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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BIG CITY COFFEE, LLC, dba, BIG CITY
COFFEE & CAFÉ, and SARAH JO FENDLEY,
an individual,

Plaintiffs,

v.

BOISE STATE UNIVERSITY, MARLENE
TROMP, individually and in her official
capacity as President of Boise State University,
LESLIE WEBB, individually and in her official
capacity as Vice President for Student Affairs
and Enrollment Management, ALICIA ESTEY,
individually and in her official capacity as
Vice President for University Affairs and Chief
of Staff, and FRANCISCO SALINAS,
individually and in his official capacity as
Assistant to the Vice President for Equity
Initiatives, and DOES 1-20,

Defendants.

Case No. CV01-21-15332

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' SECOND MOTION
TO AMEND OR FOR
RECONSIDERATION RE MOTION
TO AMEND COMPLAINT TO JOIN
MARLENE TROMP AS A
DEFENDANT**

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' SECOND MOTION TO AMEND
OR FOR RECONSIDERATION RE MOTION TO AMEND COMPLAINT TO JOIN
MARLENE TROMP AS A DEFENDANT- 1**

COME NOW Plaintiffs, Big City Coffee LLC dba Big City Coffee & Café (“Big City”) and Sarah Jo Fendley (“Fendley,” and, together with Big City, the “Plaintiffs”), by and through their attorneys of record, Givens Pursley LLP, and submit this Memorandum in support of their Second Motion to Amend or for Reconsideration Re Motion to Amend Complaint to Join Marlene Tromp as a Defendant (the “Motion”).

I. INTRODUCTION

The Motion seeks reconsideration of the following order of this Court: Order (1) Denying Motion to Amend Complaint, (2) Granting Motion to Amend Scheduling Order, in Part, and (3) Allowing Additional Briefing on the Issue of Punitive Damages (September 25, 2023) (the “Motion to Amend Order”).

As the Court is aware, this case has been pending since October 1, 2021. During discovery, Defendants aggressively and improperly resisted discovery, attempting to shield Marlene Tromp (“Tromp”) from being brought back into these proceedings, including by concealing evidence, destroying evidence and producing documents near the close of discovery—and after depositions—among other things. But, one thing is clear: Tromp was intimately involved in the decision and action to remove Plaintiffs from campus. In her own words: “**I, ultimately, oversee all of these things.**” Declaration of Michael O. Roe in Support of Motion for Reconsideration Re Motion to Amend Complaint to Join Marlene Tromp as a Defendant, filed contemporaneously herewith (“Roe Dec.”), Ex. A.

As set forth herein, in the Roe Declaration, and in the proposed amended complaint, Plaintiffs have proffered more than enough facts to add Tromp as a defendant and to request that

the Court reconsider its Motion to Amend Order and allow Plaintiffs leave of Court to amend their Complaint and join Tromp as a defendant.

II. STANDARDS OF REVIEW

Idaho Rule of Civil Procedure 11.2(b)(1) provides that a party may seek reconsideration of any order “at any time prior to or within 14 days after the entry of a final judgment.” I.R.C.P. 11.2(b)(1). A motion for reconsideration allows a party to draw “the trial court’s attention to errors of law or fact in the initial decision.” *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012). “A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order.” *Id.* A court is bound to consider a motion for reconsideration, and is not afforded discretion to decline to entertain it. *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). And while the Court must consider any new admissible evidence or authority presented, “a motion for reconsideration need not be supported by any new evidence or authority.” *Fragnella*, 153 Idaho at 276, 281 P.3d at 113. Instead, the purpose of a motion for reconsideration is to reexamine the correctness of an order, and the “district court should take into account any new facts or information presented by the moving party that bear on the correctness of the interlocutory order.” *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012); *see also Int’l Real Estate Sols., Inc. v. Arave*, 157 Idaho 816, 819, 340 P.3d 465, 468 (2014).

