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' REPLY MEMORANDUM OF LAW IN FURTHER 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: November 2, 2022

TABLE OF CONTENTS

Page (s)

TABLE OF AUTHORITIES

Page(s)

CASES

Defendants Terrence Cheng, Paisley Currah and Marcia Isaacson ("Defendants") respectfully submit this reply memorandum of law in further support of their motion, pursuant to Fed. R. Civ. P. 56, for summary judgment dismissing in its entirety Plaintiff's FAC[1] (ECF No. 129).

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 Defendants demonstrated in their initial motion papers, Currah had no involvement in the search that forms the basis of Plaintiff's search and seizure claim. Currah's total absence from the scene is not only attested to by Currah, but also by defendant Isaacson, who was tasked with the responsibility of investigating Plaintiff's workplace misconduct at the College, and who, as Plaintiff correctly alleges in paragraph 55 of the FAC, supervised the search of Plaintiff's GCWE office that took place on January 26, 2012. *See* 56.1 ¶ 21.

This undisputed evidence -- that Currah had nothing to do with, and was not present at, the search of Plaintiff's GCWE office in January 2012 -- is the *only* admissible and probative evidence with respect to Plaintiff's search and seizure claim against Currah, mandating summary judgment. Rather than provide admissible and probative evidence in opposition to Defendants' motion, Plaintiff instead relies on the allegations in his *unverified* FAC; in particular, the allegations that 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 for Worker Education; (iv) engaged in harassing conduct against Professor Wilson; (v) asserted false plagiarism charges against Professor Wilson's

[1] The defined terms set forth in Defendants' moving memorandum of law also will be used herein.

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 she and the Gang of Five made these accusations against Professor Wilson." Pl.'s Mem. at 5-6.

As an initial matter, because these allegations appear in an *unverified* complaint, they are inadmissible, and may not be relied upon in opposing Defendants' summary judgment motion. *See Rinaldi v. Nice, Ltd.*, No. 19-cv-424 (LGS), 2021 WL 827767, at *4 (S.D.N.Y. Mar. 4, 2021) (holding that a *verified* complaint may "be treated as an affidavit for summary judgment purposes" if it otherwise meets the other requirements for an affidavit under Rule 56(e)) (quoting *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995)). But more importantly, *none* of these allegations, as well as the other extraneous "evidence" on which Plaintiff relies (*see* Pl.'s Mem. at 6-7),[2] has anything to do with whether or not Currah was involved in or present at (much less personally responsible for) the January 2012 search of Plaintiff's GCWE office took place. Rather, all of these unverified allegations and supposed "evidence" are an irrelevant side-show.

In short, Plaintiff has failed to, and cannot, provide any probative evidence that Currah had any involvement in or was present at the January 2012 search which Plaintiff contends violated his Fourth Amendment rights. Proof of this fact is, however, an element essential to Plaintiff's search and seizure claim against Currah, and on which Plaintiff would bear the burden of proof at trial, as "it is well-settled in this Circuit 'that personal involvement of defendants in alleged

[2] Plaintiff attempts to make something (it is unclear what) of the fact that Currah initially paid for boxes he purchased to pack up Plaintiff's personal property from his GCWE office on March 23, 2012. *See* Pl.'s Mem. at 7 (stating that Currah "paid *with his own money* for the Home Depot boxes used to pack up the property collected [sic] Professor Wilson's office") (emphasis in original). However, as set forth in Currah's accompanying Reply Declaration, Currah submitted a request to the College to be reimbursed for the cost of the boxes he purchased at Home Depot, and in fact the College reimbursed him for such cost. Currah Reply Decl. ¶ 2. Nonetheless, who paid for the boxes is wholly irrelevant to Plaintiff's claims against Currah

constitutional deprivations is a prerequisite to an award of damages under § 1983.'" *Perez v. Ponte*, 236 F. Supp. 3d 590, 609 (E.D.N.Y. 2017), *report and recommendation adopted*, No. 16-cv-645 (JFB)(AKT), 2017 WL 1050109 (E.D.N.Y. Mar. 15, 2017) (citations omitted).

Indeed, Rule 56 *mandates* summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *E.E.O.C. v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 467 (S.D.N.Y. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Further, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Bloomberg*, 778 F. Supp. 2d at 467 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (internal citations omitted)). Finally, in the face of insufficient evidence, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Bloomberg*, 778 F. Supp. 2d at 467 (quoting *Celotex,* 477 U.S. at 322-23)).

