UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

DR. JOSEPH H. WILSON, Ph.D.,

Plaintiff,

15-cv-23 (CBA) (MMH)

-against-

TERRENCE CHENG, DR. PAISLEY CURRAH, Ph.D., and MARCIA ISAACSON,

Defendants.

----------x

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S FOURTH AMENDED COMPLAINT

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants
28 Liberty Street
New York, New York 10005
(212) 416-8663

Of Counsel:
Mark E. Klein

Dated: September 12, 2022

TABLE OF CONTENTS

Page (s)

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATE STATUTES

RULES

Defendants Terrence Cheng, Paisley Currah and Marcia Isaacson ("Defendants") respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 56, for summary judgment dismissing in its entirety Plaintiff's Fourth Amended Complaint (ECF No. 129).

PRELIMINARY STATEMENT

After Plaintiff filed five complaints in this action alleging a multitude of claims against a multitude of parties, there remain three causes of action against three individuals: Plaintiff's First Cause of Action for alleged "unlawful search and seizure" against defendants Paisley Currah and Marcia Isaacson; Plaintiff's Second Cause of Action for common law defamation against defendant Terrence Cheng; and Plaintiff's Third Cause of Action for common law conversion against Currah and Isaacson.

All of these claims fail as a matter of law. As shown in Point I.A. below, Currah and Isaacson are entitled to summary judgment dismissing the search and seizure claim because, as a matter of law, the search that Plaintiff alleges violated his Fourth Amendment rights was reasonable both at its inception and in its scope. In addition, as shown in Point I.B. below, Plaintiff's search and seizure claim also should be dismissed because Currah and Isaacson are entitled to qualified immunity with respect to such claim.

As shown in Point II.A. below, Cheng is entitled to summary judgment dismissing Plaintiff's defamation claim because there is no admissible evidence to support Plaintiff's allegation that Cheng said, in March 2014, that Plaintiff was "engaging in criminal activity" and, even assuming Cheng made such a statement -- which Cheng denies – any such statement was made in the discharge of Cheng's duties as Associate Provost at Brooklyn College and he is therefore entitled to an absolute privilege with respect any such statement. In addition, as shown

in Point II.B. below, again assuming that Plaintiff provides admissible evidence to support his allegation that Cheng made the defamatory statement, the undisputed evidence, as determined after a fourteen day arbitration hearing before a neutral American Arbitration Association arbitrator, demonstrates that Cheng's alleged statement is substantially, if not totally, true.

Finally, as shown in Point III below, Currah and Isaacson are entitled to summary judgment dismissing Plaintiff's conversion claim because there is no admissible evidence that they "converted" any of Plaintiff's personal property.

STATEMENT OF FACTS

The undisputed material facts supporting Defendants' motion are fully set forth in the accompanying Rule 56.1 Statement, dated September 12, 2022 ("56.1"), and the declarations, deposition testimony and documents referred to therein. More briefly, those facts are as follows:

A. The Parties.

Plaintiff, Dr. Joseph Wilson ("Plaintiff"), is a former Professor of Political Science and the former Director of the Graduate Center for Worker Education ("GCWE") at Brooklyn College (the "College"), which is one of the senior colleges in The City University of New York ("CUNY"). FAC ¶¶ 1.

From August 2013 through January 2016, defendant Terrence Cheng ("Cheng") was Associate Provost for Academic Affairs at the College, working with vice presidents, deans, chairs and faculty on enrollment, budget, course scheduling, planning and governance. Among many other areas of responsibility, from the Fall 2013 through Spring 2014, Cheng was responsible for the GCWE, located at 25 Broadway in lower Manhattan. 56.1 ¶ 2.

At all times relevant to the allegations in the FAC, defendant Paisley Currah ("Currah") was a Professor of Political Science at the College. FAC ¶ 4. From October 2010 to July 2015,

defendant Marcia Isaacson was Senior Associate General Counsel and Chief Compliance Officer in the CUNY Office of the General Counsel. 56.1 ¶ 4.

B. CUNY's Investigation of Plaintiff Commencing in December 2011

In or about December 2011, Frederick Schaffer, who was then the General Counsel and Senior Vice Chancellor for Legal Affairs for CUNY, informed Isaacson that Karen Gould, the then President of the College, had contacted him to express concerns about the operations of the College's GCWE, as well as about faculty members affiliated with the GCWE. As Schaffer explained to Isaacson, these concerns included the following:

(i) that Plaintiff may have received compensation to which he was not entitled;

(ii) that Plaintiff may not have accurately declared this compensation on documents known as "Multiple Position" forms that all CUNY professors, including Plaintiff, were required to file each semester; and

(iii) that extensive sums of money were being deposited into and disbursed from the GCWE and other College accounts, and that these extensive sums may not have been deposited and disbursed appropriately.

56.1 ¶ 5.

Schaffer instructed Isaacson to contact President Gould and, as appropriate, conduct an investigation. 56.1 ¶ 6. Accordingly, beginning in January 2012, Isaacson met with various people at the College, including President Gould; Kimberley Phillips, then the Dean of the College's School of Humanities and Social Science; Steve Little, then the College's Vice President for Finance and Administration; and Alan Gilbert, then the College's Assistant Vice President for Finance, Budget and Planning Administration. She also gathered and reviewed documents and information, including financial records relating to the GCWE and Multiple Position forms that Plaintiff had filed. 56.1 ¶ 7.

From Isaacson's initial meetings and review of documents, she learned that Plaintiff did not appear to have been complying with a CUNY policy that had been in effect for decades, which required that he disclose, on documents referred to as "Multiple Position" forms, all of the "extra" compensation he appeared to be receiving. Some of this "extra" compensation appeared to come from disbursements of moneys the College had received from the grant-funded Urban Community Teachers ("UCT") program and the ERIS (an acronym for "Empowering, Recruiting, Investing, Supporting") program, which was the College's name for the CUNY-wide Black Male Initiative program whose goal was to increase, encourage and support the inclusion and educational success of under-represented groups in higher education. 56.1 ¶ 8.

Isaacson also learned from her initial review of documents that Steve Little's name appeared on numerous documents purporting to approve, over the course of several years, the disbursement of thousands of dollars to Plaintiff and another professor in the College's Political Science Department, Noel Anderson ("Anderson"), and that President Gould had not previously been aware that Little had purported to authorize these disbursements. 56.1 ¶ 9.

Based on Isaacson's experience leading investigations both at the United States Attorney's Office and at CUNY, she knew that getting access to emails often was helpful, if not essential, to understand what had occurred, to identify the persons involved in events and transactions, and to glean such persons' motive and intent. Accordingly, in mid-January 2012, she sought to determine how she could access Wilson's emails. Isaacson quickly learned, however, that the College did *not* regularly back up or retain Wilson's electronic communications at the GCWE offices on the College network. 56.1 ¶ 10.

Moreover, on or about January 25, 2012, Isaacson learned that Wilson and Steve Little had met that day at Wilson's office at the GCWE. Isaacson knew that Little was aware of her

investigation because she had interviewed him, as well as from conversations he had had with President Gould and others at the College. In addition, Isaacson had not found Little to be fully credible, and was concerned that he might seek to obstruct or interfere with the investigation. Given this information, and the fact that the contents of Wilson's computer were not backed up on the College system, she believed that CUNY needed to take immediate steps to secure Plaintiff's electronic and paper records at the GCWE. 56.1 ¶ 11.

