APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 1:21-cv-01263-RMR-KLM

DAVID PEREZ,

Plaintiff,

v.

CITY AND COUNTY OF DENVER,

Defendant.

ORDER

Pending before the Court is Plaintiff's Opposed Motion for Leave to File Third Amended Complaint, ECF No. 42. For the reasons stated below, the motion is DENIED, and this case is DISMISSED WITH PREJUDICE.

I. BACKGROUND

The factual and procedural history of this case is fully laid out in this Court's Order, ECF No. 41, granting dismissal without prejudice of Plaintiff David Perez's Second Amended Complaint and Jury Demand. It is restated here only to the extent necessary to rule on Plaintiff's present motion to amend.

In its previous order, the Court dismissed Plaintiff's claims of disability discrimination and retaliation, in violation of Title VII, the Colorado Anti-Discrimination Act ("CADA"), and the Americans with Disabilities Act ("ADA"), as well as a claim of a violation of the ADA, arising out of the work assignments he received following a debilitating Line-

of-Duty injury that he sustained as a firefighter with the Denver Fire Department ("DFD") in March of 2019, as well as his eventual separation from DFD. The Court found that Plaintiff failed to exhaust administrative remedies as to his CADA claims because he failed to allege that he received a notice of right to sue letter from the Colorado Civil Rights Division ("CCRD"). ECF No. 41 at 7–10. Therefore, the Court dismissed the CADA claims without prejudice for lack of jurisdiction. *Id.* at 7–10.

The Court also dismissed Plaintiff's Title VII and ADA claims without prejudice for failure to state a claim, due to Plaintiff's failure to exhaust administrative remedies by timely filing a charge of discrimination as to those claims. *Id.* at 11–14; *see also id.* at 13–14 (citing *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013); *Reveles v. Catholic Health Initiatives*, No. 16-cv-2561-WJM-CBS, 2017 WL 2672112, at *2 (D. Colo. June 21, 2017)) (further finding that the Court could not consider whether the untimely charge of discrimination "related back" to a previous charge of discrimination because the Second Amended Complaint did not "refer[] to" or "mention[]" the previous charge of discrimination and so the Court could not consider it on a motion to dismiss pursuant to Rule 12(b)(6)). The Court further held that, "if Plaintiff chooses to move to amend, Plaintiff shall file a motion to amend on or before Thursday, September 29, 2022." *Id.*

On the date ordered, Plaintiff filed the present Motion for Leave to File Third Amended Complaint. ECF No. 42. Plaintiff attached to the motion a proposed Third Amended Complaint and Jury Demand, showing redlined proposed amendments, pursuant to Local Rule of Practice 15.1(b). ECF No. 42-1; D.C.COLO.LCivR 15.1(b). The

proposed Third Amended Complaint removes the Title VII and CADA claims and indicates that Plaintiff would only maintain claims for discrimination and retaliation in violation of the ADA. ECF No. 42-1 ¶¶ 112–39. On October 20, 2022, Defendant the City and County of Denver filed Defendant's Response to Plaintiff's Opposed Motion for Leave to File Third Amended Complaint. ECF No. 43. On November 8, 2022—five days after the deadline for replies—Plaintiff filed Plaintiff's Reply to Defendant's Response to Plaintiff's Opposed Motion for Leave to File Third Amended Complaint. ECF No. 44; *see also* D.C.COLO.LCivR 7.1(d) ("The moving party may file a reply no later than 14 days after the date of service of the response, or such lesser or greater time as the court may allow."). On November 17, 2022, Defendant filed Defendant's Motion to Strike Plaintiff's Reply to Defendant's Response to Plaintiff's Opposed Motion for Leave to File Third Amended Complaint [ECF #44], ECF No. 45, arguing that the Reply should be stricken as untimely; that Plaintiff failed to confer with Defendant or seek leave from the Court for an extension; and that Plaintiff failed to show good cause or excusable neglect for the delay. Plaintiff filed a Response in opposition to the motion to strike on December 9, 2022, ECF No. 46, and Defendant filed a Reply on December 21, 2022, ECF No. 47.

II. JURISDICTION AND APPLICABLE LAW

As stated above, Plaintiff's proposed Third Amended Complaint would bring claims for discrimination and retaliation in violation of the ADA. ECF No. 42-1 ¶¶ 112–39. As noted in the Court's previous Order, ECF No. 41 at 5–6, the Court may exercise federal question jurisdiction over claims alleging violations of the ADA. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the

Constitution, laws, or treaties of the United States."); *see also id.* § 1343(a)(4) ("The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.").

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 15, "[a] party may amend its pleading once as a matter of course within . . . 21 days after serving it, or," if a responsive pleading is required, "21 days after service of a responsive pleading" or certain motions. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Here, Plaintiff seeks to file a Second Amended Complaint well past 21 days after service of Defendant's Motion to Dismiss the First Amended Complaint, ECF No. 33, and Plaintiff's motion indicates that Defendant opposes the request to amend, ECF No. 38 at 1. Therefore, Plaintiff may only amend with the Court's leave. *See* Fed. R. Civ. P. 15(a)(1)–(2).

