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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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BRADLEY BRAZILL,

NO. CIV. 2:12-1218 WBS GGH

Plaintiff,

ORDER RE: SECOND MOTION FOR
SUMMARY JUDGMENT OR,

v.

ALTERNATIVELY, PARTIAL SUMMARY
JUDGMENT

CALIFORNIA NORTHSTATE COLLEGE OF
PHARMACY, LLC, CALIFORNIA
NORTHSTATE UNIVERSITY, LLC, and
DOES 1 through 10, inclusive,

Defendants.

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Plaintiff Bradley Brazill brings this action against
defendants California Northstate College of Pharmacy, LLC (the
"College"), and California Northstate University, LLC ("CNU"),
arising from defendants' allegedly wrongful conduct related to
the termination of plaintiff's employment. The Complaint
consists of four claims: (1) age discrimination under the Age
Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634;
(2) age discrimination under the California Fair Employment and

1 Housing Act ("FEHA"), Cal. Gov't Code §§ 12900-12996; (3)
2 retaliation under the False Claims Act ("FCA"), 31 U.S.C. §
3 3730(h); and (4) wrongful termination in violation of public
4 policy on the basis of violations of the ADEA, FEHA, and FCA.
5 (Docket No. 10.)

6 Defendants move for summary judgment, or in the
7 alternative, partial summary judgment on April 4, 2013. (Docket
8 No. 29.) In its June 4, 2013 Order resolving that motion, the
9 court dismissed plaintiff's FCA claim and his wrongful
10 termination in violation of public policy claim to the extent it
11 was based on the FCA claim. (June 4, 2013 Order at 25:5-17
12 (Docket No. 25).) It also dismissed all claims against CNU.
13 (Id. at 25:18-20.) Presently before the court is the College's
14 second motion for summary judgment, or alternatively, partial
15 summary judgment pursuant to Federal Rule of Civil Procedure 56.
16 (Docket No. 29.)

17 District courts have discretion in determining whether
18 to permit successive motions for summary judgment. Hoffman v.
19 Tonnemacher, 593 F.3d 908, 911 (9th Cir. 2010). "A renewed or
20 successive summary judgment motion is appropriate especially if
21 one of the following grounds exists: (1) an intervening change in
22 controlling law; (2) the availability of new evidence or an
23 expanded factual record; and (3) [the] need to correct a clear
24 error or prevent manifest injustice." Whitford v. Boglino, 63
25 F.3d 527, 530 (7th Cir. 1995) (quoting Kern-Tulare Water Dist. v.
26 City of Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986)).

27 The College bases its second motion for summary
28 judgment on "an expanded factual record." (See Mem. in Supp. of

1 Summ. J. at 12:8-10 (Docket No. 38-1).) It notes that the court
2 indicated at the hearing on defendants' first motion for summary
3 judgment "that evidence concerning the hiring process of
4 [p]laintiff's replacement as Department Chair, Dr. James
5 Palmieri, which was largely absent from the record, would have
6 assisted [it] in ruling on the motion." (Id. at 1:9-11.)

7 In Hoffman, the Ninth Circuit stated that "a successive
8 motion for summary judgment is particularly appropriate on an
9 expanded factual record." Hoffman, 593 F.3d at 911. It then
10 held that the district court did not abuse its discretion by
11 allowing the defendant to file another summary judgment motion
12 after a mistrial. Id. at 912. The court explained that "[t]he
13 deposition of an expert witness after the deadline for pretrial
14 summary judgment motions, the testimony at trial, and the
15 addition of a new expert witness after the mistrial expanded the
16 factual record beyond what it had been at the time of the
17 pretrial summary judgment motion." Id.

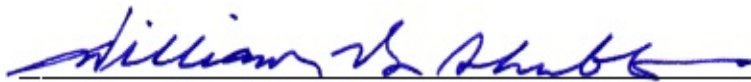
18 The court is not persuaded that an "expanded factual
19 record" in the sense meant by the Hoffman court is present here.
20 The College does not base its second motion on a previously
21 unavailable deposition, trial testimony, new expert witness, or
22 similar evidence. Instead, the "expanded factual record" that
23 the College now offers includes only evidence that could have
24 been included in the College's first motion for summary
25 judgment.¹

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27 ¹ Another case relied on by the College, Cohea v. Pliler,
28 2:00-CV-2799 GEB EFB, 2013 WL 687081 (E.D. Cal. Feb. 25, 2013),
report and recommendation adopted as modified, 2:00-CV-2799 GEB

1 What the court may suggest in colloquy with counsel at
2 a hearing is not the court's order. If the court had required
3 information about the hiring of Palmieri to decide defendants'
4 first summary judgment motion, it would have requested
5 supplemental briefing. The summary judgment process is not to be
6 used to test what the court's ruling will be and then to patch
7 any deficiencies a defendant makes in the original motion with a
8 subsequent motion. Here, the College has not provided any
9 compelling basis for the court to consider this second summary
10 judgment motion, which essentially reiterates the same arguments
11 the College made in the first motion.

12 IT IS THEREFORE ORDERED that California Northstate
13 College of Pharmacy, LLC's second motion for summary judgment, or
14 in the alternative, partial summary judgment be, and the same
15 hereby is, DENIED.

16 DATED: August 22, 2013

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19 WILLIAM B. SHUBB
20 UNITED STATES DISTRICT JUDGE
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26 EFB, 2013 WL 1281888 (E.D. Cal. Mar. 26, 2013), actually
27 undermines its position. In that case, the court considered the
28 defendants' second summary judgment motion after explaining that
it was based on evidence that was not available at the time of
the first motion and, unlike the first motion, was filed after
the plaintiff filed an amended complaint. See Cohea, 2013 WL
687081, at *4.