3d 552, 566 (5th Cir. 2002), merely recites *Foman* and affirmed denial after three prior pleading attempts. None of those postures applies here. The pincites also cut against Defendants: both *Rosenzweig*, 332 F.3d at 864, and *Herrmann*, 302 F.3d at 566, recite that Rule 15(a) "evinces a bias in favor of granting leave to amend" and requires a "substantial reason" for denial.

D. *Defendants have abandoned each claim-element ground they previously raised.* In Doc. 39, Defendants opposed amendment on four specific claim-element grounds: (i) failure "to plausibly allege intentional discrimination under the ADA or Rehabilitation Act"; (ii) failure "to plead a real and immediate threat of future injury sufficient to support prospective relief"; (iii) failure "to identify the publication of any materially false statement necessary to support a stigma-plus claim"; and (iv) failure "to allege facts plausibly establishing retaliation as the but-for cause of his dismissal." Doc. 39 at 5. Doc. 48 retreats from each one. In their place, Doc. 48 invokes only sovereign and qualified immunity at a generalized level (Doc. 48 at 4) without engaging the proposed pleading. That generalized invocation does not change the futility analysis: under *Pena*, immunity-based futility — like any other futility ground — must be evaluated against the proposed pleading. 879 F.3d at 619. The proposed SAC restructures the §1983 claims into seven counts, adds

Defendant Trotter, and adds a discrete count against Defendant Gibson on quasi-judicial-immunity grounds (Doc. 43-1 ¶¶ 71–76, 77–83, 84–88, 93–96), none of which Doc. 48 addresses on its own terms. Substituting an inferred concession (“does not add new legal theories”, Doc. 48 at 3–4) for engagement with what the proposed pleading actually pleads is not a substantial reason under Rule 15(a)(2). It is the absence of one.

E. *The pro se posture cuts in favor of leave.* “[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Ericksen v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). The Fifth Circuit accordingly requires that a pro se litigant ordinarily be afforded an opportunity to amend before dismissal. *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (per curiam); *accord Carmouche*, 77 F.4th at 369. That standard reinforces the Rule 15(a) presumption, which “evinces a bias in favor of granting leave to amend.” *Mayeaux*, 376 F.3d at 425. And pro-se liberal construction “is afforded to pro se litigants to serve as a shield”; using it “as a sword ... impermissibly denies access to federal courts.” *Carmouche v. Hooper*, 77 F.4th 362, 369 (5th Cir. 2023). Plaintiff cured the only defect identified. Denying leave on an unadjudicated futility theory would invert that protection.

IV. ADDING DEFENDANT TROTTER SATISFIES RULE 15(c)(1)(C)

Defendants argue that Plaintiff’s proposed addition of Defendant David Trotter cannot relate back because Plaintiff admits Trotter was inadvertently omitted rather than misidentified — i.e., not a “mistake” concerning identity. (Doc. 48 at 6.) That argument inverts the Supreme Court’s holding in *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010).

A. *Krupski focuses the test on the new defendant’s knowledge, not the plaintiff’s.* The Supreme Court was unequivocal: “[R]elation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party’s knowledge or its timeliness in seeking to amend the pleading.” *Krupski*, 560 U.S. at 541; *see also id.* at 548 (Rule 15(c)(1)(C)(ii) “asks what the prospective defendant knew or should have known,” not the plaintiff); *id.* at 553 (“the amending party’s diligence is not among” the rule’s requirements).

B. *Defendants' framing reproduces the analytical error Krupski reversed.* The Eleventh Circuit in *Krupski* had denied relation back precisely because plaintiff had access to information identifying the proper defendant before filing — the exact “deliberate choice” framing Defendants press here. *See Krupski*, 560 U.S. at 545–46. The Supreme Court reversed. *Id.* at 548–49. The Court squarely rejected the premise of Defendants’ argument: “A plaintiff might know that the prospective defendant exists but nonetheless choose to sue a different defendant based on a misunderstanding about the proper party’s identity. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.” *Id.* at 549. The pleading alleges omission, not exclusion (Doc. 43-1 ¶ 10), and *Krupski* turns on Trotter’s knowledge, not Plaintiff’s mental state. *Id.* at 548. *Krupski* preserves a “fully informed decision” exception, *id.* at 552–53, but the FAC itself rebuts any such inference: a body that names Trotter by title and pleads conduct attributable to him (Doc. 14 ¶ 27A) is direct evidence of intended joinder.