Although "[t]he court should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), it is within the discretion of the Court to grant or deny leave to amend, *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Refusing leave to amend is generally only justified upon a showing of undue delay, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or undue prejudice to the opposing party, or futility of amendment, etc." *Castleglen, Inc. v. Resolution Tr. Corp.*, 984 F.2d 1571, 1585 (10th Cir. 1993) (citing *Foman*, 371 U.S. at 182).

"A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC*, 878 F.3d 1224, 1230 (10th Cir. 2017) (quoting *Barnes v. Harris*, 783 F.3d 1185, 1197 (10th Cir. 2015)). "A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment." *Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997). On a motion for summary judgment, "the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). If the movant carries "the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law," then "the burden shifts to the nonmovant to go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Id.* at 670–71.

IV. ANALYSIS

A. Motion to Amend

1. Plaintiff's Arguments

Plaintiff's motion to amend argues simply that "[j]ustice requires that Plaintiff be allowed to amend his Complaint" and that "[t]he Third Amended Complaint remedies the defects in the Second Amended Complaint by pleading factual matter 'that allows the Court to draw the reasonable inference' that Plaintiff timely filed his lawsuit and exhausted his administrative remedies prior to filing this lawsuit." ECF No. 42 ¶¶ 8–9 (quoting

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). Arguably, the Court need not consider such conclusory and perfunctory arguments, which are generally deemed waived. *See, e.g.*, *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived. This briefing-waiver rule applies equally to arguments that are inadequately presented in an opening brief, such as those presented only in a perfunctory manner.") (internal quotations, citations, and alterations omitted); *In re Home Advisor, Inc. Litig.*, 491 F. Supp. 3d 879, 898 (D. Colo. 2020) (Brimmer, C.J.) (quoting *Schlecht v. Lockheed Martin Corp.*, No. 11-cv-03072-RM-BNB, 2014 WL 6778709, at *2 (D. Colo. Nov. 25, 2014) (Moore, J.)) ("Undeveloped arguments raised in a perfunctory manner are waived.").

Furthermore, Plaintiff raises arguments for the first time in his untimely reply brief regarding whether any amended charges of discrimination "relate back" to previous charges of discrimination that he filed with the Equal Employment Opportunity Commission ("EEOC") or the Colorado Civil Rights Division ("CCRD"), such that his operative charge of discrimination should be considered timely. *See* ECF No. 44 at 4–7. Although Defendant's motion to strike Plaintiff's reply in support of the motion to amend is pending, even if the Court were to consider Plaintiff's untimely reply, "[r]aising [an] issue for the first time in a reply brief does not suffice," and those arguments are deemed waived. *Home Design Servs., Inc. v. B & B Custom Homes, LLC*, 509 F. Supp. 2d 968, 971 (D. Colo. 2007) (Daniel, J.); *see also Sawyers*, 962 F.3d at 1286; *United States v. Harrell*, 642 F.3d 907, 918 (10th Cir. 2011) ("[A]rguments raised for the first time in a reply brief are generally deemed waived.").

The Tenth Circuit has articulated two reasons for the general rule that arguments raised for the first time in a reply are waived in the context of appellate practice: "First, to allow an appellant to raise an argument for the first time in a reply brief would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response." *See United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019) (internal quotations and citations omitted). "Second, the rule also protects us from issuing an improvident or ill-advised opinion because we did not have the benefit of the adversarial process." *Id.* The Court finds these rationales to be no less applicable here. First, because Plaintiff did not raise his arguments regarding whether any amended charges of discrimination "relate back" to previous charges of discrimination in his original motion to amend, Defendant did not have an opportunity to respond to any such argument in its Response. *See id.* Second, because the Defendant lacked an opportunity to respond, the Court does not have the benefit of the adversarial process in addressing this argument. *See id.* Therefore, even if the Court were to deny Defendant's motion to strike Plaintiff's reply as untimely and were to consider that reply, it would find that the arguments regarding whether Plaintiff's December 2020 charge should "relate back" to his previous charges were waived because they were not raised in the initial motion.

2. Defendant's Arguments

Defendant argues in its Response that the proposed Third Amended Complaint does not cure Plaintiff's failure to exhaust his administrative remedies. ECF No. 43 at 2–5. According to Defendant, "Plaintiff filed his charge of disability discrimination and retaliation with the EEOC on December 28, 2020," and his constructive discharge accrued

"when [he] g[a]ve[] notice of his resignation" on February 27, 2020, when he emailed his chain of command with "notice of his intent to take disability retirement" and his intent to "end[] his DFD employment on March 2, 2020." *Id.* at 4 (citing *Green v. Brennan*, 578 U.S. 547, 564 (2016)). Hence, Defendant argues that Plaintiff's December 2020 charge of discrimination was not timely because it was filed more than 300 days after his constructive discharge accrued on February 27, 2020. *See id.*; *see also McDonald v. School Dist. No. 1*, 83 F. Supp. 3d 1134, 1140–41 (D. Colo. 2015) (Brimmer, C.J.) (quoting 42 U.S.C. § 2000e-5(e)(1)) (noting that a charge of discrimination required under Title VII "must be filed within 'three hundred days after the alleged unlawful employment practice occurred"); 42 U.S.C. § 12117(a) (applying the same "powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title" to ADA actions). Further, Defendant states that "all other unlawful acts alleged to have occurred during [Plaintiff's] employment also took place before the 300-day window because Plaintiff claims they occurred before his constructive termination." ECF No. 43 at 5. Given that the Court finds that (even if it were to deny Defendant's pending motion to strike Plaintiff's untimely reply), Plaintiff has waived any arguments regarding the relation back of the December 28, 2020 charge of discrimination to previous charges of discrimination, *see supra* Section IV.A.1., the Court only considers whether that charge from December of 2020 was properly filed within the required 300-day time frame for purposes of this analysis.