Therefore, on January 25 or 26, 2012, she requested permission from Schaffer to go to Plaintiff's GCWE office, along with other persons from CUNY, including someone from the CUNY Office of Computing & Information Services ("CIS"), to obtain certain computer and paper records relating to Plaintiff or the GCWE that were relevant to CUNY's investigation. Schaffer subsequently gave Isaacson such permission. 56.1 ¶ 12.

Before granting such permission to Isaacson, Schaffer first consulted with (i) President Gould, and (ii) Professor Sandi Cooper, who in January 2012 was then Chair of the CUNY University Faculty Senate. It was Schaffer's regular and consistent practice, while General Counsel of CUNY, pursuant to the requirements of the CUNY Computer Use Policy, to consult with the College President and the Chair of the University Faculty Senate before authorizing the search without notice of a computer used by a CUNY faculty member. 56.1 ¶ 13.

In the afternoon of January 26, 2012, Isaacson went to the GCWE, along with Gordon Taylor of CUNY, Nicholas Frangoulis of the College's Department of Public Safety, and a representative from the CUNY CIS, and conducted a limited search of Plaintiff's GCWE office. At that time, the CIS representative removed the hard drive from Plaintiff's work computer, as well as the hard drives from the work computers of the GCWE Associate Director and Executive Assistant who worked there. In addition, Isaacson found on top of Plaintiff's Wilson's desk a one-page document that appeared to be notes Plaintiff had made relating to his having subleased

CUNY's space at the GCWE to private third parties. Isaacson put that document in a plastic bag and took it back to her CUNY office. Isaacson did not open the drawers of or look inside Plaintiff's desk that day. 56.1 ¶ 14.

The computer that Plaintiff was using at the GCWE, and from which CUNY removed the hard drive, was owned by CUNY and was not his personal property. 56.1 ¶ 15.

Plaintiff entered the "premises" of the GCWE while CUNY's search of Plaintiff's office on January 26, 2012 "was in progress." 56.1 ¶ 16. In addition, two "observers" from Plaintiff's union, Professional Staff Congress/CUNY ("PSC"), were present during some portion of CUNY's search of Plaintiff's GCWE office on January 26, 2012. These "observers" told Plaintiff they were there "to witness and to observe this." 56.1 ¶ 17.

After the CUNY representatives left Plaintiff's GCWE office on January 26, 2012, Plaintiff went into his office but did *not* "start[] to look at" what was missing. Further, at no time after Isaacson and the other CUNY representatives left his GCWE office on January 26, 2012 did Plaintiff "make any effort to determine what files, if any, were missing from [his] office." 56.1 ¶ 18.

On February 3, 2012, Isaacson again went to Plaintiff's office at the GCWE, along with Avril Chase and Sarah Ayres of the College Property Management department, and Russell Halloran, a locksmith from Borough of Manhattan Community College, who changed the lock to Plaintiff's GCWE office that day. This second visit was prompted by a concern that Wilson or other people could access the contents of Wilson's GCWE office -- a concern Isaacson discussed with Schaffer before going to Plaintiff's office that day. Schaffer approved Isaacson's return visit to Plaintiff's GCWE office. 56.1 ¶ 19.

In addition, that day Isaacson removed approximately ten files from filing drawers in Plaintiff's office and took them back to her office. Isaacson also reviewed and put certain

documents from Wilson's filing drawers in boxes and requested that they be delivered to her office. All of these documents were financial or programmatic documents relating to the operations of the College and the GCWE, such as agreements for the sublease of space at the GCWE that Plaintiff had signed, payroll and expense records, travel itineraries for student trips, and documents relating to the UCT and ERIS programs. 56.1 ¶ 20.

Currah had no involvement in the search of the contents of Plaintiff's computer or his GCWE office in January and February 2012. 56.1 ¶ 21.

C. The Disciplinary Proceedings Against Plaintiff.

By letter dated January 3, 2013, the College served Plaintiff with a Notice of Disciplinary Charges (the "Charges"). 56.1 ¶ 22. Pursuant to the Collective Bargaining Agreement ("CBA") between CUNY and Plaintiff's union, the College then conducted a "Step Two" hearing, over the course of twelve days from April 10, 2013 through August 22, 2014, with respect to the Charges against Plaintiff. Plaintiff was represented by his PSC counsel, Peter Zwiebach, at each of the Step Two hearing dates. 56.1 ¶ 23.

On or about October 23, 2013, Pamela S. Silverblatt, who was then CUNY Vice Chancellor for Labor Relations, Designee for the Chancellor, issued her decision (the "Decision") with respect to the College's Disciplinary Proceeding against Plaintiff, finding that the "College's decision to terminate [Plaintiff's] is . . . sustained." 56.1 ¶ 24.

Plaintiff appealed from the Decision sustaining his termination. Pursuant to the CBA, CUNY and Plaintiff then participated in a "Step Three" Hearing, before a neutral arbitrator from the American Arbitration Association, over the course of fourteen days between January 30 and September 10, 2015 (the "Arbitration"). Plaintiff was represented by his PSC counsel, Peter Zwiebach, in the Arbitration. 56.1 ¶ 25.

By Opinion and Award dated February 28, 2016 (the "Award"), the neutral arbitrator denied

Plaintiff's appeal of the Vice Chancellor's decision, sustained almost all of CUNY's charges against him, and determined that the appropriate penalty was "discharge." In particular, the arbitrator concluded, among other things, that, "[a]fter carefully considering the entire record before me, including my assessment of witness credibility, I find that CUNY has proven, with substantial evidence, Charges I, II, IV (Specification 1), V, VI, VII, VIII, XII, XIII (with respect to Annie London), XIV, and XVI a, b, and d." In addition, the arbitrator determined that, "[a]fter careful review, I find the record evidence establishes [Plaintiff's] actions constituted a willful violation of the policy prohibiting additional compensation." 56.1 ¶ 26.

The arbitrator further stated:

> Turning to the issue of penalty, I find CUNY has established sufficient cause to discharge Respondent from service. The record evidence establishes Respondent engaged in serious misconduct. He did not merely forget to turn in a form, or receive a few dollars extra on an expense account. Over a period of three years, he received additional compensation of over $100,000 to which he could not claim right to receive. These funds were not his – and therefore, he has destroyed the basic trust necessary to maintain the employment relationship.

The arbitrator concluded: "While Respondent has long service to the University, under these circumstances, I find no mitigating factors to reduce the penalty." 56.1 ¶ 27.

In the course of her Award, the arbitrator also addressed the issue of Plaintiff's "intent" with respect to the means by which he received more than $100,000 in "additional compensation" to which he had no right to receive, stating that "there are substantial facts in the record to infer" Plaintiff's intent. In particular, the arbitrator found that the "fact that [Plaintiff] only disclosed" on his Multiple Position forms certain "compensation from tax levy sources," and did not disclose on his Multiple Position forms compensation from other sources, was "troubling." The arbitrator found that the "record evidence establishes" that the compensation for tax-levy sources went "through a more multilayered reviewed [sic] process and, therefore, if they were not disclosed, they would certainly have been caught." The arbitrator also found that "this was not the only non-

disclosure," the "most significant being the substantial compensation from GCWE member organization account." As to these funds, the arbitrator concluded that the fact that "these funds could be disbursed without provost approval because they were non-tax levy moneys is further evidence of intent." 56.1 ¶ 28.

