UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DR. JOSEPH WILSON, Ph.D.,

Plaintiff,

-against-

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

Defendants

15-cv-23 (CBA)(MMH)

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff Joseph Wilson, Ph.D. ("Plaintiff" or "Professor Wilson"), by and through his undersigned attorneys, respectfully submits this memorandum of law in opposition to the motion (the "Motion") of Defendants Terrence Cheng ("Defendant Cheng), Paisley Currah ("Defendant Currah") and Marcia Isaacson ("Defendant Currah") (collectively "Defendants"), pursuant to Fed. R. Civ. P. 56, and the accompanying Memorandum of Law ("Def. Mem."), for summary judgment dismissing Plaintiff's Fourth Amended Complaint (the "Complaint," ECF No. 129).

INTRODUCTION

This is a civil action brought by Plaintiff against three (3) individual defendants who are members of the academic staff or the administrative staff at City University of New York ("CUNY") and/or Brooklyn College ("BC"). Plaintiff asserts three (3) causes of action: (i) unlawful search and seizure, in violation of the Fourth Amendment of the United States Constitution pursuant to 42 U.S.C. § 1983 against defendants Currah and Isaacson; (ii) conversion of property under New York state law against defendants Currah and Isaacson; and (iii) defamation under New York state law against defendant Cheng.

Professor Wilson is an African American male who was a tenured full professor at the City University of New York ("CUNY") and Brooklyn College ("BC"), where he taught since 1986. Beginning in the mid-1990s he also served as the Associate Director and later the Director of CUNY's Graduate Center for Worker Education ("GCWE"). As Director, he administered the Political Science Department's Urban Policy degree and was also responsible for coordinating BC's academic programs with a host of other departments, for finding outside contract courses to help fund the GCWE, and for moving GCWE from its offices on 99 Hudson Street to new offices at 25 Broadway in Manhattan. Professor Wilson's life-long work was to promote diversity at Brooklyn college, including through his assistance with programs such as the BC Black Male Initiative ("BMI," also known as "ERIS") (*see* Defendant's 56.1 Statement, at ¶8), first as a

volunteer and later as the Principal Investigator of a grant for the program. Professor Wilson essentially served as the program's Director, and he took on other programs as well, including the grant-funded Urban Community Teachers ("UCT") program (*see* Defendant's 56.1 Statement, at ¶8). Professor Wilson was a Brooklyn College employee from 1986 until his termination.

Professor Wilson's termination was the result of political infighting between Professor Wilson and a group of five (5) other professors in the Political Science Department of CUNY's Brooklyn College (the "Gang of Five"), comprised of Defendant Currah and Professors Corey Robin, Jeanne Theoharis, Mark Ungar, and Gaston Alonso. From 2005 onward, Defendant Currah and the other Gang of Five professors made false accusations against Professor Wilson, including that he was: (i) a thief; (ii) stealing tuition money; (iii) entering into secret leases at the GCWE; (iv) changing students' grades; and (v) other false statements. Defendant Cheng is accused of spreading the false and defamatory accusations initiated by the Gang of Five among the remaining faculty, including its members, to the effect that Professor Wilson was a thief and a criminal.

Defendant Currah, on behalf of the Gang of Five, prompted Frederick P. Shaffer, Esq ("Shaffer"), CUNY's General Counsel and Senior Vice-Chancellor for Legal Affairs, to initiate an investigation of Professor Wilson and his activities at CUNY and BC. To further Shaffer's investigation, Defendant Isaacson was charged with executing two warrantless searches of Professor Wilson's offices at both CUNY and BC. Defendant Isaacson brought one of CUNY's Information Technology employees along to effectuate searches of Professor Wilson's computers and electronic devices. Defendant Currah accompanied Isaacson and participated in the searches, including by going through Professor Wilson's desk drawers and file cabinets and packing up the contents for later review by Defendant Isaacson and Shaffer. During the course of the searches, Defendant Isaacson and Defendant Currah confiscated not just the electronic and paper files

bearing on Professor Wilson's financial dealings with CUNY, BC, and their respective grants and other programs, but also seized a trove of other materials that constituted Professor Wilson's personal property. That property included Professor Wilson's independent research works, student papers, Professor Wilson's collection of historical and cultural items, such as memorabilia and artifacts relating to the participation of African Americans in the United States' historical labor movement, and correspondence between Wilson and prominent members of the civil rights movement. Professor Wilson's priceless personal property was, in large part, never returned to him.

As a result of the foregoing facts, Professor Wilson is seeking redress against Defendant Currah and Defendant Isaacson for the warrantless search of his two (2) offices, and the seizure and conversion of his personal property; Professor Wilson also seeks redress against Defendant Cheng for making false and defamatory statements about Professor Wilson's purported criminal activity.

STATEMENT OF FACTS

The Court is respectfully referred to Defendants' Rule 56.1 Statement of Facts and to Plaintiff's Rule 56.1 Counterstatement of Facts for the salient facts with respect to the instant Motion.

STANDARD OF REVIEW

"A court will not grant a motion for summary judgment unless it determines that there is no genuine issue of material fact and the undisputed facts are sufficient to warrant judgment as a matter of law. *Weinstein v. Cadman Towers, Inc.*, 2007 WL 9752928, *2 (E.D.N.Y. Aug. 9, 2007) (citing Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 250 (1986). "In passing upon a Rule 56 motion the district court must determine whether there are issue of fact to be tried." *Desrameaux v. Delta Air Lines Inc.,*

2018 WL 1224100, *5 (E.D.N.Y. Mar. 8, 2018). "A 'material' fact is one capable of influencing the case's outcome under governing substantive law, and a 'genuine' dispute is one as to which the evidence would permit a reasonable juror to find for the party opposing the motion." *Id*. (internal citations/quotations omitted).