In deciding a motion to reconsider, the court should apply the same legal standard applicable to the original order under reconsideration. *See Westby v. Schaefer*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2014). Here, the relevant portion of the Motion to Amend Order denied

Plaintiffs' motion for leave to amend their Complaint to join Tromp as a defendant. Therefore, on a motion to reconsider an order denying a motion to amend, Rule 15(a)(2) of the Idaho Rules of Civil Procedure standards apply. That Rule provides "a party may amend its pleading only with the opposing party's written consent or the court's leave." I.R.C.P. 15(a)(2). The Rule states that "the court should freely give leave when justice so requires." *Id.*

"It is well settled that, in the interest of justice, courts should favor liberal grants of leave to amend[.]" *Wickstrom v. N. Idaho Coll.*, 111 Idaho 450, 453, 725 P.2d 155, 158 (1986) (internal citation omitted); *see also Smith v. Shinn*, 82 Idaho 141, 149, 350 P.2d 348, 352 (1960) ("Great liberality should be shown in allowing amendments to pleadings in furtherance of justice between the parties."). According to the Idaho Supreme Court in *Smith*:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Smith v. Great Basin Grain Co., 98 Idaho 266, 272, 561 P.2d 1299, 1305 (1977) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

The Idaho Supreme Court has further developed and elaborated upon the "liberality" within which leave to amend should be granted, going so far as to say that, on a motion to amend, it is in fact the burden of the non-moving party to show why leave to amend should not be granted. *Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986) (noting that the Idaho Supreme Court "placed the burden of showing why a court should not grant leave to amend a

complaint on the parties opposed to the amendment”). Further, additional defendants may be joined permissively: “Persons may be joined in one action as defendants if: “(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.” I.R.C.P. 20(a)(2).

III. ARGUMENT

Plaintiffs have amassed a substantial amount of additional information to prove that Tromp caused the adverse action that gave rise to Plaintiffs’ Section 1983 action. On August 7, 2023, Plaintiffs filed their Motion (1) to Amend Scheduling Order; (2) to Amend Complaint to Join Marlene Tromp as a Defendant; and (3) for Comfort Order Regarding Punitive Damages. With regard to the portion of such motion requesting the joinder of Marlene Tromp as party, the Court, after hearing oral argument, denied the request as futile, finding that Plaintiffs had not pleaded sufficient evidence of a causal connection between Tromp’s actions and the Section 1983 violation. Motion to Amend Order, pp. 9-11. With regard to the legal standard for causation in a Section 1983 case, the Court held as follows:

With respect to claims brought under 42 U.S.C. § 1983, a supervisor who does not participate in the alleged harassment can be held liable only if: (1) the behavior of her subordinates results in a constitutional violation; and (2) the supervisor’s action or inaction was affirmatively linked to the behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence of the supervisor amounting to deliberate indifference. *Welch v. Ciampa*, 542 F.3d 927, 937 (1st Cir. 2008) (citations and quotations omitted); *see also Starks v. Lewis*, 313 F. App’x 163, 167 (10th Cir. 2009) (it is not enough for a plaintiff merely to show a defendant was in charge of other state actors who actually committed the violation; plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights; the supervisor must be personally involved in

the constitutional violation, and a sufficient causal connection must exist between the supervisor and the constitutional violation); *see also Addison v. City of Baker City*, 758 F. App'x 582, 585 (9th Cir. 2018).

The causal connection “can be established by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury.” *Bartlett v. Wengler*, No. 1:12-CV-00312-EJL, 2014 WL 4773959, at *3 (D. Idaho Sept. 24, 2014) (citation omitted).

Motion to Amend Order, pp. 6-7. The Court held that the following allegations were insufficient to state a Section 1983 claim against Tromp: (1) she arranged for, attended, and participated in student meetings in which objections to Big City were made; (2) she was sympathetic to unspecified and unidentified student demands related to Big City and other vendors; (3) she agreed to give a voice to students regarding what vendors are brought to Boise State; (4) she agreed to meet with students; (5) she was included as a recipient in emails from students in which students discussed their opposition to, and a request to remove, Big City Coffee, as well as discussed its social media post; (6) she discussed Big City’s social media post and the student response in her classroom, and conferred with Webb about it; (7) she instructed Estey to arrange and attend a meeting with Big City; and (8) she failed to stop a series of actions by Estey, Webb, and Salinas that culminated in the deprivation of Plaintiffs’ constitutional rights. *Id.*, p. 9. The Court then entered a new scheduling order, setting a deadline of 14 days from completion of depositions of Defendants, Nicole Nimmons, and Marlene Tromp to join any additional parties. Order Governing Proceedings and Setting Trial (Jury Trial), entered October 6, 2023, ¶ 2(a). The extant Motion is therefore timely, as the last of such depositions was completed on April 11, 2024.