Other evidence submitted at the Arbitration reflects Plaintiff's "intent." On July 28, 2011, Professor Anderson, referring to Deutsche Bank Funds which comprised part of the funding for the UCT program, advised Plaintiff, "That would leave approx. 50K for you and I [sic] to spread for us (and show Annie [London] some love too.)." Plaintiff replied, "One word: perfect!" 56.1 ¶ 29. In addition, on April 1, 2011, Anderson told Plaintiff to draw on funds from the RBA (Results Based Analysis) and Children's Services (New York State Office of Family and Children Services) grants, as long as his time sheets did not overlap with his other work hours. 56.1 ¶ 30. Further, on August 23, 2011, Anderson sent an email in response to an inquiry from the Brooklyn College Foundation regarding the $150,000 grant supporting the Urban Community Teachers Project program. In reply to Anderson (but not to the Brooklyn College Foundation), Plaintiff wrote, "You roll'in…G-Monie." 56.1 ¶ 31.

Although Plaintiff could have moved pursuant to Article 75 of the New York Civil Practice Law and Rules to vacate or modify the arbitrator's Award, Plaintiff did not do so. 56.1 ¶ 32.

D. Cheng Did Not Defame Plaintiff.

Plaintiff's defamation claim set forth in the Second Cause of Action rests on the alleged statement by defendant Terrence Cheng in March 2014 that "Wilson was engaging in criminal activity." *See* FAC ¶¶ 64, 65. Cheng denies ever making any such defamatory statement, either in March 2014 or any other time. 56.1 ¶ 34.

Plaintiff never heard Cheng make any defamatory statement about him. 56.1 ¶ 35. Instead,

Plaintiff asserts that other people heard and told him that Cheng allegedly stated that "Wilson was engaging in criminal activity." According to Wilson's Initial Disclosures, Stephen Leberstein, a former College professor, allegedly "Witnessed defamation."[1] However, when Dr. Leberstein was asked at his deposition in this case whether "[a]t any meeting [he] had with Mr. Cheng, did Mr. Cheng state that Dr. Wilson had engaged in criminal activity?" Leberstein responded, "I don't recall that he did." 56.1 ¶ 36.

E. Defendants Did Not "Convert" Plaintiff's Personal Property.

On February 15, 2012, Plaintiff sent an email to Pamela Pollack, the College's then Director of Legal Services, requesting certain lecture notes and "course related documentary Videos and DVDs" that he stated he needed to adequately teach his classes "in the interim." 56.1 ¶ 37. On February 15, 2012, Isaacson sent an email to Pollack stating, among other things, that "[t]oday we express mailed to [Plaintiff] all of the materials that we took from his office." 56.1 ¶ 38.

On March 22, 2012, Pollack responded to Plaintiff's March 22nd email (in which Plaintiff had inquired about the "status of his books, papers, files and personal items"), stating:

> Joe: We will return all of your belongings by next week. I believe, however, that we returned the items you needed for teaching.

56.1¶ 39.

On March 23 and April 4, 2012, at the request of Dean Phillips**,** Currah packed into boxes Plaintiff's books, his papers and files not related to the workings of the GCWE, and his other personal property located in his GCWE office located at 25 Broadway in Manhattan. 56.1 ¶ 40.

After Currah packed Plaintiff's personal property into boxes on March 23 and April 4, 2012, Currah had no involvement whatsoever in moving the boxes to the College campus, putting the

[1] See Plaintiff's Initial Disclosures, dated June 30, 2018, a copy of which is annexed as Exhibit M to the accompanying declaration of Mark E. Klein ("Klein Decl."), at 4.

boxes into Plaintiff's office at 3608 James Hall on the College campus (the "James Hall office"), or maintaining them while they were kept in his James Hall office. Currah also had no involvement in deciding whether or not Plaintiff had access to, or could remove, any of the materials in his James Hall office. 56.1 ¶ 41.

On April 3, 2012, Dean Phillips sent an email to Steven Alliano at the College, in which she stated: "We need Professor Joe Wilson's personal items from 25 Broadway transported to the main campus." 56.1 ¶ 42. On April 5, 2012 at 12:34 P.M., Alliano emailed several individuals, including Pollack, Dean Phillips and Currah, to confirm that "[t]he 22 boxes have been delivered to 3608 James Hall." 56.1 ¶ 43.

On April 5, 2012, Pamela Pollack informed Plaintiff that "22 boxes were delivered to your office today." On April 6, 2012, Plaintiff replied "Thanks, Pam." 56.1 ¶ 44.

In June 2013, when Currah was (and had been since June 2011) Chair of the Political Science Department, Currah sent emails to Dean Phillips and Michael Hewitt, who was then the College's Assistant Vice President and Labor Designee, about the need to "reorganize" Plaintiff's James Hall office to make room for two incoming professors. As stated in Currah's June 12, 2013 email, all the professors in the Political Science Department already were sharing offices, Plaintiff's materials were taking up most of the space in his James Hall office, and there would not be room for the new faculty members in that office if Plaintiff's materials were not packed up and moved. Currah therefore asked for authorization to move Plaintiff's materials from his James Hall office to storage. On June 15, 2013, Dean Phillips informed Currah that moving Plaintiff's materials to storage was the "right move." 56.1 ¶ 45.

Currah thereafter asked the Political Science Department's College Assistant, Jeremy Stybel, to pack up as necessary and move the contents of Plaintiff's office down the hall to a locked storage room off the Political Science Faculty lounge. As requested, Stybel packed up the contents

of Plaintiff's James Hall office, placed the contents into boxes and moved the boxes to a locked storage room, which, during his deposition, he referred to as the "copy room." 56.1 ¶ 46. Other than College security personnel, the only person who had access to the key to the locked storage room was Barbara Haugstatter, the Political Science Department's secretary. 56.1 ¶ 47.

F. Plaintiff Himself Caused the Destruction of At Least Some of the Personal Property He Claims Currah and Isaacson Converted.

On May 5, 2014, Plaintiff sent an email to Michael Hewitt, stating, among other things:

> I will arrive around 10am thursday [May 8, 2014] to move my things. I hope you can arrange for me to park in the faculty parking. If you can get someone to help move boxes, that would be helpful.

56.1¶ 48.

Hewitt responded to Plaintiff's May 5th email the next day, stating that he was copying his assistant, who had been working on parking, and stated: "I think it's covered." Plaintiff responded: "Thanks Michael!" 56.1 ¶ 49.

On May 8, 2014, Plaintiff came to campus, took possession of the boxes located in the locked storage room, and directed that they be moved down the hall to an office in the Africana Studies Department. In response to Plaintiff's request, Hewitt and a College employee loaded and pushed carts containing Plaintiff's property down the hall and placed them in the Africana Studies Department office. 56.1 ¶ 50. Before permitting Plaintiff to place his property in the Africana Studies Department office on May 8, 2014, George Cunningham, a Professor in the Africana Studies Department, sought and received permission to do so from Professor Lynda Day, who at that time was Chair of the Africana Studies Department. 56.1 ¶ 51.

Currah spoke with Plaintiff on May 8, 2014, during which conversation Plaintiff orally gave him a "list of items he was concerned about," as reflected in an email that Currah sent that day to Pollack, Hewitt and CUNY counsel regarding Plaintiff's visit to the College that morning. 56.1 ¶ 52.

In 2016, but sometime before the fall of that year, Professor Day asked Plaintiff to "come and look through the boxes" that he had directed be placed in Room 3109 at James Hall. Plaintiff thereafter came to Room 3109 in James Hall "one day" and spent "an hour or two" looking through the boxes. After doing so, Plaintiff took "a few things" and then told Professor Day "you can do what you want with" the rest of the materials. 56.1 ¶ 53.