The movant bears the burden on demonstrating the absence of a question of material fact and even when a motion for summary judgment is unopposed, the district court is not relieved of its duty to decide whether the movant is entitled to judgment as a matter of law. *Odyssey Marine Exploration, Inc. v. Shipwrecked and Abandonned SS Mantola*, 425 F. Supp.3d 287, 292 (S.D.N.Y. 2019). As a result, the court may deny even an unopposed motion if the movant fails to meet its burden of demonstrating that no genuine issues of material fact exist, *even if no opposing evidentiary matter is presented. Id*. at 292 (quoting *Vt. Teddy Bear Co. v. 1-800-Beargram Co.,* 373 F.3d 241, 242 (2d Cir. 2004)) (emphasis in original). In making its determination, the Court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 statement, but must be satisfied that the citation to evidence in the record supports the assertion, and will deny the motion if the undisputed facts fail to show the moving party is entitled to judgment as a matter of law. *Id*. In determining whether there are genuine issues of material fact, the Court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought. *Id*. (internal quotation omitted). "In the end, to award summary judgment, the Court must be convinced that 'there can be but one reasonable conclusion as to the verdict, i.e., it is clear what the truth is.'" *Gordon v. Emmanuel,* 2018 WL 4688935, * 4 (E.D.N.Y. Sept. 28, 2018) (quoting *Rogoz v. City of Hartford*, 796 F.3d 236, 246 (2d Cir. 2015)).

ARGUMENT

I. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIRST AND THIRD CAUSES OF ACTION (FOR UNLAWFUL SEARCH AND SEIZURE, AND CONVERSION)

Defendants contend that they are entitled to summary judgment on Plaintiff's First Cause of Action (for unlawful search and seizure in violation of the Fourth Amendment) against Defendant Currah because, they claim: (i) the FAC[1] contains no allegations regarding Currah's involvement in any "search and seizure"; and (ii) Currah had no involvement in CUNY's search of Plaintiff's GCWE office and did not "seize" anything from either Plaintiff's GCWE or College campus offices. *See* Defendant's Memorandum of Law in support of their motion for summary judgment (the "Def. Mem.," at 14-15). Likewise, they claim entitlement to summary judgment on Plaintiff's Third Cause of Action for Conversion of the Personal Property Defendants confiscated during their unlawful search and seizures because, they contend, there is no admissible evidence that either Defendant Isaacson or Defendant Currah took or failed to return any of Professor Wilson's personal property. *See* Def. Mem., at 30-31. These arguments should be rejected.

A Plaintiff's Fourth Amendment and Conversion Claims Against Defendant Currah Should Move Forward To Trial Because There Is Ample Testimony of His Participation In The Searches and Seizures of Plaintiff's Offices

First, the Complaint alleges that Defendant Currah: (i) was a member of the "Gang of Five"; (ii) made, along with the Gang of Five, multiple false statements alleging criminal conduct by Professor Wilson; (iii) wanted to eliminate the Urban Policy Program and the Graduate Center

[1] It's actually unclear what Defendants are arguing here. They include a sentence citing to the "TAC," which we understand to refer to Plaintiff's (now superseded) Third Amended complaint, and then include a citation clause citing to FAC ¶70, which we understand to be paragraph 70 of Plaintiff's Fourth Amended Complaint, based on the definition of the term "FAC" contained within the opening paragraph of their Rule 56.1 Statement. However, paragraph 70 of the Fourth Amended Complaint states, in its entirety, "Conversion is a civil action that applies when there is the unlawful taking or use of someone's property." Accordingly, it's unclear to us what Defendants are citing and why, if at all, they are citing FAC ¶70, which relates to Plaintiff's Third Cause of Action for Conversion rather than the instant First Cause of Action for a breach of Plaintiff's Fourth Amendment rights, which protect him from unlawful governmental search and seizures. To the extent, if at all, Defendants' clarify this point in a Reply, we respectfully request permission to file a Sur-Reply limited to any points clarified in any such Reply.

for Worker Education; (iv) engaged in harassing conduct against Professor Wilson; (v) asserted false plagiarism charges against Professor Wilson's graduate students and against Professor Wilson for permitting and encouraging plagiarism; (vi) accused Professor Wilson of felonious conduct (changing grades); and (vii) was the Chairperson of the Political Science Department at the time that he and the Gang of Five made these accusations against Professor Wilson. *See* Complaint at ¶¶ 4, 26, 29, 33, 37, 39, 41, 42. The Complaint also alleges that Professor Robin, instigated the investigation into Professor Wilson which resulted in his termination. *Id*. at ¶¶ 44 – 46.

Second, the admissible evidence results in a dispute of material fact over Defendants' contention that Defendant Currah had no involvement in the search of the contents of Plaintiff's computer or his GCWE office in January and February 2012. *See* Def's 56.1 Statement at ¶ 21; *See* Plaintiff's 56.1 Counterstatement, at ¶21.

Among other admissible evidence, Currah admitted that he knew CUNY was investigating Professor Wilson, that Defendant Isaacson was the "head person" in charge of the investigation, that he knew there was an investigator associated with the Attorney General's office participating named Simon Brandler, that he knew CUNY arranged to have people move the boxes, that he personally packed up Professor Wilson's books, papers, research notes, teaching notes, lecture notes, and personal items during the March 23, 2012 search of Professor Wilson's office at 25 Broadway (in the presence of Defendant Isaacson and other CUNY personnel), that he had meetings with Assistant Attorney General Brandler, in 2011 or 2012, or in the summer of 2013, that he knew of two other investigators, that he gave Marcia Isaacson information and documentation which he understood Isaacson was providing to the investigators, that his own supervisor, William Barry, was also involved in the investigation of Professor Wilson's office, and

that he paid *with his own money* for the Home Depot boxes used to pack up the property collected from Professor Wilson's office. *Id*.