Additional Allegations: After taking additional discovery, Plaintiffs are able to and do make the following additional factual allegations:

- On June 19, 2020, BSU employee Nicole Nimmons (“Nimmons”) emailed Defendant, Leslie Webb (“Webb”), “Hopefully, we will be able to proceed with locking Big City into this space, and you can share the news with **Dr. Tromp**.” Roe Dec., Ex. B (Nimmons Depo. Ex. 11) (emphasis added). At her deposition on August 31, 2023, when questioned if it was common for a university president to be involved in selection of a coffee shop, Nimmons testified:

Q. Now, **Dr. Tromp** was then, and is now, the **President** of the University. Was she – was this important enough that the **President's** office was aware? I mean, did the **President's** office care about this space and Starbucks vs. Big City, etcetera?

MS. KRUG: Object to the form. Go ahead.

THE WITNESS: For me to note it in an e-mail, it would have been important to share the change on campus within our dining program. **The President was provided the Envision report that highlighted third party and local business as an interest for staff, faculty, and most of all, students.**

Id., Ex. C (Nimmons Depo. Vol. I, 48:8-22) (emphasis added).

- On July 28, 2020, Nimmons emailed Webb to convey that in 2016, Big City Coffee was involved in a controversy with Black Lives Matter relative to Big City Coffee’s support of the Thin Blue Line cause. Webb, who reports directly to **Tromp** (*Id.*, Ex. D (Webb Depo., 24:2-10)), elevates the issue to **Tromp’s** office, by emailing Defendant, Alicia Estey (“Estey”) and Roger Brown, indicating “Will need to discuss pre-anything.” *Id.*, Ex. E (Nimmons Depo. Ex. 14). At her deposition on February 22, 2024, Webb testified that she brought Estey into the conversation because she was “just making sure that the **president's** office is aware. One of my responsibilities is to keep them abreast of potential issues that happen, whether they are student issues or whether they are things that have potential to just be very public.” *Id.*, Ex. D (Webb Depo., 47:23-48:3) (emphasis added).
- On August 11 and 12, 2020, **Tromp** communicates with Estey and Lauren Griswold (“Griswold”) regarding the news of Big City Coffee’s support of the Thin Blue Line cause, requesting that the issue be added to the next strategy meeting.¹ *Id.*, Ex. F (Nimmons Depo. Ex. 15).

¹ It is unknown when this strategy meeting took place because Boise State refuses to produce the calendars of Defendants and others within the Boise State administration, including Tromp, although repeatedly requested in

- On August 13, 2020, Griswold (who reports directly to **Tromp**), forwards a Google document to Estey and **Tromp** regarding the “Big City Coffee announcement.” *Id.*, Ex. G (Nimmons Depo. Ex. 18).
- On August 14, 2020, Nimmons forwards a Google document to Estey and **Tromp** entitled “Big City Coffee and Café.” *Id.*, Ex. H (Nimmons Depo. Ex. 19). At her deposition on January 9, 2024, Nimmons testified that she sent the email to Estey “to follow up from a conversation that I had with the **president** and Alicia in the parking lot prior to this, letting them know that we're moving forward with Big City. And I had been gathering information for a press release for Big City and collecting information to positively represent Big City coming to campus. I collected a lot of information in regards to the volunteer work, the amount of donations that Sarah, on behalf of Big City, has done overall, including sourcing of coffee. That was kind of the context of the e-mail, overall, in preparation for any conversations that may have happened further of concern about having Sarah -- having Big City brought to campus.” *Id.*, Ex. I (Nimmons Depo. Vol. II, 97:17-99:18) (emphasis added).
- On August 31, 2020, a student emails **Tromp** directly concerning Big City Coffee’s campus location. In that email, the student states:

I am a student at BSU writing to you today because I saw that Big City Coffee will be moving on campus. Big City Coffee has been a big supporter of Blue Lives Matter for years now, and putting up Blue Lives Matter propaganda all over their shop. When I saw this I was not only wildly disappointed that BSU ignored this, but the fact that the silent support in moving them on campus reflects disrespect to your student body. You list your values on your website as:

‘Boise State strives to provide a culture of civility and success where all feel safe and free from discrimination, harassment. threats or intimidation. Boise State University is committed to personal and social development, educational excellence, and civic engagement. Membership in the campus community is a privilege and requires its members to conduct themselves ethically with integrity and civility. Boise State University upholds these shared values as the foundation for a civil and nurturing environment. Campus community members are expected to adhere to these common values.’

discovery. Notably, following Tromp’s April 11, 2024 deposition, Boise State did produce two pages of Tromp’s calendar, improperly limited to October 22, 2020 and October 25, 2020.

Moving Big City Coffee on campus will make many students and faculty members not only feel uncomfortable, but completely disrespected and unwelcomed on campus. This goes against your listed values. I urge you to move out of your deal with Big City Coffee and support your student body by making our campus a safe and welcoming place.

Id., Ex. J (Nimmons Depo. Ex. 29).

- In response to the student's email, on August 31, 2020, **Tromp** corresponds with Webb, Estey, Griswold, Roger Brown and Melissa Jensen (**Tromp's** assistant), indicating "***We were braced/prepared for this.***" *Id.*, Ex. J (Nimmons Depo. Ex. 29) (emphasis added). When asked about **Tromp's** comment, Webb testifies at her deposition on February 22, 2024, that "Anytime we are -- I mentioned this earlier, when I forwarded or sent a note to Roger Brown and Alicia Estey, it is a common practice that I have as a professional to alert, you know, when I believe there's going to be a flash point on campus. We were in the middle of so many. And so I think -- I believe what is being referred to there is that we were aware -- we were aware of the affiliation, and we were aware that we were going to have to navigate it, perhaps." *Id.*, Ex. D (Webb Depo., 89:14-25). A response to the student's email is generated/edited (including by **Tromp**) and presented to Nimmons on September 1, 2020, as Nimmons is selected by **Tromp** and her subordinates to be the BSU representative to respond to the student. *Id.*, Ex. J (Nimmons Depo. Ex. 29); *see also id.*, Ex. K (Tromp Depo. Ex. 168). The email response is sent to the student on September 2, 2020. *Id.*, Ex. L (Nimmons Depo. Ex. 28).
- On September 2, 2020, **Tromp** responds directly to the student, indicating, "When I received your email, I wrote the VP that oversees that area to learn more. Your concerns are significant to me. I expect to hear from her today." *Id.*, Ex. M (Salinas Depo. Ex. 119).
- On September 9, 2020, a student on the IESC (the Inclusive Excellence Student Council and the student group most vigorously advocating Big City Coffee's removal from campus), emails **Tromp** indicating, "Big City Coffee has a long and unapologetic history of being insensitive to the murder of Black men and BIPOC around the nation. Community members remember their statements from Freddie Gray era & beyond. To welcome this business into the SUB alongside a behind-closed-doors, unprepared, uninformed decision to move on with a fifth year of the police contract is not happenstance. Campus is sending clear messages to BIPOC, and we are taking notes. Impact over intention and ignorance. If campus prioritizes cops and their sympathizers, Boise State University has no grounds accepting or encouraging any form of diversity or inclusivity." *Id.*, Ex. N (Bates Nos. BSU001140-1143).
- Hours later on September 9, 2020, **Tromp** emails the student in response, "I would be so glad to talk with you about these concerns. Are you open to another conversations? If so,

would you like to have Dr. Garza present? Please take good care and let me know your thoughts. With my heartfelt regards, *MT.*” *Id.*, Ex. N (Bates Nos. BSU001140-1143).