Because Plaintiff has failed to provide *any* evidence demonstrating that Currah was personally involved in the search about which Plaintiff complains, there can be no genuine issue as to any material fact and, accordingly, summary judgment should be granted dismissing such claim against Currah 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.

Defendants demonstrated in their moving papers that Plaintiff's search and seizure claim against Isaacson also should be dismissed, because the warrantless search of Plaintiff's GCWE office on January 26, 2012 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. *See* Defs.' Mem. at 15-18.

In his opposition to Defendants' motion, Plaintiff argues that, notwithstanding the recognized holding of *O'Connor*, a warrantless search of a government employee's work space supposedly is *not* permissible where the employer is seeking "evidence of suspected 'work-related employee misfeasance.'" Pl.'s Mem. at 12 (quoting *O'Conner*, 480 U.S. at 723-724). Under Plaintiff's *re*-fashioning of *O'Connor*, a government employer is not permitted to undertake a warrantless search of an employee's work space where the employer is seeking to discover evidence of criminal wrongdoing, and because "Defendants here admit that they were investigating Professor Wilson for criminal activity including theft and embezzlement,"[3] CUNY supposedly was required to obtain a warrant before entering Plaintiff's GCWE office in January 2012. *See* Pl.'s Mem. at 13-14.

Plaintiff's argument ignores, however, not only the holding of the *O'Conner* Court itself, but subsequent decisions within this Circuit which have interpreted and applied *O'Conner*, including this Court's analysis of *O'Connor* in the course of deciding State Defendants' motion to dismiss Plaintiff's SAC.

First, Plaintiff's argument ignores the plain language of the *O'Connor* holding, where the Court stated:

> In sum, we conclude that the "*special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable*," *for* legitimate work-related, noninvestigatory intrusions as well as *investigations of work-related misconduct*. A standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public

[3] As previously stated, CUNY also was initially investigating whether Plaintiff had properly filed "Multiple Position" forms, which did not involve possible criminal conduct. 56.1 ¶ 5.

> employees. *We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees . . . 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 . . . .

O'Connor, 480 U.S. at 725-26 (emphasis added) (citation omitted).

The Supreme Court's holding in *O'Connor* thus makes no distinction between "investigations of work-related misconduct" that potentially involve criminal activity and those that do not; rather, the Court simply held that *all* "public employer intrusions on the constitutionally protected privacy interests of government employees" involving "investigations of work-related misconduct" should be judged by a reasonableness standard. *Id*. at 725-26. There is thus no basis whatsoever for Plaintiff's insertion of a qualification to this standard where, according to Plaintiff, an investigation of work-related misconduct that may potentially involve criminal conduct requires that the government employer obtain a warrant before entering an employee's office.

Nor do cases within this Circuit since *O'Connor* support the unwarranted qualification Plaintiff attempts to create here.[4] For example, in *Tangredi v. New York City Dep't of Env't Prot.*, at issue was the propriety of a search of a "patrol bag" belonging to the plaintiff, an Environmental Police Officer employed by the City of New York, which a defendant-Inspector saw on the floor in the women's locker room. *Tangredi*, No. 09-cv-7477 (VB), 2012 WL 834580, at *1 (S.D.N.Y. Feb. 16, 2012). The court preliminarily stated that "[t]his case is governed by the framework set forth in *O'Connor v. Ortega,* in which the plurality determined a government employer may search an employee's office, desk, or file cabinets to investigate work-related misconduct as long as such

[4] Plaintiff fails to cite a single post-*O'Connor* decision that supports the unwarranted qualification he postulates in opposing Defendants' motion.

a search was 'reasonable [ ] under all the circumstances.'" *Id*. at *3 (quoting *O'Connor*, 480 U.S. at 725-26).

