IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

STEVEN SALAITA,

Plaintiff,

v.

CHRISTOPHER KENNEDY, Chairman of the Board of Trustees of the University of Illinois; RICARDO ESTRADA, Trustee of the University of Illinois; PATRICK J. FITZGERALD, Trustee of the University of Illinois; KAREN HASARA, Trustee of the University of Illinois; PATRICIA BROWN HOLMES, Trustee of the University of Illinois; TIMOTHY KORITZ, Trustee of the University of Illinois; EDWARD L. MCMILLAN, Trustee of the University of Illinois; PAMELA STROBEL, Trustee of the University of Illinois; ROBERT EASTER, President of the University of Illinois; CHRISTOPHE PIERRE, Vice President of the University of Illinois; PHYLLIS WISE, Chancellor of the University of Illinois at Urbana-Champaign; THE BOARD OF TRUSTEES OF ILLINOIS; and JOHN DOE UNKNOWN DONORS TO THE UNIVERSITY OF ILLINOIS,

Defendants.

Case No. 15-cv-00924

Honorable Harry D. Leinenweber

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)

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Defendants' Motion to Dismiss is based on three fundamental points: (1) Dr. Salaita was well aware at all times that his appointment to the faculty of the University of Illinois was "subject to the approval of the Board of Trustees"; (2) prior to the Board's consideration of his candidacy, Dr. Salaita engaged in commentary on public media which caused a firestorm of outrage across the University community; and (3) on September 11, 2014, in an exercise of its statutory authority and institutional discretion, the Board of Trustees voted 8-1 not to approve an offer to Dr. Salaita. In his Response in Opposition to the Motion to Dismiss (the "Response"), Plaintiff does not rebut any of these points.

Instead, the Response simply ignores unfavorable law and facts, impermissibly asks the Court to accept conclusory and speculative allegations as facts, and blithely denies that the Board is empowered by state law as the ultimate arbiter of faculty appointments. Tellingly, Plaintiff does not dispute that during the pendency of his candidacy, which lasted as long as it did by his own choosing, no one from the University ever represented to him that Board approval was either unnecessary or a "rubber stamp," or that members of the Board received dozens of communications reflecting students and family-members' concerns about Plaintiff prior to the vote on his appointment. Instead, Plaintiff fails to rebut these unfavorable facts and the unassailable legal principles set forth in Defendants' Memorandum in an effort to drag Defendants into prolonged litigation based on speculative claims involving unknown parties. The Court should not oblige. Plaintiff's allegations and claims relating to the Unknown Alleged Donors constitute a collective red herring: after conducting discovery pursuant to a Freedom of Information Act request, Plaintiff has not and cannot identify any facts lending a shred of credibility to speculative allegations regarding any conspiracy or impermissible interference with what was a pending candidacy for faculty appointment. As such, Plaintiff's failure to state a claim and the applicability of sovereign and qualified immunity should lead this Court to dismiss the Complaint in its entirety.

I. Plaintiff Did Not Have a Contract with the University

Plaintiff's Response has not and cannot rebut the core flaw in Dr. Salaita's breach of contract claim: the requirement that the Board provide its approval before any appointment to the faculty becomes final. By state law and bedrock principles of contract law, the Board is empowered with final authority to make or decline to make faculty appointments. Because Plaintiff has not pled facts establishing that the Board delegated its authority on this matter, his breach of contract claim fails as a matter of law.

a. The Alleged Offerors Had No Actual or Apparent Authority to Bind the University.

Neither Interim Dean Ross nor any other individual could have had apparent authority to bind the University—a governmental body—by submitting the conditional offer letter. As such, no contract could have been formed and Plaintiff's breach of contract claim must be dismissed. Plaintiff cannot and does not dispute that, under well-settled Illinois law, the doctrine of apparent authority does not apply against governmental bodies. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 36. Thus, even assuming that Plaintiff's allegations are true, Interim Dean Ross could not have had apparent authority to bind the Board or the University. Plaintiff's only response to this argument is that the Eleventh Amendment does not apply to the University. (Pl.'s Resp. at 28.) First, this assertion is incorrect. (*See infra* at Section V.a.) Second, it is irrelevant. Under Illinois law, apparent authority will not apply against governmental bodies, regardless of their status under the Eleventh Amendment. The cases cited in Defendants' Memorandum make no mention of the Eleventh Amendment being the source of this doctrine, and Plaintiff cites no authority to the contrary. *See, Patrick Eng'g, Inc.*, 2012 IL 113148; *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 156 (2d Dist. 1995); *Black Knight Prods., Inc. v. Univ. of Ill. at Chi.*, 50 Ill. Ct. Cl. 406, 410 (1998). In fact, *Patrick Engineering* and *Nielsen-Massey Vanillas* held that apparent authority did not apply against municipal corporations, which do not even receive the benefit of Eleventh

Amendment sovereign immunity, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), but are nonetheless governmental bodies. And *Black Knight Productions* specifically involved an Illinois state university. Moreover, Plaintiff does not allege that Interim Dean Ross or any other individual bound the University by their actions.

Plaintiff's arguments regarding actual authority similarly fail. "The authority to bind a principal will not be presumed, but rather, the person alleging authority must prove its source . . . . Moreover, the authority must be founded upon some word or act of the principal, not on the acts or words of the agent." *Schoenberger v. Chi. Transit Auth.*, 84 Ill. App. 3d 1132, 1136 (1st Dist. 1980) (internal citations omitted). Here, at best, Plaintiff alleges that Interim Dean Ross, the alleged agent of the University, gave him documents that he thought indicated the Board had delegated hiring authority to the faculty of the University. (*See* Compl. ¶ 55.) There is no allegation of any word or act of the Board itself that would have given Interim Dean Ross the right to act on its behalf. Plaintiff's general allegations of "delegation," (*see id.* ¶¶ 48-55), are legal conclusions rather than facts, and are insufficient. As such, Plaintiff has failed to plead that Interim Dean Ross or any other University employee had actual authority to bind the Board to an employment contract, authority vested exclusively with the Board. *See* 110 ILCS 305/7(a*); People ex rel. Bd. of Trs. of Univ. of Ill. v. Barrett*, 382 Ill. 321, 340 (1943).

Plaintiff's additional argument that the University General Rules should not be considered because they contradict the allegations of the Complaint is entirely misguided. The General Rules, which require the Secretary of the Board or the Comptroller of the University to execute a contract for it to be binding on the University, are expressly incorporated into the University *Statutes* (University *Statutes*, Art. 1, § 6), and the University *Statutes* have the force of law in Illinois. S*ee*

Upadhya v. Langenberg, 834 F.2d 661, 663 (7th Cir. 1987).[1] ***Factual*** allegations in the Complaint are taken as true, but Plaintiff's conclusory allegations do not change Illinois law. Further, Plaintiff's citation to the General Rules regarding the Comptroller and Secretary being "authorized to delegate" power and his allegation that employment offers are "customarily regarded as binding" do not change the import of the pre-formation execution requirements for contracts with the University. The authorization to delegate is not an indication that the Comptroller and Secretary actually delegated that power by any word or act. And whether an offer is "customarily regarded as binding" has no effect on whether power to extend offers was in fact delegated—popular understandings are often wrong.

Accordingly, this Court should dismiss Plaintiff's breach of contract claim because, by law, the alleged offeror could not have had authority to make an offer that bound the Board or the University. *See Black Knight Prods.*, 50 Ill. Ct. Cl. at 412 (granting motion to dismiss breach of contract claim because alleged contract did not bind the University of Illinois because it was not signed by the Comptroller of the University or the Secretary of the Board of Trustees).

b. <u>By The Plain Language of the Offer, The Requirement of Board Approval Was a Condition Precedent to Contract Formation</u>.

