UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT L. BREUDER,	)	
	)	
Plaintiff,	)	No. 1:15 cv 9323
v.	)	Hon. Andrea R. Wood
	)	
BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 502, DUPAGE COUNTY, ILLINOIS, an Illinois body politic and corporate, KATHY HAMILTON in her official and individual capacity, DEANNE MAZZOCHI in her official and individual capacity, FRANK NAPOLITANO in his official and individual capacity, and CHARLES BERNSTEIN in his official and individual capacity,	)	
	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF
INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

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Dated: March 14, 2016

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Plaintiff's response to the individual defendants' motion to dismiss (DE 50) fails to show why his complaint states valid claims. Accordingly, the official-capacity claims against the individual Board members[1] and Counts I-II (Due Process), Count III (Conspiracy), Count V (Tortious Interference with Contract), and Count VI (Defamation) should be dismissed.

I. Counts I and II Fail to State Due Process Claims.

Counts I and II assert due process claims against both the Board and the individual Board member defendants. The due process claims against the individual defendants fail for the same reasons these claims fail against the Board.[2] One of the reasons these counts fail to state any procedural due process claim, either against the Board or against the individual defendants, is that all the process that was due was available to Plaintiff. *See* DE 39 at 2, incorporating DE 36 at 13-15; DE 52 at 14-15. Plaintiff does not address this reason at all in his opposition to the individual defendants' motion, and it is dispositive. Beyond the reasons applicable to all defendants, an additional reason applies to the individual defendants: qualified immunity.

On Plaintiff's deprivation-of-property claim (Count I), the individual defendants are qualifiedly immune because the alleged property interest was not a "clearly established statutory or constitutional right[] of which a reasonable person would have known" at the time the challenged conduct occurred, under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If any property right arose from a contract that (1) purported to grant tenure far beyond the term of the prior Board that voted for it, (2) conflicted with the open-meeting provisions of the Open Meetings Act, and (3) conflicted with the quorum/majority voting provisions of the Public Community College Act

[1] The individual defendants' motion to dismiss showed that the "official capacity" claims against them should be dismissed as redundant of the claims against the Board itself. DE 39 at 1. Plaintiff now concedes this issue, withdrawing the official-capacity claims. DE 50 at 18.

[2] The individual defendants adopt and incorporate the Board's reply brief (DE 52, filed March 14, 2016), including its arguments regarding Counts I and II.

— which the defendants deny — that property right was not clearly established when the individual Board members voted to terminate Plaintiff's employment. At the very least, there were open questions whether these defects made the contract void. Indeed, before voting to terminate Plaintiff's employment, these Board members had been advised that the prior Board lacked power to grant extended tenure, that approval of the contract in closed meeting violated the Open Meetings Act, and that these defects made the contract void *ab initio*. DE 1, Ex. L.[3]

Plaintiff's opposition brief offers only two responses, both of which are invalid. First, he argues that no qualified immunity can apply based on the quorum/voting and open-meeting violations "because Defendants did not rely on these arguments when terminating Dr. Breuder or voiding his Employment Contract." DE 50 at 3 n.1. Plaintiff cites no authority supporting this "reliance" argument, and there is none. As the Supreme Court made clear in *Harlow*, whether qualified immunity applies is an "objective" question, and does not depend on a party's subjective reliance. *Harlow*, 457 U.S. at 818-19.[4] Plaintiff does not point to any objective indication clearly establishing, at the time of his termination, the validity of a contract purporting to override the Open Meetings Act and the quorum/voting provisions of the Public Community College

[3] Plaintiff's opposition brief asserts that the only issue addressed in this memo to the Board was whether a board may enter a contract extending beyond its own term in office. DE 50 at 3 n.1. Not true. The memo also addressed the violation of the Open Meetings Act. *See* DE 1, Ex. L ("The Illinois Attorney General has concluded that the Board violated the Open Meetings Act when [the contract was amended and extended] without any formal or public action by the Board at any open meeting. . . . [I]t seems clear that any discussion and approval of [the addenda and extensions] were conducted in violation of the Illinois Open Meetings Act. Accordingly, those actions should be acknowledged by the Board as being void *ab initio*.").