The *Tangredi* court proceeded to list a number of instances in which "[c]ourts in this circuit have applied the *O'Connor* reasonableness standard to various workplace searches," as follows:

> In *Shaul v. Cherry Valley-Springfield Cent. School Dist.,* 363 F.3d 177, 184-85 (2d Cir. 2004), the court found that the employer's searches of a teacher's classroom, desk, and file cabinets were reasonable because the employer had reason to believe the teacher had engaged in misconduct and that such evidence could be present in those areas. . . . In *Demaine v. Samuels,* 29 Fed. Appx. 671, 675-76 (2d Cir. 2002), the court found an employer's search of a police officer's desk and patrol car was reasonable because . . . the employer had reason to suspect he was committing misfeasance. In *Leventhal v. Knapek,* 266 F.3d 64, 75-76 (2d Cir. 2001), the court found an employer's search of an employee's office computer reasonable because the employer had an individualized suspicion that the employee was misusing his computer. In *United States v. Reilly,* 2002 WL 1163572, at *4-5 (S.D.N.Y. June 3, 2002), the court held the employer's search of the employee's cubicle computer reasonable in inception and scope because the employer had reason to believe the employee was engaging in misconduct on that computer.

Tangredi, 2012 WL 834580, at *4.

The *Tangredi* court then observed that, "[i]n all those cases, the employer possessed an individualized suspicion that the employee was engaging in work-related misconduct. While the *O'Connor* Court did not reach the issue of whether individualized suspicion was an essential element of the reasonableness standard it set forth, 480 U.S. at 726, *courts in this circuit have relied upon such suspicion in reaching the conclusion that an employer's search was reasonable*." *Id*. (emphasis added).[5]

[5] As discussed in Defendants' initial brief (Defs.' Mem. at 17), the *Tangredi* court concluded that the search of the plaintiff's patrol bag was not reasonable, finding, among other things, 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." *Id*. at *4. However, as also discussed in Defendants' initial brief, the *Tangredi* court nonetheless found that the individual defendant was entitled to qualified immunity with respect to the plaintiff's Fourth Amendment claim. *See* Defs.' Mem. at 21-22, citing *Tangredi*, 2012 WL 834580, at *5-6.

In short, in its analysis of the numerous decisions within this Circuit which applied the *O'Connor* "framework," the *Tangredi* court made *no* distinction between work-related misconduct that might potentially involve criminal misconduct and other kinds of misconduct; rather, the court recognized that, under *O'Connor*, a search of a government employee's office, desk or file cabinets to investigate work-related misconduct is permissible so long as the search was "reasonable under all the circumstances." *Tangredi*, 2012 WL 834580, at *3. Further, the court identified as an "essential element" in deciding if the employer's search was reasonable was whether the employer had an "individualized suspicion" that the employee was engaging in work-related misconduct.

In this case, there can be no question that, based on Isaacson's investigation, *before* CUNY's search of Plaintiff's GCWE office on January 26, 2012, CUNY had a well-founded "individualized suspicion" that Plaintiff was engaging in work-related misconduct. 56.1 ¶¶ 8-9. Because of this "individualized suspicion," as well as the other factors Defendants demonstrated in their moving papers, the scope of CUNY's search was "reasonable," both at its inception and its scope.[6] *See* Defs.' Mem. at 15-18.

Finally, in deciding State Defendants' motion to dismiss the SAC, Magistrate Judge Scanlon did not recognize the qualification of the *O'Connor* framework that Plaintiff advances in opposing Defendants' summary judgment motion. Rather, as set forth in Defendants' initial brief, Judge Scanlon recommended that Plaintiff's search and seizure should not be dismissed because of the *possibility* that CUNY officials "fabricated" the accusations that led to the January 2012

[6] In his opposition brief, Plaintiff cites *Stack v. Perez,* 248 F. Supp.2d. 106, 119-110 (D. Conn. 2003), for the proposition that summary judgment should be denied because "'reasonableness' is a question for the jury." Pl.'s Mem. at 15. However, the *Stack* court's pronouncement solely related to the plaintiff's claim under Connecticut law for intentional infliction of emotional distress and, in particular, whether the defendant's conduct was sufficient to satisfy the element of "extreme and outrageous conduct" of such a claim. That holding has no relevance here, particularly where, as the *Tangredi* court's analysis quoted above itself indicates, numerous courts within this Circuit have granted summary judgment dismissing search and seizure claims on a finding the search at issue was "reasonable" at its inception and its scope. *See Tangredi,* 2012 WL 834580, at *4.

search, and because "*O'Connor*, *Demaine* and *Leventhal* all concerned motions for summary judgment, when the factual record had been developed." ECF No. 37, at 54.