Plaintiff does not dispute that the offer letter read that the appointment was "subject to the approval of the Board," an entity which is distinct from the individuals who had sent and signed the conditional offer letter. Creatively, Plaintiff tries to circumvent this condition by arguing that it was a condition precedent to performance rather than to contract formation. This convoluted argument is inconsistent with Illinois law and clearly wrong. Courts have consistently found that when an

[1] Plaintiff further argues that the University *Statutes* and General Rules should not be considered because they constitute "parol evidence." (Pl.'s Resp. at 22 n.14.) This argument demonstrates a fundamental misunderstanding of the concept of parol evidence. "The parol evidence rule provides that evidence of prior or contemporaneous agreements or negotiations may not be introduced to contradict the terms of a partially or completely integrated writing." *Merk v. Jewel Food Stores Div. of Jewel Cos., Inc.*, 945 F.2d 889, 892 (7th Cir. 1991). Regulations that have the force of law are *not* parol evidence.

offer is stated to be "subject to approval," that approval is a condition precedent to *formation* of the contract. *See IK Corp. v. One Fin. Place P'ship*, 200 Ill. App. 3d 802, 811 (1st Dist. 1990); *Cobb-Alvarez v. Union Pac. Corp.*, 962 F. Supp. 1049, 1054 (N.D. Ill. 1997) (applying Illinois law); *In re Walston*, 190 B.R. 855, 859 (Bankr. S.D. Ill. 1996) (applying Illinois law and finding that "[t]he agreement signed by the debtor and the buyers in this case contained a provision making it subject to the approval of a third party, the bankruptcy trustee . . . Thus, at the time the debtor's petition was filed, the sales agreement was subject to a condition precedent—the approval of the bankruptcy trustee—which was outside the control of the contracting parties and which had not yet been satisfied. At this time, then, the sales agreement was **not an enforceable contract** . . . .") (emphasis added).

In *IK Corp.*, the defendant sent a letter to the plaintiff setting out a proposal for a lease that included many of the essential terms and specifically stated "this proposal is subject to prior leasing, prior acceptance, and lender approval." 200 Ill. App. 3d at 806. The appellate court affirmed the trial court's grant of a motion to dismiss a breach of contract action based on the letter and held that "as a matter of law, the 'subject to' language expresse[d] the intent of the parties that prior leasing, prior acceptance and lender approval were conditions precedent to the formation of a binding contract." Similarly, in *Cobb-Alvarez*, the court held that a letter sent to employees regarding a severance program did not constitute an offer that could be accepted because the letter explicitly stated that the offer was subject to approval by the employer's Vice President of Human Resources. 962 F. Supp. at 1054. As such, the court granted the defendants' motion to dismiss the breach of contract claim based on the letter. *Id.* at 1056.

Plaintiff's attempt to distinguish *Cobb-Alvarez*, (Pl.'s Resp. at 23 n.15), is unavailing. He claims "the context of the relationship revealed that the plaintiffs could not have reasonably believed that merely turning in their applications would entitle to them to severance benefits." Defendants wholeheartedly agree. The "context of the relationship" that the court discusses was illuminated by

a letter, which contained a disclaimer stating that participation in the program was subject to approval by the employer's Vice President of Human Resources. *Cobb-Alvarez*, 962 F. Supp. at 1054-55. For the same reason, *Plaintiff* could not have reasonably expected that signing the conditional offer letter with a disclaimer stating that his appointment was subject to the approval of the Board would entitle him to a tenured professorship *absent Board approval*.[2]

Finally, Plaintiff's contention that there is a question of fact on this point fails because, as a matter of law, the contract is unambiguous. Courts have consistently held that a statement indicating that a conditional offer is subject to approval by some other person or entity unambiguously creates a condition precedent to formation of the contract as a matter of law. *See IK Corp.*, 200 Ill. App. 3d at 814; *Cobb-Alvarez*, 962 F. Supp. at 1056. This is true even if the document containing a conditional offer also contains some language indicating that an agreement has been reached. *See Interway, Inc. v. Alagna*, 85 Ill. App. 3d 1094, 1100 (1st Dist. 1980) (granting a motion to dismiss a breach of contract claim and holding that a letter which stated that it was "subject to a definitive Purchase and Sale Contract to be executed by the parties" constituted a condition precedent to formation of the contract event though the letter also contained language indicating an agreement had been reached, such as "(T)his will confirm our agreement" and "we have agreed").[3]

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[2] *McKee v. First Nat. Bank of Brighton*, 220 Ill. App. 3d 976 (4th Dist. 1991), on which Plaintiff relies, is easily distinguished from this case. In *McKee*, plaintiffs sought a construction loan from defendants to build a gas station and convenience store. *Id.* at 977. As conditions precedent to performance of the loan, plaintiffs were required to: "grant defendant a security interest in the building, equipment and inventory, assign their lease with [an oil supplier] to defendant, grant defendant a second mortgage on their personal residence, and obtain life insurance on themselves and assign it to defendant." *Id.* Clearly, these conditions were designed as security for the loan, not conditions on an offer. They are a far cry from the situation in *IK Corp.*, *Cobb-Alvarez*, and the case at bar where an offer explicitly stated that it was subject to approval by an individual or entity before it became effective.

[3] The cases that Plaintiff cites merely reinforce that conditions in an offer stating that it is subject to approval are unambiguous and are properly decided as a matter of law on a motion to dismiss. In *Catholic Charities v. Thorpe*, 318 Ill. App. 3d 304 (1st Dist. 2000), while the court was reviewing a summary judgment ruling, it noted that "[t]he essential facts of this case, as stated in Buyer's complaint, follow," *id.* at 306, and that "[t]he intent of the parties to create a condition precedent to the formation of a contract is a question of law where the language in the instrument is unambiguous" and in fact held that the language at issue in that case was unambiguous, *id.* at 308. *Quake Const., Inc. v. Am. Airlines, Inc.*, 141 Ill. 2d 281 (1990), is easily distinguishable. There, the Court found that a provision in a letter of intent that allowed one party to ***cancel*** the letter was ambiguous as to whether it created a condition precedent to

There is no factual issue and Illinois law is crystal clear: the language in the conditional offer letter sent to Plaintiff precluded the formation of a contract prior to Board approval. Such approval was never given and a contract was never formed.

c. Plaintiff Fails to Sufficiently Allege Waiver of the Supposed Condition Precedent.

Plaintiff's argument regarding waiver of the condition of Board approval fails because Plaintiff does not allege subsequent conduct by the Board inconsistent with enforcing that condition. "Waiver is the purposeful relinquishment of a known right . . . To establish an implied waiver, there must be a clear, unequivocal, and decisive act of a party showing such a purpose." *Jones v. Melrose Park Nat. Bank*, 228 Ill. App. 3d 249, 256 (1st Dist. 1992). Here, Plaintiff's Response points only to the fact that the Board took approximately eleven months to decide on Plaintiff's appointment. (Pl.'s Resp. at 26.) Much of that time can be attributed to the fact that Plaintiff himself postponed his proposed start date for employment. (Compl. ¶ 29.) And, as Plaintiff admits, the Board made its decision to decline to hire him at the same meeting at which conditional offers of employment to other professors who were scheduled to start in the Fall 2014 semester were considered. (*Id.* ¶ 94.) None of this is inconsistent with the conditional offer that expressly stated that it was subject to Board approval. *See LaSalle Nat. Bank v. Metro. Life Ins. Co.,* 18 F.3d 1371, 1375 (7th Cir. 1994) (holding that there was no waiver of a condition precedent even though the defendant failed to bring the condition precedent to the plaintiffs' attention for several months). Plaintiff's Response points to no act that would reasonably indicate that the Board waived its right under Illinois law and the University *Statutes* to approve or disapprove of Plaintiff's appointment.

The cases Plaintiff cites on this point are not to the contrary. In fact, they highlight the sort of clear, unequivocal acts required for waiver to apply and which Plaintiff fails to allege in this case.

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formation of a contract because there would be no need to "cancel" the letter if it had no binding effect. *Id.* at 294. Here, the conditional offer letter stated that it was subject to approval, not cancellation, which unambiguously indicates that it created a condition precedent to formation of a contract. *See IK Corp.*, 200 Ill. App. 3d at 814.