[4] *Harlow*'s objective test is black letter law. *See, e.g., Vickery v. Jones*, 100 F.3d 1334, 1342 (7th Cir. 1996) ("[T]he test for qualified immunity is one that is objective rather than subjective . . . . The Supreme Court and this Court have reiterated the objective standard many times since the *Harlow* decision, refusing to consider a defendant's subjective motivation."); *Polenz v. Parrott*, 883 F.2d 551, 554 (7th Cir. 1989) ("[A] qualified immunity analysis entails a purely objective inquiry to determine whether, at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented.").

Act, and extending beyond the term of the Board that entered it.

Second, Plaintiff argues that no qualified immunity can apply because one of the individual defendants, Ms. Hamilton, believed the prior Board did have power to enter a contract extending beyond its own term of office, since she urged the Illinois legislature to limit such power. DE 50 at 3-4. This argument fails for multiple reasons.

First, the qualified immunity question — whether it was clearly established that the contract was valid — is objective, not dependent on an individual defendant's subjective belief.

Second, even if Ms. Hamilton's subjective beliefs were relevant despite *Harlow*, the transcripts Plaintiff submitted (DE 49-1) demonstrate that she believed the contract was invalid, because it contained "illegal clauses" improperly purporting to override the statutory quorum/majority voting requirements, and was improperly entered "behind closed doors" in violation of the Open Meetings Act. DE 49-1 at 367. *See also id.* at 372 ("Nothing was noticed properly and nothing was made clear to the public at the time.").

Finally, even if Ms. Hamilton's subjective beliefs were relevant despite *Harlow* (and they were not), Plaintiff's argument concerns only one of the four individual defendants, and only one of the multiple reasons why the contract may have been (and in defendants' view was) void rather than valid. Plaintiff offers no argument against the qualified immunity of the three individual defendants other than Ms. Hamilton, nor against the qualified immunity of any of the individual defendants on the quorum/voting and open-meeting grounds.

The individual defendants are also qualifiedly immune on Plaintiff's procedural due process/liberty claim (Count II). In opposition, Plaintiff argues that the "liberty interest in occupational freedom" was clearly established. DE 50 at 4. At a high level of generality that may be

true, but infringing occupational freedom through critical speech requires at least defamation,[5] and the specifics of this case concern criticisms of a public figure (*see* Section IV below). Plaintiff alleges that the criticisms stigmatized him, but it was not clearly established at the time that voicing critical opinions about a public figure was illegal. Indeed, *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 519 (1st Dist. 1998), held that saying someone was "'fired because of incompetence' is nonactionable opinion," and the leeway for opinion and speech about public figures like Plaintiff is even greater. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45 (1974); *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988) (sharply critical speech about school governance was "legitimate public debate").

II. Count III Fails to State a Claim for Conspiracy.

Count III claims that the individual defendants are liable for conspiracy, in addition to the other Counts against them. Plaintiff defends Count III on the ground that civil conspiracy is an independent actionable wrong under federal and Illinois law. It is not.

Under federal law, Plaintiff argues, civil conspiracy claims may be asserted under Section 1983, provided that there is an underlying constitutional injury. This analysis is misguided. The case Plaintiff cites, *Drager v. Village of Bellwood*, 969 F. Supp. 2d 971, 984 (N.D. Ill. 2013), states: "Conspiracy is not an independent basis of liability under § 1983." *Drager* then cites *Cobbs v. Evans*, No. 13 C 3990, 2013 WL 5356595 at *1-2 (N.D. Ill. June 3, 2013), for the proposition that "[t]here must be an underlying constitutional injury, or the conspiracy claim fails." *Drager*, 969 F. Supp. 2d at 984. Contrary to Plaintiff's suggestion, this does not mean that con-

[5] *See Strasburger v. Bd. of Educ. Hardin Cty. Cmty. Unit Sch. Dist. No. 1*, 143 F.3d 351, 356 (7th Cir. 1998). Note, however, that defamation alone does not constitute deprivation of liberty. *See Paul v. Davis*, 424 U.S. 693, 712 (1976) (defamation alone is not a constitutional claim because "the interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law").

spiracy is an independent actionable wrong, in addition to a constitutional wrong, whenever the two are paired. It means only that when one party commits a constitutional wrong, another party who conspires with him may also be liable, even if he is a non-state actor who could not otherwise be liable for a constitutional wrong. The court in *Cobbs* relied on *Kelley v. Myler*, 149 F.3d 641, 648-49 (7th Cir. 1998), which simply held that a Section 1983 claim could be asserted against non-state actors who conspired with state actors to commit a constitutional violation. *Cobbs*, 2013 WL 5356595 at *1. That is the very point the individual defendants made in their motion to dismiss: conspiracy may serve as a means to expand the sphere of those liable for a Section 1983 violation, but civil conspiracy is not itself an independent actionable wrong.