Defendants' motion before the Court is now one for summary judgment, after the factual record in this case has been developed. Moreover, Plaintiff has failed to offer any evidence whatsoever that CUNY's allegations against him were "fabricated." Nor could he, given that CUNY's investigation of Plaintiff's workplace misconduct led to the imposition of disciplinary charges, the College's determination to terminate his employment and, ultimately -- after a fourteen-day hearing in which Plaintiff was represented by his union counsel -- the determination by a neutral American Arbitration Arbitrator that sustained the termination of Plaintiff's employment at CUNY as a result of his misconduct. 56.1 ¶¶ 25, 26, 27.

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

C. In Any Event, 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 CUNY's search of Plaintiff's GCWE office on January 26, 2012 was not reasonable at its inception and in its scope, Isaacson (and Currah[7]) are nonetheless entitled to qualified immunity with respect to Plaintiff's search and seizure claim. As set forth in Defendants' initial brief, "[q]ualified 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). "To 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*,

[7] As previously stated, there is no admissible evidence whatsoever that Currah had *any* involvement in the January 26, 2012 "search" of Plaintiff's GCWE office.

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 v. Richard*, 572 U.S. 765, 778-779 (2014) (emphasis added).

Further, even if a court determines that a clearly established right could have been violated, qualified immunity nonetheless protects officials who "act in ways they reasonably believe to be lawful." *Anderson v. Creighton,* 483 U.S. 635, 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, as 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).

As discussed above, Plaintiff has attempted to fashion a further qualification to the *O'Connor* framework in determining whether a search of an employee's office, desk or file cabinets is permissible when a government employer is investigating work-related misconduct. Plaintiff's postulated qualification is explored in more than *five pages of discussion* in Plaintiff's opposition memorandum. *See* Pl.'s Mem. at 8-14. Even assuming Plaintiff's further qualification to the *O'Connor* framework is an accurate reading of the law -- and it is not -- it hardly can be said that there was a "clearly established right," and whose "contours were sufficiently definite," which precluded a warrantless search of Plaintiff's GCWE office because CUNY's investigation of Plaintiff's work-related misconduct potentially involved criminal conduct.

In short, there 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. 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 individualized suspicion as to Plaintiff's work-related misconduct, and did so only after seeking and obtaining permission from CUNY's General Counsel,[8] it is clear that she "act[ed] in ways [she] reasonably believe[d] to be lawful." *See Anderson*, 483 U.S. at 641. Accordingly, even in the event the Court does not grant summary judgment on a finding that CUNY's January 26, 2012 search was reasonable at its inception and in its scope, Plaintiff's First Cause of Action against both Isaacson and Currah should nonetheless 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.

In her January 24, 2017 Report & Recommendation ("R&R," ECF No. 37), Judge Scanlon analyzed, in detail, Plaintiff's defamation claims set forth in his SAC. Among other things, Judge Scanlon found that "[a] claim for defamation is subject to a one-year statute of limitations, 'which statute accrues upon the first publication of the allegedly defamatory statement.'" ECF No. 37, at 63 (quoting *Lader v. Delgado*, 941 F. Supp. 2d 267, 272 (E.D.N.Y. 2013)). Judge Scanlon further found that only *one* statement alleged by Plaintiff met the standard for defamation in New York:

[8] In the only declaration (other than that of Plaintiff's counsel) that Plaintiff submitted in opposition to Defendants' motion, Professor Sandi Cooper states that she does not "remember" CUNY's General Counsel, Frederick Schaffer, "informing [her] of an impending search of a Brooklyn College professor's office." *See* Declaration of Sandi Cooper, dated October 12, 2022 (annexed as Exhibit 4 to the Declaration of Matthew Berman), ¶ 6. This of course is not the same as denying Mr. Schaffer's sworn testimony, and provides no basis for disputing the accuracy of Mr. Schaffer's declaration. *See Savarese v. City of New York*, 547 F. Supp. 3d 305, 349 (S.D.N.Y. 2021), *appeal withdrawn*, No. 21-1883, 2022 WL 351054 (2d Cir. 2022) ("'Testimony of a witness that he does not remember whether an event occurred does not contradict positive testimony that such event took place.' *Gibbons v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2015 WL 2345533, at *3 (D. Nev. May 15, 2015) (citation omitted). Indeed, 'vague denials and memory lapses . . . do not create genuine issues of material fact.' *F.D.I.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 205 F.3d 66, 75 (2d Cir. 2000).") Thus, Professor Cooper's non-denial denial provides no basis for denying Defendants' motion for summary judgment.