See Bartels v. Denler, 30 Ill. App. 3d 499, 500-01 (3d Dist. 1975) (finding waiver of a breach of contract where an employer knowingly continued to employ and employee who breached his employment contract by taking on a second job); *Caisse Nationale de Credit Agricole, Grand Cayman Branch v. Beale*, 95-454, 1995 WL 263490, at *3 (N.D. Ill. May 4, 1995) (finding waiver of a condition precedent where a party sent a letter stating "Lender hereby waives any unsatisfied conditions precedent"). By contrast, Plaintiff does not allege that he informed Defendants that he did not consider the Board approval condition in the conditional offer letter to be binding and that Defendants acquiesced. Nor does he allege that Defendants sent a letter expressly waiving that condition. Because Plaintiff fails to allege any clear, unequivocal, and decisive acts indicating an intent to waive the condition of Board approval, he fails to properly allege waiver of the condition precedent to formation of the contract.

d. The Conditional Offer Was Not Subject to Good Faith and Fair Dealing.

Plaintiff cannot assert a breach of the implied duty of good faith and fair dealing. The Illinois Supreme Court has consistently declined to recognize an action for breach of a duty of good faith and fair dealing without a valid contract. *See Voyles v. Sandia Mortg. Corp.*, 196 Ill. 2d 288, 297 (2001); *Gore v. Indiana Ins. Co.*, 376 Ill. App. 3d 282, 287 (1st Dist. 2007) ("It is axiomatic that only duties arising out of a contract itself can give rise to a breach."). Because the contract here was never formed, Plaintiff may not allege a violation of the implied duty of good faith and fair dealing.

For all of these reasons, and those explained in Defendants' Memorandum, Plaintiff cannot state a claim for breach of contract, and Count V must be dismissed.

II. Plaintiff Fails to Allege an Unambiguous Promise and Any Reliance on the Conditional Offer Letter was Unreasonable

Tellingly, Plaintiff does not dispute that when a promise is conditioned on approval by another person or entity, it is unreasonable to rely upon the promise, and the promise cannot support a claim for promissory estoppel. (*See* Defs.' Mem. at Pgs. 13-15.) Since Plaintiff concedes

that the conditional offer letter stated that it was subject to approval by the Board, (Compl. ¶ 25), this fact alone is fatal to Plaintiff's promissory estoppel claim.

Perhaps in implicit recognition that this is the case, Plaintiff reframes his promissory estoppel claim to include an alleged promise that "the Board's consideration of Salaita's appointment would accord with principles of good faith and fair dealing." (Pl.'s Resp. at 30.) In support of this supposed promise, Plaintiff cites allegations that he subjectively believed that he was entitled to certain protections, (Compl. ¶ 41), and conclusory allegations (omitted from his promissory estoppel count) that the University violated contractual duties of good faith and fair dealing, (*id.* ¶¶ 126, 129). First, as discussed above, Plaintiff's argument fails because the duties of good faith and fear dealing are contractually based and no contract was ever formed. Second, Plaintiff's subjective belief that the University would act in a certain way is totally irrelevant to whether an unambiguous promise existed. *See A/S Apothekernes Lab. for Specialpraeparater v. I.M.C. Chem. Grp., Inc.,* 873 F.2d 155, 157-58 (7th Cir. 1989) (holding that written provision requiring approval by the defendant's board of directors controlled over plaintiff's independent belief that a contract had been formed); *Rockford Cutting Tools & Abrasives v. Norton Co.*, No. 90-2743, 1991 WL 191601, at *4 (N.D. Ill. Sept. 19, 1991) (finding no unambiguous promise despite facts that led the plaintiff to believe a contract had been formed).

It is true that to support a promissory estoppel claim, a promise need not be express, but it must be unambiguous. *Rockford Cutting Tools & Abrasives*, 1991 WL 191601, at *4. The cases on which Plaintiff relies underline why the documents he received are insufficient to support a promissory estoppel claim. In *In re Midway Airlines, Inc.*, 180 B.R. 851, 941-44 (Bankr. N.D. Ill. 1995), the court found that the plaintiff could not recover under a theory of promissory estoppel because the promises that were subject to a condition precedent of approval by a board of directors were too ambiguous to support such a claim. Similarly, here, any alleged promise was too

ambiguous to support a claim for promissory estoppel because the conditional offer was subject to approval by the Board.

The court in *Chatham Surgicore, Ltd. v. Health Care Serv. Corp.*, 356 Ill. App. 3d 795, 803 (1st Dist. 2005), did find that the defendant had made a sufficiently unambiguous promise to support a claim for promissory estoppel. There, however, the promise involved an insurance company that "always represented that the individuals were covered" under policies. *Id.* The insurance company never stated that such coverage would be subject to further approval. This is in direct contrast to the case at bar, where it is undisputed that the conditional offer letter stated that it was subject to approval by the Board.

Plaintiff has failed to identify any promise made by any Defendant, let alone any ambiguous promise, on which it would be reasonable to rely. As a matter of law, it was unreasonable for Plaintiff to rely on a conditional offer. (*See* Defs.' Mem. at 13-14.) Count IV must be dismissed.

III. Plaintiff's Constitutional Rights Were Not Violated

a. Plaintiff Cannot State a Claim for First Amendment Retaliation.

i. The Complaint Does Not Contain Particularized Allegations Against Each Defendant

Plaintiff acknowledges that to sufficiently allege liability for a violation of Section 1983, he must allege that Defendants "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). Plaintiff identifies four instances that he summarily contends are sufficient to state a claim: (1) Chancellor Wise arranged to meet with donors who exercised their free speech rights with regard to potential donations to the University; (2) at a meeting on July 24, 2014, the Administrators and the Trustees met in a ten-minute executive Board session to discuss Plaintiff's tweets and the Trustees decided that they

would support a decision to deny his appointment[4]; (3) Chancellor Wise and Vice President Pierre informed Plaintiff that his appointment would not be recommended to the Board[5]; and (4) at the September 11, 2014 Board meeting, the Trustees voted down Plaintiff's appointment. (Pl.'s Resp. at 13.) Without citation to any precedent, Plaintiff summarily concludes that the allegations discussed above are sufficient to impose liability under Section 1983. Clearly, they are not.

"[T]o be liable under § 1983, the individual defendant must have caused or participated in a constitutional deprivation." *Pepper v. Vill. of Oak Park*, 430 F.3d 805, 810 (7th Cir. 2005). Plaintiff does not allege that either President Easter or Vice President Pierre caused or participated in any alleged constitutional deprivation.[6] As for Chancellor Wise, for the first time, Plaintiff contends that the Board's September 11, 2014 decision not to approve Plaintiff's appointment was "based on Defendant Wise's recommendation." (Pl.'s Resp. at 13.) This new allegation is not in the Complaint and should not be credited by the Court. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.,* 631 F.3d 436, 448 (7th Cir. 2011) ("[A] plaintiff may not amend his complaint in his response brief."). Plaintiff never alleges that that the Administrators facilitated, approved, condoned, or turned a blind eye towards any violation of his constitutional rights or that they had the authority to do so. Accordingly, Count III should be dismissed against the Administrators.

ii. Based on the Factual Allegations in the Complaint and the CAFT Report, Reasonably Viewed, the Board's Conduct Satisfied Pickering

While Defendants agree that courts normally resolve the *Pickering* balancing test after

[4] Plaintiff concedes that Defendant Estrada was not present. (Pl.'s Resp. at 13.) Attendance at this meeting is the only substantive reference to President Easter in the entire Complaint and does not impute any conduct to him with regard to the consideration of Plaintiff's recommendation for appointment.

[5] This is the only substantive reference to Vice President Pierre in the entire Complaint.

