

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

**KEVIN N. BASS,
Plaintiff,**

v.

**TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.**

§
§
§
§
§
§

Civil Action No. 5:25-cv-00244-H-BV

**PLAINTIFF'S REPLY IN SUPPORT OF RENEWED MOTION FOR LEAVE TO FILE
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 brief. Plaintiff has reviewed the content and accepts full responsibility for it.

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiff Kevin N. Bass replies to Defendants' Response in Opposition to Plaintiff's Renewed Motion for Leave to File a Second Amended Complaint (Dkt. No. 58). 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). Citations to "Br." are to Plaintiff's Brief in Support of the Renewed Motion (Dkt. No. 57-1); "Ex. 1" is the proposed Second Amended Complaint (Dkt. No. 57-2); "FCR" is the Findings, Conclusions, and Recommendation (Dkt. No. 54).

I. WHAT THE RESPONSE DOES NOT DISPUTE

1. The Response does not dispute the standard. Rule 15(a)(2) reflects "a bias in favor of granting leave to amend," and leave may be denied only for a "substantial reason." Dkt. No. 58 at 3 (quoting *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 872 (5th Cir. 2000)). The Response

recites the *Foman* factors, *id.*, and develops one. It does not argue undue delay. It does not argue bad faith. It does not argue undue prejudice. It does not dispute that no scheduling order has issued, no discovery has begun, and no trial setting exists. Br. ¶ 10. Futility is the only contested ground, and the Response says so: "Futility is the ground on which the Magistrate Judge relied here, and it is dispositive." Dkt. No. 58 at 3.

2. The futility argument, in turn, rests on a single characterization of the FCR: that it found "legal defects, not gaps in a factual narrative," which "no quantum of additional or restored detail can cure." Dkt. No. 58 at 2. The FCR's own text refutes that characterization. And the authorities the Response builds on it — *Jacquez*, *Schiller*, *Brewster*, *Krupski* — say something materially different, in the same paragraphs the Response quotes, from what the Response cites them for.

II. THE FCR IDENTIFIES MISSING FACTS; THE RESPONSE RECHARACTERIZES THEM AS INCURABLE LEGAL DEFECTS

3. The Response asserts that the FCR found the proposed amendment futile "because, even accepting every one of Plaintiff's factual allegations as true, the proposed complaint still failed to overcome the jurisdictional, immunity, standing, and clearly-established-law deficiencies governing Plaintiff's claims," and that "[t]hose are legal defects, not gaps in a factual narrative." Dkt. No. 58 at 2 (citing Doc. 54 at 56-57). Those pages contain the Recommendation — deny Dkt. No. 43 because amendment would be futile — and the notice of the right to object. They do not contain that sentence. The word "accepting" does not appear in the FCR. The accept-as-true language sits in the Rule 12(b)(6) recitation. FCR at 7. The futility analysis itself, Section F, measures the conforming pleading against "the deficiencies identified in Defendants' motion to dismiss," FCR at 46, and identifies, claim by claim, facts it finds absent.

4. The FCR's own verbs are factual, not legal. It faults the pleading because "Bass elected not to include the specific language of his post," so "the undersigned cannot evaluate it." FCR at 43. It faults the pleading because it "does not specify what accommodations he allegedly requested." FCR at 47. It faults the retaliation claim because "Bass has not pleaded facts showing that but for his protected activity, TTUHSC would not have escalated his debt." FCR at 52. And on the process claims — at the exact pages the Response cites for its independent-futility argument — the FCR writes: "Missing from Bass's new allegations, however, are facts showing that he did not receive an adequate hearing or that he was denied the opportunity to tell his side of the story." FCR at 52-53. "Missing . . . are facts" is the FCR's phrase. A deficiency the recommending court itself describes as missing facts is cured by supplying the facts. That is what Exhibit 1 does.

5. The record answers the question the Response never reaches: whether the facts exist. The motion's table maps each deficiency the FCR identified to the paragraph of Dkt. No. 32-1 — filed three and a half months before the FCR — where the fact was already pleaded, and to the paragraph of Exhibit 1 where it now appears in Rule 8-conforming form. Br. ¶ 6. The Response concedes the table "identifies where Plaintiff has supplemented or expanded factual allegations," Dkt. No. 58 at 5, and engages none of its fourteen rows. If any row mismatched — if any fact the FCR called missing were not, in truth, pleaded at the cited paragraph — the Response would have said which one.