the allegation that, "on March 12, 2014, Defendant Cheng stated to faculty members that 'Wilson was engaging in criminal activity.' [SAC] at 29. *This statement was made to third parties within a year of Plaintiff's commencement of this suit*.'" ECF No. 37, at 64 (emphasis added). Judge Scanlon therefore recommended "that Plaintiff's defamation claim be dismissed against all Defendants excepting Defendant Cheng for the 'criminal activity' statement." ECF No. 37, at 65. Judge Amon adopted Judge Scanlon's R&R "as the opinion of the Court." ECF No. 55, at 2.

As Plaintiff himself recognizes, to "survive summary judgment" he must produce evidence of, among other things, "an oral defamatory statement of fact." Pl.'s Mem. at 18. Plaintiff's defamation claim against Cheng should be dismissed because Plaintiff has failed to provide *any* admissible evidence that Cheng stated, in March 2014, that "Wilson was engaging in criminal activity." *See* FAC ¶¶ 64, 65.

As set forth in Defendants' moving papers, Plaintiff conceded at his deposition that he *never* personally heard Cheng make any allegedly defamatory statement about him (56.1 ¶ 34), and that his defamation claim was based on what other people supposedly heard and told him Cheng allegedly said. *See* Wilson Jan. 29 Dep. (Exh. A to Klein Decl.), at 132:19-134:21. And as also set forth in Defendants' initial brief, because Plaintiff's reliance on what other people supposedly told him is inadmissible hearsay, it is insufficient to defeat Defendants' motion for summary judgment. Defs.' Mem. at 22-23 (citing *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)).

Additional authority also requires this result: *see Konteye v. New York City Dep't of Educ*., No. 17-cv-2876 (GBD) (RWL), 2019 WL 4418647, at *15 (S.D.N.Y. Apr. 10, 2019), *recommendation adopted*, 2019 WL 3229068 (S.D.N.Y. July 18, 2019), *appeal dismissed,* 19-2480, 2000 WL 4559499 (2d Cir. 2020) (holding that an "'I was told' assertion" is "a textbook example of hearsay, not admissible in the context of a motion for summary judgment" and "cannot create an issue of fact"); *Parker v. Fantasia*, 425 F. Supp. 3d 171, 183 (S.D.N.Y. 2019) (holding that "a district court should consider only evidence that would be admissible at trial") (citing *Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 164 F.3d 736, 746 (2d Cir. 1998)).

One would expect therefore that, in opposing Defendants' motion, Plaintiff would submit sworn testimony from someone who supposedly directly heard Cheng say, in March 2014, that Plaintiff was "engaging in criminal activity." Plaintiff did *not*, however, do so.

Instead, Plaintiff relies on the following deposition testimony in seeking to defeat summary judgment dismissing his Second Cause of Action against Cheng:

(i) Plaintiff's own deposition testimony that people supposedly told him that, in *2012* or *2013,* Cheng said that Plaintiff was a "thief" and Cheng was "coming in to clean up the criminal stuff at the Graduate Center for Worker Education" (*see* Pl.'s Mem. at 20-21, quoting Wilson January 29 Dep. (Exhibit 1 to Berman Decl.), at 132:14-133:4, 133:15-135:3, 144:17-145:20, 147:20-148:15, 152:22-156:25);

(ii) Plaintiff's own deposition testimony that people supposedly told him someone "on Cheng's staff" said that "Wilson was a thief" (*see* Pl.'s Mem. at 21, quoting Wilson Jan. 29 Dep. (Exhibit 1 to Berman Decl.), at 148:25-151:7);

(iii) Plaintiff's own deposition testimony that, at some *unspecified* time in 2014 (Wilson Jan. 29 Dep. (Exhibit 1 to Berman Decl.), at 218:6-219:17), Stephen Leberstein, Erica Gaskins

and Don Tumaniro told him that Cheng had "mentioned" Plaintiff's "name specifically and, you know, criminality, criminal management, criminal acts" (Pl.'s Mem. at 22, quoting Wilson Jan. 29 Dep. (Exhibit 1 to Berman Decl.), at 214:16- 215:25); and

(iv) the deposition testimony of Stephen Leberstein, in which, according to Plaintiff, Leberstein "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" (Pl.'s Mem. at 22-23, quoting Leberstein Dep. (Exh. F to Klein Decl.), at 26:8-27:15).