When a defendant is already directly charged with a constitutional violation (as the individual defendants are here), there is no need to use a "conspiracy" theory to seek to hold the defendant liable for the alleged constitutional wrong. A "conspiracy" claim in this circumstance is superfluous. *See Scott v. City of Chicago*, 619 F. App'x 548, 548 (7th Cir. 2015) ("A conspiracy between private parties and state actors authorizes suit against the private parties in federal court. *See* . . . *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 149-52 (1970) (§ 1983) . . . . All of the defendants in this suit, however, are public employees (plus their employer), which means that a conspiracy claim has no role to play."); *Bonner v. O'Toole*, No. 12 CV 981, 2015 WL 7251932 at *3 (N.D. Ill. Nov. 17, 2015) ("[C]onspiracy claims matter only with respect to private-actor defendants, because state actors . . . may be sued directly under Section 1983."). *Cf. Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009) ("Plaintiffs pleaded a conspiracy claim under 42 U.S.C. § 1985(3), but it's superfluous. The function of § 1985(3) is to permit recovery from a private actor who has conspired with state actors. All defendants are state actors, so a § 1985(3) claim does not add anything except needless complexity.") (internal citations omitted).

Similarly, under Illinois law, civil conspiracy is not itself an actionable wrong, but only "has the effect of extending liability for a tortious act beyond the active tortfeasor to individuals who have not acted but have only planned, assisted, or encouraged the act." *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999). The only alleged "tortious acts" here — deprivation of due process, tortious interference, and defamation — are ones for which the individual defendants are already charged, making any conspiracy theory superfluous.

Plaintiff argues, however, that the individual defendants may be liable under Illinois law for conspiring to breach his employment contract — since they are not themselves parties to the contract, and are not charged directly with its breach. Even if Illinois law recognized a tort of conspiracy to breach a contract, Plaintiff's theory has two fundamental flaws. First, since the contract was invalid, there can be neither an action for breach nor an action for conspiracy to breach. Second, even if the contract were valid, there can be no conspiracy among an entity (the Board) and its agents (the Board members), under the intracorporate conspiracy doctrine. *See Ghiles v. City of Chicago Heights*, No. 12 CV 07634, 2016 WL 561897, at *3 (N.D. Ill. Feb. 12, 2016) (dismissing claims of conspiracy between municipality and its agents because "under both federal and Illinois law . . . , under the intracorporate conspiracy doctrine, a conspiracy cannot exist solely between members of the same entity, including government entities") (internal quotation marks, brackets, and citations omitted). *See also Scott*, 619 F. App'x at 548 (when the defendants "are public employees (plus their employer) . . . a conspiracy claim has no role to play" in a § 1983 case).

Plaintiff argues that two exceptions to the intracorporate conspiracy doctrine save his conspiracy claim, but neither does. First, he asserts that the doctrine applies only when an entity and its agents are "pursuing the corporation's lawful business," and that it cannot apply since he

"has alleged a violation of his civil rights." DE 50 at 6. As the Seventh Circuit recognized in *Scott*, however, conspiracy "has no role to play" regarding his civil rights claims, since all the defendants are state actors, making any conspiracy theory superfluous. As for Plaintiff's contract claim, contracts and termination *were* the Board members' business. The "lawful business" rule cannot mean that the intracorporate conspiracy doctrine evaporates whenever defendants allegedly committed some violation in performing their business, because every claim necessarily alleges some violation. *See Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 110 (7th Cir. 1990) ("[M]anagers of a corporation jointly pursuing its lawful business do not become 'conspirators' when acts within the scope of their employment are said to be discriminatory or retaliatory"). To say that the intracorporate conspiracy doctrine applies only when the actions at issue are "lawful" — i.e., when there is no claim or controversy — would rob the doctrine of any application. *See Hartman v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 4 F.3d 465, 470 (7th Cir. 1993) (rejecting construction that would "render[] the intracorporate conspiracy doctrine meaningless.").