6. The Response calls the closed-loop premise "mistaken" and recasts this Court's March 27 order as "an invitation to cure, not a bar." Dkt. No. 58 at 2, 7-8. The invitation was to cure form. The order denied leave to file the detailed pleading because "[i]t quotes extensively from documents" and "includes minute details about incidents forming the bases of his claims," Dkt.

No. 42 at 5-6, and it expressly declined to reach Defendants' futility arguments: their position "would supply one reason to deny amendment," but the Court ruled "for a more fundamental reason—the proposed amendment violates Rule 8." Dkt. No. 42 at 5. Three docket facts complete the loop. The detailed pleading was denied for its detail. Dkt. No. 42 at 5-6. The conforming pleading was filed four days later. Dkt. Nos. 43, 43-1. The FCR now recommends denying leave because the conforming pleading lacks the very facts the detailed pleading contained. FCR at 43, 47, 52-55; Br. ¶ 6. The Response answers that this is "the ordinary sequence Rule 15 contemplates, not a trap." Dkt. No. 58 at 8. An ordinary cure sequence ends with a court evaluating the cure. No court has evaluated the cure: the FCR declined to consider the material containing it, FCR at 8-10, 44 n.6, and the Response defends the resulting gap by renaming it.

7. What remains is assertion. The Response declares that Plaintiff's pleading "cannot be sufficient at any length, because the defects are legal rather than a matter of degree of detail." Dkt. No. 58 at 8. No court has adjudicated Exhibit 1. Futility is measured against the proposed pleading, not asserted about it. *Pena v. City of Rio Grande City*, 879 F.3d 613, 619 (5th Cir. 2018). Whether Exhibit 1's restored allegations state claims is briefed at Objections 2 through 7 (Dkt. No. 56), now before this Court de novo — a posture the Response's reliance on Dkt. No. 55 cannot change. That one-page order, entered by the Magistrate Judge the same day as the FCR, denied the January motion for leave (Dkt. No. 26) as moot and recited that the later motion (Dkt. No. 43) was evaluated with the motion to dismiss. It adjudicated no pleading's sufficiency, and it says nothing about Dkt. No. 32-1 or Exhibit 1 — neither of which any court has measured on its allegations.

III. THE "BEST CASE" AUTHORITIES ADDRESS PLAINTIFFS WHO NEVER TENDERED THEIR FACTS

8. The Response says Plaintiff "has repeatedly amended or sought leave to amend" and that Rule 15 does not require "endless opportunities to repackage the same claims." Dkt. No. 58 at 2. It pins the Magistrate Judge's "pleaded his best case" conclusion to FCR at 56. *Id.* That heading is at FCR at 45. The sentence "Bass has had ample opportunity to plead his best case" is at FCR at 55. The docket count is different. Plaintiff has amended once — as of right, before service, before any party or court had identified any deficiency. Dkt. No. 42 at 1-2. Every later pleading was proposed, never filed: the detailed pleading was denied for form, and the conforming pleading was evaluated only in the FCR now under de novo review. The *Foman* factor is "repeated failures to cure deficiencies by amendments previously allowed." Dkt. No. 58 at 3 (quoting *Schiller*). No amendment responding to a court-identified deficiency has ever been allowed. There is no repetition to invoke: notice was given once, the cure was tendered within the month, Dkt. Nos. 32, 32-1, and the cure was denied for being one. Dkt. No. 42 at 5-6.

9. *Jacquez* holds against the use the Response makes of it. The Response quotes its warnings that a plaintiff may not "continue to amend or supplement [his] pleadings until [he] stumble[s] upon a formula," Dkt. No. 58 at 4, 10 (quoting 801 F.2d 789, 792 (5th Cir. 1986)), and that notice of deficiencies came from the motion to dismiss, *id.* at 8-9. The same paragraph of *Jacquez* states the rule the Response omits: "Dismissing an action after giving the plaintiff only one opportunity to state his case is ordinarily unjustified." 801 F.2d at 792. And *Jacquez*'s facts invert this case: a counseled plaintiff, under the then-applicable heightened-pleading regime, whose counsel "stands on those pleadings in this appeal without suggesting any specificity that could be added to the claim if allowed to replead." *Id.* at 789-90. Plaintiff suggested the specificity — 215 paragraphs of it, at Dkt. No. 32-1 — and this Court's response was that "Bass need not present evidence." Dkt. No. 42 at 5. A plaintiff who tendered the facts,

and whose tender was denied for its detail, is not hunting for a formula. He followed the only formula the orders permitted.