C. *Plaintiff's situation maps onto Sanders-Burns.* The Fifth Circuit’s closest authority on caption-versus-body discrepancies is *Sanders-Burns v. City of Plano*, 594 F.3d 366 (5th Cir. 2010). There, the original complaint named the defendant in the wrong capacity (official) but pleaded conduct unmistakably individual in nature; the Fifth Circuit reversed denial of relation back, holding that courts must “take a ‘sensible approach to reading a complaint so that suits may be maintained regardless of technical pleading errors’ as is required by Rule 15(c).” *Id.* at 379. Plaintiff’s first amended complaint identified Trotter by name, title, and role — “Student Conduct Administrator Dr. David Trotter” — and pleaded specific conduct attributable to him. Doc. 14 ¶ 27A. The omission was from the caption, not the narrative. Under *Sanders-Burns*, that pattern relates back. The post-*Krupski* Fifth Circuit confirms the line: Rule 15(c) is “designed to fix” “misnomer and misidentification” errors. *Quinn v. Guerrero*, 863 F.3d 353, 366 (5th Cir. 2017). A caption omission of a defendant identified by name, title, and role in the body falls squarely within that category.

D. *Winzer is not on point.* *Winzer v. Kaufman County*, 916 F.3d 464, 471 (5th Cir. 2019), applies to plaintiffs who never identified the prospective defendant in the original pleading and instead sued “unknown officers” as John Doe defendants. The FAC identified Trotter by name, by

title, and by alleged conduct. Doc. 14 ¶ 27A. That distinction is the entire ground on which *Winzer* rests.

E. Trotter had constructive notice through shared counsel. Plaintiff alleges that Trotter received notice through “coordinated defense representation” within the Rule 4(m) period and “knew or should have known that the action would have been brought against him but for the omission.” Doc. 43-1 ¶ 10. The docket confirms that the institutional and individual Defendants have appeared throughout this action through the Office of the Attorney General. *See, e.g.*, Doc. 39 at 8 (signature block); Doc. 48 at 9 (same). The Fifth Circuit recognizes that the relation-back notice element can be satisfied through coordinated representation. *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998) (“notice may be imputed to the new party through shared counsel”); *accord Sanders-Burns*, 594 F.3d at 378 (shared counsel supports inference that the new party was on notice; assertion of qualified immunity — itself an individual-capacity defense — further “suggests that the attorney . . . is likely to have communicated to [the new defendant] that he may have been sued in his individual capacity”). Defendants asserted qualified immunity in Doc. 27 at 12–18. To the extent *Jacobsen* otherwise applied a plaintiff-focused mistake inquiry, *Krupski* (2010) controls.

V. GRANTING LEAVE WILL NOT DELAY RESOLUTION OF IMMUNITY

Defendants invoke *Pearson v. Callahan*, 555 U.S. 223 (2009), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Carswell v. Camp*, 54 F.4th 307 (5th Cir. 2022), for the proposition that immunity must be resolved at the earliest stage. (Doc. 48 at 7.) Those decisions address the timing of immunity *analysis* on the pleadings, not whether a Rule 15 amendment is appropriate when immunity is invoked. The “delay” premise is contradicted by the docket: the Court denied expedited discovery (Doc. 23); Plaintiff withdrew his PI request and disclaimed any reconsideration of Doc. 23 (Doc. 24 at 1–2); the Court denied the PI motion as moot (Doc. 28); and Defendants themselves acknowledged that Plaintiff “does not presently pursue expedited discovery” (Doc. 27 at 10 n.4). The only activities that could defer an immunity ruling were removed from the case months ago.

A. *The proposed pleading advances, rather than delays, immunity resolution.* The proposed SAC re-presents the §1983 claims and their qualified-immunity allegations in a 26-page, seven-count, Rule-8-compliant short-and-plain form, adds Defendant Trotter, and adds a discrete count against Defendant Gibson on quasi-judicial-immunity grounds. Doc. 43-1 ¶¶ 10, 18, 71–76, 77–83, 84–88, 93–96. Granting leave allows Defendants to file a renewed motion to dismiss against a Rule-8-compliant pleading and against the full set of named individual-capacity Defendants, accelerating — not deferring — the qualified-immunity ruling.

B. *Carswell does not bar amendment.* *Carswell v. Camp*, 54 F.4th 307, 311–12 (5th Cir. 2022), addresses the timing of the MTD ruling — that qualified immunity must be resolved on the pleadings “without the benefit of pre-dismissal discovery” — not whether Rule 15 leave is appropriate. It presupposes the pleading the court reviews. Granting leave gives the Court a complete pleading on which to make the *Carswell* ruling. Post-*Carswell* Fifth Circuit authority confirms the point. *See Parker v. LeBlanc*, 73 F.4th 400, 402 (5th Cir. 2023) (district court “again granted [plaintiff] leave to amend his complaint” after qualified-immunity assertion).