Second, Plaintiff asserts that the intracorporate conspiracy doctrine does not apply when defendants are motivated solely by personal bias. DE 50 at 6. The complaint's bare allegations of the individual defendants' personal and political motivations (DE 1, ¶¶ 1, 32, 34, 41, 64, 105, 125, 130) do not trigger this potential exception, which may apply only if a defendant is motivated *solely* by personal concerns (*see Hartman*, 4 F.3d at 470 (Section 1985 claim; dictum)), and only in "egregious circumstances" (*Wright v. Ill. DCFS*, 40 F.3d 1492, 1508 (7th Cir. 1994)). Board members are presumed to act in the public interest and based on Plaintiff's job performance, not on personal animosity. *See Hortonville Joint Sch. Dist. No. 1. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 495-97 (1976); *Baird v. Bd. of Educ. for Warren Cmty. Unit Sch. Dist. No.*

205, 389 F.3d 685, 689 (7th Cir. 2004). The complaint's bare allegations are insufficient to overcome this presumption under the standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See also Stone v. Bd. of Trs. of N. Ill. Univ.*, 38 F. Supp. 3d 935, 950 (N.D. Ill. 2014) (dismissing conspiracy claim and finding that it was not plausible that university trustees "were only motivated by selfishness (rather than the business of running NIU)."); *Cole v. Bd. of Trs. of N. Ill. Univ.*, 38 F. Supp. 3d 925, 935 (N.D. Ill. 2014) (same). *See also, e.g., Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 642 (7th Cir. 2006) (finding university trustees' strong dislike of faculty member not enough to indicate that his discharge was motivated solely by personal bias, to avoid intracorporate conspiracy doctrine), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 968 n.1 (7th Cir. 2013).

III. Count V Fails to State a Claim for Tortious Interference with Contract.

Count V alleges that the individual defendants tortiously interfered with Plaintiff's contracts, but the Complaint fails to state such a claim for multiple reasons.

A. The Contract Was Void.

One cannot tortiously interfere with a void contract. Since the contract here was void, this claim necessarily fails.

B. The Trustees Cannot Tortiously Interfere with the Board's Contracts.

Plaintiff does not dispute the general rule: "It is settled law that a party cannot tortiously interfere with his own contract; the tortfeasor must be a third party to the contractual relationship." *Douglas Theater Corp. v. Chi. Title & Tr. Co.*, 288 Ill. App. 3d 880, 884 (1st Dist. 1997). Plaintiff takes inconsistent positions on whether the trustees are third parties.[6] Nevertheless, the

[6] In one breath Plaintiff argues that the individual trustees were "third parties" to the contract because they were not themselves contracting parties (DE 50 at 5), and in the next Plaintiff argues that they "are not true third parties to the contract" (*id.* at 9).

trustees cannot fairly be characterized as strangers to the contractual relationship, for the Board acts only through its trustees. Even a mere agent of a community college — less intimate than the college's own trustees — is not considered a third party for these purposes. *See Quist v. Bd. of Trs. of Cmty. Coll. Dist. No. 525*, 258 Ill. App. 3d 814, 821 (3d Dist. 1994) (affirming dismissal of tortious interference claim because plaintiff failed to allege agent was a third party). Since the trustees are not strangers to the contractual relationship, they cannot have tortiously interfered with the contract.

Plaintiff argues that this rule does not apply when an agent is motivated "solely" by personal interest rather than the interest of the college, and that the defendants "were acting to further their own interests when voting to terminate Dr. Breuder's employment." DE 50 at 7. This argument is a twin of Plaintiff's argument regarding the intracorporate conspiracy doctrine, and fails for the same reason. Board members are presumed to have acted in the public interest based on Plaintiff's job performance rather than on personal animosity,[7] and the complaint's conclusory statements do not plausibly allege, under *Twombly* and *Iqbal*, that the trustees were motivated "solely" by personal interests to the exclusion of any interest in the welfare of the college.[8] *See Keri*, 458 F.3d at 642; *Stone*, 38 F. Supp. 3d at 950; *Cole*, 38 F. Supp. 3d at 935.

C. Privileges and Immunities Bar Any Tortious Interference Claim.

For several additional reasons, the individual defendants cannot be liable for tortious interference. First, criticism of a university official's performance is First-Amendment-privileged, as held in *Salaita v. Kennedy*, No. 15 C 924, 2015 WL 4692961, at *13 (N.D. Ill. Aug. 6, 2015). Plaintiff argues that this is true only if the critic is a third party to the contract, and then asserts

[7] *Hortonville*, 426 U.S. at 495-97; *Baird*, 389 F.3d at 689.

