District Court City and County of Denver, Colorado 1437 Bannock Street Denver, Colorado 80202 **Plaintiff:** **Ward Churchill**, an individual, v. **Defendant(s):** **University of Colorado,** **Regents of the University of Colorado, a Colorado body corporate**	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiff: David A. Lane, Atty. Reg. No. 16422 Darold Killmer, Atty. Reg. No. 16056 Qusair Mohamedbhai, Atty. Reg. No. 35390 **KILLMER, LANE & NEWMAN, L.L.P.** 1543 Champa Street, Suite 400 The Odd Fellows' Hall Denver, CO 80202 Phone Number: (303) 571-1000 Fax Number: (303) 571-1001 E-mail: dlane@killmerlane.com Robert J. Bruce, Atty. Reg. No. 17742 **LAWLIS & BRUCE, L.L.C.** 1875 Lawrence Street, Suite 750 Denver, CO 80202 Phone Number: (303) 573-5498 Fax Number: (303) 573-5537 E-mail: robertbruce@lawlisbruce.com	Case Number: 06 CV 11473 Division: 6

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND JUDGMENT PURSUANT TO C.R.C.P. RULE 59

Plaintiff Ward Churchill, by and through his attorneys, David A. Lane and Qusair Mohamedbhai of the law firm KILLMER, LANE & NEWMAN, LLP, and Robert J. Bruce of the law firm Lawliss & Bruce, LLC, hereby files the following *Reply in Support of Plaintiff's Motion to Amend Judgment*:

After a month long trial, the Jury rejected the testimony of each defense witness who testified that Professor Churchill was not the victim of intentional discrimination. Despite this clear pronouncement by the Jury, this Court has inexplicably vacated the jury verdict, and found Professor Churchill to be a "dishonest colleague" (*Order,* ¶ 112) and the Defendants as "innocent third parties" (*Order,* ¶ 109). Professor Churchill respectfully requests that the Court re-examine its near complete adoption of Defendants' proposed findings of facts and conclusions of law, as embodied in its July 7, 2009 Order, and rule consistent with the notion that those who intentionally violate the United States Constitution are not "innocent third parties."

1. Defendants incorrectly argue that Plaintiff did not prevail at trial against the Regents of the University of Colorado in their official capacities.

Defendants argue that Professor Churchill did not prevail at trial against the Defendants in their official capacities. *Response,* pgs. 5, 6, 7, & 8. Specifically, Defendants argue that "Professor Churchill never based any claim on a 'policy or custom,' did not present any evidence of a 'policy or custom,' never tendered any jury instruction related to 'policy or custom,' and failed to even present any argument related to 'policy or custom." This is incorrect because the unconstitutional act of terminating Professor Churchill was performed directly by the policy makers of the University of Colorado, *i.e.* the Regents.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Supreme Court opined that the 'official policy' requirement of *Monell* was intended to distinguish acts of the government from acts of employees of the government, and thereby make clear that liability is limited to action for which the government is actually responsible. *Pembaur*, 475 U.S. at 479. The Supreme Court emphasized that governmental liability attaches

where the decisionmaker possesses final authority to establish policy with respect to the action ordered. *Id.* at 481. If the decision to adopt that particular course of action is made by the government's authorized decisionmakers, it represents an act of official government 'policy' as that term is commonly understood. *Id.*[1]

In this case, the Jury affirmatively answered the following question found on the Verdict Form:

> **When it terminated Professor Churchill's employment, did a majority of the Board of Regents of the University of Colorado use Plaintiff's protected speech activity as a substantial or motivating factor in the decision to discharge the Plaintiff from employment?**

It is not disputed that the University of Colorado's Board of Regents is the University of Colorado's ultimate and highest policy maker. As such, official capacity liability (liability directly imposed on the government) was found by the Jury because the decision to unlawfully terminate Professor Churchill was made personally by the University's policy makers.

2. Defendants and the Court repeatedly reference a <u>draft</u> stipulation, not the stipulation actually entered into by the parties, or entered as an Order by the Court.

The stipulation that the Court references in its July 7, 2009 Order, and which Defendants persistently reference throughout their *Response*, was <u>not</u> the stipulation agreed to and filed by the parties on December 20, 2007, and/or signed by the Court on January 2, 2008. For example, Defendants incorrectly claim that the stipulation states "[t]he University agreed in Paragraph 6(b) of the parties' Stipulation that it would waive

[1] *Ky. v. Graham*, 473 U.S. 159, 169 (1985) cited by Defendants is inapplicable to this issue because in that case, the official capacities claims were barred by Eleventh Amendment immunity. Defendants have waived Eleventh Amendment immunity in exchange of Professor Churchill's dismissal of the claims against the individual Regents.

its Eleventh Amendment immunity "to permit the same recovery [against the University] that might otherwise be had against any of its officials or employees acting in their official or individual capacities." *Response,* pg. 5. Neither the December 20, 2007 stipulation filed by the parties, nor the January 2, 2008 stipulation entered as an Order by Court contains a paragraph 6(b).