10. *Schiller* is a Rule 59(e) case. Judgment had been entered; the plaintiffs had amended four times; the district court found they had "stated their best case after four bites at the apple"; and the Fifth Circuit affirmed the refusal of a fifth complaint that was "simply a re-write" of the fourth. 342 F.3d 563, 566-69 (5th Cir. 2003). The Response's quotations — "fair opportunity to present its case," a "re-write" as "an exercise in futility," Dkt. No. 58 at 9-10 — are drawn from that posture. This case is pre-judgment, inside the objection window, on a pleading responding to deficiencies first articulated in the FCR itself, tendered at the first opportunity to respond to them. Mot. ¶ 2. The Response's own account concedes the predicate: "every fact he now says cures the Findings was pleaded in his earlier proposed pleading months before the Findings issued." Dkt. No. 58 at 9. That is the closed loop, stated by its defenders: the facts were pleaded, in the pleading this Court declined under Rule 8, and the FCR faulted their absence from the pleading that replaced it.

11. *Brewster* supplies its own limiting principle, in the words the Response quotes: leave is not required where the plaintiff has pleaded his best case, "particularly where he 'does not state what facts he would include in an amended complaint.'" Dkt. No. 58 at 4 (quoting *Brewster v. Dretke*, 587 F.3d 764, 767-68 (5th Cir. 2009)). Plaintiff stated exactly what facts he would include: fourteen of them, row by row, with the record paragraph where each was already pleaded. Br. ¶ 6. *Brewster* is Plaintiff's authority, not Defendants': it holds that a pro se plaintiff should ordinarily be given an opportunity to amend once deficiencies are identified, unless the defects are incurable. *Id.*; Br. ¶ 3. A defect the FCR itself describes as "[m]issing . . . facts," FCR at 52, where the record already contains the facts, is the opposite of incurable. The Response's

related refrain — "no newly discovered facts," Dkt. No. 58 at 1, 9, 12 — imports the vocabulary of post-judgment practice into Rule 15(a). Before judgment, the question is not novelty; it is whether justice requires leave. Fed. R. Civ. P. 15(a)(2). And the new event here is the FCR itself: Plaintiff could not have tailored a pleading to the FCR's articulations before the FCR issued. Mot. ¶ 2.

IV. THE REHABILITATION ACT CLAIM: NO IMMUNITY, NO ENGAGEMENT

12. The Response concedes that the Rehabilitation Act claim against TTUHSC is "the single claim as to which no immunity defense applies." Dkt. No. 58 at 2. Its entire merits treatment of that claim is one clause — it "fails on the independent, merits-based grounds the Findings identified," *id.* — with no mention of the restored allegations: the specific accommodations requested, Ex. 1 ¶ 36, the limitations communicated to TTUHSC, Ex. 1 ¶¶ 23, 36, 69, the Board's own reference to a "pre-existing ██████ diagnosis," Ex. 1 ¶ 25. Those grounds are contested at Objections 2 and 3, which Plaintiff incorporates. Br. ¶ 8. For Rule 15 purposes, one observation suffices: on the sole claim Defendants agree no immunity bars, their futility argument does not discuss the allegations of the pleading whose filing they oppose.

V. THE TROTTER ADDITION RELATES BACK; KRUPSKI'S NEXT SENTENCES ANSWER THE RESPONSE

13. The Response quotes *Krupski's* sentence that a "deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity." Dkt. No. 58 at 10-11 (quoting 560 U.S. 538, 549 (2010)). The paragraph continues: "We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake." 560 U.S. at 549. It concludes: "That kind of deliberate but mistaken choice

does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied." *Id.* *Krupski* reversed a court of appeals that had done what the Response does — treat the plaintiff's awareness of the party's existence and role as proof of deliberate choice. *Id.* at 548-49. The Response's assertion that Plaintiff "deliberately chose not to name" Trotter, Dkt. No. 58 at 11, rests on nothing but that awareness. The first amended complaint names "Student Conduct Administrator Dr. David Trotter" in its body and pleads conduct attributable to him. Dkt. No. 14 ¶ 27A. A pleading that names a man by name, title, and conduct is not the record of a decision to leave him out; it is the record of a caption error.

