**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF OKLAHOMA**

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| 1. MIRANDA SUMMAR, Individually;<br>2. OLIVIA WELLS, Individually;<br>3. PRISCILLA PENA, Individually;<br>4. RHEANNA JACKSON, Individually;<br>5. GABRIELLE GLIDEWELL, Individually;<br>6. MORGAN BROWN RUSSELL, Individually;<br>7. EMILY HEUGATTER, Individually,<br><br>Plaintiffs,<br><br>v.<br><br>1. THE STATE OF OKLAHOMA *ex rel* UNIVERSITY OF CENTRAL OKLAHOMA;<br><br>Defendant. | § | Case No. 21-CV-473-G |

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE CERTAIN PARAGRAPHS FROM PLAINTIFFS' FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF COURT:

Plaintiffs Miranda Summar, Olivia Wells, Priscilla Pena, Rheanna Jackson, Gabrielle Glidewell, Morgan Brown Russell and Emily Heugatter file this Response in

Opposition to Defendant's Motion to Strike Certain Paragraphs from Plaintiffs' First Amended Complaint and in support show the Court as follows:

## INTRODUCTION

This case arises from the unfortunate experiences of six University of Central Oklahoma ("UCO") students and one faculty member who suffered discrimination on the basis of sex and prohibited retaliation in violation of Title IX of the Education Amendments of 1972. The student plaintiffs allege they were subjected to a hostile, sexually-charged environment in UCO's theatre department for years in which they suffered sexual harassment and sexual abuse perpetrated by a UCO professor and assistant dean Kato Buss. Plaintiffs bring claims under Title IX, alleging policy-based heightened risk claims, deliberate indifference claims as well as retaliation. Plaintiffs filed a 56-page First Amended Complaint in which, in addition to a general fact section and fact sections for each of the seven plaintiffs, they included a "Legal Framework" section outlining the applicable law and university policies. (Dkt. 6, Plaintiffs' FAC).

Defendant UCO moves the Court to strike 24 paragraphs from Plaintiffs' FAC arguing that they are "collectively immaterial" and citing concerns about "the dangers of misinformation." (Dkt. 14, UCO Motion at 2, 9). UCO complains repeatedly that Plaintiffs' "apparently" or "seemingly" included paragraphs containing false and misleading information to "prejudice public opinion" against the university. The challenged paragraphs are neither false nor immaterial. And, importantly, UCO has not and cannot demonstrate that the challenged paragraphs cause substantial prejudice. UCO's motion should be denied.

## ARGUMENT & AUTHORITIES

UCO's argument fails at its inception. UCO cites Federal Rule of Civil Procedure 12(f) but conspicuously ignores the abundant authority acknowledging the heavy burden placed on a party filing a motion to strike. The Court "may strike from a pleading an insufficient defense, or any redundant, immaterial, impertinent or scandalous matter." Fed. R. Civ. P. 12(f). However, such relief is a severe remedy and generally disfavored. *United States v. Hardage*, 116 F.R.D. 460, 463 (W.D. Okla. 1987); *see also, Bruner v. Midland Funding*, LLC, No. CIV-16-1371-D, 2018 WL 563183 *2 (W.D. Okla. Jan. 25, 2018). The court should resolve "[a]ny doubt as to the utility of the material to be stricken ... against the motion to strike." *Rubio ex rel. Z.R. v. Turner Unified Sch. Dist. No. 202*, 475 F. Supp. 2d 1092, 1101 (D. Kan. 2007). In fact, such motions, in addition to being disfavored, are often "considered purely cosmetic or 'time wasters.' " *Id*. (quoting 5C C. Wright & A. Miller, *Federal Practice & Procedure* § 1382 (3d. ed. 2004)); *see also*, *Tavasci v. Cambron*, CIV 16-0461 JB/LF, 2016 WL 6405896, at *7 (D.N.M. Oct. 25, 2016) (quoting the transcript of the hearing on the motions to strike in which the court described motions to strike as "busywork" that "crowd the docket"). UCO's motion is such a "time waster."