Additionally, Currah admitted that he knew Professor Wilson's office was secured, and that only Professor Wilson and Barbara Haugstatter (in the Security Department) had the key to Professor Wilson's BC Office. *Id*. at ¶¶ 58 (citing Currah Tr. at pp. 125, 204). He admitted that he had access to Professor Wilson's office at 25 Broadway, and that he was also in Professor Wilson's office at the GCWE on or about March 16, and "moved some files" that he was responsible for securing for "reasons of the Federal Education Right to Privacy Act," but that he never made any record of what was in Professor Wilson's offices, how many boxes of material were moved, or what was in the boxes, which were moved by CUNY employee Jeremy Stybel. *Id*. at ¶¶ 58 (citing Currah Tr. at pp. 12, 159-161). He also admits that he took material from Professor Wilson's office at 25 Broadway on March 23, 2012, from his bookshelves, file cabinets, desk area, and "from all parts of the office." *Id*. at ¶¶ 58 (citing Currah Tr. at pp. 175). He admits that he was in Mr. Wilson's 25 Broadway up to (but not including) 12 times between 2012 and the date of his deposition. *Id*. at ¶¶ 58 (citing Currah Tr. at pp. 129-32). Further, he admits he was in Professor Wilson's office "packing the stuff to be moved that belonged to Joe Wilson." *Id*. at ¶¶ 58 (citing Currah Tr. at pp.178); he denies only that he was present at "the initial time that people from CUNY came in and took over Professor Wilson's office," *id*. at ¶¶ 58 (citing Currah Tr. at pp. 11-12); admits that he packed up all his books and files that weren't related to the workings of the GCWE or student records and sorted them. *Id*. at ¶¶ 58 (citing Currah Tr. at pp. 35); and that he personally made copies Professor Wilson's property, including printed brochures, published articles that were photocopied for student course packs, and other printed materials and that he made sure CUNY kept at least one copy of everything. *Id*. at ¶¶ 58 (citing Currah Tr. at pp. 39-

40). He also admits that he saw material that looked like Professor Wilson's teaching or research material and that he was involved in packing it up and moving it to his office at BC, after which they were removed to a storage closet. *Id*. at ¶¶ 58 (citing Currah Tr. at pp. 82-83, 108). Mr. Stybel testified that it was either Defendant Currah or Ms. Haugstatter that assigned him the task of packing up Professor Wilson's office on the third floor of James Hall and specifically instructed him to put Professor Wilson's property in the "copy room." *Id*. at ¶¶ 58 (citing Stybel Tr. at pp.21-22; 43). In the wake of the searches, when Professor Wilson called Ms. Haugstatter about retrieving his property, she told him "I am sorry Joe. I'll speak with Paisley [Currah]." *Id*. at ¶¶ 58 (citing Wilson Tr. at pp. 49-50). Professor Wilson also testified that he saw his property stashed inside of Defendant Currah's storage closet. *Id*. at ¶¶ 58 (citing Wilson Tr. at pp. 109-110).

Accordingly, a reasonable jury could certainly conclude that Defendant Currah is culpable for the search of Professor Wilson's offices, the seizure of his personal property, and the conversion of Professor Wilson's property due to failure to ensure the preservation and return to him of those materials.[2]

B Plaintiff's Fourth Amendment and Conversion Claims Against Defendant Isaacson Should Move Forward To Trial Because Defendant Isaacson Conducted An Unlawful Warrantless Search and Seizure of Plaintiff's Offices

The Fourth Amendment protects against unreasonable searches and seizures, and provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[2] Notably, even when a criminal suspect is searched incident to arrest, their possessions are inventories to ensure their possessions are secured and ultimately returned to them, and Professor Wilson was not afforded this right. *See generally* NEW YORK SEARCH & SEIZURE (2022 Edition), Barry Kamins, §4.03 [11] Inventory Searches, pp. 872-875.

U.S. Const. Amend IV.[3]

Whenever it is determined that an area is one in which an individual has a reasonable expectation of privacy, the invasion of that privacy constitutes a *search* within the meaning of the Fourth Amendment. *Arizona v. Hicks*, 480 U.S. 321 (1987) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). Yet the Fourth Amendment protects people, not places. *See Katz v. U.S.,* 389 U.S. 347, 351 (1967).[4] *Katz* expanded the pre-existing concept of a *search* beyond a physical intrusion into a private space, and redefined the scope of the Fourth Amendment in holding that people are protected when they: (1) have an actual (subjective) expectation of privacy; and (2) where that expectation is one that society is prepared to recognize as reasonable. *Id*. at 351 ("What [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

"While a search deals with an invasion into privacy rights, a *seizure* deals with an interference of an individual's *possessory* rights." NEW YORK SEARCH AND SEIZURE (2022 Edition), Barry Kamins, Chapter 4 (Searches and Search Warrants), §4.01, at pp. 600-601. "Once it is determined that a search has been conducted, it must then be ascertained whether the search was *reasonable* . . . . the Fourth Amendment does not bar all searches, only *unreasonable* ones." *Id*. at 600.

"A warrantless search of an individual's personal effects is per se unreasonable, and therefore, there is a presumption that such searches are unconstitutional." *Id*., at §4.03, at p. 786 (Exceptions to Search Warrant Requirement) (citing cases in fn 1). This presumption is rebutted

[3] Protection against unreasonable searches and seizures can be found in both the United States Constitution (Fourth Amendment) and in the New York State Constitution (Article I, Section 12), and the language in both sections is identical. In many instances, the New York State Constitution has been interpreted to offer a higher degree of protection than the Federal Constitution with respect to search and seizure. *See generally*, NEW YORK SEARCH AND SEIZURE (2022 Edition), Barry Kamins, Chapter 1, §101 [4], at pp. 45-56 (Federal Protection Versus State Protection).
[4] Indeed, all persons enjoy the protections of the Fourth Amendment while they are located within the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 249 (1990).

only when facts establish an applicable exception. *Id.* at 786-87 ("A search is good or bad when it starts and does not change character from its success. The results of an illegal search cannot justify the search.") (internal quote omitted).