[6] Plaintiff does conclusorily allege that both "facilitated, recommend and approved Professor Salaita's firing." (Compl. ¶¶ 11, 12.) Of course, these allegations alone do not satisfy *Iqbal* or *Twombly*.

discovery, they need not do so.[7] In fact, the law is clear that "application of the *Pickering* balance . . . is made on a case-by-case basis." *Friend v. Lalley*, 194 F. Supp. 2d 803, 810 (N.D. Ill. 2002). In this case, the Court should apply *Pickering* at this stage and find in Defendants' favor as: (1) Plaintiff has already obtained documents by way of Freedom of Information Act requests, (*see* Compl. ¶ 77); (2) as it stands, the pleadings reflect the very real threat of a potential disruption[8]; and (3) courts "give **substantial weight** to government employers' reasonable predictions of disruption." *Crue v. Aiken*, 370 F.3d 668, 685 (7th Cir. 2004) (emphasis added).

On several occasions, courts in the Seventh Circuit have dismissed a complaint based on application of the *Pickering* balancing test. *See Klug v. Chi. Sch. Reform Bd. of Trs.*, 197 F.3d 853, 859 (7th Cir. 1999) (performing *Pickering* analysis at motion to dismiss stage and finding that "[l]ooking at the complaint, and the facts alleged as the Board could reasonably find them to be, we are forced to conclude that the interest of the Board . . . . with saving the school far outweighs [the Plaintiff's] interest"); *Chi. Sch. Reform Bd. of Trs. v. Substance, Inc.*, 79 F. Supp. 2d 919, 936 (N.D. Ill. 2000) (applying *Pickering* in favor of the school board at the motion to dismiss stage).

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[7] Plaintiff contends that the *Pickering* balancing test is applied only in First Amendment cases involving public employees and that Defendants' reliance on *Pickering* is somehow a concession that Plaintiff was an employee of the University. (Pl.'s Resp. at 8 n.4.) Plaintiff is mistaken. In *Bonds v. Mil., Cnty*, 207 F.3d 969, 982 (7th Cir. 2000), cited by Defendants in their Memorandum, the Seventh Circuit applied the *Pickering* balancing test to a decision by the Milwaukee County Board of Supervisors to withdraw an offer of employment from an analyst who had made comments critical of his previous employer, the City of Milwaukee, and found in the government's favor. Accordingly, *Pickering* is the appropriate standard for prospective public employees as well as for current public employees. Moreover, as discussed *infra*, Plaintiff's uncertainty about the appropriate test to apply to prospective public employees who have an offer of employment withdrawn buttresses Defendants' contention that the doctrine of qualified immunity should apply here.

[8] With stunning temerity, Plaintiff includes a footnote in his Response contending that the facts from the CAFT Report "are not part of the allegations properly considered on a motion to dismiss." (Pl.'s Resp. 4 n.1.) Plaintiff then proceeds to cite to the CAFT Report in his Response *on three occasions*. (*See id.* at 27, 39, 40.) Moreover, Plaintiff does not respond to Defendants' argument (let alone the fact) that Plaintiff relies on the CAFT Report in his Complaint, (*see* Compl. ¶¶ 39, 56), nor the legal precedent establishing that documents that are attached to a motion to dismiss are appropriately "considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim," *Wright v. Assoc. Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994) (citing *Venture Assocs. v. Zenith Data Sys.*, 987 F.2d 429, 431 (7th Cir. 1993)); *see also Taylor v. Vill. of Dolton, Illinois*, No. 14-1402, 2014 WL 6910313, at *2 n.3 (N.D. Ill. Dec. 9, 2014) ("Although the Agreement was not attached to plaintiff's complaint, I can consider it at this stage because the complaint references and discusses it."). The Court clearly may consider the CAFT Report and the tweets and letters contained therein in ruling upon Defendants' Motion to Dismiss. As Defendants established in their Memorandum, the letters are referenced in Plaintiff's Complaint, (*see* Compl. ¶¶ 77-78), were obtained pursuant to requests under the Illinois Freedom of Information Act (*id.* ¶ 77), and underpin Counts I, II, III, VI, and VII.

In *Khuans v. Sch. Dist. 110*, 123 F.3d 1010, 1014 (7th Cir. 1997), the Seventh Circuit reversed the district court, which had denied qualified immunity to a superintendent at the motion to dismiss phase, and held that the complaint, reasonably viewed, reflected actual and potential disruption sufficient to tip the scales of the *Pickering* test towards the defendant. The court found:

> Even if all of Khuans' speech was on matters of public concern, the next step would be to analyze the effects of her speech under the *Pickering* balancing test, a step the district court did not take. We believe that here, too, Khuans has pled herself out of court because of the *actual and potential disruption caused by her remarks*. At oral argument, Khuans contended that her complaint does not allege any disruptive effect from her speech. *While we admit the complaint does not literally say "the department was disrupted", Khuans nevertheless alleges certain content, times, places, and manner of speech, which, reasonably viewed, can be understood to have endangered the efficient delivery of public services.*

Id. at 1017 (emphasis added). Similarly, in *Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1113 (7th Cir. 2013), the Seventh Circuit affirmed the dismissal of a complaint filed by a teacher who had his employment terminated following the publication of a sexually explicit book written on his own time outside of the classroom. Notably, the Seventh Circuit disagreed with the district court, which had dismissed the complaint based on a finding that the book, "It's Her Fault," was not of a matter of public concern, yet still found that the school district's interests outweighed the plaintiff's at the motion to dismiss stage of the case. Citing, *inter alia*, the school's predictions of an "intimidating . . . educational environment," the court observed that "[t]he school district reasonably predicted that [the book] would disrupt the learning environment at [the] school . . . ." *Id.* at 1113, 1119.

Here, the Court has the benefit of the CAFT Report, which contains dozens of letters and e-mails from current students, alumni, prospective students, and family members of current and prospective students, which were reviewed by the Board following Plaintiff's twitter activity in July of 2014. In these letters, students and family members communicated concerns about their own ability to speak freely, students' safety and comfort on campus, and students' ability to enroll in any courses Plaintiff might teach:

"Speech like [Plaintiff's] has at best a chilling effect on the entire university community, and

unfortunately too often leads to acts of overt discrimination and violence." (Ex. 1, Doc. 6 at Pg. 75.)

"I do not wish for the tuition that I pay towards our school supporting [sic] intolerance of this sort. Please act on behalf of the students of the University of Illinois and Urbana-Champaign in promoting tolerance of all ethnicities." (Ex. 1, Doc. 6 at Pg. 83.)

"I hope that [Plaintiff's] presence does not create an unfair and threatening environment for students." (Ex. 1, Doc. 6 at Pg. 84.)

"In this day and age of social media, it is increasingly important to hire candidates who not only are the most qualified for the position, but who are responsible members of society. The lines are blurred, due to social media, between professional responsibilities and personal thoughts and feelings. When considering hiring and retaining staff, all facets of a candidate need to be considered, especially how they conduct themselves on social media." (Ex. 1, Doc. 6 at Pg. 85.)

"While I respect and admire a university's desire to create a culture of free speech and dialogue, I believe that these values should never come at the expense of making students feel intimidated . . . I hope that the University reconsiders this extremely unfortunate appointment and places its students well-being as their highest priority." (Ex. 1, Doc. 6 at Pg. 88.)

"I, as well as many of my fellow students, feel very uncomfortable by [Plaintiff's] actions and will not stand for it . . . If I am not mistaken, 'cyber hatred' was a huge problem last year . . . ." (Ex. 1, Doc. 6 at Pg. 89.)

"This hiring legitimately scares me. This hiring has caused me and hundreds of other Jews on campus to be scared to express our beliefs and to literally be ourselves as Jews. A successful learning environment allows those who participate in it to feel safe being

themselves and expressing their beliefs. Any feeling of safety is eradicated with the hiring of Steven Salaita." (Ex. 1, Doc. 6 at Pg. 94.)