Defendant's argument relies on materials outside of the proposed Third Amended Complaint. Namely, Defendant cites the following exhibits to show the date of Plaintiff's

constructive discharge: (1) Plaintiff's February 27, 2020 email to his chain of command with notice of his intent to take disability retirement and his intent to end his DFD employment on March 2, 2020 (Defendant's Exhibit F, ECF No. 43-6) and (2) Plaintiff's February 28, 2020 email to the Department of Safety's HR Business Partner and Safety HR Manager, providing them with his notice of separation from the City and seeking clarification on separation benefits (Defendant's Exhibit G, ECF No. 43-7). Although Defendant does not say so explicitly, it presumably argues, by citing to these materials from outside the four corners of Plaintiff's proposed Third Amended Complaint, that the pleading "would not survive a motion for summary judgment." *See Bauchman*, 132 F.3d at 562. The Court agrees.

The Supreme Court has held that a constructive discharge claim arising under Title VII "accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the effective date of that resignation." *Green*, 578 U.S. at 564. The same applies to a claim for constructive discharge arising under the ADA. *See, e.g.*, *Rivero v. Board of Regents of Univ. of N.M.*, 950 F.3d 754, 760–61 (10th Cir. 2020) (applying the same elements for a Title VII constructive discharge claim set forth in *Green* to a constructive discharge claim under the Rehabilitation Act and noting that "cases decided under section 504 of the Rehabilitation Act are . . . applicable to cases brought under the ADA and vice versa, except to the extent the ADA expressly states otherwise") (internal quotations, alterations, and citations omitted); *Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1222 (10th Cir. 2006) (applying the same standards to the accrual of a cause of action under Title VII, the ADEA, and the ADA); *see also* 42 U.S.C.

§ 12117(a) (applying the same "powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title" to ADA actions). Defendant has provided two emails showing that Plaintiff "g[a]ve[] notice of his resignation" on February 27 and 28, 2020—305 and 304 days prior to December 28, 2020, when he filed his charge of discrimination. *See* ECF Nos. 43-6, 43-7; *Green*, 578 U.S. at 564.

Hence, Plaintiff's December 28, 2020 charge appears to be untimely as to his constructive discharge claim and as to any claim involving acts pre-dating the constructive discharge. *See McDonald*, 83 F. Supp. 3d at 1141 (quoting *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)) ("Although a plaintiff may allege that numerous discriminatory or retaliatory acts occurred throughout his or her term of employment, 'only incidents that took place within the timely filing period are actionable.'"); 42 U.S.C. § 12117(a). Plaintiff has provided no materials, exhibits, facts, or arguments to the contrary. Moreover, although Defendant's motion to strike as untimely Plaintiff's reply in support of the motion to amend is pending, even if the Court were to deny the motion to strike and consider Plaintiff's untimely reply, the Court would find that the reply appears to admit that Plaintiff's "constructive termination date" is "27 February 2020," and not any time in March of 2020. *See* ECF No. 44 at 8.

Thus, Defendant has shown that on a motion for summary judgment, it would be able to carry "the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law," and Plaintiff has not carried the subsequent burden to "go beyond the pleadings and 'set forth

specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *See Adler*, 144 F.3d at 670; *Bauchman*, 132 F.3d at 562. Therefore, the Court agrees with Defendant that Plaintiff's proposed Third Amended Complaint would be futile because it "would not survive a motion for summary judgment." *See Bauchman*, 132 F.3d at 562.

Defendant also argues that an additional reason to deny the motion to amend is that "Plaintiff knew or should have known the facts upon which the proposed amendment is based but failed to include them in any of the previous complaints." ECF No. 43 at 5 (citing *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991)). Indeed, the Tenth Circuit has held that "[w]here the party seeking amendment knows or should have known the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial." *Woolsey*, 934 F.2d at 1462 (quoting *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)). Plaintiff and his counsel "kn[e]w[] or should have known" the facts alleged in the Third Amended Complaint at the time of Plaintiff's *pro se* filing of the original Complaint, ECF No. 1, and First Amended Complaint, ECF No. 4, as well as at the time of Plaintiff's counsel's filing of the Second Amended Complaint, ECF No. 12-2. The Court finds that this, in combination with the paucity of timely and un-waived argument in support of Plaintiff's motion to amend, is an additional reason that the present motion to amend should be denied.

B. Dismissal With Prejudice

"[T]he district court may dismiss without granting leave to amend when it would be futile to allow the plaintiff an opportunity to amend his complaint." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006). "Where a complaint fails to state a claim, and no amendment could cure the defect, a dismissal *sua sponte* may be appropriate." *Id.* "If such dismissal operates on the merits of the complaint, it will also ordinarily be entered with prejudice." *Id.*

Here, the Court dismissed the Second Amended Complaint without prejudice, allowing Plaintiff to seek leave to amend the Complaint again to add allegations to sufficiently state his claims. However, because the Plaintiff, after given an additional opportunity to plead his claims, has failed to propose an amendment that would not be futile, the Court finds that dismissal with prejudice is appropriate.