The purpose of Rule 12(f) "is to conserve time and resources by avoiding litigation of issues which will not affect the outcome of a case." *In Re McDaniel*, 590 B.R. 537 (D.Colo. 2018)(quoting *Sierra Club v. Tri–State Generation & Transmission Ass'n,* 173 F.R.D. 275, 285 (D. Colo.1997)) Accordingly, courts deny motions to strike immaterial and impertinent matter "unless it can be shown that no evidence in support of the allegation[s] would be admissible." *United States v. Shell Oil Co.*, 605 F.Supp. 1064, 1085

(D. Colo. 1985) (quoting *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) ). "Only allegations 'so unrelated to plaintiff's claims as to be unworthy of any consideration' should be stricken." *Id.* (quoting *EEOC v. Ford Motor Co.*, 529 F.Supp. 643, 644 (D. Colo. 1982))(emphasis added). In short, motions to strike "should be denied unless the challenged allegations have ***no possible relation or logical connection*** to the subject matter of the controversy and may cause some form of ***significant prejudice*** to one or more of the parties to the action." *Copeland v. C.A.A.I.R., Inc*., No. 17-CV-564-TCK-JFJ, 2019 WL 4307125 *13 (N.D. Okla. Sep. 11, 2019)(quoting Wright & Miller, § 1382)(emphasis added). *See also*, *Parker v. City of Tulsa*, No.16-cv-0134-CVE-TLW, 2016 WL 6330569, at *2, (N.D. Okla. Oct. 28, 2016).

Here, UCO Motion falls woefully short. UCO claims only that the challenged paragraphs are "immaterial" and "appear" to be an "attempt to prejudice public opinion" against the university. UCO does not – as it must – establish that the paragraphs have no possible relation or logical connection to the controversy and UCO does not – as it must – even argue that the paragraphs will cause significant prejudice.

**A. The Challenged Paragraphs Are Not Immaterial.**

Here, UCO contends that 24 paragraphs of Plaintiffs' First Amended Complaint should be stricken from their First Amended Complaint as "immaterial." Most of the challenged paragraphs – Paragraphs 24-39 – fall under the heading "Legal Framework" and recite the Title IX regulations and policies Plaintiffs assert are applicable to their claims. The remaining paragraphs – Paragraphs 41-48 – are included as factual background and relate to concerns raised by the UCO Chapter of the American Association

of University Professors about the university's handling of Title IX matters during the relevant time period. UCO fails to demonstrate that the challenged paragraphs have "no possible relation or logical connection" to Plaintiffs' claims. *See* Wright & Miller, §1352. Rather, UCO demonstrates a fundamental misunderstanding of Rule 12(f) and its protestations actually reveal the reasons its motion should be denied.

***2020 Amendments to Title IX Regulations***

Challenging Plaintiffs' reference to the 2020 Title IX regulations, UCO declares that Plaintiffs complaints are based on "events undisputedly occurring *prior to August 14, 2020*" and asserts that "it is absolutely clear that the new rules did not then and will not now apply to Plaintiffs' Title IX complaints." (Dkt. 14, UCO Motion at 4-5). UCO's characterization of Plaintiffs' claims is not "undisputed" and it is not "absolutely clear" that the 2020 regulations are wholesale inapplicable. UCO ignores that Plaintiffs allege conduct that that spans years – including conduct that was ongoing at the time the First Amended Complaint was filed in August 2021. (Dkt. 6, FAC §§ 127, 137-139, 196-230, 238-241. Whether and to which Plaintiff the 2020 regulations apply is a question to be answered at a later stage of this litigation.

***The UCO American Association of University Professors Title IX Accountability Subcommittee***

UCO next challenges paragraphs "that relate to actions taken by the Title IX Accountability subcommittee…without providing any foundational allegations that explain (1) who the subcommittee members are/were, (2) whether they have any knowledge or training in Title IX procedures and rules, (3) what information they were

reviewing to come to the recommendations listed, or (4) that specifically tie the subcommittee's recommendations to the Plaintiffs' complaints." (Dkt. 14, UCO Motion at 6). Although asserting in a heading that these paragraphs "should be stricken as immaterial," UCO's principal complaint is that Plaintiffs do not "provide any of the contextual background information that would allow members of the public reviewing the FAC to assess the level of credence to be given the subcommittee's recommendation or Defendant to challenge the foundation of the allegations." (Dkt. 14, UCO Motion at 6).

Challenging the factual support for an allegation through a motion to strike, as UCO does here, is inappropriate. *Kaufman v. Central RV, Inc.,* No. 21-2007-SAC-ADM, 2021 WL 809293 (D. Kan. Mar. 2, 2021). The purpose of a complaint is not "allow members of the public" to assess the parties' credibility or determine the merits of the case. Nor is the Plaintiffs' duty to provide facts for Defendant to use to "challenge the foundation of the allegations." Further, if a plaintiff pleads facts that "aid in giving a full understanding of the complaint as a whole, they need not be stricken." *Id.* (quoting *Nwakpuda v. Falley's, Inc.*, 14 F. Supp. 2d 1213, 1215 (D. Kan. 1998 at 1215-16. *See also e.g., Jensen v. United States Tennis Assoc.,* No. 20-2422-JWL, 2021 WL 134570 (D. Kan. Jan. 14, 2021)(refusing to strike paragraphs concerning the events leading up to the United States Olympic Committee's commission of a sexual abuse task force supported the plaintiff's theory that the defendant, the United States Tennis Association, knew or should have known that its athletes were vulnerable to sexual abuse and yet failed to take any action to prevent that abuse and finding the challenged paragraphs "provide[d] background to the key issue of whether USTA acted reasonably under the circumstances."); *Ortiz v. Cooper*