Defendant Currah testified that it was Defendant Isaacson who was in charge of the investigation, and that he acted in association with Simon Brandler, an investigating attorney associated with the Attorney General's office. *Id*. at 21 (citing Currah Tr. at pp. 23-24). Currah testified that Defendant Isaacson was present along with Dean Phillips and Albert Gilbert on March 23, 2012, when Professor Wilson's office at 25 Broadway was searched. *Id*. at 21 (citing Currah Tr. at 122-23, 164). Defendant Currah testified that he gave Defendant Isaacson documents or emails, indirectly, by providing them to Defendant Isaacson who acted as the "point person" for providing information to the Attorney General's office. *Id*. at 21 (citing Currah Tr., at 195).

Professor Wilson also testified to Defendant Isaacson's involvement in the search and seizures of his office that took place in late January 2012. *Id*. at 59 (citing Wilson Tr. at 22). He testified that he emailed Pam Pollack and called Barbara Haugstatter, the security officer, in the weeks following the search and seizure, and was unable to obtain satisfaction in recovering his property. *Id*. at 60 (citing Wilson Tr. at 9-50; 121). He testified that his research, files, documents, and hundreds of books were taken. *Id*. at 62 (citing Wilson Tr. at 51-52). Professor Lynda Day testified that boxed of Professor Wilson's property was moved from his office to the Africana Studies department, and that she gave away and threw away the materials from the boxes without ever inventorying them or contacting Professor Wilson. *Id*. at 62 (citing Day Tr. at 30-36, 79-80, 87-101). Professor Robin Kelley testified that Professor Wilson's office had contained audiotapes concerning a historical documentary of the Brotherhood of Sleeping Car Porters, and that she had

a list of 52 pages of detailed notes of very specific materials that she knew existed in Professor Wilson's office and that were seized. *Id*. at 63 (citing Kelly Tr. at pp. 20-21, and Kelley Exh. 1).

Accordingly, a reasonable jury could certainly conclude that Defendant Isaacson is culpable for the search of Professor Wilson's offices, the seizure of his personal property, and the conversion of Professor Wilson's property due to failure to ensure the preservation and return to him of those materials.

C The *O'Connor* Exceptions To The Requirement For A Search Warrant Do Not Apply

Here, Defendants can identify no applicable exception to the requirement for a search warrant prior to searching Professor Wilson's offices and seizing his property. Defendants contend that their search of Professor Wilson's GCWE office was permissible under the U.S. Supreme Court decision in *O'Connor v. Ortega,* 480 U.S. 709, 721 (1987) because, they claim, the search was undertaken by a governmental employer as part of an investigation into Plaintiff's "work-related misconduct" and was reasonable at its inception and in its scope.[5] *See generally*, Defendants' Memorandum of Law, at 15-19. This is a complete perversion of what *O'Connor* teaches and flies in the face of well-established Fourth Amendment law, both before and since the publication of O'Connor. Instead, as set forth below, *O'Connor* teaches that there is a critical distinction between searches in which a public employer is acting in the capacity of an employer alone (i.e., in the same way that a private sector employer would act), as opposed to when it is acting in the capacity of exercising its powers of *law enforcement*.

[5] Importantly, Defendants do not contend that they are entitled to any exception from the Fourth Amendment's requirement for a search warrant based upon either "probable cause" or "exigent circumstances." Nor do they assert any exemption under the "special needs" exception to the requirement of a search warrant. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987). Nor do they contend that this was an "administrative search" of a closely regulated enterprise pursuant to a regulatory scheme such that a warrantless search was nevertheless constitutional. *See, e.g.*, *Anobile v. Pelligrino*, 303 F.3d 107 (2002). Defendants simply contend that their search satisfies O'Connor's test for reasonableness. *See generally*, Def. Mem. at 15-19.

The *O'Connor* decision began by noting that "There is surprisingly little case law on the appropriate Fourth Amendment standard of reasonableness for a public employer's work-related search of its employee's offices, desks, or file cabinets." *O'Connor, supra,* at *720. However, the Court then explained that it had recognized that the "legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial" and that these interests must be balanced against the "realities of the workplace." *Id*. at 721. As a result, *O'Connor* carved out two (and only two) exceptions to the requirement for a search warrant in the case of public employers' intrusions into the privacy of their employees: (i) a *non-investigatory* work-related intrusion, and (ii) an investigatory search for evidence of suspected "work-related employee misfeasance." *Id*. at 723-724.

The first of the two *O'Connor* exceptions to the requirement for a search warrant was justified based upon the governmental employer's interest *in its capacity as an employer* in providing services to the public, and because the work of government agencies would suffer if these employers were required to have probable cause before they entered an employee's desk for the purpose of finding "a file or piece of office correspondence." *Id*. at 723. The Court expressly differentiated this from the "criminal investigatory context" in which the standard of probable cause is rooted ("To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, *noninvestigatory* reasons."). *Id*. (emphasis added).

