IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

FRANCK MAUVAIS-JARVIS,	)	
	)	
Plaintiff/Counter-Defendant/Counter-Plaintiff,	)	
	)	
v.	)	
	)	No. 2010 CH 31064
NORTHWESTERN UNIVERSITY,	)	and No. 2013 L 7324
	)	(consolidated)
Defendant/Counter-Plaintiff/Counter-Defendant,	)	
	)	
----------	)	
FRANCK MAUVAIS-JARVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
WINIFRED P.S. WONG, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER AND OPINION

INTRODUCTION

This matter comes for ruling on multiple motions to dismiss filed by the various Defendants, Third Party Defendants, and Counter-Defendant in this case.

Defendants Northwestern University ("University"), Joseph T. Walsh, and Lauran Qualkenbush (collectively, the "Northwestern Defendants") filed a motion pursuant to 735 ILCS 5/2-619(a)(9) to dismiss Counts III-VIII of Plaintiff Franck Mauvais-Jarvis' Amended Counterclaims to the University's Counterclaims in Case No. 2010 CH 31064 ("Indemnification Case") and Counts I-IV of Plaintiff's

Complaint in Case No. 2013 L 7324 ("Defamation Case"). The Northwestern Defendants argue that the information, interviews, statements, recommendation, and other data which form the basis of Plaintiff's defamation claims and amended counterclaims are privileged under the Medical Studies Act, 735 ILCS 5/8-2101, and, Plaintiff's claims should be dismissed as a result.

Defendant Dr. Winifred P.S. Wong filed a motion pursuant to 735 ILCS 5/2-619(a)(9) to dismiss Counts I and II of Plaintiff's Complaint in the Defamation Case.

Third Party Defendant Dr. Jon Levine filed a motion pursuant to 735 ILCS 5/2-619(a)(4) and (a)(9) to dismiss Counts III and IV of Plaintiff's First Amended Third Party Complaint, and he argues that Plaintiff's claims are barred by the Medical Studies Act and on *res judicata* grounds.

Wong and Levine both adopt the arguments put forth by the Northwestern Defendants in their section 2-619(a)(9) motion to dismiss and reply brief and the related Medical Studies Act arguments advanced by Third Party Defendant Kazunari Nohara.

Third Party Defendant Michelle Oeser Prost filed a motion pursuant to 735 ILCS 5/2-619(a)(4) to dismiss Counts I and II of Plaintiff's First Amended Third-Party Complaint on the grounds of *res judicata*. She also adopts the Northwestern Defendants' reply brief to their section 2-619(a)(9) motion to dismiss.

Third Party Defendant Kazunari Nohara filed a motion pursuant to 735 ILCS 5/2-619(a)(9) and (a)(5) to dismiss Counts V, VI, VII, and VIII of Plaintiff's First Amended Third Party Complaint. Nohara argues that the Medical Studies Act bars

Counts V through VIII and that the statute of limitations has expired on Counts VII and VIII. Nohara has adopted the reply briefs of the Northwestern Defendants, Wong, and Levine with regard to additional Medical Studies Act arguments.

Finally, the Northwestern Defendants also filed a separate motion to dismiss Plaintiff's third through eighth counterclaims pursuant to section 2-619(a)(5) and to dismiss Plaintiff's third through sixth counterclaims pursuant to section 2-619(a)(4). Similar to Third Party Defendants Nohara, Oeser Prost, and Levine's motions, the Northwestern Defendants argue that Plaintiff's third through sixth counterclaims should be dismissed on the grounds of *res judicata* and because the one-year statute of limitations for defamation has expired.