*Tire & Rubber Co*., No. CIV-13-32-D, 2013 WL 2151674 (W.D. Okla. May 16, 2013)(refusing to strike paragraphs "concern[ing] an alleged history of conduct or knowledge regarding alleged defects in its tires and improvements that could have been made" even though the allegations were not "pertinent" to the tire at issue in the case).

Here, Plaintiffs have plead that Defendant's maintained a policy of indifference to sexual misconduct, including sexual harassment, on campus. (Dkt. 6, FAC ¶ 244). Plaintiffs allege that this policy of deliberate indifference created a heightened risk of sexual harassment that was known and/or obvious to Defendant. (Dkt. 6, FAC ¶ 245). Plaintiffs further allege that UCO failed to enact and/or disseminate and/or implement proper or adequate procedures to discover, prohibit or remedy the kind of gender-based discrimination Plaintiffs suffered and that UCO failed to properly train employees and students with respect to preventing and responding to sexual misconduct. (Dkt. 6, FAC ¶ ¶ 246-248). Not only are Paragraphs 41-48 relevant to Plaintiffs' policy-based Title IX claim, they provide important context and background. They are not immaterial.

***RUSO's Title IX Policy, UCO's EEO Statement, and UCO's Sexual Relationship Policy***

In an argument that strains credulity, UCO asks the Court to strike Plaintiffs' reference to its own policies as "immaterial." (Dkt. 14, UCO Motion at 7-9). Characterizing the FAC as "bloated," UCO criticizes Plaintiffs' for "lazily cit[ing] nearly verbatim UCO's Equal Opportunity Statement and…UCO's Sexual Relationship Policy without use or application to the case at hand." (Dkt. 14, UCO Motion at 8). UCO then attacks a strawman and concludes that Plaintiffs' "arguments fall flat as a matter of law."

(Dkt. 14, UCO Motion at 8). UCO again demonstrates a fundamental misunderstanding of pleading practice and Rule 12(f).

Paragraphs 27-39 are not argument. Paragraphs 27-39 set forth the legal and policy framework applicable to Plaintiffs' claims – hence the "nearly verbatim" citation UCO labels lazy. The two pages UCO devotes ostensibly to argue these policies are "immaterial" may be appropriate for a motion to dismiss or motion for summary judgment. They are entirely inappropriate for a motion to strike under Rule 12(f).

**B. The Challenged Paragraphs Will Not Cause Significant Prejudice To UCO.**

"Immateriality is not enough to trigger the drastic remedy of striking parts of a pleading; the allegation must also be prejudicial to the defendant." *Baxter v. Central RV, Inc.,* No. 19-cv-2179-CM-TJJ, 2019 WL 2423344 at *2 (D. Kan. June 10, 2019) (quoting *Dean v. Gillette*, No. 04-2100-JWL-DJW, 2004 WL 3202867, at *1 (D. Kan. June 8, 2004). Therefore, even if the Court agrees with UCO that the challenged paragraphs are immaterial, UCO must still demonstrate that it would suffer "some form of substantial prejudice" that warrants striking them from the FAC. UCO does not even attempt to make such a showing. Rather, UCO offers nothing more than paranoid speculation of potential impact on public opinion:

- Plaintiffs' allegations regarding "the scope and history of Title IX…***appear to be aimed*** more at providing a ***skewed view of the law to the press***." (Dkt. 14 at 1)(emphasis added).

- Plaintiffs' allegations "***appear*** to have been included for the sole purposes of painting UCO in a ***negative and unduly prejudicial light***…" (Dkt. 14 at 4)(emphasis added).

- Plaintiffs' allegations "***appear*** to have been included for the purpose of painting an inaccurate picture of UCO's approach to resolving Plaintiffs' internal complaints and to ***generate prejudice against UCO in the minds of the community members exposed to press coverage***…" (Dkt. 14 at 6)(emphasis added).

- "Plaintiffs' allegations "***appear*** to be another attempt to ***prejudice the news media and pit the public against UCO.***" (Dkt. 14 at 7)(emphasis added).