"Let me be clear that I am in no way criticizing Mr. Salaita's right to stay what he has . . . If I happen to register for Mr. Salaita's course, how could I respectfully engage in conversation and learn material?" (Ex. 1, Doc. 6 at Pg. 96.)

"[T]here is no way I would be able to take this mans [sic] course." (Ex. 1, Doc. 6 at Pg. 103.)

"What will bother me is the safety of students in Steven Salaitas [sic] classroom." (Ex. 1, Doc. 6 at Pg. 109.)

"As a student at the University of Illinois I want to be able to feel safe and welcomed on campus." (Ex. 1, Doc. 6 at Pg. 110.)

"I have talked to many people who said they would feel uncomfortable in [Plaintiff's] classroom. His personal views create an environment that may cause students to feel unsafe." (Ex. 1, Doc. 6 at Pg. 111.)

"As a student at UIUC I am advocating for a safe and respectful learning environment by reaching out to you Chancellor Wise." (Ex. 1, Doc. 6 at Pg. 113.)

"If [Plaintiff] is employed by the University in the fall I will seriously consider transferring away from the University of Illinois . . . ." (Ex. 1, Doc. 6 at Pg. 116.)

Even as alleged, these materials were considered by the Board prior to the vote not to appoint Plaintiff to the faculty. Therefore, the Board had ample evidence of a potential disruption to the University's educational environment and acted accordingly in denying Plaintiff's appointment.

In consideration of the seven-part test generally employed by courts in the Seventh Circuit when evaluating *Pickering* claims, *see Khuans*, 123 F.3d at 1015, factors three ("whether the speech impeded the employee's ability to perform [his] daily responsibilities") and four ("the time, place, and manner of the speech"), in particular, establish that the Board's interest in providing for a safe

and efficient educational environment outweighed Plaintiff's free speech rights. *See Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 672 (7th Cir. 2006) (finding that the plaintiff's speech "inhibited her ability to perform [her] job by undermining her relationship with [the student] and other students who disagreed with or were offended by her expressions of her beliefs").[9] Plaintiff's argument that academic freedom guarantees "heighten[ed] Salaita's speech interest and diminishe[d] the University's interest in an employee's 'personal loyalty'," (Pl.'s Resp. at 12), is of no matter. Defendants agree that tenured faculty employed the University are entitled to academic freedom, but clearly dispute that those protections applied in full force to Plaintiff, a prospective employee.

The Complaint and the CAFT Report, reasonably viewed, reflect legitimate concerns regarding a potential disruption to the learning environment at the University. In light of these facts and the substantial weight that courts afford to government employers' reasonable predictions of disruption, this Court should find that the Board's decision not to grant Plaintiff's appointment to the faculty satisfies the *Pickering* test and dismiss Count I of the Complaint.

b. Plaintiff Cannot State a Claim for Violation of His Due Process Rights.

i. As a Prospective Employee, Plaintiff Was Not Entitled to any Procedural Due Process

[9] Plaintiff contends that courts' concern about disruption pertains only to speech that occurs within the classroom and directed at particular students. (Pl.'s Resp. at 11.) This argument begs the question: the cases cited by Plaintiff either considered the level of deference to school boards to regulate in-classroom speech or in no way address the issue at all. *See Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (finding that *Garcetti* applies to primary and secondary teachers when they "cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system"); *Brown v. Chi. Bd. of Educ.*, 973 F. Supp. 2d 870, 879 (N.D. Ill. 2013) (evaluating the board's discipline of a high school teacher for using the "n-word" in class); *Connick v. Myers*, 461 U.S. 138, 153 (1983) (in a case that did not involve the educational environment whatsoever, the Supreme Court noted that "[e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office, bring different factors into the *Pickering* calculus, and *might* lead to a different conclusion") (emphasis added). Nor is Plaintiff's argument accurate. *See, e.g.*, *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 309 (D. Conn. 2008) (granting summary judgment to the defendants on the plaintiff's First Amendment retaliation claim based on adverse employment action related to the plaintiff's private, out of school postings on MySpace page). Notably, the court in *Brown* found, at the motion to dismiss stage, that the doctrine of qualified immunity protected the principal from liability because "the alleged constitutional violation [was] not "so obvious that a reasonable state actor would know what they are doing violates the Constitution." *Brown*, 973 F. Supp. 2d at 881 (internal quotation marks omitted).

As a prospective employee at the University, Plaintiff never had a property interest in his position at the University. Therefore, he had no procedural due process right that could have been violated. Plaintiff contends that: (1) he will prevail on any of his several attempts to save his contract claim; and (2) even if he cannot, he is entitled to procedural due process based on his purported reliance on University officials' (unidentified) promise. (Pl.'s Resp. at 14-15.) Both arguments are belied by the facts alleged and settled law.

Plaintiff relies in large part on the Seventh Circuit's decision in *Vail v. Bd. of Educ. of Paris Union Sch. Dist. No. 95*, 706 F.2d 1435 (7th Cir. 1983). There, the board of education unanimously agreed to offer a contract to the plaintiff and unambiguously promised him a one-year contract that would renew at the end of his first year. When the board voted not to renew the plaintiff's contract, the court found that the board had violated his due process rights. *Id.* at 1438. Several glaring distinctions make *Vail* inapplicable here: in *Vail*, the board made a promise to the plaintiff; the board's promise was unambiguous; and the board actually approved the plaintiff's employment. Where board approval is required but lacking, *Vail* does not apply. *See Wolf v. City of Fitchburg*, 870 F.2d 1327, 1335 (7th Cir. 1989) (distinguishing *Vail* based on lack of promise from the board and finding that "[i]t is now firmly established that the 'mutually explicit understandings' that constitute property interests under the holding of *Perry [v. Sindermann*, 408 U.S. 593 (1972)] cannot be based on the representations of government officials who are not authorized to make such representations."); *Upadhya*, 834 F.2d at 666 ("It should be clear by now that Upadhya does not come within the holding of *Vail:* he did not obtain an express promise that five years would be his minimum term, and **any implication to that effect was unauthorized by the President and Board of Trustees of the University—the only persons who could bind the University to such contracts**."). (emphasis added); *Valentine v. Joliet Twp. Sch. Dist.*, 802 F.2d 981 (7th Cir. 1986) (finding that representations made to a guidance counselor who had not been recalled after layoffs were not

binding because the administrators did not have authority to make any such representations).

By contrast, here, Plaintiff does not allege any unambiguous promise from anyone at the University or on the Board and the Board did not approve Plaintiff's appointment. Rather, in effect, Plaintiff alleges that, by voting down his appointment, the Board prevented him from the opportunity to acquire a property interest. The Seventh Circuit has rejected this very argument. *See Kyle v. Morton High Sch.*, 144 F.3d 448, 452 (7th Cir. 1998) ("A procedurally-flawed firing of a probationary employee may have the effect of depriving the employee of an *opportunity* to attain a property right (tenured status), but since that property right does not 'presently securely belong [ ]' to the employee, *Cornelius v. LaCroix,* 838 F.2d 207, 210 (7th Cir. 1988), the loss of the opportunity to acquire property is not a deprivation of a constitutional right.") (emphasis in original).

Where obtaining a government position requires a condition precedent to contract formation that has not been satisfied, one simply does not have a property interest. *See DeGroot v. Vill. of Matteson*, No. 13-08530, 2014 WL 3360562, at *3 (N.D. Ill. July 9, 2014) ("Plaintiff received a conditional offer of employment, but the Village ultimately did not hire him. Because Plaintiff had no property interest in prospective employment with the Village, his due process claim fails . . . ."). Plaintiff's non-factual assertion that the Board delegated actual and apparent authority to University officials, (Pl.'s Resp. at 15), is plainly contrary to the law, unsupported by specific facts, and need not be credited by the Court, (*see supra* at Section I.A).