V. CONCLUSION

For the reasons stated above, Plaintiff's Opposed Motion for Leave to File Third Amended Complaint, ECF No. 42, is DENIED, and this action is DISMISSED WITH PREJUDICE.

DATED: February 7, 2023

BY THE COURT:

REGINA M. RODRIGUEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 21-cv-01263-RMR-KLM

DAVID PEREZ,

Plaintiff,

v.

CITY AND COUNTY OF DENVER,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order entered by Judge Regina M. Rodriguez on February 7, 2023 [ECF No. 48] it is

ORDERED that Plaintiff's Opposed Motion for Leave to File Third Amended Complaint [ECF No. 42] is DENIED. It is

FURTHER ORDERED that this action is DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that Defendant shall have their costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen days after the entry of judgment, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 7th day of February, 2023.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/K. Myhaver
K. Myhaver
Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit

November 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID PEREZ,

Plaintiff - Appellant,

v.

CITY AND COUNTY OF DENVER,

Defendant - Appellee.

No. 23-1057
(D.C. No. 1:21-CV-01263-RMR-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **KELLY**, and **McHUGH**, Circuit Judges.

David Perez, pro se, appeals the district court's order denying his motion to file a third amended complaint and dismissing his case with prejudice. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Mr. Perez was a firefighter with the Denver Fire Department (DFD) when on March 13, 2019, he sustained a debilitating Line of Duty (LOD) injury to his right

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

hand (his dominant hand) while fighting a house fire. As a result of the injury, he was placed on work restrictions. According to Mr. Perez, between March 19, 2019, and November 13, 2019, (1) he received various modified duty positions that either did not comply with his work restrictions or exacerbated his injury and (2) he was passed over for other, more appropriate positions within the DFD for which he was qualified. On October 21, 2019, Mr. Perez filed a complaint with the Colorado Civil Rights Division (CCRD), which alleged that he was retaliated against and denied the use of Leave Without Pay (LWOP) to attend a medical appointment because he had exhausted his sick leave to be treated for his LOD injury.

Mr. Perez was placed on LWOP on December 6, 2019. Based on his belief that the DFD had failed to accommodate his LOD injury and forced him to quit, on February 27, 2020, Mr. Perez informed DFD's chain of command that he was taking disability retirement and his employment would end on March 2. On December 28, 2020, he filed a charge of disability discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC) based on events from March 19, 2019, through February 27, 2020, when he tendered his resignation.

The EEOC issued Mr. Perez a right-to-sue letter on May 4, 2021, and three days later—May 7—Mr. Perez, pro se, filed a complaint in the United States District Court for the District of Colorado alleging discrimination and harassment, retaliation, and failure to accommodate, in violation of federal and state law.

Acting under the magistrate judge's order permitting him to cure deficiencies, Mr. Perez filed an amended complaint. But after reviewing the amended complaint,

the magistrate judge still found several deficiencies and ordered Mr. Perez to submit a second amended complaint. This time, counsel entered an appearance on behalf of Mr. Perez, and filed a second amended complaint, which asserted six claims for relief—namely: (1) race and national origin discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1); (2) race and national origin discrimination in violation of the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-402(1)(a)(l); (3) violation of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101; (4) retaliation in violation of the ADA, 42 U.S.C. § 12203(a); (5) disability discrimination in violation of CADA, Colo. Rev. Stat. § 24-34-402(1)(a)(l); and (6) disability retaliation in violation of CADA, Colo. Rev. Stat. § 24-34-402(1)(e)(IV).

The City and County of Denver (Denver) moved to dismiss. The district court found that Mr. Perez failed to exhaust his administrative remedies as to the CADA claims because the second amended complaint failed to allege that he received a right-to-sue letter from the CCRD. The court dismissed the CADA claims without prejudice.[1] The court also dismissed the Title VII and ADA claims without prejudice on the grounds that Mr. Perez had failed to exhaust his administrative remedies. In

[1] Mr. Perez later argued that he received a right-to-sue letter from the CCRD on November 20, 2020. Pursuant to Colo. Rev. Stat. § 24-34-306(11)(b), Mr. Perez was required to file a civil action within ninety days after jurisdiction of the commission ends. The commission's jurisdiction ends when "[t]he complainant has requested and received a notice of right to sue." Colo. Rev. Stat. § 24-34-306(11)(a)(II). But Mr. Perez did not file suit until May 7, 2021—long after the ninety-day deadline expired. However, we need not address whether the suit was timely because Mr. Perez ultimately abandoned his claims under the CADA.

doing so, the court specifically declined to consider Mr. Perez's relation-back argument and exhibits "in the context of this [Fed. R. Civ. P.] 12(b)(6) motion" on the grounds that Mr. Perez "cannot amend [his] complaint by adding factual allegations in response to [Denver's] motion to dismiss." R., Vol. II at 38 (ellipsis and internal quotation marks omitted).[2]

Mr. Perez, through counsel, moved to file a third amended complaint. Attached to the motion was the proposed complaint, which dropped the Title VII and CADA claims, and alleged two claims under the ADA—retaliation and discrimination. Denver opposed the motion, arguing that the proposed amendment was futile because Mr. Perez had failed to file a charge of discrimination with the EEOC within 300 days of his constructive discharge, which accrued on February 27, 2020. Mr. Perez filed an untimely reply in which he first raised the issue of whether any amended charges of discrimination relate back to previous charges filed with the CCRD or EEOC and thus should be deemed timely. Denver moved to strike the untimely reply, Mr. Perez responded, and Denver filed a reply.