14. The Response's remaining authorities confirm the point. The sentence it quotes from *Sanders-Burns* — "a conscious choice to sue one party and not another does not constitute a mistake," Dkt. No. 58 at 11 (citing 594 F.3d 366, 380 (5th Cir. 2010)) — is the court's quotation of a treatise, at 379. The same paragraph is the holding: "the error of naming Cabezuela in his official capacity was an actual mistake," and relation back applied. 594 F.3d at 379. The next page states the Rule 15(c) instruction: courts take a "sensible approach to reading a complaint so that suits may be maintained regardless of technical pleading errors." *Id.* at 380. *Winzer* and *Jacobsen* denied relation back to plaintiffs who sued unknown or unidentified officers — plaintiffs who could not have made a mistake about defendants they never identified. *Winzer v. Kaufman Cnty.*, 916 F.3d 464, 470-71 (5th Cir. 2019); *Jacobsen v. Osborne*, 133 F.3d 315, 320-21 (5th Cir. 1998). A complaint that identifies Trotter by name, title, and conduct is the opposite record. And *Mornes*, on the Response's own description, denied leave where the plaintiff "only recently learned of [the defendant's] identity" and did not allege mistake. Dkt. No. 58 at 12. Plaintiff pleaded Trotter's identity and conduct from the outset. Each case describes the record this one does not present.

15. Two more gaps. First, the Response does not contest the notice element: that Trotter, represented like every defendant by the Office of the Attorney General, received notice of the action within the Rule 4(m) period through shared counsel. *Jacobsen*, 133 F.3d at 320; *Sanders-Burns*, 594 F.3d at 378-79; Ex. 1 ¶ 10. Second, the limitations argument is wholly derivative: an added claim is untimely only if it does not relate back, Dkt. No. 58 at 11-12 (citing *Jacobsen*, 133 F.3d at 320), so limitations adds nothing to the mistake argument that fails above.

16. The Response's fallback — that adding Trotter is futile "independent of relation back" because of the FCR's analysis at pages 52-53, Dkt. No. 58 at 12 — points to the pages where the FCR evaluated the stripped conforming pleading and found "[m]issing . . . facts." FCR at 52-53. The FCR acknowledged the request to add Trotter, FCR at 46, and never analyzed relation back, never analyzed any claim against Trotter as a defendant, and never conducted a Trotter-specific immunity inquiry. Br. ¶ 9. An analysis never performed, applied to a pleading (Exhibit 1) never reviewed, as to a defendant never evaluated, is not an independent ground for futility. It is the same recommendation, under the same de novo review, wearing a different label.

VI. CONCLUSION

17. The Response develops no ground for denial but futility. Its futility argument attributes to the FCR a dichotomy — legal defects versus factual gaps — that the FCR's own words refute, and its authorities, read to the end of their paragraphs, address plaintiffs who never tendered their facts. Plaintiff tendered his, and the tender was denied for its detail. The Court may grant leave and order Exhibit 1 filed, or may recommit the question of amendment to the Magistrate Judge with instructions to consider the attached pleading. *Freeman v. County of Bexar*, 142 F.3d 848, 852-53 (5th Cir. 1998); Mot. ¶ 4. The Response does not address recommitment.

WHEREFORE, Plaintiff respectfully requests that the Court grant leave to file the Second Amended Complaint attached to the Renewed Motion as Exhibit 1, or in the alternative recommit the question of amendment to the Magistrate Judge with instructions to consider the attached pleading, and grant such other relief as is just.

Dated: August 19, 2026.

Respectfully submitted,

/s/ Kevin N. Bass

Kevin N. Bass

████████████████████

████████████████

Telephone: 512-333-4092

Email: kbassphiladelphia@gmail.com

CERTIFICATE OF SERVICE

I certify that on August 19, 2026, I served this reply on counsel for Defendants of record via the Court's ECF system.

/s/ Kevin N. Bass