

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-00836-RM-MEH

DETLEV HELMIG,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO,
PHILIP DiSTEFANO, in his official capacity as
Chancellor of the University of Colorado-Boulder;

ILLANA DUBIN SPIEGEL,
GLEN GALLEGOS,
HEIDI GANAHL,
IRENE GRIEGO,
CHANCE HILL,
JOHN KROLL,
SUE SHARKEY,
LINDA SHOEMAKER, and
LESLEY SMITH,
in their individual capacities as members of the
University of Colorado Board of Regents;

GREGORY BROWN, of the Fiscal Compliance Analyst Campus Controllers Office,
DEBBIE CHAPMAN, Senior Audit Manager Investigations, Internal Audit Department,
TERRI FIEZ, Vice Chancellor for Research and Innovation and Dean,
MELANIE MARQUEZ PARRA, former Director of Communications and Chief Spokesperson,
GIFFORD MILLER, Associate Director of INSTAAR,
CHRYSTAL POCHAY, Financial and Accounting Program Manager of INSTAAR,
STEVE SMITH, Director of Investigations for the Internal Audit Department,
ERIC THOMPSON, former Senior Audit Manager for the Internal Audit Department, and
MERRITT TURETSKY, Director of INSTAAR,
in their individual capacities;

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Before the Court are two motions to dismiss: 1) Defendant Board of Regents of the University of Colorado's Motion to Dismiss First Amended Complaint [filed October 3, 2022, ECF 31]; and 2) Non-Regent Defendants' Amended Motion to Dismiss First Amended Complaint [filed October 4, 2022, ECF 34]. Both motions are fully briefed and ripe for judicial review. Oral argument on the motions was held on February 14, 2023. For the reasons that follow, I respectfully recommend the motions be granted in part and denied in part, with leave to amend.

We have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

BACKGROUND

This action is brought pursuant to 28 U.S.C. §1983. Plaintiff Detlev Helmig, Ph.D., a former associate research professor, contends that the University violated its published policies which provide that all faculty in his position held five-year appointments and could be terminated during those appointments only for cause and after being given an opportunity to be heard. In connection therewith, he alleges certain Defendants published statements which rendered it impossible for him to obtain comparable employment. He brings claims for property deprivation (Count I) and deprivation of liberty interest (Count II) in violation of the Fifth and Fourteenth Amendments to the United States Constitution, as well as breach of contract (Count III), or in the alternative, promissory estoppel (Count IV), under Colorado law.

All Defendants also argue for dismissal for the failure to state plausible claims for relief pursuant to Fed. R. Civ. P. 12(b)(6). Those Defendants who are members of the Board of Regents, the "Regent Defendants," move to dismiss Plaintiff's claims against them, in part, on the basis of qualified immunity. ECF 31. The remaining individuals who worked for the University during the relevant period of time but were not board members ("Individual Defendants") likewise invoke

qualified immunity protection. ECF 34. Finally, Chancellor DiStefano argues that Eleventh Amendment sovereign immunity shields him in his official capacity from Plaintiff's pursuit of monetary damages.

I. Alleged Facts

The allegations in the First Amended Complaint ("FAC") are as follows. Plaintiff was an associate research professor at the University of Colorado-Boulder ("CU"), Institute of Arctic and Alpine Research ("INSTAAR") for more than 15 years. FAC ¶¶ 1, 22. He joined CU in 1995. FAC ¶ 21. On April 7, 2020, he was terminated. FAC ¶ 91.

Plaintiff is an internationally prominent atmospheric research scientist and a citizen of Colorado who, until the events described below, enjoyed a sterling reputation for the quality and extent of his atmospheric and climate research. FAC ¶ 2. Defendant Board of Regents of the University of Colorado ("Board of Regents") is a body corporate authorized to staff CU's Boulder Campus ("CU-Boulder") with teaching and research faculty. FAC ¶ 3. At all relevant times, Defendants Illana Dubin Spiegel, Glen Gallegos, Heidi Ganahl, Irene Griego, Chance Hill, John Kroll, Sue Sharkey, Linda Shoemaker, and Lesley Smith, sued in their individual capacities, each held the office of Regent (collectively, the "Regent Defendants") and together comprised the Board of Regents. FAC ¶ 4. Plaintiff also names the following Defendants: the Board of Regents; Chancellor of CU, Philip Distefano (sued in his official capacity); and Gregory Brown, Debbie Chapman, Terri Feiz, Melanie Marquez Parra, Gifford Miller, Russell Moore, Chrystal Pochay, Steve Smith, Eric Thompson and Merritt Turetsky (the "Individual Defendants") (collectively, "Non-Regent Defendants").¹

¹ Defendant Merritt Turetsky is the current Director of INSTAAR. FAC ¶ 6. Defendant Gifford Miller is the current Associate Director of INSTAAR. FAC ¶ 7. Defendant Terri Fiez is the Vice

Prior to his termination, Dr. Helmig voiced his reasonable, good faith belief that CU and INSTAAR² were wrongfully overbilling the federal government by obtaining grant funding for duplicative and inflated overhead fees, through the practice of intentionally mischaracterizing project costs. FAC ¶ 83. He voiced his opposition to these practices repeatedly to Chrystal Pochay, INSTAAR's Financial and Accounting Program Manager, and also raised the issue to the INSTAAR Director and Directorate. FAC ¶ 44. Dr. Helmig alleges Ms. Pochay disagreed with his opposition to this allegedly fraudulent fee charging scheme and instituted a campaign of retaliation against him, which ultimately resulted in his termination. FAC ¶ 45. Increasingly over time, Ms. Pochay systematically blocked Dr. Helmig's research and made baseless reports on Dr. Helmig's work. FAC ¶¶ 46, 55. By early 2019, Ms. Pochay's hostility had grown to such a point that Dr. Helmig requested the intervention of Dr. Gifford Miller, INSTAAR's then-Acting Director. FAC ¶ 47. CU took no action to address the harassment and retaliation by Ms. Pochay, in violation of its own policies. FAC ¶ 48. Ms. Pochay's ever-expanding retaliatory campaign against Dr. Helmig was both the catalyst for and a direct cause of his ultimate termination. FAC ¶ 58.

By voicing his concerns about improper overbilling, Dr. Helmig upset CU and INSTAAR administrators, who have numerous motivations to maximize funding granted by the federal government. FAC ¶ 84. Defendants retaliated against Dr. Helmig by impeding his ability to

Chancellor for Research and Innovation and Dean of the Institutes for CU-Boulder. FAC ¶ 8. Defendant Russell Moore is the Provost and Executive Vice Chancellor For Academic Affairs for CU-Boulder. FAC ¶ 9. Defendant Frances Draper was the Senior Strategic Advisor – Community and Government Engagement for CU. FAC ¶ 10. Defendant Melanie Marquez Parra is the former Director of Communications and Chief Spokesperson for CU. FAC ¶ 11. Defendant Chrystal Pochay is the Financial and Accounting Program Manager for INSTAAR. FAC ¶ 12. Defendant Gregory Brown is a Fiscal Compliance Analyst in the CU Controller's Office. FAC ¶ 13.