- Also on September 9, 2020, *Tromp* shares with Estey the news of a potential meeting with the student, and Estey replies, “Thank you for the update. I look forward to hearing more.” *Id.*, Ex. O (Estey Depo. Ex. 143).
- On September 10, 2020, *Tromp*’s assistant updates *Tromp*’s executive team strategy meeting agenda for the September 17, 2020 meeting to include, “Leslie joining this week to discuss Big City Coffee.” *Id.*, Ex. P (Estey Depo. Ex. 145).
- On September 14, 2020, Webb emails *Tromp* a Google document entitled, “IESC Big City” for *Tromp* to edit. *Id.*, Ex. Q (Nimmons Depo. Ex. 38).
- On September 15, 2020, *Tromp* meets with members of the IESC. Big City Coffee is a prominent focus of the meeting. *Id.*, Ex. R (Tromp Depo. Ex. 170).
- *Tromp* forwards the meeting minutes to the “IESC leadership” on September 19, 2020, and then immediately forwards, to Webb and Tony Roark, and in her email to the IESC, indicates, “Keeping you both in the loop. Please see attached and below. *M.*” *Id.*, Ex. R (Tromp Depo. Ex. 170).
- On September 18, 2020, *Tromp* emails Webb about the IESC Big City Google document, indicating that *Tromp* has “had a chance to look this over with an eye to the meeting I had with IESC. Was this document you and Nicole made intended to be shared with that student group? Was it for my information? I have some additional questions about how student voices are typically incorporated into the process (in a non-COVID period). Can you illuminate that for me? From the bottom of my heart, thank you for all you’ve done lately. I really and truly felt it when I met with IESC. I will be ever grateful. I know it was a real sacrifice. I feel it keenly.” *Id.*, Ex. Q (Nimmons Depo. Ex. 38).
- The morning of October 22, 2020 (the day of the meeting at which Big City Coffee was forced off campus), *Tromp* taught a class called “leadership and times of crisis or something akin to that.” *Id.*, Ex. S (Tromp Depo., 27:12-13). A student cried during the class over the social media post made by Big City Coffee on October 21, 2020. *Id.* (Tromp Depo., 27:14-23).
- At 10:50 am on October 22, 2020, a student emails *Tromp*, Webb, Nimmons and multiple students regarding Big City Coffee’s social media post. Throughout the day, multiple students chime in, calling for Big City Coffee to be removed from campus. At 1:02 pm, Webb responds to the students’ emails indicating “all—Thank you for bringing this to us. I can feel the pain in this conversation. *Dr. Tromp* and I just discussed the conversation that took place in her morning class on this topic. Nicole was on the phone with the business owner just now. And we are meeting with them later today. I will circle back around.” *Id.*, Ex. T (Estey Depo. Ex. 147).

- At 11:20 am on October 22, 2020, Webb forwards the student email to Defendant, Francisco Salinas (“Salinas”) and Eric Scott indicating that she was “Asking for a strategy conversation with us and nicole [sic] asap.” *Id.*, Ex. U (Nimmons Depo. Ex. 48). At her deposition on January 9, 2024, Nimmons testified that she participated in a strategy conversation with Webb, Salinas, **Tromp** and Eric Scott to bring Salinas and Eric Scott up to date as “they weren’t included in the original e-mail that was sent by students, whatever student this was, to my understanding. So it was bringing them into the loop of the happenings of that morning.” *Id.*, Ex. I (Nimmons Depo. Vol. II, 189:22-191:1).
- At 12:30 pm on October 22, 2020, a meeting is held regarding “BCC” that is attended by **Tromp** and others. *Id.*, Ex. V (Bates Nos. BSU010118-10119).
- At 1:49 pm on October 22, 2020, Sherry Squires creates a Google document called “University Statement Oct. 2020 – Big City Coffee” relative to the University’s public message concerning Big City Coffee’s departure from campus. *Id.*, Ex. W (Estey Depo. Ex. 149).
- On October 22, 2020, Webb instant messages Nimmons at 2:18 pm, indicating “meeting with *pres* now” and “new strategy.” *Id.*, Ex. X (Nimmons Depo. Ex. 57) (emphasis added).
- Also on October 22, 2020, at 3:05 pm, Lauren Griswold (who directly reports to **Tromp**), edited the “University Statement Oct. 2020 – Big City Coffee” Google document relative to the University’s public message concerning Big City Coffee’s departure from campus, by including “if Big City Coffee opts out of the contract and contacts the media, this is the proposed response.” *Id.*, Ex. Y (Tromp Depo. Ex. 173) (emphasis added).
- At 3:17 pm on October 22, 2020, **Tromp** edits the “University Statement Oct. 2020 – Big City Coffee” Google document relative to the University’s public message concerning Big City Coffee’s (at this point anticipated) departure from campus. *Id.*, Ex. Z (Tromp Depo. Ex. 174).
- At 4:26 pm on October 22, 2020, **Tromp** emails Gordon Jones (Dean of Students) and Veronica Cuppy indicating, “The BCC issue is exploding on social media and in real life. *I’ve been working on it all day with some of our other leaders.* I wrote several messages privately to [redacted] (in the Zoom chat). *As I, ultimately, oversee all of these things, I can’t walk away from information like that.* Several people canceled all of their meetings today to work on it. VP Webb has been in contact with several officers from ASBSU (including [redacted]). *We’re right into it, aren’t we?*” *Id.*, Ex. A (Nimmons Depo. Ex. 58) (emphasis added). Nimmons testified on January 9, 2024 that:

Q. Was it -- was it your impression at 4:30 on the afternoon of October 22nd that the BSU administration, from **Tromp** on down, considered it a real -- a significant problem, this Big City Coffee, Black Lives Matter, Thin Blue Line issue, we’ll call it?

MS. DUKE: Form, foundation, calls for speculation, assumes facts not in evidence. Please don't speculate.

Q. BY MR. ROE: Again, the question was what was your impression?

MS. DUKE: Same objections, form, foundation, calls for speculation, assumes facts not in evidence.

THE WITNESS: Based on the e-mail and facts set forth in the emails, yes, it was a major concern and issue on campus to clear appointments and everything, to meet or be available for any conversation.

Q. BY MR. ROE: It was a very high priority, wasn't it?

A. *Extremely high priority.*

Q. Because *Tromp* herself said, we canceled a bunch of meetings, I've been working on it all day, the buck stops with me, right?

A. Yes.

Id., Ex. I (Nimmons Depo. Vol. II, 218:5-219:10) (emphasis added).

- A meeting (the “Meeting”) is held at 4:30 pm on October 22, 2020, attended by Fendley, Estey, Webb, Brian Holzworth (Aramark) and others on behalf of Plaintiffs. *Tromp* does not attend but requested that Estey attend the Meeting. *Id.*, Ex. AA (Estey Depo., 67:21-68:11). Estey had met with both *Tromp* and with Webb earlier in the day concerning Big City Coffee. *Id.* (*Id.*, 72:3-21). Fendley testified at her deposition on January 31, 2023, that when asked if she requested Boise State to support Plaintiffs, that she did, and by “support -- if you will let me explain. I also said, I am not asking you to donate to the Treasure Valley FOP, which is the Fraternal Order of the Police or the Firemen's Burnout Fund. All I'm simply saying is that you say we invited her on campus. We asked her to come to campus, students picked her. We showed her the poll. If you want to go there, great. If you don't, don't. That's it.” *Id.*, Ex. BB (Fendley Depo., 115:1-14). At the conclusion of the meeting, Fendley testified that Estey says, “I think it is best we part ways. And she said it in a manner, with her body language and the way that she said it, that I knew that there was no more discussion.” *Id.* (Fendley Depo., 112:17-21). Unbeknownst to Fendley, Estey had secretly recorded the Meeting (although the later-produced recording conveniently was truncated and did not capture Estey's comment about parting ways) and Boise State did not produce the secret recording until after Fendley had been deposed. *Id.*, ¶ 30.
- When the Meeting ended, Webb went back to her office, and Webb testified at her deposition that after the Meeting, she was unsure whether Big City Coffee would remain

on campus or not. *Id.*, Ex. D (Webb Depo., 234:24-235:7). Estey, however, went directly to **Tromp's** office and "updated her on the meeting." *Id.*, Ex. AA (Estey Depo., 104:19-105-4). **Tromp** testified that Estey had conveyed that "Sarah had called on us to silence our students, and I was shocked, and I said we can't do that. And she said I know. And said that was the condition for her to keep the store open. And that was essentially the gist. She just gave me a brief summary, and that was essentially what she told me." *Id.*, Ex. S (Tromp Depo., 42:17-23). **Tromp** further testified that Estey had told her "because that was the condition of the store remaining open, there was nothing she could do and that Sarah chose to close. And, you know, then immediately what we did is -- you know, you just have to snap into problem solving, say, okay, what do we do next?" *Id.* (Tromp Depo., 43-4-9).