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[2] Specifically, the district court noted that

> [t]he Second Amended Complaint only refers to a Charge of Discrimination that resulted in a Notice of Right to Sue letter from the EEOC on 04 May 2021. Therefore, the Second Amended Complaint does not refer to or mention the initial charge of discrimination to which [Mr. Perez] argues his December 2020 charge should relate back, such that the Court could consider this initial charge on a 12(b)(6) motion to dismiss.

R., Vol. II at 38-39 (citation, brackets, and internal quotation marks omitted).

The district court determined that Mr. Perez's relation-back argument, raised for the first time in his reply, was waived.[3] The court further found that Mr. Perez's constructive discharge accrued on February 27, 2020, when he gave notice to the DFD chain of command, and therefore, that his December 28, 2020, EEOC complaint was untimely as to any acts pre-dating the constructive discharge and the discharge itself because it was filed more than 300 days after his constructive discharge. *See* 42 U.S.C. § 2000e-5(e)(1) ("[A] charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred"); *see also* 42 U.S.C. § 12117(a) (applying the same "powers, remedies, and procedures set forth in section[] . . . 2000e-5" to suits under the ADA). As a result, the court denied Mr. Perez's motion to file the third amended complaint as futile because it could not

[3] The district court declined to consider the relation-back argument raised for the first time in Mr. Perez's reply brief. *See United States v. Leffler*, 942 F.3d 1192, 1197-98 (10th Cir. 2019) (holding that "we generally do not consider arguments made for the first time . . . in an appellant's reply brief [because it] would be manifestly unfair to the appellee who . . . has no opportunity for a written response" and "the rule protects [the court] from issuing an improvident or ill-advised opinion because [it] did not have the benefit of the adversarial process" (internal quotation marks omitted)). To be sure, *Leffler* addressed appellate briefing, but we see no reason why the arguments raised by a party for the first time in a reply brief in the district court should be evaluated differently. In either forum, waiting to raise an argument for the first time in a reply brief robs the other party of a chance to respond and denies the court the benefit of the adversarial process.

survive summary judgment and dismissed the case with prejudice.[4] Mr. Perez filed a pro se appeal.

STANDARD OF REVIEW

"Generally, we review a denial of leave to amend for abuse of discretion." *Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1217 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1748 (2023). "An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances. A district court also abuses its discretion when it issues an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1247 (10th Cir. 2015) (citation and internal quotation marks omitted).

"Although [Fed. R. Civ. P.] 15(a)[(2)] provides that leave to amend shall be given freely, the district court may deny leave to amend where the amendment would be futile." *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Inv.'s Servs., Inc.*, 175 F.3d

[4] The district court also denied the motion as a matter of discretion on the alternate ground that Mr. Perez knew or should have known all the facts upon which the amendment was based but inexplicably failed to include them in any of the prior versions of his complaint. *See, e.g., Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) ("Where the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial." (internal quotation marks omitted)). Mr. Perez, however, does not address this alternate determination, which means that we could affirm even without addressing futility. *See, e.g., Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 763 (10th Cir. 2020) ("If the district court states multiple grounds for its ruling and the appellant does not challenge all those grounds in the opening brief, then we may affirm the ruling.")

848, 859 (10th Cir. 1999). "A court may properly deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment." *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997). "When a district court denies amendment based on futility, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Chilcoat*, 41 F.4th at 1218 (internal quotation marks omitted).

This court "review[s] a district court's grant of summary judgment de novo, using the same standard applied by the district court pursuant to Fed. R. Civ. P. 56(a)." *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

On a motion for summary judgment, "the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). If the movant carries "the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law," then "the burden shifts to the nonmovant to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of a trial from which a rational trier of fact could find for the nonmovant." *Id.* at 670-71 (internal quotation marks omitted). "Unsubstantiated allegations carry no probative weight in summary

judgment proceedings." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

"If a party that would bear the burden of persuasion at trial does not come forward with sufficient evidence on an essential element of its prima facie case, all issues concerning all other elements of the claim and any defenses become immaterial. If there is no genuine issue of material fact, we next determine whether the district court correctly applied the substantive law." *Adler*, 144 F.3d at 670 (citation omitted).

LEGAL FRAMEWORK/DISCUSSION

"An employee wishing to challenge an employment practice under Title VII must first file a charge of discrimination with the EEOC." *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1163 (10th Cir. 2007) (internal quotation marks omitted) (citing 42 U.S.C. § 2000e-5(e)(1)). The same charging requirements, including the 300-day window of actionable work-related incidents, apply to employment practices under the ADA. *See* 42 U.S.C. § 12117(a).