Because the Board never approved Plaintiff's appointment, he was never an employee and never acquired the property interest required to assert a procedural due process claim. Count II must be dismissed.

ii. Plaintiff Has Failed to Sufficiently Allege a Deprivation of His Liberty Interest

As a matter of law, one does not have a liberty interest in a prospective position. *See Koszola v. Bd. of Educ. of City of Chi.*, No. 01-2722, 2002 WL 398547, at *3 (N.D. Ill. Mar. 14, 2002) ("Our

search of the applicable precedents, in fact, finds no instance in which a person was held to have been deprived of a liberty interest in a job he or she never had to begin with. As such, we dismiss Count II of Ms. Koszola's amended complaint."). Accordingly, Plaintiff cannot allege a violation of his liberty interest as he was never employed by the University. Plaintiff relies on *Colaizzi v. Walker*, 542 F.2d 969, 973 (7th Cir. 1976), where the Seventh Circuit found that a claim of stigma based on a press release alleging abuse of official positions in attempting to force a company to drop criminal actions against an employee and a termination was sufficient to state a liberty interest claim. The court specifically carved out discharge and failure to re-hire as employment actions upon which a plaintiff may claim a liberty interest, but notably did not include the failure to initially hire. *Id.* Plaintiff has failed to identify such a case where failure to hire led to an actionable deprivation of one's liberty interest, because no such case exists.

Moreover, even assuming that Plaintiff *had* a liberty interest, his allegations regarding a purported *violation* of such an interest are plainly insufficient.[10] To assert a liberty interest claim, a plaintiff must allege that the defendant called into question his honesty, morality, loyalty, or other similar charges, *see Adams v. Walker*, 492 F.2d 1003, 1008 (7th Cir. 1974), which results in his "permanent exclusion" from his field, *Parker v. Ill. Human Rights Comm'n*, No. 12 C 8275, 2013 WL 5799125, at *7 (N.D. Ill. Oct. 25, 2013). Alleged statements questioning Plaintiff's qualifications as a teacher and a scholar do not arise to that level. *See Head v. Chi. Sch. Reform Bd. of Trs.*, 225 F.3d 794, 802 (7th Cir. 2000) (affirming dismissal of liberty interest claim as "[s]imple charges of professional incompetence do not impose the sort of stigma that actually infringes an employee's liberty to pursue an occupation"). What remains are two allegations that Trustee Kennedy stated that "the comments of Professor Salaita's that he reviewed were anti-Semitic' and 'blatantly anti-Semitic.'" (Compl. ¶¶ 96, 98.) These comments in no way impose a "stigma" that would implicate Plaintiff's

[10] In support of his liberty interest claim, Plaintiff relies on *Klug v. Chi. Sch. Reform Bd. of Trs.*, 197 F.3d 853, 859 (7th Cir. 1999), where the Seventh Circuit found that the district court properly dismissed the plaintiff's liberty interest claim.

liberty interest, if he had one. Moreover, even if these statements were sufficient to allege a violation of Plaintiff's liberty interest, which they are not, they in no way implicate any other Trustee or Administrator. Plaintiff's due process claim for a deprivation of his liberty interest fails as well.

c. Plaintiff Cannot Meet the Higher Pleading Standard for a Conspiracy Claim.

Plaintiff's conspiracy claim fails because there was no underlying violation of his constitutional rights, he has not sufficiently alleged the existence of a conspiracy, and the intra-corporate conspiracy doctrine applies to shield Defendants from liability. "[C]ourts are loathe to allow discovery to proceed regarding 'a vast, encompassing conspiracy' without meeting a high standard of plausibility." *Drager v. Vill. of Bellwood*, 969 F. Supp. 2d 971, 985 (N.D. Ill. 2013) (citing *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009)).

Plaintiff cites *Sow v. Fortville Police Dep't*, 636 F.3d 293, 305 (7th Cir. 2011), where the Seventh Circuit affirmed the district court's dismissal of the civil conspiracy claim as the "[p]laintiff presented no evidence of a conspiracy other than speculation and conjecture." Such is the case here. To wit, Plaintiff contends that "his appointment was discussed in communications and meetings between donors and Defendants Wise, and that the decision to terminate his appointment was agreed upon at meetings of Defendant Trustees . . . at which Defendants Wise, Pierre, and Easter were present." (Pl.'s Resp. at 38.) First, Plaintiff concedes that he has failed to allege that the Unknown Alleged Donors or Chancellor Wise, Vice President Pierre, or President Easter agreed with the Trustees to deprive Plaintiff of his constitutional rights. By his own admission, Plaintiff merely pleads that the Unknown Alleged Donors "discussed" Plaintiff's appointment and that Chancellor Wise, Vice President Pierre, or President Easter "were present" at a meeting at which the Trustees allegedly agreed not to approve his appointment. Second, the "agreement" was not to deprive Plaintiff of his constitutional rights, but merely not to confirm his appointment to the faculty. Plaintiff's allegations

lack the necessary "critical details" to survive Defendants' Motion. *See Wojcik v. InterArch, Inc.*, No. 13-1332, 2013 WL 5904996, at *12 (N.D. Ill. Nov. 4, 2013).

Plaintiff is correct that the Seventh Circuit has never applied the intra-corporate conspiracy doctrine to Section 1983 claims, but is decidedly wrong that "most" district courts have found that it does not apply. (Pl.'s Resp. at 39.) Plaintiff misstates the court's analysis in *Cannon v. Burge*, No. 05-2192, 2006 WL 273544, at *14 (N.D. Ill. Feb. 2, 2006), which was in the context of conspiracy claims involving **police misconduct**; in fact, "the majority of district courts in the Seventh Circuit apply the concept to § 1983 cases." *Mnyofu v. Bd. of Educ. of Rich Tp. High Sch. Dist. 227*, 832 F. Supp. 2d 940, 948 (N.D. Ill. 2011). The doctrine applies "where several managers confer on a business decision, such as an employee termination, later alleged to be discriminatory or retaliatory." *Petrishe v. Tenison*, No. 10-7950, 2013 WL 5645689, at *5 (N.D. Ill. Oct. 15, 2013). Here, the decision not to hire a prospective employee is precisely the type of "routine, collaborative business decision" to which the intra-corporate conspiracy doctrine applies. Count III should be dismissed.

IV. Plaintiff's State Law Claims Are Inapplicable to an Underlying Employment Dispute Between Plaintiff and the University

a. Plaintiff's Spoliation Claim is Ill-Pled and Misplaced.

Plaintiff fails to meet the basic, fundamental requirements of pleading a negligent spoliation of evidence cause of action. First, Plaintiff has failed to plead that Chancellor Wise owed a legally recognized duty of care **to him**. *See Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007); *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶¶ 14-18 (holding that the touchstone of the court's duty analysis in a negligence claim is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation). In fact, Plaintiff fails to establish any duty. Rather, Plaintiff unavailingly relies on the Illinois State Records Act, a statute which sets out general record retention requirements and in no way addresses the relationship between a prospective employee and the Chancellor of a public university. Plaintiff fails

to cite to a single case supporting the proposition that the Illinois State Records Act creates a duty between an administrator at a university and a prospective faculty member.

Even if Plaintiff sufficiently establishes a duty owed by Chancellor Wise to Plaintiff by virtue of a generally applicable records retention statute, Plaintiff still fails to show that the duty extended to the documents at issue, as required to state a claim for negligent spoliation of evidence. *See Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004) (holding that the defendant's duty to the plaintiff must, "extend[] to the evidence at issue—i.e., [ ] a reasonable person should have foreseen that the evidence was material to a potential civil action."). According to Plaintiff, "Chancellor Wise knew that Salaita's appointment was likely to generate controversy . . . [and] to cause both uproar and litigation." (Pl.'s Resp. at 35.) That is simply not the standard for negligent spoliation of evidence. *See Vill. of Roselle v. Commonwealth Edison Co.*, 368 Ill. App. 3d 1097, 1116 (2d Dist. 2006) ("[C]ase law suggests that more than a request for certain evidence is required to put a party on notice of a potential civil action. Notably, there must be an additional indication that the defendant knew or reasonably should have known of the potential for litigation."). Such evidence is not pled here.