² INSTAAR is an interdisciplinary scientific research arm of CU dedicated to understanding changes in Earth systems whose work relies heavily on grant funding from the National Science Foundation ("NSF"). FAC ¶ 5.

perform his research, conducting a sham investigation of nonexistent “misconduct,” publicly disparaging Dr. Helmig’s reputation, and terminating his employment. FAC ¶ 85.

For several years, Dr. Helmig had secured for CU a contract for air monitoring and related work with Germany’s equivalent to the Environmental Protection Agency. FAC ¶ 62. After an increase in fees charged by CU, the German agency declined to renew its contract with CU and sought alternative options to continue the work. FAC ¶¶ 63, 64. 66. Dr. Helmig then founded Boulder Atmosphere Innovation Research LLC (“Boulder A.I.R.”). Before forming Boulder A.I.R., Dr. Helmig discussed his plan with CU’s Director for Compliance, Conflicts of Interest, and Commitment. FAC ¶ 67. Dr. Helmig advised his then-director, Dr. Alan Townsend, of the formation of Boulder A.I.R. and then submitted an Application for Approval of Regular and Periodic Consulting Activities on February 14, 2018. FAC ¶ 68. On April 4, 2018, Dr. Townsend and Vice Chancellor Fiez approved Dr. Helmig’s application, acknowledging that he would be working with Boulder A.I.R. through 2021. FAC ¶ 69. Dr. Gifford Miller, then-Interim INSTAAR Director, also signed a Conflict of Interest Memorandum of Understanding, on May 31, 2018, acknowledging Dr. Helmig’s work with Boulder A.I.R. FAC ¶ 70.

On or about February 9, 2019, Jason Elkins, on behalf of the City of Longmont, contacted Dr. Helmig to contract for air quality studies. Mr. Elkins specified that, in order for Longmont to contract with CU for the work, they likely would have to go through the time-consuming process of establishing an Intergovernmental Agreement. FAC ¶ 71. Dr. Helmig pushed for Longmont to contract directly with CU and worked with Mr. Elkins and the CU administration to move that process forward. FAC ¶ 72. On February 13, 2019, Mr. Elkins wrote to Dr. Helmig: “I need you

to provide me with a quote for services through your company and not CU. In order to expedite this, it's much easier to contract with your company than CU.” FAC ¶ 73.

Dr. Helmig immediately contacted the CU Office of Contracts & Grants, alerting CU to Longmont's request to contract with Boulder A.I.R. rather than CU and expressed that he needed CU's input to secure the contract *for the University* emphasizing the time-sensitive nature of Longmont's request. FAC ¶ 74 (emphasis in FAC). On behalf of that office, David Christopher, senior contracts officer, responded that he wanted the advice of Nicole Carleton, project manager, before responding to Longmont, but Ms. Carleton was out of the office that week. FAC ¶ 75. Dr. Helmig followed up with Ms. Carleton on February 18, 2019, the first day she was scheduled to return. FAC ¶ 76. The next day, February 19, 2019, Ms. Carleton wrote back, asking Dr. Helmig to assist in the price quote for the requested services. Dr. Helmig responded in less than ninety minutes, with the pricing information, and, again, impressing the timing issue, writing: “There is an upcoming City Council meeting in the first week of March where these quotes will be presented and voted on.” FAC ¶ 77. On February 20, 2019, Mr. Elkins wrote to Dr. Helmig: “we need the proposal by the end of today[.]” Dr. Helmig alerted Ms. Carleton that Longmont needed the proposal that day and asked if that was possible. Ms. Carleton did not respond. FAC ¶ 78. Shortly after 5 p.m., Dr. Helmig informed Mr. Elkins that CU had not yet given its final approval of the proposal, but still Dr. Helmig touted the benefits of contracting directly through CU. FAC ¶ 79. CU's failure to deliver a timely proposal led Mr. Elkins to write: “What about the proposal from Boulder AIR? We aren't going through the University.” FAC ¶ 80. Ultimately, Longmont did not contract with CU. FAC ¶ 82.

Dr. Helmig further alleges the following. Eventually, Ms. Pochay's retaliatory and unfounded allegations against Dr. Helmig gained traction, when Mr. Brown tasked Debbie Chapman, Senior Audit Manager of Investigations, to look into them. FAC ¶ 86. Ms. Chapman spoke with Ms. Pochay, who repeated her litany of false and misleading allegations. This prompted Ms. Chapman to initiate an internal audit of Dr. Helmig, which ultimately resulted in a wholly inaccurate and defamatory report. FAC ¶ 87. According to Dr. Helmig, Messrs. Brown and Steve Smith oversaw the publication of the report, Ms. Chapman was the primary driver and author of the report, Mr. Thompson and Ms. Pochay both contributed significantly to the report. FAC ¶ 90. In conducting their internal "audit," Eric Thompson had a short conversation with Dr. Helmig, but Defendants Thompson, Brown, Chapman, and Steve Smith did not otherwise ask Dr. Helmig for any information concerning specific activities or the reasons for them. FAC ¶ 88.

According to Dr. Helmig, the falsehoods in the report were a direct cause of his termination. FAC ¶ 90. The termination notification came via a letter, delivered by Drs. Turetsky and Miller on April 7, 2020, with the subject "Notice of Termination." FAC ¶ 90. It was signed by Turetsky and Fiez in their respective capacities as Director of INSTAAR and Vice Chancellor for Research & Innovation. FAC ¶ 90. The Notice of Termination alleged that Dr. Helmig was being terminated on grounds which, he now alleges, Defendants knew were demonstrably false:

- a. His outside personal and financial interests had negatively impacted his personal judgment and compromised his professional "loyalty" to CU;
- b. He was not fully cooperative nor transparent with CU officials about his work for Boulder A.I.R.; and
- c. He intentionally diverted CU resources (including contract opportunities).

FAC ¶ 91.

Plaintiff alleges that the Notice of Termination failed to meet any of the necessary prerequisites to terminate a faculty member in Dr. Helmig's position, FAC ¶ 93, and further, wrongly claimed that Dr. Helmig was an "at-will" employee, "pursuant to C.R.S. § 24-19-104." FAC ¶ 100.

As set forth in the FAC, for decades, Colorado law has been clear: CU's adopted policies and the Laws of the Regents of the University of Colorado ("Regent Laws") dictate the terms of faculty appointments when they provide job protections. "Where the regents have promulgated rules governing such matters as termination of appointees and such rules are more stringent in favor of the appointee, then due process requires that the regents strictly comply with their rules." FAC ¶ 94, quoting *Subryan v. Regents of University of Colorado*, 698 P.2d 1383 (Colo. App. 1984); accord *Churchill v. Univ. of Colorado at Boulder*, 2012 CO 54, 285 P.3d 986 (Colo. 2012).