A constructive discharge claim under Title VII accrues "when the employee gives notice of his resignation, not on the effective date of that resignation." *Green v. Brennan*, 578 U.S. 547, 564 (2016). The same rule applies to a claim for constructive discharge under the ADA. *See Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1222 (10th Cir. 2006) (applying the same standard to the accrual of a cause of action under Title VII, the Age Discrimination in Employment Act, and the ADA). Therefore, Mr. Perez's ADA claims accrued on February 27, 2020, when he

gave notice of his intent to retire, which means that his charge of discrimination filed with the EEOC on December 28, 2020, was untimely as to his constructive discharge claim or any claims involving acts that pre-dated the constructive discharge.

In response to Mr. Perez's motion to amend, Denver came forward with evidence that Mr. Perez gave notice on February 27, 2020, that he intended to retire, but did not file his charge with the EEOC until December 28, 2020—more than 300 days later. Thus, Denver met its initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. In response, Mr. Perez provided no materials, exhibits, facts, or argument to contradict Denver's prima face case. Based on our de novo review, the proposed third amended complaint was futile because it could not survive a motion for summary judgment.

Mr. Perez's additional arguments are unavailing. First, any arguments concerning the district court's non-dispositive order dismissing the second amended complaint without prejudice have nothing to do with the ruling that is on appeal. To the contrary, Mr. Perez clearly states in his opening brief that the ruling presented for review is the district court's order denying his motion to file a third amended complaint and dismissing the case with prejudice. *See* Aplt. Opening Br. at 11.

Second, we reject Mr. Perez's argument—made for the first time on appeal—that he was entitled to equitable tolling of the 300-day deadline to file his charge of ADA discrimination and retaliation with the EEOC. "When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we

ordinarily deem the issue waived . . . and decline to review the issue at all—for plain error or otherwise." *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). "Under such circumstances, the failure to argue for plain error and its application on appeal . . . marks the end of the road for an argument not first presented to the district court." *Id.* (ellipses and internal quotation marks omitted). Because Mr. Perez fails to argue for plain error review on appeal, we decline to consider the argument.

CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Gregory A. Phillips
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 1:21-cv-01263-RMR-KLM

DAVID PEREZ,

Plaintiff,

v.

CITY AND COUNTY OF DENVER,

Defendant.

ORDER

This matter is before the Court on Plaintiff's Opposed Motion to Reopen Case and Vacate Order Granting Defendant's Motion to Dismiss and Order for Summary Judgment, filed *pro se*, ECF No. 57. Defendant filed a response, ECF No. 58. Plaintiff filed an untimely reply, ECF No. 59, which Defendant has moved to strike, ECF No. 60. For the reasons discussed below, the Motion is DENIED.

I. BACKGROUND

The factual and procedural history of this case has been discussed at length by this Court and the Tenth Circuit. *See* ECF Nos. 41, 48, 55. It is restated here only to the extent necessary to rule on Plaintiff's present motion to reopen.

Plaintiff David Perez ("Plaintiff") is a former firefighter who was previously employed by the City and County of Denver ("Defendant"). In May 2021, Plaintiff, proceeding *pro se*, filed this employment discrimination and retaliation case against Defendant. ECF No.

(4) the newly discovered evidence is material; and (5) that a new trial with the newly discovered evidence would probably produce a different result." *Zurich N. Am.*, 426 F.3d at 1290 (internal quotation marks and citation omitted). The required showing remains the same even where, as here, Plaintiff seeks relief from an order dismissing the case, not from the result of a trial. *See Dronsejko v. Thornton*, 632 F.3d 658, 670 (10th Cir. 2011).

Here, Plaintiff claims that he has "recently discovered new evidence that discredits" Defendant's assertion that Plaintiff retired. ECF No. 57 at 6. This newly discovered evidence is a September 2023 email from someone named Patti Seno, a representative of the Fire and Police Protective Association ("FPPA"), who answered Plaintiff's questions regarding his disability benefits. *See* ECF No. 57, Ex. 10.

The Court finds that Plaintiff has not satisfied his burden to prove relief is warranted under Rule 60(b)(2). As an initial matter, Plaintiff has not shown he was diligent in discovering this new evidence. Plaintiff could have emailed his questions to Patti Seno/the FPPA at any point after his employment separation in March 2020, but failed to do so until September 2023 – three and a half years after his employment separation and seven months after his claims had been dismissed. Plaintiff offers no reason why he was prevented from seeking the answers to his questions at an earlier date. Accordingly, the Court cannot find that Plaintiff acted diligently in obtaining this new evidence.

Further, Plaintiff cannot show that the newly discovered evidence is material or would produce a different result. Plaintiff claims the new evidence supports that he did not provide notice of retirement to Defendant. However, nothing about Plaintiff's email from Patti Seno (which simply explains the FPPA's process and that the FPPA's disability

benefit starts the day after a member's last day on the City's payroll) changes the Court's conclusion – based on Plaintiff's emails to Defendant – that he "g[a]ve[] notice of his resignation' on February 27 and 28, 2020." ECF Nos. 43-6, 43-7, 48 at 10. Based on Plaintiff's emails, the Court concluded his charge of discrimination was untimely filed and amendment would be futile. Thus, this newly discovered evidence does not provide reason to vacate the judgment under Rule 60(b)(2) because it is immaterial to the challenged orders and would not produce a different result. *See Zurich N. Am.*, 426 F.3d at 1290.