Finally, Plaintiff cannot establish that the loss of such evidence was the proximate cause of his failure to prevail in an underlying suit. *Jackson v. Michael Reese Hosp. & Med. Ctr.*, 294 Ill. App. 3d 1, 16-17 (1st Dist. 1997) ("According to *Boyd,* actual damages must be alleged in an action for the negligent spoliation of evidence. A threat of future harm, not yet realized, is not actionable.") Plaintiff does not and cannot allege either that the alleged destruction of evidence was crucial to an underlying suit or that he has failed to prevail on an underlying suit, because there was no underlying suit—this *is* the underlying suit. Plaintiff's spoliation claim is inapplicable and must be dismissed.

b. Plaintiff's Claim for Intentional Infliction of Emotional Distress is Wholly Inapplicable.

Despite mistaken allegations based on his purported "death," (Compl. ¶ 141), Plaintiff refuses to concede that his claim for intentional infliction of emotional distress is frivolous. In his

Response, Plaintiff does not address the ample caselaw cited by Defendants establishing that such claims must be truly extreme and outrageous, particularly in the employment context, and that "[f]ailing to hire . . . does not amount to conduct that is extreme and outrageous." *Bogie v. PAWS Chi.*, 914 F. Supp. 2d 913, 917 (N.D. Ill. 2012) (internal quotation marks omitted).

Rather, Plaintiff makes a conclusory statement that Defendants' conduct was extreme and outrageous. Plaintiff argues that his allegations that defendants called his tweets "antisemitic" and that he was "unfit to teach" amounts to such "egregious" conduct. (Pl.'s Resp. at 36.) Even under the caselaw cited by Plaintiff, *Van Stan v. Fancy Colours & Co.*, 125 F.3d 563, 568 (7th Cir. 1997), "mere insults, indignities, threats, annoyances, petty oppression, or other trivialities do not amount to extreme and outrageous conduct." (internal quotation marks and citations omitted). Plaintiff's failure to allege extreme and outrageous conduct by defendants is fatal to Plaintiff's claim.

But even if mere insults did suffice to support a claim for intentional infliction of emotional distress, Plaintiff still fails to allege that he suffered *severe* emotional distress as required to state a claim. *See Pub. Fin. Corp. v. Davis*, 66 Ill. 2d 85, 90 (1976) (finding fright, horror, grief, shame, humiliation, worry, etc. insufficient emotional distress to support a cause of action). Nor has Plaintiff alleged an intent by Defendants to cause him this unalleged severe emotional distress. (*See* Defs.' Mem. at 27-28.) Count VIII must be dismissed.

c. Plaintiff's Tortious Interference Claims Fail as a Matter of Law.

i. The Court May Dismiss Claims Against the Unknown Alleged Donors Because Plaintiff Has Failed to State a Claim Against Them

Plaintiff contends that the Court cannot dismiss the claims against the unrepresented Unknown Alleged Donors—of course, that is not the case. First, a court may properly dismiss claims pled against unidentified "Doe" defendants where, as here, a plaintiff fails to state a claim upon which relief can be granted. *See Golden v. Stutleen,* 535 F. App'x. 526, 528 (7th Cir. 2013) (affirming dismissal with prejudice of claims against unrepresented "Doe" defendants when the

plaintiff failed to state a claim against those defendants); *see also Bey v. City of Phi.*, 6 F. Supp. 2d 422, 424 (E.D. Pa. 1998) ("In cases that allow for Doe defendants, other identified defendants have been able to represent the unknown individual defendants' interests."). Second, a district court may *sua sponte* dismiss a claim under Rule 12(b)(6) "provided that a sufficient basis for the court's action is evident from the plaintiff's pleading." *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997). Here, the Complaint fails to state a claim upon which relief can be granted in either of the claims exclusively brought against the Unknown Donor Defendants—tortious interference with contract and tortious interference with business relations—and dismissal is warranted. Finally, even if the Court declines to dismiss the claims against the Unknown Alleged Donors based on Defendants' Motion to Dismiss or *sua sponte*, the claims should be dismissed if the other claims against the University Defendants are also dismissed. Allowing claims against unidentified and unserved "Doe" defendants to proceed when all other defendants have been dismissed from the case would "offend basic notions of due process." *Bey*, 6 F. Supp. 2d at 424.

ii. Plaintiff's Attempt to Correct His Impermissible Merged Claim in His Response Does Not Address the Deficiencies in the Complaint Which Warrant Dismissal of the Claim

Plaintiff attempts to distinguish his impermissible merging of his claims for tortious interference with contract and tortious interference with business relations from the prohibition set forth in *Raymond v. Alexander*, No. 11-00532, 2012 WL 4388328 (S.D. Ill Sept. 25, 2012), by arguing that, unlike the plaintiff in *Raymond*, he "appreciates" the difference between the two claims. (Pl.'s Resp. at 37 n.19.) While it is comforting to know that Plaintiff now appreciates the difference between the two claims, this does not change the fact that, like the plaintiff in *Raymond*, he fails to set them forth and plead them separately in his Complaint despite the fact that they are separate torts with separate elements of proof. *See Raymond*, 2012 WL 4388328 at *9 (holding that plaintiff must

choose which of the two claims to pursue or to pursue both in separate counts). As such dismissal of the as-pled claim is warranted.[11]

iii. Plaintiff's Claim for Tortious Interference With Business Relations Fails as a Matter of Law Because Plaintiff Fails to Allege a Reasonable Expectation of Entering Into a Valid Business Relationship

Plaintiff fails to address Defendants' argument that even assuming that his allegations were true, Plaintiff's expectation of a valid business relationship based on a conditional offer was *per se* unreasonable. *See Pompa v. Swanson*, 2013 IL App (2d) 120911, ¶ 35 (affirming dismissal of claim for interference with prospective business relations where expectancy was "conditional at best"). Instead, Plaintiff conclusorily states that he has pled it, while citing portions of the Complaint that refer to allegations related to supposed meetings with the Unknown Alleged Donors. (Pls.' Resp. at 37; Compl. ¶¶ 78-80, 132-133.)

iv. The Alleged Unknown Donors' Conduct Was Privileged

Finally, the Alleged Unknown Donors' alleged conduct was privileged because it constituted First Amendment-protected speech and petitioning of the government. Plaintiff cites no cases for his assertion that there should be a distinction between "*quid pro quo*" statements that a donation will be withheld and "general advocacy." This distinction has no basis in the law. The very case that Plaintiff attempts to distinguish, *Nat'l Org. for Women, Inc. v. Scheidler*, No. 86-7888, 1997 WL 610782, at *24 (N.D. Ill. Sept. 23, 1997), involved a defendant who wrote letters and organized a letter-writing campaign to encourage a landlord to cancel a lease with a plaintiff who planned to run an abortion clinic on the site. The letters stated that the defendant would organize a boycott of the landlord and create disturbances at the site by picketing unless the landlord agreed to break its lease

[11] Plaintiff seeks leave to re-plead these claims if they are dismissed. (Pl.'s Resp. at 37 n.19.) Leave should be denied because, as demonstrated in Section III.a. of the Memo and Sections I and IV.c.iv. of this Reply, re-pleading would be futile considering Plaintiff's inability to plead a valid contract and that the actions of the Unknown Alleged Donors as alleged were privileged. *See Glick v. Koenig,* 766 F.2d 265, 268 (7th Cir. 1985) (affirming denial of leave to re-plead a claim where the amended claim would not survive a motion to dismiss).

with the abortion clinic. *Id.* at *24 & n.35. This conduct was certainly a more direct *quid pro quo* threat than the vaguely alleged conduct of the Unknown Alleged Donors, who purportedly only expressed their disagreement with Plaintiff's statements and stated that they would not make voluntary donations "in the future."