Throughout Dr. Helmig's employment, CU's formally adopted and published policies provided that associate research professors hold multi-year term appointments. As of the time of his termination, he held a five-year appointment under these policies. FAC ¶ 95. Applicable Regent Laws designated all faculty appointments for a specified term of years as a "limited appointment." Regent Laws, art. 5.B.2(B)(2). FAC ¶ 96. Regent Laws strictly regulated the dismissal of all faculty on term appointments, providing that:

- a. Revocation of the appointment during the term constitutes a "dismissal." *Id.* at art. 5.C.2(A)(2), (3).
- b. Authority to dismiss faculty is reserved to the Board of Regents. *Id.* at art. 5.C.1.
- c. Faculty may be dismissed only following determinations by the Regents that (i) a specifically enumerated ground for dismissal was present, and (ii) the best interests of CU required dismissal. *Id.*;
- d. The permitted causes for dismissal are limited to "demonstrable professional

incompetence, gross or repeated neglect of duties, conviction of a felony, sexual harassment, or other conduct that falls below minimum standards of professional integrity.” *Id.* at art. 5.C.1.

e. “A faculty member whose dismissal for cause is contemplated shall be given written notification as far in advance as possible of the contemplated effective date of dismissal for cause and the reasons therefor. Such notice shall inform the faculty member of the right of review as provided in this subsection.” *Id.* at art. 5.C.1(B).

f. The referenced “right of review” includes the right to a pre-termination hearing before the “Privilege and Tenure Committee.” *Id.*

FAC ¶ 97. Plaintiff alleges that in contravention of each of the foregoing Regent Laws, Drs. Turetsky and Fiez’s Notice of Termination: gave no indication that his dismissal had been approved by any higher authority within CU, let alone its Board of Regents; gave him no advance notice of termination, but rather purported to be effective that day; failed to identify any of the allowed grounds for dismissal identified in the Regent Laws; was issued without having afforded him any prior opportunity to be heard; and failed to inform him of his rights to a hearing before the Privilege and Tenure Committee, which he requested. FAC ¶¶ 99, 101. Plaintiff alleges that on multiple occasions in April and May 2020, the Regents were apprised of Dr. Helmig’s termination and the surrounding circumstances, and failed to intervene, instead, ratifying his termination. FAC ¶¶ 106, 107.

On April 15, 2020, Boulder County Commissioner Elise Jones contacted Chancellor DiStefano regarding Dr. Helmig’s termination. FAC ¶ 109. Chancellor DiStefano asked Defendant Russell Moore, Provost and Executive Vice Chancellor for Academic Affairs, to provide information. FAC ¶ 110. Without citing any supporting evidence, Mr. Moore wrote that Dr. Helmig:

violated university policy regarding conflicts of interest and the Employee Fiscal Code of Ethics. Helmig diverted university opportunities to his private company in

violation of university policy and an agreement that he signed in August, 2019. Moreover, he was not transparent regarding his work with that private company.

FAC ¶ 111. Plaintiff denies this. FAC ¶ 112. In the publicly accessible letter, Ms. Draper, Senior Strategic Advisor – Community and Government Engagement for CU, wrote: “The university determined, after careful review and consideration, that the separation of work and resources was not being maintained and a separation of the university from Dr. Helmig and his commercial enterprise was required.” FAC ¶ 115. The individual Regents personally repeated these falsehoods, on numerous occasions, in publicly accessible correspondence. FAC ¶ 118.

Following Plaintiff’s termination, in response to media inquiries, the University Spokesperson, Defendant Parra, stated that Plaintiff “failed to maintain the required degree of daylight between publicly funded research efforts and his own for-profit business[,] . . . Boulder A.I.R., an LLC which performs work substantially similar to that performed by Dr. Helmig for the university.” FAC ¶¶ 120-23. Defendant Parra went on to repeat the same misleading statement at least twice more, to Katie Langford, Boulder Daily Camera staff writer, and in response to a media request from Rebecca Trager, Royal Society of Chemistry. FAC ¶ 123. Defendants Turetsky and Miller repeated to the NSF the same purportedly false statements. FAC ¶ 127.

It is further alleged that in a misguided attempt to insulate itself after terminating Dr. Helmig, CU commissioned an Investigation Report and Internal Audit (“Investigation Report”) with the primary purpose of conjuring reasons to justify Dr. Helmig’s termination. FAC ¶ 130. Plaintiff alleges the Investigation Report is replete with falsehoods and intentionally misleading statements. FAC ¶ 137. CU published this report to the media. FAC ¶ 155. The individual Regents and certain Non-Regents (not including Terri Feiz, Marquez Parra, Miller, Pochay and Turetsky) “assisted with, oversaw, contributed to, or ratified the Investigation Report. FAC ¶ 159.

II. Claims for Relief

The FAC alleges four causes of action: 1) deprivation of property interest without due process of law against Defendant Chancellor Distefano in his official capacity, the Regent Defendants in their individual capacities, and the non-Regent Defendants (except Melanie Marquez Parra) in their individual capacities; 2) deprivation of liberty interest without due process of law, against Defendant Chancellor Distefano in his official capacity, the Regent Defendants in their individual capacities, and the Non-Regent Defendants (except Terri Feiz) in their individual capacities; 3) breach of contract against Defendant Board of Regents in its official capacity; and 4) promissory estoppel against the Board of Regents in its official capacity, as an alternative to the Third Claim for Relief.

LEGAL STANDARD

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts that allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. *Twombly* requires a two-prong analysis. First, a court must identify “the allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Iqbal*, 556 U.S. at 679–80. Second, a court must consider the factual allegations “to determine if they plausibly suggest an entitlement to relief.” *Id.* at 681. If the allegations state a plausible claim for relief, the claim survives the motion to dismiss. *See id.* at 680.

Plausibility refers “to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs ‘have not nudged their claims across the line from conceivable to plausible.’” *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). “The nature and specificity of the allegations required to state a plausible claim will vary based on context.” *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Thus, while Rule 12(b)(6) does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *See Khalik*, 671 F.3d at 1191.

Courts may consider matters outside the pleadings under Rule 12(b)(6) if the document is “referred to in the complaint,” “central to the plaintiff’s claim,” and the “parties do not dispute [its] authenticity.” *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010); *Davis v. BAE Sys. Tech. Sols. & Servs., Inc.*, 764 F. App’x 741, 742 n.1 (10th Cir. 2019). The Tenth Circuit has noted that there are exceptions to this rule, but they are “quite limited.” *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). If a court intends to rely on evidence outside the scope of these exceptions, “it must convert the Rule 12(b)(6) motion to a motion for summary judgment, giving proper notice to the parties.” *Gee*, 627 F.3d at 1186.

The general rule that “[i]n the context of a 12(b)(6) motion to dismiss, [the Court’s] review of the qualified immunity defense is limited to the pleadings[, and in] assessing the pleadings, [the Court construes] the allegations in the complaint, and any reasonable inferences to be drawn therefrom, in favor of [Plaintiff]” remains the dispositive inquiry. *Neiberger v. Hawkins*, 6 F. App’x 683, 686 (10th Cir. 2001).