Paragraph 9 of the Court's July 7, 2009 Order Granting Defendant's Motion for Judgment as a Matter of Law is an example of the Court completely adopting the language of an agreement not actually entered into by the parties, or entered as an Order of the Court:

> "9. To avoid this unnecessary cost and complexity, the University agreed to waive its Eleventh Amendment immunity, thus allowing direct claims to be brought against the University and the Board of Regents. In return for the ability to bring direct claims, however, Professor Churchill agreed that the University acquired the ability to assert any defenses that would be available to individual Regents. The parties' Stipulation provides:
>
> **The University agrees and stipulates that it shall waive its immunity to claims for damages under the Eleventh Amendment to the United States Constitution to permit the same recovery from the University that might otherwise be had against any of its officials or employees acting in their official or individual capacities, reserving to the University the ability to present the same defenses that would have been applicable to any of its officials or employees acting in their official or individual capacities."**

This language is **NOT FOUND** in the stipulation agreed to and filed by the parties on December 20, 2007, or signed by the Court on January 2, 2008. This Court should not use extrinsic evidence (such as a draft stipulation never entered into by the parties) to interpret the unambiguous stipulation agreed by the parties. *Fox v. I-10, Ltd.,* 936 P.2d 580, 582 (Colo. App. 1996).

Furthermore, this Court must construe the agreement between the parties in a manner that allows each party to receive the benefit of the bargain and reflects the reasonable expectations of the parties within the scope of the agreement**.** *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003). The intent of the stipulation was not to create a "gotcha" legal tactic to be raised by Defendants as a last resort after losing a month long jury trial. Professor Churchill did not intend to allow the Defendants to reserve "to the University the ability to present the same defenses that would have been applicable to any of its officials or employees acting in their official or individual capacities." This language was specifically not included in the stipulation agreed to by the parties on December 20, 2007, or the Order of the Court on January 2, 2008 because it was not part of the parties' agreement.

The intent of the stipulation, as explicitly agreed to by the parties filing on December 20, 2007, was to "simplify the pleadings to the extent possible, prevent litigation against potentially unnecessary parties, and to allow the case to proceed in the most expeditious manner." *December 20, 2007 Stipulation, Filing ID 17745077.* The stipulation agreed to and filed by the parties on December 20, 2007, and signed by the Court on January 2, 2008 does not contain any language that suggests that these Defendants, in their official capacities, were to be given defenses, such as quasi-judicial immunity, which are only available to defendants in their individual capacities. As such, this Court erred by finding that quasi-judicial immunity applies to the Regents and the University of Colorado, in their official capacities, based on an agreement between the parties. Government officials (e.g., local officials in their official capacity and counties, among others) do not enjoy absolute immunity from suit under § 1983. *Leatherman v.*

Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 165-66 (1993).

3. CRE 606(b) is inapplicable because the juror affidavit does not contest the final verdict.

CRE 606(b) broadly prohibits using juror testimony to contest a verdict. *People v. Richardson*, 184 P.3d 755, 764 (Colo. 2008). However, the submitted juror affidavit does not contest the final verdict, but rather, is used to refute the Court's complete adoption of Defendants' submitted inferences based on the verdict. In denying reinstatement of employment, the Court found that it was "bound by the jury's implicit finding that Professor Churchill has suffered 'no actual damages' as a result of the constitutional violation." *Order,* ¶ 80. The Court also found Professor Churchill suffered "no actual damages" based on the Court's answer to a jury question. *Order,* ¶¶ 74-76. The juror affidavit is intended to inform the Court that the Jury by no means found that Plaintiff "suffered no actual damages." The Court should not adopt Defendants' proposed inferences from the verdict, but rather strictly apply the findings of the Jury and determine that Professor Churchill was harmed by Defendants. *Verdict, Question 2.*

4. Senior Federal District Court Judge John L. Kane found that the Regents of the University of Colorado were not entitled to quasi-judicial immunity.

Plaintiff respectfully requests that the Court review the case of *Friedman v. Weiner*, 515 F. Supp. 563, 566-567 (D. Colo. 1981)(attached hereto as Exhibit 1), in which Judge Kane specifically found that individual Regents of the University of Colorado were not entitled to quasi-judicial immunity in an action, similar to this one, brought pursuant to 42 U.S.C § 1983. While Judge Kane's analysis was not detailed nor exhaustive, Judge Kane reviewed the cases of *Pierson v. Ray*, 386 U.S. 547 (1967) and

Imbler v. Pachtman, 424 U.S. 409 (1976), and found that the individually named Regents of the University of Colorado were not entitled to quasi-judicial immunity. In paragraphs 22 & 23 of its July 7, 2009 Order, this Court, also after reviewing *Imbler v. Pachtman* and *Pierson v. Ray*, came to the precise opposite legal conclusion as Judge Kane.

Importantly, quasi-judicial immunity strictly applies to individual capacity claims, not official capacity. *Hulen v. Yates,* 322 F.3d 1229, 1236 (10th Cir. 2003). Plaintiff respectfully requests that the Court re-examine the cases of *Pierson v. Ray,* 386 U.S. 547 (1967), *Imbler v. Pachtman,* 424 U.S. 409 (1976), *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315 (10th Cir. 2002) and *Tonkovich v. Kansas Board of Regents*, 1996 U.S. Dist. Lexis 18323 (D. Kan. 1996) in light of Judge Kane's decision in *Friedman v. Weiner*, 515 F. Supp. 563 (D. Colo. 1981). Finally, Professor Churchill respectfully requests that the Court not deviate from Judge Kane's persuasive legal authority in *Friedman*, a case which has never been presented for this Court's review, and find that the individual Regents of the University of Colorado are not entitled to quasi-judicial immunity.

WHEREFORE, Plaintiff requests that the Court amend its judgment to find that the Regents are not entitled to quasi-judicial immunity and to reinstate Professor Churchill to his former position of fully tenured professor at the University of Colorado.

Respectfully submitted this 16th day of September 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court and served via *LexisNexis File and Serve* on September 16, 2009 to the following:

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