Nonetheless, the court in *Scheidler* held that the non-violent letter-writing campaign was "intended to apply economic pressure and . . . force economic and political change" and was thus privileged because "the application of the state law of tortious interference with contractual relations to [the defendant's] conduct in this case would violate the First Amendment." *Id.* at **30-31; *see also N. A. A. C. P. v. Claiborne Hardware Co.,* 458 U.S. 886, 909 (1982) (holding that a nonviolent boycott involves "speech in its most direct form" and that such speech "does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). Similarly, here, Plaintiff alleges only that the Alleged Unknown Donors "made clear that they disagreed with Professor[ ] Salaita's views critical of Israel policy" and stated that they would cease giving voluntary donations to the University and encourage others to do so as well. (Compl. ¶¶ 78-79.) One alumnus wrote: "[b]ased on the hiring of Mr. [sic] Salaita, I have decided to reconsider any *future* commitment of time and money to the University of Illinois . . . I am deeply conflicted by my decision to reconsider any support for the Business School. However, as a Jew and lover of Israel, *I see no other way to make my voice heard* then [sic] to take this action." (Ex. 1, Doc. 6 at Pg. 86.) (emphasis added). This is precisely the sort of economic pressure and letter writing that occurred in *Scheidler* and which the First Amendment protects. Accordingly, Counts VI and VII should be dismissed.

V. Defendants Are Protected By Sovereign and Qualified Immunity

a. The Board, the Trustees and Administrators in their Official Capacities Are Entitled to Sovereign Immunity.

Plaintiff ignores Illinois law regarding the Illinois Court of Claims' exclusive jurisdiction over suits against the Board and asks the Court to undo decades of Seventh Circuit decisions and Illinois

state law in order to launch a lengthy fact-intensive inquest into the University's land grants, private donations, endowment, and other sources of revenue and reconsider the University's status as a state agency. (Pl.'s Resp. at 32.) Such an inquiry is unnecessary. Illinois and federal precedent on this issue is clear: the University is an arm of the state and entitled to sovereign immunity. *See Kroll v. Bd. of Trs. of Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991) (applying sovereign immunity to the Board of Trustees of the University of Illinois); *see also Pollak v. Bd. of Trs. of Univ. of Ill.,* No. 99-710, 2004 WL 1470028, at *2 (N.D. Ill. June 30, 2004).

The sole Seventh Circuit case Plaintiff relies upon in support of his argument that the Court should allow discovery into the University's finances is *Benning v. Bd. of Regents of Regency Univs.*, 928 F.2d 775, 777 (7th Cir. 1991), a case which *directly repudiates* Plaintiff's position. In *Benning*, the plaintiff filed suit against officials and employees of Northern Illinois University, alleging that he suffered extensive injuries as a result of their negligence. The Seventh Circuit held that it, "need not resolve [the] delicate, fact-intensive question [of whether a state entity is entitled to sovereign immunity] because this case is easily decided upon other grounds." *Id.* The court referred to the *Erie* doctrine and found that "**state rules of immunity govern actions in federal court alleging violations of state law**," and that "[h]ere, an Illinois statute specifically ousts both state and federal courts of jurisdiction over all tort suits against the Board of Regents, conferring exclusive jurisdiction upon the Illinois Court of Claims." *Id.* at 778 (emphasis added).

State law, which governs sovereign immunity here, is clear that "any suit against the Board [of Trustees of the University of Illinois] based upon a claim sounding in tort must be filed in the Court of Claims," 110 ILCS 305/1, and that the Illinois Court of Claims' jurisdiction covers "[a]ll claims against the State founded upon any contract entered into with the State of Illinois," 705 ILCS 505/8. In his Response, Plaintiff clarifies that his request for equitable relief–being hired by the Board (which he does not establish is actually a remedy that can be provided)–applies only to

Counts IV and V of the Complaint, which are asserted only against the Board. (Pl.'s Resp. at 31.) Impermissibly, Plaintiff also seeks monetary damages in Counts IV and V. (*See* Compl. ¶¶ 123, 130.) Insofar as a state agency is involved, sovereign immunity applies "regardless of the nature of the relief sought." *Kroll*, 934 F.2d at 907. Thus, even if the Eleventh Amendment permits suit against the Board, this Court still lacks jurisdiction over his state law claims and they must be dismissed. *See Benning*, 928 F.2d at 778 ("Even if the Eleventh Amendment should permit suits against the Board of Regents, [the Illinois Court of Claims Act] thus requires us to dismiss Benning's state law tort claim."). Finally, Plaintiff does not dispute that, based on the doctrine of sovereign immunity, he cannot recover from the Trustees and Administrators in their official capacities.

b. The Trustees and Administrators' Qualified Immunity Defense May be Resolved at the Pleading Stage.

As with a *Pickering* analysis, qualified immunity defenses are often decided after fact discovery, but need not be. *See Brown*, 973 F. Supp. 2d at 88; *Rasmussen v. Zollar*, No. 95-58551, 1997 WL 779103, at *3-5 (N.D. Ill. Dec. 11, 1997). Here, even as alleged, the Trustees and Administrators did not violate a clearly established constitutional right and are entitled to qualified immunity. "Once a qualified immunity defense is raised, it is plaintiff's burden to establish that her constitutional right was clearly established." *Maes v. Folberg*, 504 F. Supp. 2d 339, 346 (N.D. Ill. 2007) (granting the defendants' motion to dismiss based on doctrine of qualified immunity).

As Defendants' argued in their Memorandum, Plaintiff may establish that his constitutional right was clearly established by presenting case law that "has both articulated the right at issue and applied to a factual circumstance similar to the one at hand." *Boyd v. Owen*, 481 F.3d 520, 526 (7th Cir. 2007). Plaintiff failed to set forth a single case where a trustee or administrator of a public university was found liable for not approving a prospective faculty member's appointment based on his or her extramural speech. In all likelihood, this is the first where such liability is sought. Clearly, then, that "right" is not "clearly established" such that liability would be warranted. *See Danenberger v.*

Johnson, 821 F.2d 361, 363 (7th Cir. 1987) ("In light of the existing case law, we hold that Danenberger had no clearly established constitutional right . . . . The district court thus properly dismissed Danenberger's complaint since the defendants were immune from her suit."); *Khuans*, 123 F.3d at 1020 ("The least that can be said here is that at the time Khuans lost her job, whether independent contractors could be terminated for their exercise of free speech in the workplace was unaddressed, undecided and unsettled in this circuit."); *Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist.*, 133 F.3d 1054, 1062 (7th Cir. 1998) (reversing lower court's denial of defendants' motion to dismiss on qualified immunity grounds where plaintiff, "did not carry his burden of showing that it was clearly established at the time the defendants acted that they had an affirmative obligation to act as [plaintiff] alleges they were obliged to do").

Plaintiff contends that Defendants apply a "hyper-technical reading" of the facts in support of their qualified immunity defense, (Pl.'s Resp. at 18), yet, he fails to point to a single analogous case. Instead, he relies on doctrine regarding public employers retaliating against *current* employees for constitutionally protected speech. *See, e.g.*, *Gustafson v. Jones*, 117 F.3d 1015, 1021 (7th Cir. 1997) (involving the transfer of police officers in response to criticism of police policy). Plaintiff's self-serving and disingenuous construal of the allegations and use of caselaw contravenes the Supreme Court's guidance that inquiry into whether a right was "clearly established" at the time of the alleged violation "must be taken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Defendants are entitled to qualified immunity at this stage of the proceedings.

CONCLUSION

For all of the foregoing reasons and those stated in Defendants' Memorandum in Support of Their Motion to Dismiss, Defendants respectfully request that this Court enter an Order dismissing the Amended Complaint in its entirety with prejudice and granting any other relief that this Court

deems just and proper.

Dated: April 20, 2015

Respectfully submitted,

By: /s/ Christopher B. Wilson
One of Their Attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **REPLY IN SUPPORT OF THE MOTION** was served upon all counsel of record this 20th day of April, 2015 via the Case Management/Electronic Case Filing ("CM/ECF") System.

/s/ Christopher B. Wilson