ANALYSIS

I. Timeliness

Regent Defendants move to dismiss on the grounds that the claims brought against them in their individual and official capacities are time-barred. In Colorado, the statute of limitations for a § 1983 action is two years. *Braxton v. Zavaras*, 614 F.3d 1156, 1160 (10th Cir. 2010). Dr. Helmig was terminated on April 7, 2020. The original complaint was filed on April 6, 2022, within the statute of limitations, however, the FAC was filed on June 24, 2022, outside the statute of limitations. ECF 1 (“Compl.”), 7. The original complaint does not specifically list in separate paragraph form the individual Regents as defendants, ECF 1 at 2-4, but the FAC does. ECF 7 at ¶ 4.

The Regents concede that the original complaint was timely filed, but contest whether the FAC is subject to relation back under Fed. R. Civ. P. 15(c).³ Rule 15(c)(1)(B) applies to an amendment asserting a claim or defense, and Rule 15(c)(1)(C) applies to an amendment changing a party or the naming of a party. *See Pierce v. Amaranto*, 276 Fed. Appx. 788, 792 (10th Cir. 2008). The relation back doctrine’s purpose is “to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure . . . for resolving disputes on their merits.” *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550 (2010).

I recommend denying the Regents’ motion to dismiss brought on the grounds of timeliness pursuant to Fed. R Civ, P. 15(c)(1)(B) and (c)(1)(C). The purpose of Rule 15(c)(1)(B) is that “a

³ Defendant Board of Regents was separately named as “a body corporate authorized to staff CU’s Boulder Campus . . . with teaching and research faculty,” in both the original Complaint and the FAC.

party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.” *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149 n.3 (1984) (citation omitted). So long as there is a “factual nexus” between the original and amended complaints, the amended claim “is liberally construed to relate back to the original complaint if the defendant had notice of the claim and will not be prejudiced by the amendment.” *Benton v. Bd. of Cnty. Comm’rs*, No. 06–cv–01406–PSF, 2007 WL 4105175, at *3 (D. Colo. Nov. 14, 2007), *aff’d*, 303 F. App’x 625 (10th Cir. Dec. 17, 2008) (unpublished) (quoting *Grattan v. Burnett*, 710 F.2d 160, 163 (4th Cir. 1983)). In *Benton*, the court summarized the law governing the application of the relation back doctrine as follows:

As a general rule, amendments will relate back if they amplify the facts previously alleged, correct a technical defect in the prior complaint, assert a new legal theory of relief, or add another claim arising out of the same facts. For relation back to apply, there is no additional requirement that the claim be based on an identical theory of recovery. On the other hand, amendments generally will not relate back if they interject entirely different facts, conduct, transactions or occurrences. It is a matter committed to the district court’s sound discretion to decide whether a new claim arises out of the same transaction or occurrence.

Benton, 2007 WL 4105175, at *3 (quoting *Kidwell v. Bd. of Cnty. Comm’rs of Shawnee Cnty.*, 40 F. Supp. 2d 1201, 1217 (D. Kan. 1998)).

Rule 15(c)(1)(C) applies to relation back of an amended complaint that “changes the party or the naming of the party against whom a claim is asserted.” Fed. R. Civ. P. 15(c)(1)(C). Thus, when a list of parties has “changed,” Rule 15(c)(1)(C) governs the relation back to the original complaint. *See Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004) (holding that [the predecessor to Rule 15(c)(1)(C)] governed relation back because the plaintiff’s amendment “amounted to adding a new party” (citations omitted)).

Upon review of the FAC and construing it liberally, I find that the allegations in the FAC share a factual nexus with the allegations asserted in the original complaint, and that to the extent there is a substitution of defendants and addition of a new parties, the Regent Defendants should have known of the possibility of their implication in the suit. The original complaint, and the allegations therein, identified the Board of Regents members in their individual and official capacities, sufficient to provide notice. *See* Rule 15 Advisory Committee Notes, 1966 Adoption. The original Complaint's caption includes all defendants **"IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES"** (capitalization and emphasis in original) and pleads claims at Counts I and II "[a]gainst ALL DEFENDANTS, in their individual and official capacities." ECF 1 at 25, 26 (capitalization in original), ¶¶ 160, 166. Like the FAC, it alleges "Dr. Helmig asserts claims against CU, and the persons named above, in both their individual and official capacities." ECF 1 at 2. It asserts claims against the Board of Regents on the basis that they had exclusive authority to terminate his employment and failed to provide appropriate due process as provided in Regent Laws. Compl. at 15, n. 2.

The FAC clarifies and lists the Defendants as "The University of Colorado Board of Regents: Illana Dubin Spiegel, Glen Gallegos, Heidi Ganahl, Irene Griego, Chance Hill, John Kroll, Sue Sharkey, Linda Shoemaker, and Lesley Smith. . . .IN THEIR INDIVIDUAL CAPACITIES." ECF 7 (emphasis in original). The FAC further alleges "Dr. Helmig asserts claims against CU and the persons named above, in their individual and official capacities as noted," ECF 7 at 2, and later lists them as being sued in their individual capacities at Counts I and II. ECF 7 at 26, 27. The FAC alleges the Regents breached their duties to abide by Regent Law and failed to exercise their exclusive authority with respect to Dr. Hemig's termination.

In my view, the Regent Defendants knew or should have known of the possibility of their implication in the suit. They will not be prejudiced in defending this case on the merits. Accordingly, I recommend that the Regent Defendants' Motion to Dismiss be denied to the extent it argues the § 1983 claims are time-barred.

II. Due Process Claims

I now examine whether Dr. Helmig has alleged facts that sufficiently state claims that there was a deprivation of his property and liberty interests without due process.

The Fourteenth Amendment provides that no state may deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Absent an emergency, an individual generally must be provided with some kind of process before he is deprived of one of these protected interests. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 & n. 7, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

A. Property Interests

1. (Count I) against Chancellor (Official Capacity), Regents, and Non-Regents (Individual Capacities)

“The Supreme Court has stated that property interests are not created by the Constitution, but by existing rules or understandings that stem from independent sources, ‘such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.’” *Darr v. Town of Telluride, Colo.*, 495 F.3d 1243, 1251 (10th Cir. 2007) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). “The standard for the existence of a property right in employment is whether the plaintiff has a legitimate expectation of continued employment.” *Hennigh v. City of Ashawnee*, 155 F.3d at 1249, 1253 (10th Cir. 1998). For example, a public employee may possess such an interest in his employment if he has tenure, a contract for a fixed

term, an implied promise of continued employment, or if state law allows for his dismissal only for cause or its equivalent. *See Darr*, 495 F.3d at 1251 (citing cases); *see also Dickey v. Adams Cnty. Sch. Dist.* No. 50, 773 P.2d 585, 586 (Colo. App.1988) (citing cases).