Likewise, the second *O'Connor* carve-out was justified on the basis that even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." *Id*. at 724. *O'Connor* specifically remarked that "The only cases [involving a public employer's work-related search of its employee's offices, desks or file

cabinets] to imply that a warrant should be required involve searches that are not work related, *or searches for evidence of criminal misconduct*." *Id*. at 721 (emphasis added) (citing *Gillard v. Schmidt,* 579 F.2d 825, 829 (3d Cir. 1978) ("The cases indicate that [a public] employer may conduct a search in accordance with a regulation or practice that would dispel in advance any expectations of privacy") and *United States v. Kahan*, 350 F. Supp. 784, 791-92 (S.D.N.Y. 1972) (Where government supervisor begins an investigation of suspected criminal activities by an employee in the course of his work, the supervisor's role is no longer that of a manager of an office, but that of a criminal investigator for the government, and the purpose of surveillance is no longer simply to preserve efficiency in the office, but is specifically designed to prepare a criminal prosecution of the employee, such that searches and seizures by supervisors are government by the Fourth Amendment's admonition that a warrant be obtained in the absence of exigent circumstances.) (reversed on other grounds by *U.S. v. Kahan*, 479 F.2d 290 (2d Cir. 1973)).

> Although the ultimate measure of the constitutionality of a governmental search is reasonableness, our cases establish that warrantless searches are typically unreasonable where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing. The, in the absence of a warrant, search is reasonable only if it falls within a specific exception to the warrant requirement.

Carpenter v. U.S., 138 S.Ct. 2206, *2221 (2018).

Here, the first *O'Connor* exception to the requirement for a search warrant is inapplicable because Defendants admit that their search was *investigatory*. *See* Defendant's 56.1 Statement, ¶¶ 5-21. Likewise, the second *O'Connor* exception to the requirement for a search warrant is inapplicable because, unlike a private sector employer investigating an employee's non-criminal work-related "misconduct," Defendants here admit that they were investigating Professor Wilson for criminal activity including theft and embezzlement. *See* Defendant's 56.1 Statement, at ¶5. This puts them squarely in the ambit of *Kahan*, 350 F. Supp. 784 (holding as unlawful warrantless search by government employer's supervisor of their employee's office devoted to his exclusive

use) and *Gillard* (holding as unlawful warrantless search by government school board member of school guidance counselor's desk in locked counselor's suite), *supra*.

D Even if *O'Connor's* "Workplace Misconduct Investigation" Exception To The Requirement For A Search Warrant Applied, Plaintiff's Search and Seizure Claim Should Still Proceed to Trial.

Even assuming, *arguendo*, that Defendants' searches and seizures fell within *O'Connor's* "Workplace Misconduct Investigation" exception to the Fourth Amendment's requirement that the government obtain a search warrant prior to conducting a search and seizure, Defendants' searches and seizures were still unconstitutional because they were unreasonable both at "inception" and in "scope." *O'Connor, supra*, at 725-26 ("We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.") (citing *Terry v. Ohio*, 392 US 1, at 20 (1968) and *New Jersey v. T.L.O.,* 469 U.S. 325*,* at 341 (1985)).

Defendants' search was neither reasonable at its inception or with respect to its scope. Defendants' search could not possibly be objectively reasonable at its inception in light of New York's Executive Law §§ 53(1) and 55(1), which, read conjunctively, establish that the function and responsibility of the New York State Office of the Inspector General is to receive and investigate allegations concerning the "Covered Conduct" (including "allegations of corruption, fraud, criminal activity, conflicts of interest or abuse") in any agency within its jurisdiction (including CUNY), and imposing upon CUNY an affirmative obligation to promptly report to the Inspector General any information concerning the Covered Conduct by "another . . . employee relating to his or her office or employment, or by a person having business dealings with [CUNY] relating to those dealings.

Nor could Defendants' search be reasonable at its inception because Defendants' search violated its own Computer Use Policy (*see* Plaintiff's 56.1 Statement, at ¶ 13) which provided that Faculty members had the right to be present for any search and that such a search was subject to other safeguards, including that it could only be conducted after a consultation with the President and with the head of the Faculty Senate. *See* Declaration of Sandi Cooper. Because Defendants' search violated their own policy, it could not possibly have been reasonable upon its inception.

Additionally, the scope of Defendants' search and seizure went far beyond the computer files and transactional documents pertaining to the subject of their investigation and, instead, Defendants turned over Professor Wilson's entire office and seized all of his personal property and effects, including materials that were clearly irrelevant to the subject matter of their investigation, such as his independent research, student papers, and correspondence. *See* Plaintiff's 56.1 Statement ¶ 14.

Accordingly, Defendants have not satisfied *O'Connor's* rule of reasonableness even were it to be applied here (and for the reasons set forth above, it should not be). Accordingly, the "reasonableness" of Defendants actions cannot be determined on a motion for Summary Judgment, and that is a question for the jury at trial. *See, e.g., Stack v. Perez,* 248 F. Supp.2d. 106, 110 (D. Conn. 2003) ("'reasonableness' is a question for the jury"). Defendants' request for summary judgment with respect to Plaintiff's Fourth Amendment claim should thus be denied.

E Defendants Isaacson and Currah Are Not Entitled to Qualified Immunity For Their Unlawful Warrantless Searches and Seizures of Plaintiff's Offices And Personal Property

Defendants argue that Isaacson and Currah are entitled to Qualified Immunity with respect to Professor Wilson's search and seizure claim. *See* Def. Mem. at 19-22. This assertion must be rejected because, as Defendants themselves acknowledge, qualified immunity only shields government officials from liability where they did not violate a statutory or constitutional right

that was clearly established at the time of the challenged conduct. *See* Def. Mem. at 20 (citing *Reichle v. Howards,* 566 U.S. 658, 664 (2012)).