Curiously, UCO asserts that "Plaintiffs…***apparently circulated the complaint to the press***…."(Dkt.14 at 2)(emphasis added). UCO provides no basis for this conclusion, merely attaching a news article summarizing the complaint as Exhibit 1. Neither the Plaintiffs nor Plaintiffs' counsel provided the complaint to the press nor did they provide statements or participate in interviews with the press. It is unclear why UCO believes they did or, more importantly, why UCO believes timing of the article to be "particularly noteworthy". In any event, neither Plaintiffs nor their counsel may be blamed for the effect media coverage may have on public opinion.[1]

[1] The Oklahoma Rules of Professional Conduct provide that "[a] lawyer who is participating or has participated in the investigation or litigation of a matters shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication in the lawyer knows or reasonably should know that it will have *an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.*" Rules of Prof'l Conduct, Rule 3.6, Okla. Stat., tit. 5, Ch.1, app 3-A. (emphasis added). The comments recognized that the Oklahoma version of Rule 3.6 "differs from the ABA Model Rules standard of 'substantial likelihood of material prejudice' to emphasize that Oklahoma's standard approximates the "clear and present danger" test that is familiar to lawyers and also to highlight the fact that *the Rule is concerned with effects on the factfinding processes of tribunals* ***rather than effects on public opinion***."

Perhaps recognizing the futility of its argument that the allegations caused some form of significant prejudice, UCO resorts to leveling unfounded accusations of dishonesty and unethical conduct against Plaintiffs and their counsel:

- "[T]hat contention is ***patently false***." (Dkt. 14 at 3).
- Plaintiffs' FAC is seemingly aimed at providing ***a false vision*** of what legal standards governed the Defendant's conduct…" (Dkt. 14 at 2)(emphasis added).
- "[T]he paragraphs at issue do not actually speak to the law applicable to Plaintiffs' causes of action, or otherwise provide any facts which buttress Plaintiff's [sic] claims, and instead are merely ***inserted to mislead and prejudice the public's perception of UCO.***" (Dkt. 14 at 2)(emphasis added)
- UCO calls Paragraphs 41-48 a "***brazen attempt to prejudice public opinion*** against UCO by ***falsely implying*** UCO created a committee to address the investigations in this lawsuit." (Dkt. 14 at 3)(emphasis added).
- Perhaps Plaintiffs are conveniently ***leaving out the truth*** of the matter…." (Dkt. 14 at 6)(emphasis added).
- "[T]he only reason Plaintiffs have included the allegations [is] to prejudice public opinion against UCO by ***falsely implying*** UCO created a committee to address the investigations in this lawsuit." (Dkt. 14 at 7)(emphasis added).
- Plaintiffs' allegations "seem to be presented cynically in a ***naked attempt to mislead and unduly prejudice public opinion*** against UCO. (Dkt. 14 at 9)(emphasis added).

Although UCO couches a couple of these statements with "seem" and "seemingly," the accusations are no less grave --- and no less repugnant to the Oklahoma Rules of

Professional Conduct[2] and the Federal Rules of Civil Procedure.[3] Ironically, with these wholly unfounded accusations of dishonesty, UCO's counsel actually commit the very rule violations of which they complain. It is expected in litigation that there will be disputes about the facts and disagreements about the law. UCO cannot ignore the nature of the adversarial process and declare that Plaintiffs are being deliberately deceitful simply because the university fears unfavorable publicity. It "seems" that perhaps UCO is the party attempting to steer public opinion against Plaintiffs with this frivolous motion to strike. In addition to exemplifying the type of time-wasting busywork Wright and Miller and the

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[2] Oklahoma Rule of Professional Conduct 3.3 requires "Candor Toward the Tribunal" and provides that "a lawyer shall not knowingly make a false statement of fact or law to a tribunal…"." Rules of Prof'l Conduct, Rule 3.3, Okla. Stat., tit. 5, Ch.1, app 3-A.

[3] Federal Rule of Civil Procedure 11(b) provides as follows:

Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

caselaw caution against, UCO's Motion to Strike is an unwarranted attack on Plaintiffs and their counsel.

**Conclusion & Prayer**

In sum, UCO's has failed to meet the heavy burden under Rule 12(f). UCO has not established that the challenged paragraphs are immaterial. And, finally, UCO has not demonstrated *any* prejudice, much less the "substantial prejudice" required to strike paragraphs from Plaintiffs' FAC.

For these reasons, Plaintiffs request the Court deny Defendant's Motion to Strike Certain Paragraphs from Plaintiffs' First Amended Complaint in its entirety and for any and all such other relief to which they may be entitled.

Dated: October 15, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 15, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this matter.

Dated: October 15, 2021

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