Defendants argue that Count One should be dismissed for failure to plead a protected property interest because Dr. Helmig was an at will employee. Although opaque, Plaintiff asserts a property interest from two sources. At paragraph 95 of the FAC, Dr. Helmig asserts a property interest in continued employment arising from CU's "formally adopted and published policies [which] provided that associate research professors hold multi-year term appointments," and that as of the time of his termination "he held a five-year appointment under these policies." These are bare assertions. Although not specifically cited, he now explains that this allegation arose from the campus-wide policy at the CU, titled "Research Professor Appointments – Procedures for Policy Implementation on Research Professor Series" ("UCB Research Faculty Policy"), which, according to Dr. Helmig, has been in place at the Boulder campus at all relevant times, at least since 2011, and applies to research associate professors. Reply Br., ECF 48, at 5; Exhibit 1, ECF 48-1, § 1. This policy provides that renewal of a five-year term of appointment (previously, according to counsel's representation at oral argument, a three-year term) is "completely discretionary" with the University, and that during a term of appointment, research faculty are subject to "dismissal for cause on the same grounds as are applicable to tenure-track and tenured faculty." Exhibit 1, ECF 48-1, § 5.1(a). Arguably, this creates a legitimate expectation in continued employment safeguarded by due process.

The other source of Dr. Helmig's alleged protected property interest in continued employment is Article 5 of the Regent Laws ("Regent Law 5"), as it existed at the time of Dr.

Helmig's termination, which he attaches as Exhibit 2 to his Reply Brief. ECF 48-2. Regent Law 5 is not specifically cited in the FAC. Under Regent Law 5, the highest authority in the CU system, such a termination constitutes a "dismissal," and may be determined by the Regents, and "[n]o member of the faculty shall be dismissed except for cause and after being given an opportunity to be heard." ECF 48-2 at 7, art. 5.C.2(A). According to this policy, this is distinct from non-renewal of a limited appointment at the end of the period of employment and from termination of a faculty member employed at will, each of which "shall not be regarded as a dismissal." *Id.* Cause for dismissal is narrowly defined, including demonstrable professional incompetence, insubordination, felony conviction, or crime of moral turpitude. Ex. 2, Art. 5.C.1.

These two sources, according to Dr. Helmig, establish that he could only be terminated during his definite term of years for cause, after giving him an opportunity to be heard, and thus, he was not an at will employee and his termination was a violation of his due process rights. In response, Defendant initially cited to APS 5002, attached as Exhibit B to Non-Regents' Motion, which states limited appointments are only for those that are "for a specified period of time and are not explicitly at-will." When the applicability of this version of APS 5002 was challenged by Mr. Helmig in briefing on the grounds that it was not in force at the time of his employment, *see* ECF 48-3 (last revised March 1, 2017), Defendants withdrew this argument. Reply Brief, ECF 51 at 4, n. 5. Defendant further challenges the version of Policy 5L relied upon by Dr. Helmig, arguing it was repealed. Non-Regent Def. M., ECF 34 at 4. Plaintiff does not concede the accuracy of this document at this juncture and explains that the policy was amended with an effective date of July 1, 2020, which postdates his termination. He further argues that Policy 5L may conflict with the UCB Research Faculty Policy, upon which he relied, and that the amended version, if considered,

made it the responsibility of each campus chancellor to maintain appropriate policies for the termination of research faculty. CU campuses were encouraged to provide multi-year contracts to some research faculty. Plaintiff represents that least since 2012, the UCB Faculty Research Policy has stated that Associate Research Professors such as Dr. Helmig hold appointments for a defined period of years (three years, as of 2012) and could be terminated during that term only “for cause.” ECF 48-6, UCB Research Faculty Policy (revised Feb. 17, 2012) pp. 4 (three-year appointments); 11 (“All research faculty are subject to immediate dismissal for cause on the same grounds as are applicable to regular faculty members”).

The parties’ reliance on and my consideration of documents extrinsic to the FAC without first converting the Motions to motions for summary judgment is improper in this context, and I am unable to make a determination based on the record before me as to whether Policy 5L defeats the right to be terminated for cause. Hence, the best solution is to dismiss these claims without prejudice and permit Plaintiff to amend the FAC to expound upon the allegations in paragraph 95.

At this juncture, given the liberal standard of granting leave to amend under Rule 15(a), it is respectfully recommended that the Motions be granted at Count I and that the claims therein be dismissed without prejudice.⁴

2. Allegations as to Regent Defendant’s Deprivation of Property Interest

⁴ The sole basis for dismissal of Count I asserted by the Non-Regents is that he did not have a property interest in continued employment. Based on the current allegations in the FAC, the termination decision appears to only have been made by three individuals who may have had participatory responsibility: Fiez, Miller and Turetsky, who held dual appointments and either delivered or signed the notice of termination in their capacities as Director and Associate Director of INSTAAR and Vice Chancellor for Research and Innovation. FAC ¶ 90. As alleged, Turetsky and Fiez lacked authority to terminate him.

Regent Defendants, sued in their individual capacities at Count I, seek dismissal of the claims on the additional grounds that Plaintiff has failed to allege sufficient personal involvement, noting that individual action by government officials must be sufficiently detailed to provide notice of the basis of the claims against them. Regent Defendants argue that Plaintiff has not alleged facts showing that the Regents were personally involved in the decision to terminate him or caused his termination, or that any Regent Laws or Policies enabled the allegedly unconstitutional conduct.

Liability against a defendant in his individual capacity under section 1983 may be predicated only upon a showing of “an affirmative link . . . between the [constitutional] deprivation and either the [defendant’s] personal participation, his exercise of control or direction, or his failure to supervise.” *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003) (quoting *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000) (citations and quotations omitted)). “Supervisory status alone does not create [section] 1983 liability.” *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (citation omitted).

Citing the Regent Laws, Plaintiff responds that as alleged in paragraphs 97 through 99 of the FAC:

Regent Laws strictly regulated the dismissal of all faculty on term appointments, providing that . . . [a]uthority to dismiss faculty is reserved to the Board of Regents” and yet, the Notice of Termination was “signed by Dr. Turetsky and Terri Fiez in their respective capacities as Director of INSTAAR and Vice Chancellor for Research & Innovation . . . [i]n contravention of each of the foregoing Regent Laws[.]

Plaintiff further cites to the Regent Laws section which states that “a faculty member may be dismissed for cause when, in the judgment of the Board of Regents and subject to the Board of Regents constitutional and statutory authority, the good of the university requires such action.”

ECF 48-2, at art. 5.C.1; *see also id.* at 5.C.3(B)(2) (dismissal goes before Regents on recommendation of the president). Plaintiff alleges that the Regents were aware of and routinely fulfilled their statutory duties to hire and fire CU faculty, and that on multiple occasions in April and May 2020, the Regents were apprised of Dr. Helmig's termination and the surrounding circumstances, failed to intervene, and failed to perform their legal duty and instead, ratified his termination. FAC ¶¶ 105-107. Regardless, Plaintiff has failed to allege facts which could plausibly support a claim that the individual Regent Defendants were personally involved in a deprivation of his property rights.

Based on these allegations, I recommend that the motion to dismiss the Regent Defendants be granted to the extent they argue a failure to plead personal involvement in the termination decision, and that Count I be dismissed without prejudice.