C. *Wimm is inapposite.* *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139–41 (5th Cir. 1993), affirmed denial of leave to amend filed in response to a pending summary-judgment motion, on grounds of bad faith and dilatory motive after the plaintiffs delayed nine months despite knowing the underlying facts at the outset. No comparable circumstance exists here: this case is at the pleadings stage, no summary-judgment motion is pending, and the proposed amendment follows the Court’s Rule 8 order by four days (Docs. 42, 43).

VI. THE PRIOR RULE 8 ORDER IDENTIFIED A SINGLE, CURABLE DEFECT — AND THE CURE IS COMPLETE

Defendants invoke “repeated failure to cure” but identify only one prior amendment denial. That denial (Doc. 42) rested entirely on Rule 8 length — not legal sufficiency. The Court itself drew the distinction expressly: Defendants’ merits-futility arguments “would supply one reason to deny

amendment”, but the Court ruled “for a more fundamental reason—the proposed amendment violates Rule 8.” Doc. 42 at 5. The Court did not reach the futility question Defendants now press.

The cure is concrete on every metric the Court identified: from “more than 100 pages with more than 215 paragraphs,” extensive document quotations, and “134 pages of exhibits” (Doc. 42 at 6) to a 26-page, 96-paragraph pleading with no block quotations and no exhibits (Doc. 43-1). The pleading is “simple, concise, and direct” — the Rule 8 standard the Court applied. Doc. 42 at 3–4. The authorities the Court cited for futility-by-continued-noncompliance — *Jumonville v. Dep’t of Treasury*, No. 94-30583, 1995 WL 136507, at 3 (5th Cir. Mar. 16, 1995), and *Landavazo v. Toro Co.*, 301 F. App’x 333, 337 (5th Cir. 2008) — each turned on a proposed pleading that “still d[id] not comply with Rule 8” after prior amendments. Doc. 42 at 3 (quoting *Jumonville**). Here the proposed pleading does not still violate Rule 8; the Court has not previously adjudicated a Rule-8-compliant draft, and Plaintiff has not been afforded an opportunity to cure since Rule 8 was identified.

“Repeated failure to cure” requires repeated identification of the same defect followed by repeated failure to address it. *Smith*, 393 F.3d at 595; *Mayeaux*, 376 F.3d at 425. Here there has been one identification (Rule 8 length), one cure, and no opportunity yet for the Court to identify any further defect — the opposite of repeated failure. See *Jack v. Evonik Corp.*, 79 F.4th 547, 564–65 (5th Cir. 2023) (vacating denial of leave; “repeated failure to cure” not shown where the dismissal order first identified the deficiency; “[n]ormally, a plaintiff should be afforded at least one chance to remedy all identified flaws in his pleadings”; faulting a plaintiff for failing to cure a not-yet-identified deficiency “amounts to faulting [him] for not being clairvoyant”). The governing Fifth Circuit standard — “Rule 15(a)(2) evinces a bias in favor of granting leave to amend,” *Clark v. Dep’t of Pub. Safety & Corr.*, 141 F.4th 653, 661 (5th Cir. 2025) (cited in Doc. 42 at 3) — controls.

VII. CONCLUSION

Defendants do not argue delay, bad faith, or prejudice. Their futility argument depends on a Motion to Dismiss the Court has not adjudicated, applied to a pleading other than the one whose filing is sought. Their relation-back argument inverts *Krupski*. Their immunity-timing argument cuts against them: granting leave allows qualified immunity to be decided on a complete pleading. And the prior Rule 8 denial identified a single defect that is concretely cured. The Rule 15(a) bias toward granting leave (*Mayeaux*, 376 F.3d at 425) controls.

WHEREFORE, Plaintiff respectfully requests that the Court grant leave to file the proposed Second Amended Complaint (Doc. 43-1) and order that it be accepted as the operative pleading.

Respectfully submitted,

/s/ Kevin N. Bass

Kevin N. Bass

Plaintiff, Pro Se

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CERTIFICATE OF SERVICE

I certify that on April 28, 2026, I filed this reply via the Court's CM/ECF system, which will send notification to all counsel of record, including Scott D. Smith, Assistant Attorney General, Office of the Attorney General of Texas, General Litigation Division, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, scott.smith@oag.texas.gov.

/s/ Kevin N. Bass

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