- Also on October 22, 2020, and importantly, after the Meeting, **Tromp** calls Boise Mayor Lauren McLean. *Id.*, Ex. S (Tromp Depo. 43:10-19); McLean Depo. 22:16-27:24; 29:4-31:8 (*Id.*, Ex. CC). Mayor McLean then calls Boise Police Chief Ryan Lee (*id.*), who called Corporal Kevin Holtry and Sarah Fendley to the Chief's office the next morning. *Id.*, Ex. BB (Fendley Depo. 212:13-24).
- On October 22, 2020, **Tromp** forwards to Estey a long email string from multiple students calling for the removal of Big City Coffee from campus. *Id.*, Ex. T (Estey Depo. Ex. 147).
- At 9:56 am on October 23, 2020, Estey contacts Red Sky Public Relations, a public relations firm. *Id.*, Ex. DD (Griswold Depo. Ex. 186). **Tromp** continues to edit the "University Statement Oct. 2020 – Big City Coffee" Google document relative to the University's public message concerning Big City Coffee's departure from campus. *Id.*, Ex. W (Estey Depo. Ex. 149). Also on October 23rd, Sean Olson with Red Sky emails Griswold that they dropped a "new response in the google doc" containing language that Red Sky "strongly suggest[ed]" remain in the University's response: "***that [Big City Coffee] remains welcome if it chooses to stay.***" *Id.*, Ex. EE (Griswold Depo. Ex. 183) (emphasis added).
- On October 23, 2020, **Tromp** receives a complaint about Plaintiffs being forced off campus for support of law enforcement, and forwards the same to Griswold, Sherry Squires and Estey. *Id.*, Ex. FF (Estey Depo. Ex. 146).
- On October 24, 2020, Fendley emails **Tromp** requesting a meeting, indicating that **Tromp** may not have the full story of what happened to Plaintiffs and being forced off campus. **Tromp** forwards the email to Estey stating, "Thoughts?" *Id.*, Ex. GG (Estey Depo. Ex. 148).
- On October 25, 2020 **Tromp** participates in a meeting with Fendley via FaceTime. *Id.*, Ex. D (Tromp Depo., 61:16-25). Unbeknownst to Fendley, **Tromp** secretly recorded the meeting, but did not produce the recording until a couple of days before **Tromp's** April 11, 2024 deposition. *Id.*, ¶ 36. During the meeting, and despite being concerned about the University's ability to feed its students during COVID, **Tromp** did not request that Fendley

re-open Big City Coffee's campus location or otherwise attempt to reverse its removal. *Id.*, Ex. S (Tromp Depo., 65:14-66:12).

- On October 28, 2020, **Tromp** continues to edit the “University Statement Oct. 2020 – Big City Coffee” Google document relative to the University’s public message concerning Big City Coffee’s departure from campus. *Id.*, Ex. W (Estey Depo. Ex. 149). Matt Wilde, the University’s general counsel, asks the group editing the “University Statement Oct. 2020 – Big City Coffee” Google document “*did [Big City] actually ask to be let out of the contract?*” (*id.*, Ex. W (Estey Depo. Ex. 149) (emphasis added)) and then removes the following language from the Google doc.: “and that [Big City Coffee] remains welcome if it chooses to stay.” *Id.*, Ex. HH (Tromp Depo. Ex. 176). Also that day, **Tromp** is interviewed by Brian Holmes with KTVB, and states that she did not know what happened at the Meeting, which was clearly a lie. *Id.*, Ex. II.
- On October 29, 2020, **Tromp** receives an email from a student questioning why Big City Coffee was removed from campus. **Tromp** engages in email back and forth with the student on October 29 and 30, 2020, ultimately inviting the student to meet with **Tromp** and Webb. *Id.*, Ex. JJ (Tromp Depo. Ex. 179). **Tromp** continues to edit the “University Statement Oct. 2020 – Big City Coffee” Google document relative to the University’s public message concerning Big City Coffee’s departure from campus. *Id.*, Ex. W (Estey Depo. Ex. 149).
- On October 30, 2020, Salinas emails a student indicating that he “just got off the phone with **Dr. Tromp** and she related that she had a conversation with you regarding navigating the recent Big City Coffee issue that has developed on campus and in our community. **She** mentioned that you received an email and that it was pretty challenging. **She** also let me know that she is dealing with a number of these emails as well.” *Id.*, Ex. KK (Salinas Depo. Ex. 127) (emphasis added).
- On October 30, 2020, **Tromp**, Estey and other members of **Tromp’s** team participate in a “communications strategy” meeting with Red Sky Public Relations regarding Big City Coffee. *Id.*, Ex. LL (Griswold Depo. Ex. 191).
- On November 9, 2020, Griswold forwards to Estey and **Tromp** an email wherein a student (the same student who wrote to **Tromp** on September 9, 2020) made a public records request for documents concerning Big City Coffee. *Id.*, Ex. MM (Tromp Depo. Ex. 188).
- On November 18, 2020, **Tromp** continues to make significant edits to the “University Statement Oct. 2020 – BCC” Google document relative to the University’s public message concerning Big City Coffee’s departure from campus and emails received from the public, alumni and students expressing outrage at the same. *Id.*, Ex. NN (Tromp Depo. Ex. 177).