BACKGROUND

Plaintiff Franck Mauvais-Jarvis was an associate professor of medicine at the University's Feinberg School of Medicine from 2006 until August of 2013. Plaintiff's research focuses on the effects reproductive hormones may have on the risks of obesity and diabetes. While at the University, Plaintiff employed defendants Wong and Oeser Prost at his lab. Wong was a postdoctoral fellow at the lab between 2006 and May 2010, and Oeser Prost worked as a research technician between 2006 and June 2008. As for the other defendants in the case, Dr. Levine is a professor emeritus at the University; he was previously a professor of neurobiology and physiology at the University. Defendant Walsh is the Vice President for Research of the University, and his responsibilities include overseeing the University's Office of Research Integrity ("ORI"). The University's ORI initiates and oversees inquiries

and investigations of research misconduct. Defendant Qualkenbush is the Director of the University's ORI, and she initiates and oversees ORI proceedings. Third Party Defendant Kazunari Nohara was a witness during the Plaintiff's ORI proceedings.

In 2008, Plaintiff and his laboratory personnel were involved in research that focused upon the role of reproductive hormones in the maintenance of energy metabolism in humans and the way such hormones influence the risks of obesity and diabetes. Specifically, Plaintiff's research focused on the role estrogen plays in protecting insulin-producing pancreatic beta-cells in type 1 and type 2 diabetes. Plaintiff has stated that his research and work may help cure type 1 diabetes in children and adults of both genders and may help prevent obesity and type 2 diabetes in predisposed women. In June of 2008, Plaintiff, Wong, and Oeser Prost submitted a manuscript regarding this research to the *Journal of Biological Chemistry* for possible publication. Oeser Prost was responsible for collecting and then mapping certain data that was included in two figures within the manuscript, figures 6C and 6H. Those figures, however, contained fabricated data. The parties disagree as to who included the fabricated data in the two figures.

Shortly afterwards, Oeser Prost contacted Levine to discuss the fabricated data. Oeser Prost worked in Levine's lab during her undergraduate studies at the University, and Levine advised her that the manuscript should be withdrawn. On June 23, 2008, Oeser Prost informed Plaintiff of the inaccuracies of the submitted data and this led to a subsequent correction of the figures and data, the withdrawal

of the manuscript from review by the *Journal of Biological Chemistry*, and eventual publication of the article in a separate medical journal, the *Proceedings of the National Academy of Sciences*.

On July 30, 2008, Plaintiff received a letter from the University's ORI which stated that Oeser and Levine had accused him of research misconduct. Specifically, Plaintiff was charged with falsifying figures 6C and 6H in the draft manuscript submitted to the *Journal of Biological Chemistry* earlier that year. Shortly afterwards, an inquiry committee was formed to assess the allegations of research misconduct. The committee interviewed various individuals and reviewed the allegations. On May 5, 2009, the committee issued a final report where it found that the charges by Oeser and Levine were not credible and did not merit a full investigation.

After the issuance of the committee's final report, it was found that figure 4F of the manuscript submitted to the *Journal of Biological Chemistry* was also inaccurate. According to the Complaint, in early 2009, Wong informed Plaintiff that another postdoctoral student in his lab found that there was a problem with figure 4F. Starting from February 2009, Plaintiff then began documenting Wong's alleged substandard performance in his lab. Plaintiff alleges that he fired Wong from his lab in April 2010 due to serious inadequacies in her work. After an alleged confrontation between Plaintiff and Wong, Wong then spoke to Qualkenbush with respect to Plaintiff falsifying data figures in 6C, 6H, and 6F of the manuscript.

A new charge letter of research misconduct was issued by defendant Qualkenbush, the University's Director of ORI, to Plaintiff on December 17, 2010. The charge letter alleged that Plaintiff had: 1) falsified the data in figure 4F, 2) falsified the data in figures 6C and 6H, and 3) instructed Wong to lie to the inquiry committee in February 2009 and blame Oeser Prost for the falsified images in figures 6C and 6H.

Copies of the charge letter were sent to two administrative officials, and a second inquiry committee was formed. On June 2, 2011, this committee concluded that a full investigation into the charges against Plaintiff was warranted. Defendant Walsh sent a letter to Plaintiff listing the allegations made against him, and Qualkenbush forwarded copies of Walsh's letter to the interim dean and the vice dean of the University's Feinberg School of Medicine.