Professor Day thereafter went through the boxes "little bit by little bit" and decided what to discard and what to keep. 56.1 ¶ 54. Professor Day shelved at least 50 of Plaintiff's books in the Africana Studies Department offices and gave approximately 50 of Plaintiff's books to the Black Latino Male Initiative office. Professor Day kept some research files, at least "a couple of" which Plaintiff took back when he and his attorney met with Professor Day a couple of weeks before Professor Day's deposition in March 2019. Plaintiff did not take back any VHS tapes, as to which Plaintiff told Professor Day "there were things in there that would be useful to students." 56.1 ¶ 55.

At Plaintiff's request, Professor Day sent Plaintiff a "thank you" note for donating his "hundreds of books," which note he could "potentially use for tax purposes." 56.1 ¶ 56.

Professor Day's "thank you" note stated in relevant part:

> I am writing to formally thank you for your donation of several prints and 20 boxes (approximately 2500) books to the Africana Studies Department. Your books covered a wide range of scholarly material including dozens of Political Science and Sociology textbooks, numerous bound journals and conference proceedings, rare classic monographs, as well as new and cutting edge scholarly studies. We were able to support a prison college preparatory program with some of the books as well as replenish the Department's Africana Studies Institute holdings. I am sure, given the rarity of some of the volumes, that the total would be valued at several thousand dollars.

56.1 ¶ 57.

Neither Currah nor Isaacson ever had in their personal possession or failed to return any of the documents or personal property listed on the document titled "Professional Production and Seized Materials." 56.1 ¶ 58.

STANDARD OF REVIEW

Summary judgment in a defendant's favor is required if the plaintiff has failed to make a sufficient showing on an essential element with respect to which the plaintiff has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A plaintiff cannot defeat summary judgment merely by showing the existence of some alleged factual dispute between the parties, but must establish through the evidentiary record a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986); *see also* Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. In order to avoid summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986), and "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Alemenas*, 143 F.3d 105, 114 (2d Cir. 1998).

ARGUMENT

I. PLAINTIFF'S FIRST CAUSE OF ACTION FOR ALLEGED UNLAWFUL SEARCH AND SEIZURE SHOULD BE DISMISSED.

A. Plaintiff's Fourth Amendment Claim Against Currah Should Be Dismissed Because There Is No Admissible Evidence Supporting Such a Claim Against Him.

As an initial matter, although Plaintiff has characterized his search and seizure claim as against Professor Currah as well as Isaacson, the TAC contains *no* allegations regarding Currah's involvement in any "search and seizure." *See* FAC ¶ 70. Moreover, the undisputed, admissible

evidence demonstrates that Currah had no involvement in CUNY's search of Plaintiff's GCWE office and, further, did not "seize" anything from either Plaintiff's GCWE or College campus offices. 56.1 ¶¶ 21, 58. Accordingly, Plaintiff's search and seizure claim against Currah should therefore be dismissed in its entirety.

B. Plaintiff's Fourth Amendment Claim Against Isaacson Should Be Dismissed Because the Undisputed Facts Demonstrate that CUNY's Search of Plaintiff's GCWE Office Was Reasonable at Its Inception and in Its Scope.

Plaintiff's search and seizure claim against Isaacson should also be dismissed, because the search of Plaintiff's GCWE office was permissible under the U.S. Supreme Court decision in *O'Connor v. Ortega*, 480 U.S. 709, 721 (1987), as it was undertaken by a government employer as part of an investigation into Plaintiff's "work-related misconduct" and was reasonable at its inception and in its scope. In *O'Connor*, the Supreme Court analyzed whether a warrant is required to perform a search of a public employee's workspace. Although the Court recognized that public employees frequently have "substantial" privacy expectations in private property maintained at their workplaces, the Court also recognized that the government interest in "the efficient and proper operation of the workplace" will often require intrusions on employee privacy. *Id*. at 723. In particular, even where a government employee has a reasonable expectation of privacy, intrusions undertaken by a government employer for "investigations of work-related misconduct" are permissible. *Id.* at 725. Such intrusions -- which do *not* require either a warrant or probable cause -- must be justified (i) at their inception; and (ii) in their scope. *O'Connor*, 480 U.S. at 725-26; *Gudema v. Nassau County*, 163 F.3d 717, 722 (2d Cir. 1998). Both requirements are satisfied here.

An intrusion is reasonable at its inception "if there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct." *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 184 (2d Cir. 2004) (quoting

O'Connor, 480 U.S. at 723). The scope of the intrusion is reasonable when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light … the nature of the misconduct." *Id.* (quoting *O'Connor*, 480 U.S. at 726); *see also Tangredi v. N.Y. City Dep't of Envtl. Prot.*, No. 09-cv-7477 (VB), 2012 WL 834580, at *3-410-12 (S.D.N.Y. Feb. 16, 2012). Further, the search need *not* be the least intrusive search practicable. *City of Ontario, California v. Quon*, 560 U.S. 746, 763 (2010) (holding that the defendant was not required to give the plaintiff notice that the content of his text messages would be read).

In this case, for at least the following four reasons, CUNY's search of Plaintiff's GCWE office was reasonable at its inception:

(i) President Gould had contacted Frederick Schaffer, CUNY's General Counsel, because of her concerns about the operations of the College's GCWE, including her concerns that extensive sums of money were being deposited into and disbursed from the GCWE and other College accounts to Plaintiff and another College professor, and that these extensive sums may not have been deposited and disbursed appropriately;

(ii) Isaacson believed that Plaintiff's electronic records could be helpful, if not essential, to understand what had occurred, to identify the persons involved in events and transactions, and to glean such persons' motive and intent;

(iii) Isaacson had learned that the contents of Wilson's computer were *not* regularly backed up on the College system, and thus potentially valuable information and records could be easily deleted; and

(iv) on January 25, 2012, the day before the search of Wilson's office, Isaacson had learned that Wilson and Steve Little had met that day at Wilson's GCWE office, she knew that Little was aware of her investigation because, among other things, she had interviewed him, and

she was concerned that he might seek to obstruct or interfere with the investigation. 56.1 ¶ 11.

In short, CUNY had a reasonable suspicion that Plaintiff had engaged in workplace misconduct and, based on information Isaacson had obtained, she believed CUNY needed to take immediate steps to secure Wilson's electronic and paper records at the GCWE. Isaacson therefore sought, and obtained, Schaffer's permission to enter Plaintiff's GCWE office, along with other persons from CUNY, including someone from the CUNY Office of Computing & Information Services ("CIS"), to obtain certain computer and paper records relating to Plaintiff or the GCWE that were relevant to CUNY's investigation. 56.1 ¶ 12. Further, in accordance with CUNY's Computer Use Policy in effect at the time, before Schaffer granted such permission, he first consulted with (i) President Gould, and (ii) Professor Sandi Cooper, who in January 2012 was then Chair of the CUNY University Faculty Senate. 56.1 13.

For these reasons, CUNY's search of Plaintiff's GCWE office was justified at its inception. *See Demaine v. Samuels*, 29 Fed. App'x 671, 675-76 (2d Cir. 2002) (finding an employer's search of a police officer's desk and patrol car was reasonable because, among other things, the employer had reason to suspect he was committing misfeasance); *Leventhal v. Knapek*, 266 F.3d 64, 75-76 (2d Cir. 2001) (finding an employer's search of an employee's office computer reasonable because the employer had a suspicion that the employee was misusing his computer).