[8] The complaint simply recites this conclusion. *See, e.g.*, DE 1, ¶ 64 (reciting that decision to terminate was "baseless, frivolous, and motivated solely by Defendants Hamilton, Mazzochi, Napolitano, and Bernstein's personal and political agendas").

that the trustee defendants here are *not* third parties. DE 50 at 9. If that is true, then they cannot be liable for tortious interference. *See Douglas Theater*, 288 Ill. App. 3d at 884 (for a tortious interference claim, "the tortfeasor must be a third party to the contractual relationship").

Second, statements made by public officials in public meetings or in connection with their role as trustees (e.g., DE 1, ¶ 89) are absolutely privileged under *Barr v. Matteo*, 360 U.S. 564, 574-75 (1959), *Blair v. Walker*, 64 Ill. 2d 1, 4-5 (1976), and similar authorities. Plaintiff's focus on statements allegedly made by the defendants outside their role as trustees (DE 50 at 15-16) does not alter that their statements in their role as trustees are absolutely privileged — and this is regardless of any allegation of malice.[9] *See Horwitz v. Bd. of Educ. of Avoca Sch. Dist. No. 37*, 260 F.3d 602, 618 (7th Cir. 2001) ("[O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties . . . . Absolute immunity cannot be 'overcome by a showing of improper motivation or knowledge of the statement's falsity, including malice.'") (quoting *Klug v. Chi. Sch. Reform Bd. of Trs.*, 197 F.3d 853, 861 (7th Cir. 1999)). *See also Goldberg v. Brooks*, 409 Ill. App. 3d 106, 112-14 (1st Dist. 2011) (affirming dismissal of complaint including claim of tortious interference based on absolute immunity for criticisms of school employee's job performance).

Third, the individual defendants' acts while "serving in a position involving the determination of policy or the exercise of discretion" are protected by the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-201. Plaintiff argues that the Tort Im-

[9] Statements made by the defendants before their election as trustees "as part of the campaign to whip up public support in order to put pressure on the Board to remove [Plaintiff]" are "classic political speech" with First Amendment protection. *Stevens v. Tillman*, 855 F.2d at 403 (Even if the statements were "distorted presentations and overblown rhetoric," "[a] campaign to influence [whether to remove principal] is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account. . . . [O]nly evidence satisfying the *New York Times* standard would permit an award of damages.").

munity Act does not apply because his termination was not a "policy" choice that "balanced competing interests," but an isolated personnel action. DE 50 at 8-9. That characterization re-writes this whole dispute. According to the Complaint, Plaintiff's termination was the product of a fundamental clash of competing political and educational visions, pitting the "Clean Slate platform" and its conception that COD's administration was characterized by "corruption, waste, fraud, and abuse," against Dr. Breuder's vision that his administration was characterized by "improvement, advancements, and accolades." The defendants' actions, even as alleged, concerned "balancing competing interests" rather than an isolated personnel issue. A decision to select or terminate the chief executive responsible for setting the institution's financial and academic course is by its nature a policy decision, as recognized by *Brooks v. Daley*, 2015 IL App (1st) 140392, ¶¶18, 27, 37, and *Collins v. Bd. of Educ. of N. Chi. Cmty. Unit Sch. Dist. No. 187*, 792 F. Supp. 2d 992, 999 (N.D. Ill. 2011).

IV. Count VI Fails to State a Claim for Defamation.

A. The First Amendment Bars the Defamation Claim.

Plaintiff does not deny that uninhibited, robust, caustic, critical, and even inaccurate speech about public figures is protected by the First Amendment, absent clear and convincing proof of "actual malice" (which means deliberate falsification, not ill will). *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45 (1974) (adopting for public figures the standards of *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Nor does he deny that speech otherwise "defamatory per se" is not actionable if it is protected by the First Amendment. *See Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 517-18 (1st Dist. 1998). Plaintiff only denies that he is a public figure or public official. DE 50 at 10, 12-14. He is incorrect.