Here, it was already clearly established that government officials violate the Fourth Amendment when they conduct warrantless searches. *See O'Connor, supra*; *see also Kentucky v. King*, 563 U.S. 452, 459 (2011) ("a warrant must generally be secured."); *Veronia School District. 47J v. Acton,* 515 U.S. 646, 652-53 (1995) ("We have held that the Fourteenth Amendment extends this constitutional guarantee to searches by state officers, including public school officials") (citing *Elkins v. United States,* 364 U.S. 206, 213 (1960) and *New Jersey T.L.O.,* 469 U.S. 325, 336-37 (1985). It was also clearly established that a governmental supervisor conducting an investigation of suspected criminal activities by an employee in the course of his work was unlawful absent a warrant. *United States v. Kahan*, 350 F. Supp. 784, 791-92 (S.D.N.Y. 1972). Further, it was clearly established that to conduct such a warrantless search, they would have had to have put Professor Wilson on advance notice that he should not have any expectations of privacy instead of promulgating their Computer Use Policy, which represented to employees that they would not be subjected to searches conducted without notice outside of their presence. *See* Plaintiff's 56.1 Statement ¶ 13 (re Computer Use Policy). *Gillard v. Schmidt,* 579 F.2d 825, 829 (3d Cir. 1978) ("The cases indicate that [a public] employer may conduct a search in accordance with a regulation or practice that would dispel in advance any expectations of privacy"). Here, Wilson had dominion, control, and an ability to exclude others from his offices (*see* Plaintiff's 56.1 statement at ¶ 19), contributing to the expectation of a high level of privacy. *See Rawlings v. Kentucky,* 448 U.S. 98, 105 (1980).

Additionally, at the time of the search and seizure of Professor Wilson's property, it was already clearly established that warrantless searches of government employee's offices and

personal effects were unconstitutional. *See, e.g.*, *United States v. Nasser,* 476 F.2d 111, 1123 (7th Cir. 1973) (office search); *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965) (work area search); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975) (locker search); and *United States v. Block*, 188 F.2d 1019, 1021 (D.C. Cir. 1951) (desk search); *see also In re Asia Glob. Crossing Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (establishing four part test for measuring an employee's expectation of privacy in his computer files and email).

Further, it was established at the time of Defendants' searches and seizures that under New York Executive Law §55(1) (which was unchanged from 2006 through at least 2019) Defendants had an affirmative duty to report promptly to the state inspector general, *inter alia*, any information concerning "corruption, fraud, criminal activity, conflicts of interest or abuse by another state officer or employee relating to his or her office or employment" rather than investigating such matters themselves. Accordingly, it was clearly established at the time that Defendants' searches and seizures of Professor Wilson's offices was objectively unreasonable.[6]

Defendants assert that Isaacson "acted diligently" only after "seeking and obtaining permission from CUNY's General Counsel," and that she thus "act[ed] in ways [she] reasonably believe[d] to be lawful." *See* Def. Mem. at 22. This assertion is unavailing, because, as Defendants themselves acknowledge, the applicable standard is one of *objective* reasonableness (as opposed to subjective reasonableness). *See* Def. Mem. at 20 (quoting *Coolick v. Hughes*, 699 F.3d 211, 220 (2d Cir. 2012) ("[W]e use an objective standard for judging the actions of state and federal officials." *See also Anobile, supra,* 66 F. Supp.2d at 486 (the subjective motives of an

[6] The Court can take judicial notice of New York's Executive law pursuant to Fed. R. Evid. 201 and of the 2016 OIG Interim Report demonstrating that CUNY, through Mr. Schaffer and Ms. Isaacson, failed to follow NY Executive Law §55.

inspector are irrelevant; instead, the lawfulness of the search is based on the objective circumstances surrounding it)(internal citation omitted).

Where, as here, the right of governmental employees to be free from warrantless investigative searches was already clearly established, qualified immunity will not shield Defendants' conduct even if it was subjectively reasonable (and it was not). *See Cerrone v. Brown,* 246 F.3d 194, 202 (2001) ("A court must evaluate the objective reasonableness of [defendant's] conduct in light of the clearly established law and the information the … officers possessed. Because the test is an objective one, the officer's subjective beliefs about the [seizure] are irrelevant.") (internal quote omitted). Accordingly, Defendants' claims to qualified immunity must be rejected and sent to a jury at trial. *See Green v. City of New York*, 465 F.3d 65, 83 (2d Cir. 2006) ("If there is a material question of fact as to the relevant surrounding circumstances, the question of objective reasonableness is for the jury. (citing *Kerman v. City of New York,* 374 F.3d 93, 102 (2d Cir. 2004)).

II. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN FOR SUMMARY JUDGMENT ON PLAINTIFF'S DEFAMATION CLAIM AGAINST CHENG

To survive summary judgment on a defamation claim, a plaintiff must allege: (1) an oral defamatory statement of fact; (2) regarding the plaintiff; (3) published to a third party by the defendant; and (4) injury to the plaintiff. *Weldy v. Piedmont Airlines*, 985 F.2d 57, 61 (2d Cir. 1993). For a defamatory statement to be actionable under New York law, "it must either cause special harm or constitute defamation per se." *Peters v. Baldwin Union Free Sch. Dist*., 320 F.3d 164, 169 (2d Cir. 2003). A statement is defamatory per se if it asserts that the plaintiff committed a serious crime or tends to injure the plaintiff in his trade, business or profession. *Id*.

Defendant Cheng ("Defendant Cheng" or "Cheng") contends that he is entitled to summary judgment dismissing Plaintiff's defamation claim because: Cheng denies making any defamatory

statement at any time (Def. Mem. at 22); Plaintiff's purported reliance on statements from witnesses who related Cheng's defamatory statements to Plaintiff are inadmissible hearsay (*id*. at 22-23); any statements made by Cheng were absolutely privileged (*id*. at 22-24); and, in any event, any such statements were substantially true (*id*. at 24-30). Defendant Cheng is not entitled to summary judgment on any of these grounds.