B. Liberty Interest (Count II) against Chancellor DiStefano (official capacity), Regents, and Non-Regents (Individual Capacities)

In Count II, Plaintiff alleges that he was deprived of a liberty interest in his right to enjoy employment opportunities and professional reputation, without due process. A public employee has a liberty interest in his good name and reputation as they relate to his continued employment. *McDonald v. Wise*, 769 F.3d 1202, 1212 (10th Cir. 2014) (citing *Workman v. Jordan*, 32 F.3d 475, 480 (10th Cir.1994)). The government infringes upon that interest when: (1) it makes a statement that “impugn[s] the good name, reputation, honor, or integrity of the employee”; (2) the statement is false; (3) the statement is made during the course of termination and “foreclose[s] other employment opportunities”; and (4) the statement is published, in other words, disclosed publicly. *McDonald*, 769 F.3d at 1212. at 481.

1. Allegations as to Regent Defendant's Deprivation of Liberty Interest

Regent Defendants argue that the liberty interest claim is insufficiently pleaded because Plaintiff has not alleged any individual disparaging statements made by the Regents, citing *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (to state a claim under Section 1983, the complaint must “make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations.”). Regent Defendants argue that the FAC is conclusory and lacks specificity when it broadly alleges that the Regents repeated “on numerous occasions, in publicly accessible correspondence” that “the University determined, after careful review and consideration, that the separation of work and resources was not being maintained and a separation of the university from [Plaintiff] and his commercial enterprise was required.” Motion, ECF 31 at 7-8, citing FAC ¶¶ 115-118. Plaintiff responds to this argument by citing to *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010), in which the Court held that it is not necessary that each Defendant personally, directly published the stigmatizing statements, but rather, as stated in *Bailey v. Kirk*, 777 F.2d 567, 572 (10th Cir. 1985), “to establish a deprivation of a liberty interest, plaintiff must show that the discipline imposed *resulted in the publication of information* which was false and stigmatizing.” (emphasis added). Plaintiff further argues that government officials are liable for the deprivation of a protected liberty interest if they overtly or impliedly adopt the defamatory accusations of a third party. *Melton v. City of Oklahoma City*, 928 F.2d 920, 931(10th Cir.) (*en banc*), *cert. denied*, 502 U.S. 906 (1991). Plaintiff has alleged that the Investigation Report, “replete with falsehoods” which he details in the FAC, was commissioned by CU “with the primary purpose of conjuring reasons to justify Dr. Helmig’s termination.” FAC ¶¶ 130, 135-150. These

previously published stigmatizing statements were repeated by the Regent Defendants. He has also alleged that in a letter dated April 16, 2020, Frances Draper (Senior Strategic Advisor – Community and Government Engagement) sent a publicly accessible letter in which it was stated “that the separation of work and resources was not being maintained” which the Regents personally repeated to Boulder County Commissioner Elise Jones FAC ¶¶ 115, 118.

Having reviewed the allegations in the FAC, I recommend that the motion to dismiss Count II as to the Regent Defendants be denied, as Plaintiff has plausibly alleged, albeit barely, that the Regents publicly disseminated the purportedly false statements..

2. Allegations as to Non-Regent Defendant’s Deprivation of Liberty Interest

Communications related to reasons for termination

Non-regent Defendants argue that Count II should be dismissed on the grounds of qualified immunity. Qualified immunity protects public officials who are required to exercise their discretion, shielding them from personal liability for civil damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012). This type of immunity applies when a public official’s conduct does not violate clearly established rights that a reasonable person would have known about. *Schwartz*, 702 F.3d at 579.

“The plaintiff must demonstrate on the facts alleged both that the defendant violated his constitutional or statutory rights, and that the right was clearly established at the time of the alleged unlawful activity.” *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)). The Supreme Court affords courts the discretion to decide “which of the two prongs of the qualified immunity analysis should be addressed first in light of the

circumstances in the particular case at hand.” *Pearson*, 555 U.S. at 232-35; *see also Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1277 (10th Cir. 2009).

Defendants Miller (Associate Director of INSTAAR) and Turetsky (Director of INSTAAR)⁵ are alleged to have had communications with the NSF, a federal agency. FAC ¶ 127. They argue they are immune from personal liability because their communications related to Dr. Helmig’s termination were “intra-governmental disseminations” which the Tenth Circuit has held do not meet the publication requirement for purposes of being a “public disclosure” in violation of a protected liberty interest. ECF 34 at 9. Plaintiff contends that the cases Defendants rely on are inapplicable because they “are expressly limited to statements that are ‘not published outside the *state government*’” and the communications at issue were made “directly to the National Science Foundation,” *i.e.*, the federal government. ECF 48 at 25 (internal citations omitted). Defendants reply this Circuit has not “precisely defined the scope of intra-government disseminations.” ECF 51 at 7 (internal citations omitted). In the absence of a violation of a clearly established right, Defendants assert, they may not be held liable. *Id.* at 8. Neither side’s argument is significantly developed.

It is well-established in the Tenth Circuit that intra-governmental communications are not publications for liberty deprivation claims. *See, e.g., Asbill v. Hous. Auth. of Choctaw Nation of Oklahoma*, 726 F.2d 1499, 1503 (10th Cir. 1984) (citing *Bishop v. Wood*, 426 U.S. 341, 348, (1976)); *Isengard v. New Mexico Pub. Educ. Dep’t*, 708 F. Supp. 2d 1190, 1201 (D.N.M. 2009) (collecting 10th Circuit cases). This Circuit has also long held that “intra-government

⁵ To the extent the FAC includes allegations of publication with the Boulder County Commissioner Elise Jones and the National Science Foundation by Non-Regents Moore and the Estate of Draper, the motion to dismiss is now moot because Plaintiff has voluntarily dismissed Moore and the Estate of Draper. ECF 46.

dissemination, by itself, falls short of the Supreme Court’s notion of publication: ‘to be made public.’” *Id.* (citing *Bishop*, 426 U.S. at 348).

The Tenth Circuit has used the term “intra-government dissemination” to describe “communications made across governmental units” like those “between a city and county,” and “internal communications of the same unit of government.” *Alcorn v. La Barge, WY*, 784 F. App’x 614, 619 (10th Cir. 2019). It has also found the term should apply to communications “between a state and its sub-units,” like those “between a municipal government and a state agency.” *Id.* But as Defendants correctly emphasize, the Tenth Circuit recently acknowledged it “ha[s] not, however, precisely defined the scope of intra-government disseminations.” ECF 51 at 7 (quoting *Alcorn*, 784 F. App’x at 619). While the Tenth Circuit’s caselaw on this issue concerns state governments, another circuit has persuasively found the federal government’s “intragovernmental dissemination . . . to other federal agencies and components, to be used for federal law enforcement purposes, is not ‘public disclosure’ for purposes of a stigma-plus claim.” *Elhady v. Kable*, 993 F.3d 208, 225–26 (4th Cir. 2021) (citing *Asbill*, 726 F.2d at 1503).