B. Rule 60(b)(3) – Fraud or Misrepresentation

To be eligible for relief under Rule 60(b)(3), the moving party must, by adequate proof, clearly substantiate the claim of fraud, misconduct or misrepresentation. *Wilkin v. Sunbeam*, 466 F.2d 714, 717 (10th Cir. 1972). "In other words, they must show clear and convincing proof of fraud, misrepresentation, or misconduct." *Zurich N. Am.,* 426 F.3d at 1290 (quotations omitted). "Moreover, 'the challenged behavior must substantially have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial.' " *Id.* (quoting *Woodworker's Supply Inc.*, 170 F.3d at 993).

Here, Plaintiff argues that the Court should vacate its order of dismissal under Rule 60(b)(3), because "[t]he City, through its legal counsel, has continued to knowingly make false statements with the intent of omitting and concealing a material fact in this case which thereby has creat[ed] a false impression of the Plaintiff's claims." ECF No. 57 at 11.

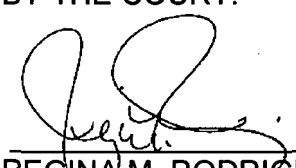
The Court finds that the conduct Plaintiff complains of does not rise to the level of misconduct or a misrepresentation within the meaning of Rule 60(b)(3). Plaintiff does not specify what "false statements" Defendant made or what "material fact" has been omitted and concealed. Plaintiff's conclusory allegation of fraud or misrepresentation falls short of the "clear and convincing proof" required for relief under Rule 60(b)(3). The Court declines to grant such extraordinary relief on this basis.

C. CONCLUSION

Accordingly, it is **ORDERED** that Plaintiff's Opposed Motion to Reopen Case and Vacate Order Granting Defendant's Motion to Dismiss and Order for Summary Judgment, filed pro se, ECF No. 57, is **DENIED**. Further, Defendant's Motion to Strike Plaintiff's Reply, ECF No. 60, is **DENIED AS MOOT**.

DATED: May 14, 2024

BY THE COURT:



REGINA M. RODRIGUEZ
United States District Judge

UNITED STATES DISTRICT COURT

for the

DISTRICT OF COLORADO

DAVID PEREZ,

Plaintiff

v.

CITY AND COUNTY OF DENVER

Defendant

Case No. 1:21-cv-01263-RMR-KLM

NOTICE OF APPEAL

Notice is hereby given that David Perez, Pro Se plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the 10th Circuit on Order with denying Plaintiff's Opposed Motion to Reopen Case and Vacate Order Granting Defendant's Motion to Dismiss and Order for Summary Judgment, filed pro se, ECF No. 57.

Dated this 28th day of May 2024.

Respectfully submitted.

David Perez
Pro Se Plaintiff
(303) 422 2702

Address of Plaintiff
619 12th St # 348
Golden Colorado 80401

FILED
United States Court of Appeals
Tenth Circuit

February 7, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID PEREZ,

Plaintiff - Appellant,

v.

CITY AND COUNTY OF DENVER,

Defendant - Appellee.

No. 24-1243
(D.C. No. 1:21-CV-01263-RMR-KLM)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **PHILLIPS**, Circuit Judge.

Plaintiff David Perez was a firefighter who sued the City and County of Denver for discrimination and harassment, retaliation, and failure to accommodate his injury. After the district court dismissed his complaint for failure to exhaust his administrative remedies, he then moved to reopen the case under Rule 60(b) of the Federal Rules of Civil Procedure. The district court denied the motion, and Mr. Perez appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

Mr. Perez was injured in the line of duty in March 2019. He alleged that between March 2019 and December 2019, the City failed to accommodate his injury and passed him over for other more appropriate positions for which he was qualified. Based on his belief that the City had failed to accommodate his injury and forced him to quit, Mr. Perez resigned by emailing his chain of command on February 27, 2020. The email advised that he intended to take disability retirement as of March 2, 2020.

On December 28, 2020—more than 300 days after his resignation email—Mr. Perez filed a charge of disability discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a right-to-sue letter on May 4, 2021. Three days later Mr. Perez filed a complaint in district court alleging discrimination and harassment, retaliation, and failure to accommodate, in violation of federal and state law.

After Mr. Perez twice amended his complaint, the City moved to dismiss and argued that Mr. Perez had not alleged facts sufficient to establish administrative exhaustion. The district court granted the motion without prejudice, and Mr. Perez sought leave to file a third amended complaint. The district court, however, denied the motion to amend as futile and dismissed the complaint with prejudice. The district court held that Mr. Perez's resignation email triggered the 300-day deadline for filing an EEOC charge, and that he missed the deadline by several days. This court affirmed on appeal. *See Perez v. City & Cnty. of Denver*, No. 23-1057, 2023 WL 7486461 (10th Cir. Nov. 13, 2023).