However, *none* of this deposition testimony provides any admissible evidence, and indeed *no* evidence at all, that Cheng allegedly said, in March 2014, that Plaintiff was "engaging in criminal activity." First, with respect to (i), Plaintiff's deposition testimony as to what Cheng supposedly said in 2012 or 2013 not only precedes when Cheng *first* began working at Brooklyn College (56.1 ¶ 2), but, more importantly, as Judge Scanlon previously found, only statements "made to third parties within a year of Plaintiff's commencement of this suit" in January 2015 come within the one-year statute of limitations applicable to defamation claims. ECF No. 37, at 63-65. Thus, any such alleged statements, even assuming they took place, are time-barred.

With respect to (ii) and (iv), Plaintiff's and Leberstein's deposition testimony as to what someone on "Cheng's staff" or other "officials" at the College supposedly said about Plaintiff provide *no* probative evidence whatsoever that Cheng made a defamatory statement in March 2014.

With respect to (iii), Plaintiff's deposition testimony that, at some *unspecified* time, Stephen Leberstein, Erica Gaskins and Don Tumaniro supposedly told him that Cheng had "*mentioned*" Plaintiff's "name specifically and, you know, criminality, criminal management, criminal acts" does not provide any probative evidence that Cheng stated, in March 2014, that

Plaintiff "was engaging in criminal activity."[9] Even putting aside the fact that, at his deposition, Leberstein himself disavowed hearing Cheng say that Plaintiff was engaging in criminal activity (56.1 ¶ 36),[10] Plaintiff's testimony that Gaskins and Tumaniro supposedly "mentioned" Cheng's name is not sufficient evidence that Cheng made, in March 2014, the allegedly defamatory statement Plaintiff ascribes to him, even if such testimony were not inadmissible hearsay.

Finally, Plaintiff's assertion -- in his memorandum of law -- that "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" (Pl.'s Mem. at 23-24) is insufficient to defeat summary judgment on Plaintiff's defamation claim. Plaintiff's counsel's naked, *unsworn* assertion in a memorandum of law that unspecified witnesses, who reside in unspecified jurisdictions, will give unspecified testimony at trial, simply cannot satisfy a non-moving party's burden "to make a sufficient showing on an essential element with respect to which the plaintiff has the burden of proof." *Celotex*, 477 U.S. at 323.

In short, because Plaintiff has failed to provide any admissible and probative evidence that, in March 2014, Cheng stated to third parties that Plaintiff "was engaging in criminal activity," Plaintiff's Second Cause of Action should be dismissed on summary judgment.[11]

---

[9] To survive dismissal of a defamation claim, "a plaintiff must 'identif[y] the purported communication, and [indicate] who made the communication, when it was made, and to whom it was communicated.'" *Elcan Indus., Inc. v. Cuccolini, S.R.L.*, No. 13-cv-4058 (GBD) (DF), 2014 WL 1173343, at *9 (S.D.N.Y. Mar. 21, 2014) (citations omitted).

[10] As set forth in Defendants' moving papers, when Leberstein was asked at his deposition 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.

[11] Plaintiff asserts in his opposition brief that, "[a]s a result of Cheng's defamatory statements, reported above, Plaintiff became unemployable." Pl.'s Mem. at 23. To the contrary, however, at his deposition Plaintiff *repeatedly* attributed his becoming "unemployable" *not* to Cheng's alleged defamatory statement in March 2014, but rather to an article that appeared in *The New York Times* on January 12, 2014, two months *before* Cheng's alleged defamatory statement. *See* Wilson Jan. 29 Dep. (Exhibit 1 to Berman Declaration), at 159:24-162:23, 164:16-165:19, 168:21-169:23, 224:23-227:19; *see also* Exhibit 3 marked at Wilson Jan. 29 Dep., a copy of which exhibit is annexed as Exhibit N to the accompanying Klein Reply Decl. And as Judge Scanlon noted in her R&R, "the *only* source noted in the [*New York Times*] story is Plaintiff and his former attorney." ECF No. 37, at 64 (emphasis added).