As for inter-governmental communications, “the Tenth Circuit appears to have left the door open for consideration of whether [this] dissemination could be considered publication.” *Al-Turki v. Tomsic*, No. 15-cv-00524-REB-KLM, 2017 WL 11501099, at *9 (D. Colo. Feb. 28, 2017), *report and recommendation adopted*, No. 15-cv-00524-REB-KLM, 2017 WL 11501170 (D. Colo. Mar. 24, 2017). Non-binding caselaw has interpreted this issue in varying ways. *Compare id.* at *10 (“[T]he Court is persuaded that the scant available legal authority illuminating this unusual issue mandates a holding that allegations regarding inter-governmental dissemination of defamatory statements from one sovereign to another sovereign are sufficient to meet the

publication element of a stigma-plus claim.”), *with Elhady*, 993 F.3d at 225–26 (noting the federal “government could not function if every intra- or inter-departmental memo critical of a person created a constitutional claim” and “[t]he same rationale explains why disclosure to state or tribal law enforcement agencies does not constitute public disclosure.”).

Moreover, a non-State actor’s actions can be attributed to the State in certain circumstances. The Supreme Court has determined that a regulated entity’s action “may be fairly treated as that of the State itself” when “there is a sufficiently close nexus between the State and the challenged action.” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (holding the State was insufficiently connected with the challenged action to make the privately owned and operated utility corporation’s conduct attributable to the State for purposes of the Fourteenth Amendment); *see also Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 303 (2001) (holding interscholastic athletic association’s private actions considered state action for purposes of the Fourteenth Amendment given “close nexus” with the State). But as the Tenth Circuit has acknowledged, the Supreme Court has also held “extensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish the kind of symbiotic relationship between the government and a private entity that is required for state action.” *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451 (10th Cir. 1995) (internal citations omitted). This “sufficiently close nexus” test has also been applied to determine whether challenged actions of private entities are attributable to the federal government for Fourteenth and Fifth Amendment purposes. *See* 16C C.J.S. Constitutional Law § 1843 (Apr. 2023); *see also Warren v. Gov’t Nat. Mortg. Ass’n*, 611 F.2d 1229, 1232 (8th Cir. 1980) (citing *Jackson*, 419 U.S. at 351). Based on this precedence, a lower court in this Circuit found a council

“funded by the government and perform[ing] an important government function . . . could be considered governmental for the purpose of intra-governmental disseminations.” *Isengard v. New Mexico Pub. Educ. Dep’t*, 708 F. Supp. 2d 1190, 1205–06 (D.N.M. 2009).

Here, the FAC asserts Section 1983 claims against Defendants. FAC ¶ 1. Section 1983 allows an individual to sue state government employees and others acting “under color” of state law in their individual capacity for civil rights violations. 42 U.S.C. § 1983; *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989) (holding Section 1983 claims are not against a State or “its officials acting in their official capacities”). Indeed, the FAC alleges INSTAAR is a subdivision of the University of Colorado, which is a public state university. ECF 7 ¶ 194. But it also alleges that the state school subdivision’s “work relies heavily on grant funding from the [NSF],” which is “an agency of the United States government that funds scientific research at colleges and universities.” FAC ¶¶ 5, 25, 194. It is unclear if INSTAAR’s actions would be attributed to the state or federal government. Regardless of whether these communications could be viewed as within the federal government (intra) or between the state and federal government (inter), there is no clearly established law that would have informed Defendants Miller and Turetsky that their communications with the NSF violated the Constitution. *See Schwartz*, 702 F.3d at 579; *see also Riggins*, 572 F.3d at 1107 (citing *Pearson*, 555 U.S. 223). In the absence of a violation of a clearly established right, Defendants Miller and Turetsky are thus entitled to qualified immunity. I therefore respectfully recommend that the motion to dismiss be granted as to these two Non-Regent Defendants at Count II.

Dr. Helmig further alleges that Defendant Parra violated his clearly established rights when she reported and exaggerated the defamatory statements about him to the press in connection with

his termination. Parra also seeks dismissal on the grounds of qualified immunity, citing *McDonald* 769 F.3d at 1215. That court held that a mayor's press secretary was entitled to qualified immunity, despite having publicly stated plaintiff had been terminated because of a serious allegations of misconduct, because she was not in a position to provide due process in the form of a name-clearing hearing. Here, Parra, a former Director of Communications and Chief Spokesperson for CU, is not alleged to have been in a position to provide him with a name-clearing hearing.⁶

Accordingly, I recommend that Count II be dismissed as to Non-Regent Defendant Parra.

Allegations Regarding Investigation Report

Plaintiff alleges that Defendants Brown, Chapman, Steve Smith, Thompson, and Pochay were participants in the creation of an internal audit of his activities which contained false statements, and then disseminated that report. At oral argument, Plaintiff's counsel expanded on the allegations, describing the theory that each of these individuals were involved in a plan to institute the investigation as a coverup, motivated by a desire to prepare the document for public dissemination.

The specific allegations as to these Non-Regent Defendants are as follows.⁷ Defendant Brown was a Fiscal Compliance Analyst at CU Controller's Office. FAC ¶ 13. Plaintiff alleges that Brown purportedly tasked Defendant Chapman, Senior Audit Manager of Investigations, to look into concerns Defendant Pochay had raised about Plaintiff's grant management, and that he oversaw the "publication" of the internal audit investigation report. FAC ¶¶ 86-88, 159.

⁶ At oral argument, Plaintiff's counsel conceded this point and indicated a desire to preserve the issue for appeal.

⁷ There are no allegations as to Count II against Feiz. When Defendants argued this point, ECF 34 at 12, Plaintiff responded by stating he "withdraws his Second Claim for Relief against Terri Feiz." ECF 48 at 20, n. 4. I therefore recommend granting the motion to dismiss in this regard.

As to Defendants Chapman, Steve Smith, and Thompson, these three Defendants worked for CU's Internal Audit department (the "Internal Audit employees"), FAC ¶ 14. Plaintiff alleges Chapman initiated an internal audit of Plaintiff and all three worked on the internal audit investigation report. FAC ¶¶ 86-88, 159. Defendant Pochay was the Financial and Accounting Program Manager for INSTAAR. FAC ¶ 12. Plaintiff alleges Defendant Pochay "systematically blocked" his research and refused to approve his purchase of calibration standards. FAC, ¶¶ 46, 50, 51. He further alleges that Pochay "went well beyond the scope of her job duties and authority, tracking and 'reporting' on [Plaintiff's] work," and "contributed significantly" to the internal audit investigation report. FAC ¶¶ 57, 86-88.

Nowhere in the First Amended Complaint does Plaintiff allege that any of these Defendants publicly shared or disseminated the internal audit investigation report, thus failing to state a claim as to this portion of Count II. Instead, he argues that they purposefully *crafted* a false report for the purpose of publicly justifying his wrongful termination, without speaking to him first. Nor has Plaintiff demonstrated that these Defendants were in the position to provide him with a name-clearing hearing, which, under *McDonald*, 769 F.3d at 1215, entitles them to qualified immunity.