A Plaintiff's Defamation Claim Is Supported By Testimony That Can Be Presented in Admissible Form at Trial

Plaintiff's Second Cause of Action asserts a defamation claim against Defendant Cheng based on allegations that on March 12, 2014, Cheng told Brooklyn College faculty members and Professor Jocelyn Wills that "Wilson was engaging in criminal activity" and that Cheng repeated these defamatory allegations to the Labor Arts Society later in March 2014, including to Evie Rich and Rachel Burnstein. Complaint ¶¶ 63-68. Despite Defendant Cheng's denials, there are numerous witnesses who testified that they were aware of Cheng's defamatory statements to the effect that Professor Wilson was a criminal and a thief, as set forth in the section below.

1 Plaintiff's Defamation Claim Is Supported By Deposition Testimony

Plaintiff testified during his deposition established a foundation for his defamation claim against Cheng, including the following testimony:

- "Q. What defamation is referred to there? A. So Gould and her staff including Cheng went around telling people I was a thief. Q. Are you aware of any defamatory statement made by Mr. Cheng himself? A. Yes. Q. What statement? A. My understanding is that he told Ivy Rich that I was a thief. Q. And who is Ivy Rich? A. Ivy Rich was at that time the leader or director of some position in the labor arts program." (Wilson Tr. 132:14 - 133:4).

- "Q. All right. So Ivy Rich told you that Mr. Cheng said you were a 'thief'; is that right? A. No, that's not right. Q. Ivy Rich told somebody that Mr. Cheng said you were a thief? A. Correct. Q. Who did Ivy Rich tell that Mr. Cheng said that? A. She told Steve Leberstein. Q. And Mr. Leberstein told you that Ivy Rich told him that Terrence Cheng said you were a thief? A. Exactly. Q. And when did Ivy Rich tell Steve Leberstein that? A. That would have been in early 2012. Q. And when did Mr. Leberstein tell you that Ivy Rich had told him that Terrence Cheng said you were a thief? A. Contemporaneously, like the same day it happened. Q. Early 2012? Q. Early 2012. Q. Did Mr. Leberstein tell you at any other time that Terrence Cheng had said in front of Ivy Rich that you were a thief? A. Yes, later in 2012 he told me. Q. Now, he told you in 2012 and 2013 that Terrence Cheng had said to Ivy Rich in early 2012 that you were a thief? A. He told me in 2012 when it happened and then repeated it subsequently. (*Id*. at 133:15 – 135:3).
- "Q. Are you aware of any other 'defamation' that he [Steve Leberstein] witnessed? A. At that time in 2012, he mentioned that he had a meeting or several meetings with Terrence Cheng. Q. And that was in 2012? A. 2012 I believe maybe. Possibly 2013. Q. What did he tell you Mr. Cheng said during these meetings in 2012 and 2013? A. After one of the meetings, he called me to describe the meeting that he had with Terrence Cheng. Q. And what did he tell you Mr. Cheng had said, if anything? A. What he said was that Terrence Cheng basically said he was coming in to clean up the criminal stuff at the Graduate Center for Worker Education. Q. That is what Mr. Leberstein told you? A. That is what he told me at that time, yes.

Q. And what Mr. Leberstein told you was about meetings that took place in 2012 or 2013, right? A. Right." (*Id*. at 144:17 – 145:20).

- "Q. Are you aware of any other defamatory statements to which Professor Cherry was a witness? A. Yes. Q. What? A. I am trying to recall the details. Well, I am not totally sure, but I think he told Immanuel Ness, another professor, that Gould told him that basically you shouldn't associate with criminals, and, you know, I was a criminal, and then there was also by implication that Ness – I don't remember all the details, but that was – yes, that was the sort of – what I remember. Q. And to the best of your knowledge, when [sic] President Gould's husband tell Professor Cherry this? A. To the best of my knowledge that would have been in 2012." (*Id*. at 147:20 – 148:15).
- "Q. Do you see number 23 Max Azoula [referring to the witness list contained in Plaintiff's Initial Disclosures (Exhibit M to Declaration of Mark Klein, filed in support of Defendant's Motion)]? A. Yes. Q. And according to the list here he was told by Cheng's staff, Philips, "Wilson was a thief." Do you see that? A. Yes, I see that. Q. Who is Cheng's staff? A. Phillips. Q. So are you saying Dean Phillips was on Terrence Cheng's staff? A. Dean Phillips reported to Terrence Cheng, yes." (*Id*. at 148:25 – 149:12).
- Jose Ohyan, Professor Emeritus Nancy Romer, New York City Council Member Jumaane Williams, GCWE student Erica Gaskins, Penny Lewis, and Professor Haroon Kareeam all reported to Professor Wilson that Cheng was accusing him of stealing and being a criminal (*Id*. at 149:20 – 156:25).

- "Q. Can you identify any defamatory statement that Mr. Cheng made in 2014? A. Well, what was reported to me was he, Cheng, did not want my photographic representation in the historical documentation of the institutional history of the Graduate Center for Worker Education, which was a project that he hired the Labor Arts Society to conduct, and he said basically don't use Wilson's photo because he is a crook. He is a thief. This is what was reported to me contemporaneously at that time. Q. And who reported this to you? A. I heard it from actually a couple of sources. I heard it from [Stephen] Leberstein. I heard it from Erica Gaskins, and I heard it at that time from Don Tuminaro, and those were widely – you know, that was going by – his staff were going around telling everybody I am a crook. I am a thief, and that was in the New York Times article. Q. I asked you what Mr. Cheng said. A. So my understanding of what Cheng said is in one of the meetings that Leberstein, Gaskins, and Tumaniro had said that he mentioned my name specifically and, you know, criminality, criminal management, criminal acts. I got different stories from people who were there years back at the time that it happened." (*Id*. at 214:16 – 215:25).
- Stephen Leberstein, a part time adjunct faculty member, corroborated Professor Wilson's account, and testified that he attended a meeting at the GCWE on the seventh floor of 25 Broadway, with defendant Cheng and took contemporaneous notes, dated May 14, 2014 (*See* Leberstein Deposition Transcript ("Leberstein Tr."), Klein Decl. Exhibit F filed in support of Defendants' Motion) and that during the meeting, which included faculty member Mr. Tuminaro and GCWE alumnus Mr. Alter, and was attended by Defendant Cheng and 8-10 other students, alumni,