B. Plaintiff's Defamation Claim Also Should Be Dismissed Because Cheng Is Entitled to an Absolute Privilege with Respect to the Alleged Defamatory Statement.

Defendants further demonstrated in their moving papers that, even assuming Cheng made any alleged defamatory statement -- which Cheng denies -- an absolute privilege applies to any such statement because, as the undisputed facts show, any such statement was made during the discharge of his administrative duties. Defs.' Mem. at 23-24 (citing *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) (holding that, 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.") (citations omitted)).

In his opposition Plaintiff fails either to distinguish *Houraney* or demonstrate that Cheng's alleged defamatory statement (assuming it was made) was not made during the discharge of his duties. Indeed, Plaintiff's only retort is that Cheng's defamatory statement supposedly was "gratuitous" (s*ee* Pl.'s Mem. at 25), thereby implying, with *any* citation of authority or other explanation, that the privilege is inapplicable.

In any event, given that Plaintiff had misappropriated to himself tens of thousands of dollars from grants that funded, among other things, the College's Urban Community Teachers and ERIS programs -- thereby depriving underrepresented groups at the College of monies that were intended to encourage and support their success -- it is unclear why it would have been "gratuitous" for Cheng to "not want [Plaintiff's] photographic representation in the historical documentation of the institutional history of the Graduate Center for Worker Education," as Plaintiff contends (*see* Pl.'s Mem. at 22). Again, Cheng denies making any defamatory statement

about Plaintiff, but even assuming he did, such statement would hardly have been "gratuitous," but rather made in the course of the discharge of his duties with respect to the GCWE.

Cheng is therefore entitled to an absolute privilege with respect to 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.

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

In their moving brief, Defendants made an extensive showing that, giving preclusive effect to the findings of the neutral AAA Arbitrator, including her findings regarding Plaintiff's "intent," as well as other evidence with respect to Plaintiff's intent submitted at the Arbitration, Plaintiff's conduct constituted a violation of New York Penal Law § 175.05. *See* Defs.' Mem. at 24-30. Thus, Defendants demonstrated that Cheng's alleged defamatory statement, even assuming it was made, was substantially, if not wholly, *true*, and, for this additional reason, Plaintiff's defamation claim should be dismissed on summary judgment. *Id*. at 24-25.

Plaintiff's only substantive response to Defendants' showing in this regard is that "[a] close review of the award indicates that the Arbitrator did NOT find that Professor Wilson violated the New York Penal Law." Pl.'s Mem. at 24. Of course, Defendants never contended that the Arbitrator had found that Plaintiff violated the New York Penal Law, and thus Plaintiff has failed to respond to the argument that Defendants did, in fact, make. "Federal courts may deem a claim abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address the argument in any way." *Taylor v. City of N.Y.*, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003); *see also Douglas v. Victor Capital Group*, 21 F. Supp. 2d 379, 393 (S.D.N.Y. 1998) (collecting cases). It thus remains undisputed that Plaintiff took funds to which

he was not entitled, and that he did so willfully and with knowledge of the impropriety of his conduct. 56.1 ¶¶ 26-31.

Accordingly, any statement that Plaintiff "was engaging in criminal activity" was substantially, if not totally, true, and thus could not be defamatory. For this additional reason, Defendant Cheng is entitled to summary judgment dismissing Plaintiff's defamation claim 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.

As shown in Defendants' initial brief, Plaintiff admitted at his deposition that the only "evidence" of which he was aware for his assertion that Professor Currah "seized and failed to return" any of Plaintiff's personal property 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* Defs.' Mem. at 31 (quoting Wilson Jan. 30 Dep. (Exh. B to Klein Decl.), at 325:13-326:7). When, however, Plaintiff was asked at his deposition whether he was "aware of any property that [Currah] personally took and didn't return," he responded: "Not specifically." Wilson Jan. 29 Dep. (Exh. 1 to Berman Decl.), at 140:11-19.

Further, 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. *Id*. (quoting 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 "evidence," of course, constitutes no evidence at all that either Currah or Isaacson "exercised an unauthorized dominion" over a "*specific identifiable thing*." *See Clark Street Wine & Spirits v. Emporos Sys. Corp*., 754 F. Supp. 2d 474, 484 (E.D.N.Y. 2010) (emphasis added).