Plaintiff cites cases finding school teachers not to be public figures, based on their lack of policy-making authority. DE 50 at 12-13. But the issue here is whether Dr. Breuder (a prominent

public college president — not a school teacher) is a public figure or public official. He is. The Seventh Circuit has recognized that even an elementary school principal is a public official. *See Stevens v. Tillman,* 855 F.2d 394, 403 (7th Cir. 1988) ("[Plaintiff] was a public *official* . . . whether or not she was a public figure . . . [Plaintiff] was not an elected public official, but as principal she possessed great discretion over the operation of [the school]. How she used that discretion was the subject of legitimate public debate.") (emphasis original). This is even more true for a public college's executive like Plaintiff. For example, in *Grossman v. Smart,* 807 F. Supp. 1404, 1408 (C.D. Ill. 1992), the court held that (1) a University of Illinois law professor who chaired a faculty search committee and (2) the Vice Chancellor for Research and the Graduate College (who was also the assistant to the Chancellor of the University and an administrative hearing officer) were public officials/figures. Here, Plaintiff had at least as much decision-making authority as the administrators in *Stevens* and *Grossman*. Indeed, given Dr. Breuder's high profile, the prominence of the position of college president, the importance of education, and the public interest in and scrutiny of the issues regarding COD governance, the question is not even a close one.

Plaintiff argues that he is not a public figure because he did not "voluntarily inject" himself into a public controversy. DE 50 at 13, quoting *Gertz,* 418 U.S. at 351. What *Gertz* actually says is that an individual may be designated as a public figure if he

> voluntarily injects himself *or is drawn into a particular public controversy* and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id. (emphasis added). Plaintiff was drawn into a public controversy about COD governance — as the legislative debate transcripts he submitted (DE 49-1), if nothing else, show. And "statements [about] the way [he] ran [COD]" are "legitimate public debate." *Stevens,* 855 F.2d at 403.

Since Plaintiff is a public figure, robust and even inaccurate criticism of him cannot con-

stitute defamation absent clear and convincing proof of "actual malice" — i.e., deliberate or reckless falsification. Plaintiff argues that since he pled "malice," a motion to dismiss is improper. DE 50 at 14-15. But he does not address the authorities cited in the defendants' opening brief holding that this is not sufficient to survive a motion to dismiss under the *Twombly* and *Iqbal* pleading standards.[10] *See Pippen v. NBC Universal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) (affirming dismissal of complaint for failure to sufficiently plead "actual malice" under *Twombly/Iqbal*, by pleading "details sufficient to render a claim plausible"); *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 276-80 (S.D.N.Y. 2013) (dismissing defamation claim after extensive discussion of *Twombly/Iqbal* standard as applied to "actual malice"), *aff'd*, 807 F.3d 541 (2d Cir. 2015) (actual malice must "be plausibly pleaded and supported by factual allegations"; plaintiff's conclusory and nonconclusory allegations "are inadequate to state a plausible claim for relief").[11]

B. Absolute Privilege Bars the Defamation Claim.

Absolute privilege bars defamation claims based on public officials' statements during public meetings or in connection with matters within their responsibility. Plaintiff argues that this privilege does not extend to *all* the statements at issue, because some of the defendants' statements preceded their election to the Board. DE 50 at 15.[12] He does not deny that those statements

[10] Plaintiff relies on certain authorities predating *Twombly* and *Iqbal*. DE 50 at 14.

[11] The statements attributed to the individual defendants are rife with opinions. Indeed, Plaintiff characterizes one of defendant Hamilton's statements as an "opinion" in his Complaint. Complaint at ¶ 46 (Hamilton "supported her opinion . . . "). The only specific statements attributed to Mazzochi, Bernstein, and Napolitano are set forth in paragraphs 52, 54, and 89. The statements in paragraph 52, during the election, are pure opinion. None of the statements alleged in paragraph 54 even reference Breuder by name. Finally, the vague references to "false statements" in paragraph 89 do not specifically identify any statement, and the allegations reference opinions, not facts. Even if they did, Plaintiff admits those statements were made in the course of public Board meetings, which are protected by absolute privilege.

[12] Plaintiff also argues that Ms. Hamilton made certain statements to the media as a "private citizen" about Plaintiff's performance as President of COD. DE 50 at 15. This argument is una-

made within their duties as Board members are privileged. If some statements were made by the defendants as candidates for election to that office, they enjoy a different privilege. *See, e.g., Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686-87 (1989) (stating that statements in election campaigns are subject to *N.Y. Times v. Sullivan* rule).

C. Qualified Privilege Bars the Defamation Claim.

Plaintiff does not dispute that statements of important interest to the speaker or public are protected by a qualified privilege, which may be overcome only if "the defendant either intentionally published the material while knowing the matter was false, or displayed a reckless disregard as to the matter's falseness." *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill. 2d 16, 29 (1993). Plaintiff contends only that he pled the exception. DE 50 at 16. But he relies on pre-*Twombly/Iqbal* cases. As discussed in Section IV.A above, the claims should be dismissed because he has not satisfied the pleading standards of *Twombly* and *Iqbal*.