Plaintiff filed a five-count complaint against Wong, Walsh, Qualkenbush, Oeser Prost, Levine, and Northwestern on June 13, 2011 (Case No. 2013 L 7324, the Defamation Case). Plaintiff's Complaint alleged claims of defamation *per se*, defamation *per quod*, and civil conspiracy against these defendants.

The alleged defamatory statements originate from the research misconduct allegations made by Oeser Prost and Levine, the charge letters issued by Walsh and Qualkenbush to the Plaintiff and other University officials, and e-mail exchanges between Qualkenbush and Wong regarding the charges. The statements are listed here:

Charge letter to Plaintiff dated July 30, 2008 (Compl. ¶ 42; Am. Counterclaims ¶ 55):

1. You falsified figure 6C in a draft manuscript titled "Estrogen Amplify Pancreatic ß-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry.

2. You falsified figure 6H in a draft manuscript titled "Estrogens Amplify Pancreatic ß-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry.

3. You falsified data for body weight values in Supplement Table I in a draft manuscript titled "Estrogens Amplify Pancreatic ß-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry.

Letter from Walsh to Plaintiff dated June 14, 2010 (Compl. ¶ 182):

You were contacted by the Office for Research Integrity because new allegations of research misconduct have been raised against you. Specifically, that:

1. You falsified figure 4F in a draft manuscript titled "Estrogen Amplify Pancreatic ß-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry in 2008; and

2. You instructed Winifred Wong to lie on your behalf in preparation for her interview with the Inquiry Committee in February 2009

E-mail exchange between Qualkenbush and Wong dated July 22, 2010 (Compl. ¶ 202):

[From Qualkenbush to Wong]

Hello Winnie,

Thank you for taking the time to talk this afternoon. I'm sending the revised language for the allegations for your review and approval.

DRAFT allegation language:

> You instructed Winifred Wong to lie on your behalf in preparation for her interview with the Inquiry Committee in February 2009. Specifically, you instructed Ms. Wong to inform the Committee that Michelle Oeser was responsible for the falsified images in the manuscript. In addition, in an attempt to coerce her into saying what you wanted, you told Ms. Wong that the lives of the five people in your lab depended on what she told the Committee.

Please let me know if the above statement is correct, or if not, please let me know what is incorrect.

Thank you again for your assistance.

Lauran

[Response from Wong]

Hi Lauran,
Yes, the statement below is correct.
Winnie

Charge letter from Qualkenbush to Plaintiff dated December 17, 2010 (Compl. ¶ 192; Am. Counterclaims ¶ 169):

1. You falsified figure 4F in a draft manuscript titled "Estrogen Amplify Pancreatic β-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry in 2008; and

2. You instructed Winifred Wong to lie on your behalf in preparation for her interview with the Inquiry Committee in February 2009. Specifically, you instructed Ms. Wong to inform the Committee that Michelle Oeser was responsible for the falsified images in the manuscript. In addition, in an attempt to coerce her into saying what you wanted, you told Ms. Wong that the lives of the five people in your lab depended on what she told the Committee...

3. You falsified figure 6C in a draft manuscript titled "Estrogen Amplify Pancreatic β-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry; and

4. You falsified figure 6H in a draft manuscript titled "Estrogen Amplify Pancreatic β-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry

Charge letter from Walsh to Plaintiff dated June 3, 2011 (Compl. ¶ 213; Am. Counterclaims ¶ 176):

1. You falsified figure 4F in a draft manuscript titled "Estrogen Amplify Pancreatic β-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry in 2008; and

2. You instructed Winifred Wong to lie on your behalf in preparation for her interview with the Inquiry Committee in February 2009. Specifically, you instructed Ms. Wong to inform the Committee that Michelle Oeser was responsible for the falsified images in the manuscript. In addition, in an attempt to coerce her into saying what you wanted, you told Ms. Wong that the lives of the five people in your lab depended on what she told the Committee...

