DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: WARD CHURCHILL, an individual **Defendants:** UNIVERSITY OF COLORADO; THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate; Patrick T. O'Rourke, #26195 Office of University Counsel 1800 Grant Street, Suite 700 Denver, Colorado 80203 (303) 860-5691 Patrick.orourke@cu.edu	Case Number: 2006 CV 11473 Division 6

SURREPLY BRIEF IN OPPOSITION MOTION TO ALTER OR AMEND JUDGMENT

The University of Colorado and the Regents of the University of Colorado respectfully file their surreply brief in opposition to Professor Churchill's Motion to Alter or Amend Judgment.

I. The Court Has Not Relied on a Draft Stipulation

1. Although the parties' Stipulations have been before the Court since June, Professor Churchill has used his reply brief on a post-judgment motion to argue for the first time that the language of Paragraph 6(b) was not part of the parties' agreement, but was instead a "draft" stipulation that the parties' never finalized. This argument is simply untrue and disregards the plain language of the parties' agreements.

2. In fact, shortly after the University filed its Reply Brief in Support of its Motion for Judgment as a Matter of Law in June of 2009, Mr. Lane sent the University's counsel a letter claiming that the University misrepresented the stipulations between the parties and asking the University to withdraw its references to Paragraph 6(b). He claimed that "this purported clause you referenced in your Reply Brief was, to my honest recollection, never discussed nor contemplated even in the negotiations leading up to the final stipulation."[1]

3. The University responded to the Mr. Lane's letter on June 8, 2009 to refresh his recollection.[2] The University's letter contains a full and complete summary of the negotiations between the parties, including the verbatim e-mails between them, and demonstrates that the parties negotiated and entered two separate Stipulations:

- The first Stipulation was entitled *Joint Stipulation for Dismissal of Claims and Withdrawal of Motions to Dismiss*.[3] This provision did nothing other than dismiss individual parties, dismiss particular claims, and withdraw some pending motions. It was an entirely procedural document.

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[1] A copy of Mr. Lane's June 5, 2009 letter is attached as Exhibit A.

[2] A copy of the *Joint Stipulation for Dismissal of Claims and Withdrawal of Motions to Dismiss* is attached as Exhibit C.

[3] A copy of the *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity* is part of the .pdf file attached as Exhibit C. This is the same .pdf scan that the University used to transmit the documents to Mr. Lane with the University's June 8, 2009 letter. As described below, Professor Churchill did not contest the University's description of this course of events until yesterday.

- The second Stipulation was entitled *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity*. This Stipulation contains the substantive agreements between the parties about the nature and extent of the University's liability.

Specifically, the *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity* describes the terms upon which the University agreed to waive its Eleventh Amendment immunity and preserved its ability to "present the same defenses that would have been applicable to any of its officials or employees acting in their official or capacities."[4]

4. The University has complied with its agreement under the Stipulation and has not raised the entity's Eleventh Amendment immunity as a defense to Professor Churchill's claims under 42 U.S.C. §1983. Because Professor Churchill has accepted the benefit of this agreement, Colorado law does not allow him to simultaneously disregard the Stipulation's clear statement that the University may "present the same defenses that would have been applicable to any of its officials or employees acting in their official or capacities." *See Western Cities Broadcasting, Inc. v. Schueller*, 830 P.2d 1074, 1080 (Colo. App. 1991) (stating that a party may not accept the benefits of a contract without also assuming the burdens imposed upon it by that same contract); *Gerbaz v. Hulsey*, 288 P.2d 357, 364 (Colo. 1955) (stating that a party "could not affirm and at the same time disaffirm the contract").

5. Ironically, if Professor Churchill is correct in his argument that the *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity* was only a "draft" agreement upon which the parties did not reach a meeting of the minds, the University would remain absolutely entitled to invoke Eleventh Amendment immunity as a complete jurisdictional defense, even if not raised at trial and is argued for the first time before the Court of Appeals. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

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[4] *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity* at Paragraph 6(b).

6. In the final analysis, Professor Churchill's argument is that the Court should not enforce the the *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity* because the parties did not initially present it to the Court, but his argument is contrary to the plain language of the Stipulation itself:

> The parties agree to maintain this Stipulation confidentially and to file it with the Court only if necessary to resolve a dispute between them as to its validity or construction.[5]

The University filed the Stipulation only when it became necessary because of Professor Churchill's attempts to deny the University's ability to present defenses that it had explicitly preserved through the parties' agreement.

7. After the University sent the June 8, 2009 letter to Mr. Lane reminding him of the course of events leading to the parties' Stipulation, he did not argue that the Stipulation was a "draft" either in his briefs on the quasi-judicial immunity issue or in his post-judgment motion. This argument's appearance in a reply brief, just days before the Court would normally encounter a deadline to rule on a post-judgment motion, and with no reference to the history of the Stipulation's drafting, reveals it as a desperate effort to avoid a correct legal outcome.