Mr. Perez then filed a motion to reopen the case and vacate the dismissal order. His motion was premised on newly discovered evidence under Rule 60(b)(2) and allegations of fraud under Rule 60(b)(3). The newly discovered evidence was a September 2023 email from a representative of the Fire and Police Pension Association ("FPPA"). Mr. Perez claimed the email supported his contention that his email of February 27, 2020, did not trigger the 300-day deadline; rather, it was triggered on March 2, 2020, which is the date the City determined to be his last day of work. He also argued the City continued to make unspecified false statements. The district court denied the Rule 60 motion, and Mr. Perez appeals.

II. Discussion

"This court reviews the district court's denial of a Rule 60(b) motion for abuse of discretion." *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998) (internal quotation marks omitted). "Given the lower court's discretion, the district court's ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below." *Crow Tribe of Indians v. Repsis*, 74 F.4th 1208, 1216 (10th Cir. 2023) (internal quotation marks omitted).

Mr. Perez argues the district court erred in denying his motion under Rule 60(b)(2). He contends the newly discovered email demonstrates that the City, not the employee, determines the date of termination, and he therefore did not in fact resign on February 27, 2020. The email was from an FPPA representative who explained that Mr. Perez's disability benefits began "the day after [his] last day on payroll," which is "confirmed with [the] department." R. vol. 3 at 25. The City later

confirmed to the FPPA that Mr. Perez's last day of work was March 2, 2020, consistent with his own email of February 27, 2020.

The question of Mr. Perez's last day of work, however, is unrelated to the question of when he gave notice of his resignation for purposes of the 300-day deadline. *See Green v. Brennan*, 578 U.S. 547, 564 (2016) ("[A] constructive discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the effective date of that resignation."). The district court acted within its discretion in holding the FPPA email is immaterial to the district court's finding of futility based on Mr. Perez's February 27, 2020, notice of resignation.[1]

Mr. Perez also argues the district court erred in denying his motion under Rule 60(b)(3). On appeal, he argues the City's attorneys falsely claimed that he gave his notice of resignation on February 27, 2020. This appears to be a variation of his Rule 60(b)(2) argument—he insists that because the City, not he, determined the date of his termination, any contrary assertion by the City is necessarily fraudulent. In effect, Mr. Perez is attempting to elevate his disagreement with the City into an allegation of fraud. This does not satisfy Rule 60(b)(3). *See Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005) ("Subsection (b)(3) is aimed at judgments which were unfairly obtained, not at those which are factually incorrect,

[1] Given this conclusion, we need not address the district court's separate conclusion that Mr. Perez was not diligent in discovering the September 2023 email.

which may be remedied under subsections (b)(1) or (b)(2)." (internal quotation marks omitted)).

Finally, we note that Mr. Perez seems to argue that the EEOC charge he filed in 2020 related back to a previous charge and was therefore timely. We previously deemed that argument waived, *see Perez*, 2023 WL 7486461, at *2 n.3, and it is therefore law of the case, *see McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1034 (10th Cir. 2000). Similarly, Mr. Perez attempts to argue he is entitled to equitable tolling of the 300-day deadline. We reject that argument for the same reason. *See Perez*, 2023 WL 7486461, at *4.

III. Conclusion

The judgment of the district court is affirmed.

Entered for the Court

Carlos F. Lucero
Senior Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

March 26, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID PEREZ,

Plaintiff - Appellant,

v.

CITY AND COUNTY OF DENVER,

Defendant - Appellee.

No. 24-1243
(D.C. No. 1:21-CV-01263-RMR-KLM)
(D. Colo.)

ORDER

Before **MATHESON**, Circuit Judge **LUCERO**, Senior Circuit Judge and **PHILLIPS**, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

inherent power to correct any clerical and/or adverse errors and should do so in this case. The Petitioner should not be penalized for any mis guidance as outlined in this Motion.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant this motion and accept the Petition for a Writ of Certiorari as timely filed, based on the original submission date of 17 June 2025.

Respectfully submitted,

David Perez
Petitioner, Pro Se

However, Petitioner was notified on 25 July 2025 via a letter from the Clerk's Office of the U.S. Supreme Court that his petition was being returned and needed to be corrected for following reasons:

> *"No motion for leave to proceed in forma pauperis signed by the petitioner or by counsel is attached. Rules 33.2 and 39. The motion must be signed."*
>
> *"No notarized affidavit or declaration of indigency is attached. Rule 39. You may use the enclosed form."*

On 3 September 2025, Petitioner called the Clerk's Office of the U.S. Supreme Court to inform the court that he did not want to file leave to proceed in forma pauperis and originally and still intended to pay the court filing fee for his petition as outlined under Rule 28. At 1340 hrs. on 3 September 2025, Petitioner spoke with the clerk's office and was instructed that in order to meet the courts requirements and timely filing of his petition, the original copies of his petition, to include the affidavit of compliance, affidavit of service and court filing fee needs to be submit to the court no later than Tuesday 23 September 2025 per the letter provided by the court in stating:

> *"Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter [July 25, 2025], the petition will not be filed. Rule 14.5."*

On this day, 22 September 2025, Petitioner hand delivered an unbounded copy of his Petition for a Writ of Certiorari to the Supreme Court Clerk's office by way of the Courts Security Building to includ his affidavit of compliance, affidavit of service, forty copies of his Petition for Writ of Certiorari as required by Rule 33(1), and a docket fee as required by Ruel 38(a). To ensure due process, the Court has the