3. You falsified figure 6C in a draft manuscript titled "Estrogen Amplify Pancreatic β-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry; and

4. You falsified figure 6H in a draft manuscript titled "Estrogen Amplify Pancreatic β-Cell Insulin Synthesis Via Extranuclear Signaling of the Estrogen Receptor α," which was submitted for publication to the Journal of Biological Chemistry

On August 31, 2011, the defendants Wong, Walsh, Qualkenbush, and Northwestern filed two combined section 2-619.1 motions to dismiss Plaintiff's claims in the Defamation Case. Defendants argued that Plaintiff's defamation claims were barred by absolute privilege and by the Illinois Citizen Participation Act. Oeser Prost, Wong, and Levine also argued that the civil conspiracy claims against them were barred by the one-year statute of limitations. The trial court denied the Defendants' motion on the basis of the Illinois Citizen Participation Act,

but granted their motion pursuant to absolute privilege under Illinois common law. The trial court then dismissed the civil conspiracy claims against Oeser, Wong, and Levine because the statute of limitations had expired.

Plaintiff appealed the trial court's ruling. On March 28, 2013, the First District of the Illinois Appellate Court issued its decision, *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070 (Ill. App. Ct. 1st Dist. 2013), where it affirmed in part and reversed in part the trial court's order. The Appellate Court reversed the trial court's dismissal of Plaintiff's defamation claims and ruled that absolute privilege did not extend to statements made in the context of a university's research misconduct proceedings. The Appellate Court affirmed the Circuit Court's dismissal of Plaintiff's civil conspiracy claim against Wong, Oeser, and Levine on the basis of it being time-barred.

While the procedural history for the Defamation Case is described above, this lawsuit also involves a separate cause of action for indemnification that was filed on July 20, 2010 in the Chancery Division of the Circuit Court of Cook County (Case No. 2010 CH 31064, the "Indemnification Case"). Based on his contract rights, Plaintiff sued the University for indemnification and the advancements of the cost and expenses he had and continued to incur while defending himself during the internal University research misconduct proceedings.

On May 19, 2011, the Circuit Court entered a preliminary injunction ordering the University to advance to Plaintiff his legal expenses subject to repayment

individual counts of tortious interference with contract and tortious interference with prospective business advantage and expectation against each of the Third Party Defendants for the statements they made during the ORI proceedings. Two additional counts of defamation *per se* and defamation *per quod* were alleged against Nohara.

The statements which form the basis for Plaintiff's Amended Third Party Complaint and his Counterclaims in Response to the University's Counterclaim in the Indemnification Case stem from the alleged defamatory statements listed earlier and statements made by the Third Party Defendants during the ORI proceedings:

Statement by Michelle Oeser Prost to Investigation Committee on November 17, 2011 (Am. Counterclaims ¶¶ 185-86):

> Dr. Mauvais-Jarvis had falsified those two images to be included in a Figure 6 in the manuscript and instructed her to further and falsely manipulate those images.
>
> She informed Dr. Mauvais-Jarvis that she had not done the experiments that were supposed to underlie the images;
>
> Dr. Mauvais-Jarvis knew from their prior meetings and for other reasons that she had not done the experiments;
>
> Dr. Mauvais-Jarvis instructed her to manipulate certain images that he showed her during the meeting to make them appear as if they were the result of real experiments, and to include them in the manuscript then under preparation;
>
> The images that Dr. Mauvais-Jarvis showed her were not templates on which she should model the images of the actual experiments that Dr. Mauvais-Jarvis believed she had done;
>
> She had never used templates before in her work in Dr. Mauvais-Jarvis' Lab and she never used templates in her imaging work;

Her June 4, 2008 email to Dr. Mauvais-Jarvis that stated she had completed her work on images in Figure 6 did not mean that she had in fact done the experiments underlying images 6C and 6H; and

In another meeting, Dr. Mauvais-Jarvis told her that he manipulated data by taking out a couple of points to make the data look stronger.