8. As such, the University respectfully requests that the Court apply the Stipulation as written and judicially estop Professor Churchill from his attempts to disavow it. *See Burford v. Burford*, 935 P.2d 943, 947 (Colo. 1997) (stating that the doctrine of judicial estoppel exists because "parties must "maintain a consistency of positions in the proceedings, assuring promotion of truth and preventing the parties from deliberately shifting positions to suit the exigencies of the moment". . . and doesn't to allow "self-contradiction . . .as a means of obtaining unfair advantage").

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[5] *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity* at Paragraph 6.

II. No Official Capacity Verdict Could Enter Against the University

9. As the University has described before, it waived Eleventh Immunity only "to permit the same recovery from the University that might otherwise be had against any of its officials or employees in their official or individual capacities . . ."[6] If Professor Churchill did not possess a right of recovery against the individual Regents, he did not somehow improve his situation by entering the Stipulation.

10. The University explained in detail on Page 6 of the its response brief why Professor Churchill could not bring an official capacity claim for damages against any individual Regent under *Kentucky v. Graham*, 473 U.S. 165 (1985). The law is clear that an "official capacity action could not have been maintained against [a state official] in federal court." *Graham*, 473 U.S. at 169. Professor Churchill cites no authority in any of his briefs that creates allows an official capacity action for damages against a state official under *42 U.S.C. §1983*.

11. The Court has also already exhaustively explained why an official capacity judgment for injunctive relief could not have entered in this case because the Regents were acting in a quasi-judicial capacity. Professor Churchill cites no authority that allows the Court to disregard under *42 U.S.C. §1983*'s plain language that "injunctive relief shall not be granted" in any action "brought against a judicial officer for an act or omission taken in such officer's judicial capacity."

12. Professor Churchill may be correct in his assertion (although he has never argued it before) that employment decisions made by the Regents potentially constitute "policy decisions" under *Pembaur City of Cincinnati* 475 U.S. 469 (1986). Nonetheless, his argument is meaningless, because he cannot establish that an official capacity claim for damages or injunctive relief could have entered against an individual Regent. Because Professor Churchill cannot refute the arguments described above, the Court properly granted the University's Motion for Judgment as a Matter of Law.

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[6] *Joint Stipulation for Dismissal of Claims, Withdrawal of Motions to Dismiss and Limited Waiver of Eleventh Amendment Immunity* at Paragraph 6(b).

III. Judge Kane's Decision in Friedman Does Not Control this Lawsuit

13. Professor Churchill raises *Friedman v. Weiner*, 515 F.Supp. 563 (1981) for the first time to argue that the University should not enjoy raise quasi-judicial immunity. He provides no reason why he failed to cite this case any time during the last three months. As the University noted in its response to the Motion to Alter or Amend Judgment, post-judgment motions are "not designed to serve the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment." *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (D.C. Va. 1984).

14. Nor is the Court required to consider an argument raised for the first time in a reply brief. *IBC Denver II, LLC, v. City of Wheat Ridge*, 193 P.3d 714, 718 (Colo. App. 2008).

15. *Friedman* did not make any determinations about whether the University could invoke quasi-judicial immunity. Judge Kane simply stated that "there are two types of immunity" and explained the distinctions between them before concluding that "a review of the cases suggests that the individual defendants, if entitled to any immunity, are entitled at most to qualified immunity." *Friedman*, 515 F.Supp. at 566-67. Because qualified immunity is an affirmative defense, Judge Kane denied a motion to dismiss, but he did not reach the merits of any potential immunities. *Friedman*, 515 F.Supp. at 567.

16. Even more importantly, there is no evidence in *Friedman* about the nature of the University's employment decision or the processes that the University used in reaching that decision. As a tenured professor, Professor Churchill was entitled to a full panoply of judicial processes that are not available to other employees, including a contested evidentiary hearing before a body of his peers. As the Court recognized, the extraordinary processes that the University applied in this case were sufficient to create quasi-judicial immunity.

17. The Court heard the evidence and properly determined the merits of the University's quasi-judicial immunity defense. Professor Churchill's citation to an opinion that does not apply the doctrine of quasi-judicial immunity to any particular facts provides no basis for the Court to alter its judgment.

IV. Ms. Newill's Affidavit Remains Inadmissible

18. Finally, Professor Churchill argues that Ms. Newill's affidavit is admissible because he does not contest a verdict, but instead wishes to refute "the Court's complete adoption of Defendants' submitted inference based on the verdict."

19. This argument neglects the plain language of Colo. R. Evid. 606(b), which states that "a juror may not testify as to any matter occurring during the course of the jury's deliberations or the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or concerning his mental processes in connection therewith." The affidavit remains an impermissible attempt by Professor Churchill to undermine the Court's rulings.

Dated this 17th day of October, 2009:

OFFICE OF UNIVERSITY COUNSEL

_/s/Patrick T. O'Rourke_____

Certificate of Service

I certify that I served a true and correct copy of this pleading to Professor Churchill's counsel of record by electronic filing on this 17th day of October 2009:

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