Accordingly, qualified immunity bars Plaintiff's Second Claim for Relief against these individuals. I respectfully recommend the motion to dismiss be granted at Count II as to Defendants Brown, Chapman, S. Smith, Thompson, and Pochay, without leave to amend.

III. Allegations as to Defendant Chancellor DiStefano

Plaintiff alleges claims against Chancellor DiStefano in his official capacity at Counts I and II. The Chancellor moves to dismiss any claims where damages are sought. It is black letter law that claims against state officials sued in their official capacity for damages or compensatory

relief are barred by the Eleventh Amendment. Eleventh Amendment immunity extends to suits “asserting a damage claim against state officers in their official capacities.” *Colby v. Herrick*, 849 F.3d 1273, 1276 (10th Cir. 2017). Indeed, it is generally understood that “the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself.” *Hill v. Kemp*, 478 F.3d 1236, 1255–56 (10th Cir. 2007) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

Accordingly, I recommend dismissal of any monetary damages against Chancellor DiStefano in his official capacity at Counts I and II.

IV. Breach of Contract and Promissory Estoppel (Counts III and IV)

For the same reasons explained above, Plaintiff’s breach of contract and promissory estoppel claims are insufficiently plead as they do not clearly describe which Regents Laws or policies give rise to an enforceable agreement or reliance.

At Count III, Dr. Helmig brings a claim for breach of contract under Colorado law against the Board of Regents of the University of Colorado in its official capacity. Under Colorado law, to prove a breach of contract claim, a plaintiff must establish the following elements: (1) the existence of a contract; (2) plaintiff’s performance or some justification for nonperformance; (3) defendant’s failure to perform; and (4) resulting damages to the plaintiff. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992).

In the FAC, Dr. Helmig alleges that employment with CU could be terminated during the term only for certain causes specified in Regent Law and only upon affording Dr. Helmig certain procedural rights. FAC ¶ 188. He further alleges that he performed his obligations under the

contract by teaching, researching, and representing CU in various publishing and speaking enterprises, FAC ¶ 189. He alleges that from in or around April 2020, CU breached the contract with him, or demonstrated a clear and definite intention not to perform under the contract, when Dr. Turetsky and Ms. Fiez, in their respective capacities as Director of INSTAAR and Vice Chancellor for Research and Innovation, informed him that his employment was being terminated, without due process, FAC ¶ 190, and that he suffered and continues to suffer damages. FAC ¶ 191.

At Count IV, Dr. Helmig alleges promissory estoppel, in the alternative to the breach of contract claim at Count III, against the Board of Regents, in its official capacity. The elements of a promissory estoppel claim are (1) the promisor made a promise to the promisee; (2) the promisor should have reasonably expected that the promise would induce action or forbearance by the promisee; (3) the promisee reasonably relied on the promise to his or her detriment; and (4) the promise must be enforced to prevent injustice. *Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142, 151 (Colo. 2006). “[T]he concept of promissory estoppel was developed by equity to enforce, in appropriate circumstances, a unilateral promise for which no consideration was provided.” *Soderhun v. Pub. Serv. Co. of Colo.*, 944 P.2d 616, 620 (Colo. App. 1997).

Dr. Helmig alleges that the Board of Regents, on behalf of and as an agent for CU, promulgated the Regent Laws, and CU established policies, which together govern termination of term appointments, and which promised certain substantive and due process job protections. FAC ¶ 193. INSTAAR, as a subdivision of CU, is alleged to be bound by these decrees. FAC ¶ 194. According to the FAC, the Board of Regents and CU should reasonably have expected that these promises would induce action or forbearance by Dr. Helmig, FAC ¶ 195, he detrimentally relied

on these promises by refraining from seeking appointment with any other research institution, FAC ¶ 196, the Board of Regents and CU have refused to honor their promises to Dr. Helmig. FAC ¶ 197, and he has damages arising therefrom. FAC ¶ 199.

The analysis of the sufficiency of these claims is related to whether Plaintiff had a protected interest in continued employment or whether he was an at-will employee. Plaintiff argues that under *Subryan v. Regents of University of Colorado*, 698 P.2d 1383 at 1384-85 (Colo. Ct. App. Dec. 20, 1984) he had a right to rely on this appointment term, justifying the breach of contract claim where the regents have promulgated rules governing termination of appointees. “These rules were adopted by the regents and are relied upon by all who are affected. They must be given effect and cannot be disregarded. . . . The regents have the power to amend these rules to avoid such problems and should follow the procedures set forth therein.” *Id.* at 1385.

As previously discussed, I find that these claims fail to state a claim and should be dismissed without prejudice. I therefore recommend that the motion to dismiss Counts III and IV be granted without prejudice with leave to amend as to Counts III and IV.

V. Leave to Amend

“In dismissing a complaint for failure to state a claim, the court should grant leave to amend freely ‘if it appears at all possible that the plaintiff can correct the defect.’” *Triplett v. LeFlore Cty., Okla.*, 712 F.2d 444, 446 (10th Cir. 1983) (quoting 3 Moore’s Federal Practice, ¶ 15.10 & n. 2 (1983))

The Court cannot, at this point, find that permitting amendment certainly would prove futile. Therefore, I recommend the dismissing the FAC in part without prejudice, with leave to file, if he so chooses, a motion to amend. Under our Local Rules of Practice, leave to amend requires a

formal motion. *See* D.C.COLO.LCivR 7.1(d) (“A motion shall not be included in a response or reply to the original motion. A motion shall be filed as a separate document.”).

CONCLUSION

Accordingly, based upon the foregoing and the entire record herein, this Court respectfully RECOMMENDS that:⁸

- 1) Regent Defendants’ Motion to Dismiss First Amended Complaint [filed October 3, 2022, ECF 31] be granted in part and denied in part. It would be denied with prejudice with respect to whether the individual capacity claims are time-barred. It would be granted as to Count I, which would be dismissed without prejudice.
- 2) Non-Regent Defendants’ Amended Motion to Dismiss First Amended Complaint [filed October 4, 2022, ECF 34] be granted in part and denied in part. It would be granted and the claims dismissed with prejudice at Count II as to Defendants Miller, Turetsky, Parra, Brown, Chapman, S. Smith, Thomson and Pochay on the basis of qualified immunity without leave to amend. It would further be granted and claims for monetary damages would be dismissed with prejudice against Chancellor DiStefano in his

⁸ Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party’s failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *In re Garcia*, 347 F. App’x 381, 382-83 (10th Cir. 2009).

- official capacity at Counts I and II without leave to amend. It would be granted as to the property interest claim at Count I, breach of contract and promissory estoppel claims at Counts III and IV against the Board of Regents in its official capacity; said claims would be dismissed without prejudice with leave to amend.
- 3) The claims asserted in Count II against Defendant Terri Feiz would be dismissed on the grounds that Plaintiff voluntarily withdraws this claim.

Entered this 15th day of May, 2023, at Denver, Colorado.

BY THE COURT:

A handwritten signature in black ink that reads "Michael E. Hegarty". The signature is written in a cursive, flowing style.

Michael E. Hegarty
United States Magistrate Judge