In light of the foregoing, it is inconceivable that Tromp did not play an active role in directing and effecting Plaintiffs’ removal from campus. Based on these new allegations,

including as to causation, Plaintiffs ask the Court to reconsider its prior ruling and join Tromp as a defendant. It is clear that, from the beginning, Tromp was involved in bringing Big City Coffee to campus, including managing the expected “flash point” on campus related to Big City Coffee’s support of the Thin Blue Line. She was intimately involved in the events leading up to, during, and subsequent to the October 22, 2020, meeting and the official messaging about the meeting. And, again, not only does the documentary and testimonial evidence support Plaintiffs’ argument, but Tromp herself declared that he oversaw this matter personally.

These allegations are far more than what has been alleged regarding Defendant Salinas (who is not in the senior administration and whose statements and actions were remote in time to the Meeting), of which the Court ruled that “These allegations plead an *inference of causation*” Order on Motion to Dismiss, p. 14 (emphasis added). There would be absolutely no way for the Court to reconcile its ruling as to Salinas with a denial of Plaintiffs’ Motion in light of the facts set forth above. Plaintiffs therefore respectfully request that the Court allow them to join Marlene Tromp as party defendant. Plaintiffs’ proposed First Amended Complaint and Demand for Jury Trial is attached to the Motion paper as Exhibit A (clean copy) and Exhibit B (redline copy).²

² The Plaintiffs’ Proposed First Amended Complaint and Demand for Jury Trial (“Proposed Amended Complaint”), attached as Exhibit A (clean copy) and Exhibit B (redline copy) to the Motion papers adds allegations related to Tromp without removing the claims and parties that were previously dismissed by the Court. Plaintiffs understand that their remaining claims are for First Amendment Retaliation and Procedural Due Process, against Defendants Estey, Webb and Salinas (and, if the Court grants this Motion, Tromp). Plaintiffs, however, did not remove the dismissed claims and parties from their Proposed Amended Complaint for fear that such removal would be taken as a withdrawal of those dismissed parties and claims, barring Plaintiffs from seeking appellate review. Generally, “[t]he amendment of the complaint supersedes the original complaint and all subsequent proceedings are based upon the amended complaint.” *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 330, 233 P.3d 1221, 1252 (2010) (quoting *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 739, 653 P.2d 791, 794 (1982)). Thus, the general rule is that “the ‘amended complaint supersedes the original, the latter being treated thereafter as non-existent.’ ” *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)). Although the Idaho Supreme Court has recognized an exception to this rule when pleadings have

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant the Motion and enter an order allowing Plaintiffs to join Marlene Tromp as a defendant.

DATED this 25th day of April, 2024.

GIVENS PURSLEY LLP

By /s/ Michael O. Roe
Michael O. Roe – Of the Firm
Attorneys for Plaintiffs

been involuntarily amended by the district court (*see, e.g., Hammer v. Ribi*, 162 Idaho 570, 573, 401 P.3d 148, 151 (2017)), for avoidance of doubt and in order to preserve their appeal rights, Plaintiffs have not removed the allegations related to dismissed parties and claims. Should the Court grant Plaintiffs' Motion and prefer their removal, Plaintiffs will certainly do so, so long as their right to appeal the dismissal of those parties and claims is not thereby impaired.