faculty and staff (Leberstein Tr. at 8:8 – 19:22; 22:21 – 23:22). Leberstein testified that he had one prior meeting with Cheng (*Id*. at 25:15 – 20). While Leberstein didn't recall Mr. Cheng directly stating that Dr. Wilson had engaged in criminal activity (*Id*. at 26:3 – 7), he confirmed that "those allegations were going around, and that the students had heard it, and that he himself heard it directly from officials of the college. (*Id*. at 26:8 - 27:15). Leberstein also confirmed Professor Wilson's account that Cheng instructed Evelyn Rich and Rachel Bernstein, of the Labor Arts Society, not to include Professor Wilson's photo in art work being displayed at the GCWE (*see* Leberstein Deposition Exhibit 3).

As a result of Cheng's defamatory comments, reported above, Professor Wilson became unemployable. *Id*. at 159:24 – 161:16.

2 **The Testimony Adduced Can Be Presented In Admissible Form at Trial**

Defendant Cheng contends that the evidence of his defamatory statements against Professor Wilson is inadmissible hearsay. But the statements set forth above are admissible pursuant to the Federal Rules of Evidence, which provide exceptions to the rule against hearsay. See F.R.E. 803(1) (Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it); 807 (Residual Exception for statements supported by sufficient guarantees of trustworthiness after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement, and more probative on the point for which it is offered than other evidence the proponent can reasonably obtain). Moreover, even if no hearsay exception were applied, the testimony of these witnesses can still be presented in admissible form at trial by having the witnesses testify directly to these matters at trial. *See Santos v. Murdock,* 243 F.3d 681, 683 (2d Cir. 2001) ("Affidavits

submitted to defeat summary judgment must be admissible themselves or must contain evidence that will be presented in an admissible form at trial") (citing *Celotex Corp*., *supra*, 477 U.S. at 324 U.S. at 324 (stating that nonmoving party need not "produce evidence in a form that would be admissible at trial" but must "by her own affidavits … designate specific facts showing that there is a genuine issue for trial")(internal quote omitted)); *see also In re Chiquita Brands International Inc.*, 2019 WL 11497632, *13 – 14 (S.D. Fla. Sept. 5, 2019) (citing *Pritchard v. Southern Co. Servs.,* 92 F.3d 1130, 1135 (11th Cir. 1996) (hearsay affidavit may be "reduced to admissible form at trial" by calling the previously identified affiant as a witness)).

B **Defendant Cheng's Defamatory Statements Are Not "Substantially True"**

Defendant Cheng also contends that his statements are "substantially true." Defendant Cheng relies upon the findings of the arbitrator who served as the neutral in an action between CUNY and Professor Wilson, and the underlying charges, and argues that "Plaintiff's conduct violated a provisions [sic] of the New York Penal Law." A close review of the award indicates that the Arbitrator did NOT find that Professor Wilson violated the New York Penal Law and that, at most, Professor Wilson's conduct constituted a violation of policy and he may have been unjustly enriched (i.e., his conduct was, at most, contrary to civil but not penal law). *See* Award, attached as Exhibit C to the Declaration of Rachel J. Nash, dated September 12, 2022, filed with Defendant's Motion. And, of course, the underlying charges themselves are not probative of anything – only the Arbitrator's findings themselves carry weight.

C **Defendant Cheng's Defamatory Statements Are Not Privileged**

Likewise, Defendant Cheng is not entitled to summary judgment on Professor Wilson's defamation claim due to "privilege." Cheng relies on *Houraney v. Burton & Associates, P.C.,* No. 08-cv-2688 (CBA)(LB), 2010 WL 3926907, *10 (E.D.N.Y. Sept. 7, 2010), *report and recommendation adopted,* 2011 WL 710269 (E.D.N.Y. Feb. 22, 2011), for the proposition that

statements made during the discharge of officials' "administrative or executive policy-making responsibilities" are afforded an absolute or qualified privilege if those statements concerned matters within the ambit of those duties. *See* Def. Mem. at 23-24. That case is inapplicable here. Defendant Cheng's comments were not made during the discharge of any administrative or policy-making responsibilities and were entirely *gratuitous*, and Professor Leberstein's testimony, above, concerning Cheng's insistence that Professor Wilson not be included in the Labor Society Artwork at GSWE demonstrates that he was motivated by malice, and thus he is not entitled to any privilege whatsoever:

> With regard to the second element of a defamation claim, New York recognizes a qualified common interest privilege when the allegedly defamatory statement is made between persons who share a common interest in the subject matter. At the pleadings stage, a plaintiff can overcome the common interest privilege by alleging that the defamatory statement was motivated solely by [common law or constitutional] malice. "Common-law malice mean[s] spite or ill will, and will defeat the privilege only if it is the one and only cause for the publication." "Constitutional or actual malice means publication with [a] high degree of awareness of [the publication's] probable falsity or while the defendant in fact entertained serious doubts as to the truth of [the] publication." " 'Mere conclusory allegations, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege.' "

Thai v. Cayre Group, Ltd., 726 F. Supp.2d 323, 330 (S.D.N.Y. 2010). Accordingly, Defendant's request for summary judgment on Professor Wilson's defamation claim should be denied.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion for Summary Judgment in its entirety.

Dated: Garden City, New York
November 2, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022 a true and correct copy of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment was served via electronic email on all counsel of record.

Date: November 2, 2022

/s/ Matthew L. Berman
Matthew L. Berman, Esq.