The "scope of a search will be appropriate if 'reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct'" *Leventhal*, 266 F.3d at 75-76 (quoting *O'Connor*, 480 U.S. at 726). In this case, the scope of CUNY's search of Plaintiff's GCWE office was limited to the hard drive of Plaintiff's *work* computer, and financial, programmatic and other documents in his possession relating to the College's operations and programs. 56.1 ¶¶ 14, 15, 20. CUNY's search was therefore reasonable in its scope. *Compare Tangredi*, 2012 WL 834580, at *4 (finding that a search of "a closed patrol bag in the women's

locker room" was not "reasonably related to graffiti discovered in the men's locker room, either in inception or scope"); *Cunningham v. N.Y.S. Dep't of Labor*, 21 N.Y.3d 515, 522-523 (2013) (finding that the employer's GPS search of an employee's car "outside of business hours" -- *i.e.*, "on all evenings, on all weekends and on vacation" -- to be "excessively intrusive" and therefore "unreasonable").

In these circumstances, this Court should grant summary judgment dismissing Plaintiff's First Cause of Action against Isaacson. *See Leventhal*, 266 F.3d at 78 (affirming grant of summary judgment to the defendants because, among other things, the "searches of [the plaintiff's] office computer were not 'unreasonable' under the Fourth Amendment").

As the Court is aware, in July 2015, the State Defendants moved, pursuant to Federal Rules 12(b)(6) and 12(b)(1), to dismiss Plaintiff's Second Amended Complaint, including Plaintiff's "unlawful search and seizure" claim. *See* ECF No. 22. Magistrate Judge Scanlon, however, recommended in her Report and Recommendation that the State Defendants' motion to dismiss Plaintiff's search and seizure claim should be denied, stating:

> Plaintiff alleges that the adverse actions taken against him by CUNY, including the investigation into his management of the GCWE, the disciplinary hearing and the search of his office were pretexts for race and age discrimination, and that Defendants, in particular the Defendants responsible for convincing high-level CUNY officials to investigate him, fabricated their accusations that led to the search. *If the allegations were fabricated*, Defendants would have lacked probable cause to search Plaintiff's office.

ECF No. 37, at 54 (emphasis added) (citations omitted).

Judge Scanlon concluded: "Taking Plaintiff's allegations as true as the Court must on this Rule 12(b)(6) motion, it is unlikely the search of his office was justified. *O'Connor*, *Demaine* and *Leventhal* all concerned motions for summary judgment, when the factual record had been developed." ECF No. 37, at 54. This Court adopted Judge Scanlon's findings and rationale, and denied the State Defendants' motion to dismiss Plaintiff's search and seizure claim. *See* ECF No.

55, at 21.

Now, however, Defendants' motion before the Court is one for summary judgment, after the factual record in this case has been developed. Moreover, there is no admissible evidence whatsoever that CUNY's allegations against Plaintiff were "fabricated." This is particularly apparent given that, as set forth above, CUNY's investigation of Plaintiff's workplace misconduct led to the imposition of disciplinary charges against Plaintiff, the College's determination to terminate his employment and, ultimately, the determination by a neutral American Arbitration Arbitrator that sustained the termination of Plaintiff's employment at CUNY based on his misconduct. 56.1 ¶¶ 26, 27. Further, during all the disciplinary proceedings leading ultimately to the neutral arbitrator's determination that the "penalty" of "termination" was appropriate, Plaintiff was represented by his union counsel. 56.1 ¶ 25.

Accordingly, this Court should grant summary judgment dismissing Wilson's search and seizure claim against Isaacson and Currah set forth in the First Cause of action of the FAC.

C. Defendants Isaacson and Currah Are Entitled to Qualified Immunity with Respect to Plaintiff's Search and Seizure Claim.

Even if this Court were to determine that Plaintiff's search and seizure claim should not be dismissed on summary judgment, Isaacson and Currah[2] are nonetheless entitled to qualified immunity with respect to Plaintiff's search and seizure claim.

"'[T]he importance of resolving immunity questions at the earliest possible stage in litigation" is well-established and, accordingly, courts should aim to "'decide the issue of qualified immunity as a matter of law, preferably on a pretrial motion for summary judgment when possible.'" *Tierny v. Davidson*, 133 F.3d 189, 194-95 (2d Cir. 1998) (quoting *Hunter v. Bryant*,

[2] As stated above, there is no admissible evidence whatsoever that Currah had any involvement in the search of Plaintiff's GCWE or College campus offices.

502 U.S. 224, 227 (1991) and *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990)). Where "no disputed fact is material to the resolution of defendants' qualified immunity" claim, summary judgment should be granted. *Id*. Indeed, qualified immunity "'is an immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity must be granted to a defendant when no clearly established law proscribes their conduct.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right *that was clearly established at the time of the challenged conduct*." *Reichle v. Howard*s, 566 U.S. 658, 664 (2012) (emphasis added). Employees of public universities acting in their official capacities are government officials for purposes of qualified immunity. *Naumovski v. Norris*, 934 F.3d 200, 215 (2d Cir. 2019). A court may grant qualified immunity based on a lack of "clearly established" law without resolving whether a purported right exists at all. *Id.*

In determining whether a right was clearly established at the time a defendant acted, the Supreme Court has noted that "clearly established law [should not be defined] at a high level of generality."[3] "The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in [the] defendant's position should know about the constitutionality of the conduct. . . . [W]e use an objective standard for judging the actions of state and federal officials." *Coollick v. Hughes*, 699 F.3d 211, 220 (2d Cir. 2012) (internal citations and quotation marks omitted). Thus, "[t]o be clearly established, a right must be sufficiently clear 'that every 'reasonable official would [have understood] that what he is doing violates that right." *Reichle*,

[3] *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). *See also Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (cautioning against "framing the constitutional right at too broad a level of generality").

566 U.S. at 664 (quotation and citation omitted). Indeed, "a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff*, 572 U.S. at 778-779 (2014).

Further, even if the Court determines that a clearly established right could have been violated, qualified immunity protects officials who "act in ways they reasonably believe to be lawful." *Anderson,* 483 U.S. at 641(1987); *see also Winfield v. Trottier*, 710 F.3d 49, 57 (2d Cir. 2013) (qualified immunity applies where it was objectively reasonable for an official to believe that he was not violating clearly established law). Finally, even a mistake or oversight in the performance of an official duty does not deprive a public officer of qualified immunity. Indeed, public "'officials will not be liable for mere mistakes in judgment.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 367-68 (2001) (quotation and citation omitted). *See also Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991) (qualified immunity protects "mistaken judgments" and "all but the plainly incompetent or those who knowingly violate the law") (quotation and citation omitted).

In this case, there simply is no basis to conclude that Isaacson's actions in undertaking a search of Plaintiff's GCWE office violated Plaintiff's constitutional rights, much less that she should have understood that to be the case. Indeed, in several instances in which a court has found that a plaintiff may alleged a valid search and seizure claim, the court nonetheless dismissed such a claim on qualified immunity grounds. *See, e.g., Tangredi*, 2012 WL 834580, at *5-6 (on summary judgment, holding that the search of the plaintiff's closed patrol bag, if it occurred, was "unreasonable" under the standard set forth in *O'Connor v. Ortega*, but holding that "[w]hether or not the alleged search violated the Fourth Amendment, at the time of the search it was *not* clearly established that such a search was unlawful" and therefore the individual defendant was "entitled

to qualified immunity") (emphasis in original); *Goydos v. Rutgers*, No. 19-cv-08966 (MAS) (DEA), 2021 WL 5041248, at *7-8 (D.N.J. Oct. 29, 2021) (denying the defendants' 12(b)(6) motion to dismiss on the ground that the plaintiff's Fourth Amendment claim "pleads enough facts to state a claim for relief" but nonetheless dismissed the individual defendant "from this claim under the doctrine of qualified immunity" because the plaintiff "must allege that their constitutional right was clearly established" and they had failed to do so).