D. The Tort Immunity Act Bars the Defamation Claim.

Finally, under Section 2-201 of the Tort Immunity Act public employees are immune from tort liability for their discretionary acts, and commenting on matters central to college management and financial affairs is at the heart of Board members' discretionary duties. *See* 745 ILCS 10/2-201. Plaintiff's only responses are (1) to deny that commenting on college govern-

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vailing, and is contradicted by Plaintiff's own allegations in his Complaint and established precedent. Pursuant to the Policy Manual of the Board of Trustees, Ms. Hamilton's responsibilities as a Board Trustee included evaluating Plaintiff in his role as President and reviewing the financial management of COD. DE 36-4 at 3-5. *See* Board Policy No. 5-15, attached as Ex. A. Plaintiff's own allegations demonstrate that the statements allegedly made by Ms. Hamilton to the media all related to her evaluation of Plaintiff as President of COD in her capacity as a Board trustee. DE 1 ¶¶ 41-46, 53. Moreover, courts have repeatedly held that statements to the media by public officials concerning matters of public interest are within or reasonably related to the scope of the public official's duties. *See, e.g., Nagle v. Chi. Sch. Reform Bd. of Trs.*, No. 96 C 4150, 1999 U.S. Dist. LEXIS 3326, at *14-18 (N.D. Ill. Mar. 10, 1999); *Cameli v. O'Neal*, No. 95 C 1369, 1995 U.S. Dist. LEXIS 9307, at *3-5 (N.D. Ill. July 2, 1995).

ance concerns policy and discretion, and (2) to contend that this immunity applies only to those acting in their official capacity, not their individual capacity. Plaintiff has now withdrawn his official-capacity claims against the individual defendants. DE 50 at 18.

E. Some of the Defamation Claims Are Time-Barred.

Plaintiff admits that some of his defamation claims are time-barred. DE 50 at 17-18. He argues that he may assert other claims subject to a different statute of limitation, but that does not cure the defamation time bar.

V. The Prayers for Punitive Damages Are Improper.

Plaintiff admits that, despite the demands in his Complaint, he may not seek punitive damages against the Board or Board members in their official capacity. DE 50 at 18.

Conclusion

For all the reasons stated above and in their opening brief, the individual defendants respectfully request that the claims against them be dismissed under Rule 12(b)(6).

Dated: March 14, 2016

Respectfully submitted,

Defendants Frank Napolitano, Charles Bernstein, Deanne Mazzochi, and Kathy Hamilton

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016, I caused copies of the foregoing REPLY BRIEF IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS to be served on all counsel of record by filing electronic copies with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered CM/ECF users.

/s/ Kaitlin G. Klamann

EXHIBIT A

COLLEGE OF DUPAGE
Policy Manual of the Board of Trustees

The Board of Trustees - Governance
Policy No. 5-15

Responsibilities of the Board

As the governing body of Community College District No. 502, the Board of Trustees' responsibilities include, but are not limited to, the following:

1. Appoint the President, who will be the chief administrative officer of the College and the executive officer in dealing with the Board.
2. Direct the President to develop, implement and modify procedures to carry out the Board's policies, rules and actions.
3. Evaluate, at least annually, the President's overall and specific performance.
4. Exercise, as an exclusive right, approval authority over all duties and powers authorized by the Illinois Community College Act.
5. Judiciously review matters as recommended by the President or others and cause appropriate action to be taken.
6. Ensure ongoing long-range planning through direction to, participation in, and annual approval of a strategic long range plan.
7. Review periodically the organizational structure and the operation of major components of the College.
8. Exercise, as an exclusive right, requisite and proper authority for the efficient and effective development, operation and maintenance of the College.
9. Review and evaluate progress toward accomplishment of the College's mission and goals.
10. Formulate and revise policies and procedures as necessary.
11. Review the financial management of the College and cause an audit to be made, at least annually.
12. Ensure the quality of education provided by the College.
13. Review and approve the College's annual budget, and perform (at least quarterly) budget variation and performance reviews.

The Board of Trustees will not delegate or relinquish its overall responsibility for results, nor any portion of its accountability.

Adopted: 3/19/09	Reviewed: 4/30/15	Amended: 8/20/09, 5/21/15