Plaintiff's argument in opposition to Defendants' motion is simply more of the same: that because Isaacson and Currah had *access* to Plaintiff's personal property, this supposedly constitutes "evidence" that they converted his property. *See* Pl.'s Mem. at 5-6. Such "evidence" is, however, nothing more than rank speculation, and is insufficient to defeat Defendants' motion for summary judgment. *See Sagy v. City of New York*, No. 18-cv-1975 (HG), 2022 WL 6777602, at *2 (E.D.N.Y. Oct. 11, 2022) ("The nonmovant may not, however, 'rely on conclusory allegations or unsubstantiated speculation'" in opposing a motion for summary judgment) (quoting *Scotto v. Alemenas*, 143 F.3d 105, 114 (2d Cir. 1998)).

Further, Plaintiff fails to overcome the undisputed evidence that vast portions of his personal property were discarded at *Plaintiff's* direct *instructions*: when, after Plaintiff took "a few things" from the boxes of his property he had directed be moved to the Africana Studies Department on May 8, 2014 (56.1 ¶¶ 48, 50),[12] he then told Professor Lynda Day that "you can do

[12] In Plaintiff's response to 56.1 ¶ 50, which he "disputed in part," Plaintiff blithely asserts that "[t]here is no admissible evidence to support the claim that Plaintiff directed that the boxed [sic] be moved to the Africana Studies Department." *See* Plaintiff's Responses to Defendants' Rule 56.1 Statement, ¶ 50, at 21. Plaintiff's assertion, however, wholly ignores the declaration of Michael T. Hewitt, dated September 7, 2022 ("Hewitt Decl."), where Hewitt states:

> On May 8, 2014, Plaintiff came to campus and informed me that he wished to move the boxes of his materials from the Political Science Department on the 3rd floor of James Hall down the hall to an office in the Africana Studies Department. Accordingly, after speaking with Plaintiff and Professor George Cunningham, who was a professor in the Africana Studies Department, on May 8th I, along with another College employee, loaded Plaintiff's property that had been stored in a storage room off the Political Science Department lounge into carts and, in accordance with Plaintiff's request, pushed those carts down the hall and placed them in one of the offices in the Africana Studies Department suite of offices.

Hewitt Decl. ¶ 4. Plaintiff has provided no evidence of any kind to dispute Hewitt's direct testimony of what took place on May 8, 2014. Therefore, it is undisputed that Plaintiff made the request to move his boxes to the Africana Studies Department, and for this additional reason his conversion claim fails as a matter of law.

what you want with" the rest of the materials (56.1 ¶ 53). In accordance with Plaintiff's instructions, Professor Day -- who is not a party to this litigation -- thereafter went through the boxes 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, gave approximately 50 of Plaintiff's books to the Black Latino Male Initiative office, and gave some of Plaintiff's books to "support a prison college preparatory program." 56.1 ¶ 55-56. Finally, at *Plaintiff's* request, Professor Day sent to Plaintiff a "thank you" note -- which Plaintiff could "use for tax purposes" -- in which Professor Day thanked Plaintiff for donating "approximately 2500" books that, according to her note, "given the rarity of some of the volumes" she valued at "several thousand dollars." *Id.*

Professor Day's undisputed deposition testimony thus demonstrates that, as a direct result of *Plaintiff's* instructions to Professor Day, the integrity of the evidence with respect to what materials were contained in the boxes of materials *before* Plaintiff took "a few things" and then told Professor Day she could do what she wanted with the rest has been wholly *destroyed*.

Finally, Plaintiff admitted during his deposition that he had taken home some, unidentified materials that had previously been in his GCWE office or his office at the College campus. Wilson Jan. 30 Dep. (Exhibit 2 to Berman Decl.), at 331:6-13. Plaintiff has never, however, identified or provided any inventory of the materials he took home. Thus, Plaintiff is wholly unable to prove, and has failed to identify, any "specifically identifiable thing" he alleges was not returned to him, much less that either Currah or Isaacson "converted" any specifically identifiable thing. 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, and those set forth in Defendants' moving papers, Defendants respectfully request that the Court grant their motion for summary judgment dismissing in its entirety plaintiff's Fourth Amended Complaint.

Dated: New York, New York
November 2, 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