Here, where the undisputed facts show that Isaacson acted diligently in proceeding with the search of Plaintiff's GWCE office based on her well-founded suspicions, and doing so only after seeking and obtaining permission from CUNY's General Counsel, it is clear that she "act[ed] in ways [she] reasonably believe[d] to be lawful." *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Therefore, there is no support for Plaintiff's claim that Isaacson [or Currah] violated any clearly established constitutional right. Accordingly, Plaintiff's First Cause of Action against Isaacson and Currah should be dismissed under the doctrine of qualified immunity.

II. WILSON'S DEFAMATION CLAIM AGAINST DEFENDANT CHENG SHOULD BE DISMISSED.

A. Plaintiff's Defamation Claim Against Cheng Should Be Dismissed Because It Is Based on Inadmissible Hearsay and, In Any Event, Cheng Is Entitled to an Absolute Privilege with Respect to Any Alleged Defamatory Statement.

Plaintiff's defamation claim against Terrence Cheng also should be dismissed on summary judgment. Plaintiff's claim rests on alleged statements by Cheng in March 2014 that "Wilson was engaging in criminal activity." *See* FAC ¶¶ 64, 65. Cheng denies ever making any such defamatory statement, either in March 2014 or any other time. 56.1 ¶ 34.

Plaintiff conceded at his deposition that he never personally heard Cheng make any allegedly defamatory statement about him. 56.1 ¶ 34. Plaintiff nonetheless asserts that other people supposedly heard and told him about Cheng's alleged statements. See Wilson Jan. 29 Dep.

(Exh. A to Klein Decl.), at 132:19-134:21. Of course, any such reliance on what other people supposedly told Plaintiff is inadmissible hearsay, and cannot defeat Defendants' motion for summary judgment. *See Greene v. Brentwood Union Free Sch. Dist.,* 966 F. Supp. 2d 131, 139 (E.D.N.Y. 2013) ("the evidence proffered by the party opposing summary judgment must be of a type that would be admissible at trial.") (quoting *Cerqua v. Stryker Corp.,* No. 11-cv-9208 (KBF), 2013 WL 1752284, at *4 (S.D.N.Y. Apr. 23, 2013), *aff'd*, 576 Fed. App'x 39, 41 (2d Cir. 2014) (the testimony of witnesses commenting on a coworker's affidavit reiterating derogatory comments allegedly made by a Board member is inadmissible hearsay)).

Further, according to Plaintiff's Initial Disclosures, one of the people who supposedly told Plaintiff about Cheng's allegedly defamatory statement was Stephen Leberstein, a former College professor, who allegedly "Witnessed defamation." *See* Plaintiff's Initial Disclosures, a copy of which is annexed as Exhibit M to the Klein Decl., at 4. However, when Dr. Leberstein was asked at his deposition in this case whether, "[a]t any meeting [he] had with Mr. Cheng, did Mr. Cheng state that Dr. Wilson had engaged in criminal activity?" Leberstein responded, "I don't recall that he did." 56.1 ¶ 36.

Accordingly, because there is no admissible evidence supporting Plaintiff's defamation claim, his Second Cause of Action against Cheng should be dismissed.

In addition, even assuming that Cheng made any alleged defamatory statement, which Cheng denies, Cheng is entitled to an absolute privilege with respect to any such statement because, as the FAC itself alleges, any such statement was made during the discharge of his administrative duties. *See Houraney v. Burton & Assocs., P.C.*, No. 08-cv-2688 (CBA) (LB), 2010 WL 3926907, at *10 (E.D.N.Y. Sept. 7, 2010), *report and recommendation adopted*, 2011 WL 710269 (E.D.N.Y. Feb. 22, 2011) (To the extent that Town officials made the statements during

the discharge of their "administrative or executive policy-making responsibilities," they are entitled to an absolute or qualified privilege if those statements concerned "matters which come within the ambit of those duties.") (quoting *Bisaccia v. Funicello,* 149 A.D.2d 645, 645 (2d Dep't 1989) (executive officer of local government was entitled to absolute privilege regarding statements made during a closed session concerning plaintiff's involvement in a ticket-fixing scheme)), and citing *Cosme v. Town of Islip*, 63 N.Y.2d 908, 909, (1984) (town supervisor was entitled to absolute privilege for statements made about discharged town youth board director), and *Baumblatt v. Battalia,* 134 A.D.2d 226 (2d Dep't 1987) (town supervisor and members of town board were entitled to absolute privilege for statements made in published report criticizing local police chief).

Here, the FAC itself alleges that Cheng made the alleged defamatory statement during the discharge of his duties. Paragraph 64 of the FAC alleges that, "[o]n March 12, 2014, Associate Provost for Academic Affairs, Terrence Cheng, told BC faculty members and Professor Jocelyn Wills and Plaintiff Wilson [sic] that 'Wilson was engaging in criminal activity.'" And paragraph 65 of the FAC alleges that "Defendant Cheng repeated these defamatory statements to the Labor Arts Society, a 50l(C)(3) organization, later in March 2014, including to Evie Rich and Rachel Burnstein." Cheng is therefore entitled to an absolute privilege with respect any alleged defamatory statement regarding Plaintiff and, accordingly, on this additional ground, Cheng is entitled to summary judgment dismissing Plaintiff's Second Cause of Action against him.

B. Plaintiff's Defamation Claim Also Should Be Dismissed Because, Even Assuming Cheng Made the Alleged Defamatory Statement, Such Statement Is Substantially, If Not Totally, True.

"Under New York law, it is 'fundamental that truth is an absolute, unqualified defense to a civil defamation action.'" *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012) (quoting

Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 301 (2d Cir. 1986), *cert. denied,* 479 U.S. 1091 (1987) (citation omitted)). Indeed, even "[i]f an allegedly defamatory statement is 'substantially true,' a claim of libel is 'legally insufficient and . . . should [be] dismissed.'" *Id*.

In this case, Plaintiff's defamation claim should be dismissed because, based on the undisputed evidence from the Arbitration between CUNY and Plaintiff, including the neutral arbitrator's findings, Plaintiff's conduct violated a provisions of the New York Penal Law, and thus the alleged defamatory statement is true.

As set forth above, by letter dated January 3, 2013, the College served Plaintiff with a Notice of Disciplinary Charges (the "Charges"). 56.1 ¶ 22. The Charges against Plaintiff included that Plaintiff had failed to obtain approval, through the submission of forms pursuant to CUNY's long-standing "Multiple Position Policy," to receive all the payments he received from CUNY and through grant funds while working at CUNY. In particular, CUNY charged that, between 2009 and 2012, Wilson had failed to submit Multiple Position forms, or had submitted *false* Multiple Position forms, to the College's Provost's Office, and that, by deceiving the Provost's Office, Wilson had enriched himself with over $140,000 in College funds. *See* Award (Exh. C to the Declaration of Rachel J. Nash, dated September 12, 2022 ("Nash Decl."), Charges I, II, XII, XIV, at 4-5, 8-9.

Further, although CUNY contended that Wilson's violation of CUNY's policy prohibiting additional compensation without proper authorization was the "crux" of Brooklyn College's misconduct charges against him, and *alone* provided more than sufficient grounds for his termination, CUNY charged that Plaintiff had committed other acts of misconduct, including: (i) Plaintiff had submitted requests and received reimbursements for the same travel expenses from multiple sources; (ii) he had used grant funds to purchase electronic and other personal items for himself and his daughter; and (iii) he had, without authorization, submitted an application to the New York State Department of Higher Education to establish a joint degree program with

Brooklyn Law School. *See* Award (Exh. C to Nash Decl.), Charges IX, V, VI, VII, VIII and XVI, at 5-10.

After the College's issuance of the Charges, the College then conducted a "Step Two" hearing over the course of twelve days between April 2013 and August 2014. Plaintiff was represented by his union counsel, Peter Zwiebach, at each of the Step Two hearings dates. 56.1 ¶ 23. On or about October 23, 2013, the then Vice Chancellor for Labor Relations, Designee for the Chancellor, issued the Decision, finding that the "College's decision to terminate [Plaintiff's] is . . . sustained." 56.1 ¶ 24.

Plaintiff then appealed the Decision sustaining his termination. Pursuant to the CBA, CUNY and Plaintiff then participated in a "Step Three" Hearing, before a neutral arbitrator from the American Arbitration Association, over the course of fourteen days. Plaintiff was again represented by his PSC counsel, Peter Zwiebach, in the Arbitration. 56.1 ¶ 25.

In her Award, the neutral arbitrator denied Plaintiff's appeal of the Vice Chancellor's decision, sustained all but three of CUNY's Charges against him, and determined that the appropriate penalty was "discharge."[4] In particular, the arbitrator concluded, among other things, that, "[a]fter carefully considering the entire record before me, including my assessment of witness credibility, I find that CUNY has proven, *with substantial evidence*, Charges I, II, IV (Specification 1), V, VI, VII, VIII, XII, XIII (with respect to Annie London), XIV, and XVI a, b, and d." 56.1 ¶ 26 (emphasis added). The arbitrator stated that, "given the nature of the charges," she had applied a "clear and convincing" evidence standard in reaching her determination. Award (Exh. C to Nash Decl.), at 35 n.3.

[4] Although Plaintiff could have moved pursuant to Article 75 of the New York Civil Practice Law and Rules to vacate or modify the arbitrator's Award, Plaintiff did not do so. 56.1 ¶ 32.

Charge I stated that Plaintiff "secured for himself upwards of $100,000 over and above his salary as a faculty member from various College, CUNY, Brooklyn College Foundations, and Research Foundation funding sources during the time period Fall 2009 through Fall 2011." Award, at 4. In sustaining Charge I, the arbitrator stated that, "[a]fter careful review, I find the record evidence establishes [Plaintiff's] actions constituted a *willful* violation of the policy prohibiting additional compensation." Award (Exh. C to Nash Decl.), at 42 (emphasis added.)

The arbitrator also addressed the issue of Plaintiff's "intent" with respect to the means by which he received more than $100,000 in "additional compensation" to which he had no right to receive, stating that "there are substantial facts in the record to infer" Plaintiff's intent. In particular, the arbitrator found that the "fact that [Plaintiff] only disclosed" on his Multiple Position forms certain "compensation from tax levy sources," and did not disclose on his Multiple Position forms compensation from other sources, was "troubling." The arbitrator found that the "record evidence establishes" that the compensation for tax-levy sources went "through a more multilayered reviewed [sic] process and, therefore, if they were not disclosed, they would certainly have been caught." The arbitrator also found that "this was not the only non-disclosure," the "most significant being the substantial compensation from GCWE member organization account." As to these funds, the arbitrator concluded that the fact that "these funds could be disbursed without provost approval because they were non-tax levy moneys is further evidence of intent." Award (Exh. C to Nash Decl.), at 42-43. The arbitrator also repeatedly rejected Plaintiff's "explanations" as "not credible." *See, e.g.*, Award (Exh. C to Nash Decl.), at 43.[5]

[5] Other evidence submitted at the Arbitration reflects Plaintiff's "intent." On July 28, 2011, Professor Anderson, referring to Deutsche Bank Funds which comprised part of the funding for the UCT program, advised Plaintiff, "That would leave approx. 50K for you and I [sic] to spread for us (and show Annie [London] some love too.)." Plaintiff replied, "One word: perfect!" 56.1 ¶ 29.

In addition, on April 1, 2011, Anderson told Plaintiff to draw on funds from the RBA (Results Based Analysis) and Children's Services (New York State Office of Family and Children Services) grants, as long as his time sheets did

Further, Charges V, VI, VII and VIII stated that Plaintiff had "submitted false, duplicate, and/or misleading paperwork . . . such that he was unjustly enriched" in connection with a Spring 2010 trip to Egypt and Greece (Charge V), a Spring 2011 trip to Brazil (Charge VI), a Spring 2009 trip to Venezuela (Charge VII), and a Spring 2008 trip to Cuba (Charge VIII). Award (Exh. C to Nash Decl.), at 7-8. Each of these Charges further asserted that Plaintiff had "deliberately sought and accepted payments for expenses he did not actually incur, and/or for expenses that he had already been paid." *Id*.

In addition, Charge XIV charged that Plaintiff had "improperly appropriated funds provided in a grant by the New York State Office of Children and Family Services," by "caus[ing] himself to receive money from grants to which he was not entitled." Award (Exh. C to Nash Decl.), at 9. Finally, Charge XVI charged that, during the period 2009-11, Plaintiff had "submitted multiple receipts for reimbursement for purchases unrelated to his employment and received moneys from various CUNY related funding sources for personal items," as detailed in the Specifications provided. Award (Exh. C to Nash Decl.), at 9-10.

Thus, all of the Charges which the arbitrator determined CUNY had proven by substantial evidence alleged that Plaintiff took moneys to which he was not entitled, and that he did so willfully and with knowledge of the impropriety of his misconduct.

The arbitrator further found:

> Turning to the issue of penalty, I find CUNY has established sufficient cause to discharge Respondent from service. The record evidence establishes Respondent engaged in serious misconduct. He did not merely forget to turn in a form, or receive a few dollars extra on an expense account. Over a period of three years, he received additional compensation of over $100,000 to which he could not claim right to

---

not overlap with his other work hours. 56.1 ¶ 30. Further, on August 23, 2011, Anderson sent an email in response to an inquiry from the Brooklyn College Foundation regarding the funding for the Urban Community Teachers Project program. In reply to Anderson (but not to the Brooklyn College Foundation), Plaintiff wrote, "You roll'in…G-Monie." 56.1 ¶ 31.

> receive. These funds were not his – and therefore, he has destroyed the basic trust necessary to maintain the employment relationship.

Award (Exh. C to Nash Decl.), at 49. The arbitrator concluded: "While Respondent has long service to the University, under these circumstances, I find no mitigating factors to reduce the penalty." *Id*. at 50.

The Second Circuit has held that not only are arbitration decisions, such as the Award at issue here, admissible, but that significant weight should be given to them in subsequent federal lawsuits. In particular, in *Cortes v. MTA N.Y. City Transit*, 802 F.3d 226, 232 (2d Cir. 2015), the Second Circuit expanded on its prior decision in *Collins v. N.Y. City Transit Auth.*, 305 F.3d 113 (2d Cir. 2002), and confirmed that binding arbitration decisions have *preclusive* effect in subsequent discrimination lawsuits brought in federal court. When an arbitration decision "follows an evidentiary hearing and is based on substantial evidence," the plaintiff "must present strong evidence that the decision was wrong as a matter of fact—e.g. new evidence not before the tribunal—or that the impartiality of the proceeding was somehow compromised." *Cortes*, 802 F.3d at 232 (quoting *Collins*, 305 F.3d at 119). *See also Tomasino v. Mount Sinai Med. Ctr. & Hosp.*, 97-cv-5252 (TPG), 2003 WL 1193726, at *11-23 (S.D.N.Y. Mar. 13, 2003) (relying on *Collins* and adopting findings of a neutral arbitrator in summary judgment context).

Here, Plaintiff was represented by counsel throughout the fourteen days of the Arbitration, and he cannot show that the arbitrator was not impartial.[6] Thus, the arbitrator's findings that, among others, Plaintiff's "actions constituted a willful violation of the policy prohibiting additional

[6] The Award itself recites that "[b]oth parties had full and fair opportunity to adduce evidence, examine and cross-examine witness, and to make argument in support of their respective positions." Award (Exh. C to Nash Decl.), at 1. Further, the Award confirms that the "hearings were transcribed and the parties submitted written closing statements," and "neither party has raised any objection to the fairness of" the arbitration. *Id.*

compensation," as well as her findings as to the evidence of Plaintiff's "intent" with respect to those actions, should be given preclusive effect in this action.

Giving preclusive effect to the arbitrator's findings regarding Plaintiff's "serious misconduct" and the "record evidence" from which his intent could be inferred, such evidence demonstrates that Plaintiff violated at least one New York State Criminal Law: New York Penal Law § 175.05 – falsifying business records. That law provides, in relevant part, as follows:

> A person is guilty of falsifying business records in the second degree when, with intent to defraud, he: 1. Makes or causes a false entry in the business records of an enterprise; or 2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or 3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or 4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise. Falsifying business records in the second degree is a class A misdemeanor.

Thus, giving preclusive effect to the arbitrator's findings in the Award, Cheng's statement, even assuming it was made, that Plaintiff "was engaging in criminal activity" is substantially, if not totally, true. For this additional reason, Defendant Cheng is entitled to summary judgment dismissing Plaintiff's Second Cause of Action against him.

III. WILSON'S "CONVERSION OF PERSONAL PROPERTY" CLAIM AGAINST ISAACSON AND CURRAH SHOULD BE DISMISSED BECAUSE THERE IS NO ADMISSIBLE EVIDENCE TO SUPPORT IT.

In his Third Cause of Action, Plaintiff asserts a claim for conversion of personal property. To establish a cause of action to recover damages for conversion, "'the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights.'" *Clark St. Wine & Spirits v. Emporos Sys. Corp.,* 754 F. Supp. 2d 474, 484 (E.D.N.Y. 2010) (citing *Eight In One Pet Products v. Janco Press, Inc.,* 37 A.D.3d 402, 402 (2d Dep't 2007) (citation omitted).

Here, Isaacson and Currah are entitled to summary judgment dismissing Plaintiff's Third Cause of Action, because there is *no* admissible evidence that either Isaacson or Currah converted Plaintiff's personal property. As an initial matter, although Plaintiff characterizes his conversion claim as one against Currah as well as Isaacson, the FAC contains no allegations whatsoever regarding Currah's supposed involvement in the conversion of Plaintiff's property. Moreover, the undisputed, admissible evidence demonstrates that Currah did not "seize" or fail to return any of Plaintiff's personal property. 56.1 ¶ 58.

Further, as Plaintiff admitted at his deposition, the only "evidence" of which he is aware for his assertion that Professor Currah "seized and failed to return" Plaintiff's "professional letters, [his] special books, [his] jazz albums, manuscripts, [his] research, and research notes, and [his] lectures and lecture notes" is that "Professor Currah was on the premises in [Plaintiff's] office over a significant period of time going through my documents, my letters, my books, my research, handled all my things," and that while Professor Currah supposedly "was there" "volumes of material from my office and from the administrative offices were discarded, were trashed." *See* Wilson Jan. 30 Dep. (Exh. B to Klein Decl.), at 325:13-326:7. In addition, the only "evidence" supporting his conversion claim against Isaacson is that she "was in charge of the investigation" and "in control of those premises where all of these things were taken and seized," and therefore she was supposedly "responsible for seizing" Plaintiff's personal property. Wilson Jan. 30 Dep. (Exh. B to Klein Decl.), at 319:5-321:13. Indeed, in response to a series of specific questions regarding what property Isaacson supposedly "seized," Plaintiff testified that he did *not* "know what she seized." *Id.* at 319:5-320:21. This, of course, is no evidence at all, and Plaintiff therefore cannot meet his burden to demonstrate that either Currah or Isaacson "exercised an unauthorized

dominion" over a "*specific identifiable thing*." *Clark Street*, 754 F. Supp. 2d at 484 (emphasis added).

In contrast with this "evidence," Currah and Isaacson deny that they ever "seized" or failed to return any of Plaintiff's personal property. 56.1 ¶ 58.

Moreover, the undisputed evidence demonstrates that it was not Currah and Isaacson who "seized and failed to return" Plaintiff's personal property, but that, at *Plaintiff's* specific instructions, it was Professor Day who discarded his property. In particular, that evidence demonstrates the following:

(i) it was *Plaintiff* who directed that the boxes of his personal property be moved to the offices of the Africana Studies Department (56.1 ¶¶ 48, 50), and

(ii) as Professor Lynda Day, a non-party to this action, who Plaintiff listed on *his* Initial Disclosures,[7] testified at her deposition, in 2016 Plaintiff came to 3109 James Hall "one day" and spent "an hour or two" looking through the boxes he had moved there and, after doing so, Plaintiff took "a few things" and then told Professor Day "you can do what you want with" the rest of the materials (56.1 ¶ 53). Professor Day further testified that, thereafter she went through the boxes "little bit by little bit" and decided what to discard and what to keep. 56.1 ¶ 54. Professor Day also testified that she shelved at least 50 of Plaintiff's books in the Africana Studies Department offices and gave approximately 50 of Plaintiff's books to the Black Latino Male Initiative office. In addition, Professor Day testified that she kept some research files, at least "a couple of" which Plaintiff took back when he and his attorney met with Professor Day a couple of weeks before Professor Day's deposition in March 2019. 56.1 ¶ 55.

Finally, Professor Day testified that, at Plaintiff's request, she sent to Plaintiff a "thank you"

[7] Plaintiff's Initial Disclosures, a copy of which is annexed as Exhibit M to the Klein Decl., at 4.

note for donating his "hundreds of books," which note he could "potentially use for tax purposes." 56.1 ¶ 56.

Professor Day's "thank you" note stated in relevant part:

> I am writing to formally thank you for your donation of several prints and 20 boxes (approximately 2500) books to the Africana Studies Department. Your books covered a wide range of scholarly material including dozens of Political Science and Sociology textbooks, numerous bound journals and conference proceedings, rare classic monographs, as well as new and cutting edge scholarly studies. We were able to support a prison college preparatory program with some of the books as well as replenish the Department's Africana Studies Institute holdings. I am sure, given the rarity of some of the volumes, that the total would be valued at several thousand dollars.

56.1 ¶ 57.

Of course, Professor Day's deposition testimony wholly contradicts Plaintiff's contention that anybody, much less Currah or Isaacson, seized and failed to return his personal property, including his claimed thousands of valuable books, prints and research materials. In addition, Professor Day's deposition testimony also demonstrates that, as a direct result of *Plaintiff's* instructions to Professor Day, the integrity of the evidence with respect to what personal property was contained in the boxes of materials *before* Plaintiff took "a few things" and then told Professor Day "you can do what you want with" the rest of the materials has been wholly destroyed.

For all these reasons, Currah and Isaacson are entitled to summary judgment dismissing Plaintiff's Third Cause of Action.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court grant their motion for summary judgment dismissing plaintiff's Fourth Amended Complaint against all Defendants and in all respects.

Dated: New York, New York
September 12, 2022

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants

By: /s/ *Mark E. Klein*
Mark E. Klein
Assistant Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8663