Statement by Jon Levine to Investigation Committee on November 28, 2011 (Am. Counterclaims ¶¶ 192-93):

Dr. Mauvais-Jarvis had falsified those two images to be included in a Figure 6 in the manuscript and instructed her to further and falsely manipulate those images.

Oeser told him that she informed Dr. Mauvais-Jarvis that she had not done the experiments that were supposed to underlie the images for Figures 6C and 6H, and asked him to let her do the experiments over the next couple of days;

Dr. Mauvais-Jarvis had falsified the images for 6C and 6H and told Oeser that he would put them in the paper notwithstanding her objections;

The images that Dr. Mauvais-Jarvis showed her were not templates on which she should model the images of the actual experiments that Dr. Mauvais-Jarvis believed she had done.

Dr. Mauvais-Jarvis had concocted a cover-up;

Dr. Mauvais-Jarvis had committed some serious commissions of misconduct; and

Levine had not lodged the charges against Dr. Mauvais-Jarvis with Northwestern's Office of Research Integrity.

Statement from Kazunari Nohara to Investigation Committee (Am. Counterclaims ¶ 198):

By selectively reporting food intake data, Dr. Mauvais-Jarvis falsified Figure 2C in the second submission (later resubmitted as Figure 2B in the third submission) of the manuscript titled "Neonatal testosterone programs energy homeostatsis" to a scientific journal known as the *Journal of Clinical Investigation (JCI).*

Dr. Mauvais-Jarvis falsely stated in his Answers to Reviewer Comments A attached to the second submission of "Neonatal testosterone programs energy homeostasis" to the *JCI* that data derived from two external core facilities also confirmed increased food intake.

> Dr. Mauvais-Jarvis falsified Figure 4A of the Endocrinology article, "Early-Life Exposure to Testosterone Programs the Hypothalamic Melanocortin System" by representing data from two different experiments as data from one experiment...
>
> Dr. Mauvais-Jarvis instructed his staff to falsify data by selectively removing data points.
>
> Dr. Mauvais-Jarvis falsified the figure measuring Relative Ucpl expression in the Sigma Plot file PNAE RT-PCR data by representing data from two different experiments as data from one experiment.
>
> Dr. Mauvais-Jarvis falsified the nature and supplier of the H_2O_2 solution used in the October 2009 Diabetes article titled "Importance of Extranuclear Estrogen Receptor-a and Membrane G Protein-Coupled Estrogen Receptor in Pancreatic Islet Survival," which called into question the purity of the H_2O_2 used.

On September 30, 2013, the Indemnification Case was transferred to the Law Division of the Circuit Court. The Indemnification Case and Defamation Case have since been consolidated.

This court will now address the numerous section 2-619 motions to dismiss filed in this case.[1] The section 2-619 motions to dismiss primarily argue that the Plaintiff's claims in his Complaint, First Amended Third Party Complaint, and Counterclaims in Response to the University's Counterclaim should be dismissed

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[1] The section 2-619 motions to dismiss at issue here are:
(1) The Northwestern Defendants' Motion to Dismiss Counts III through VIII of Plaintiff's Amended Counterclaims to the University's Counterclaims in Case No. 2010 CH 31064 (Indemnification Case) and Counts I through IV of Plaintiff's Complaint in Case No. 2013 L 7324 (Defamation Case) Pursuant to 735 ILCS 2-619(a)(9);
(2) Defendant Winifred Wong's Motion to Dismiss Counts I and II of Case No. 2013 L 7324 (Defamation Case) Pursuant to 735 ILCS 2-619(a)(9) based on the Medical Studies Act;
(3) Third Party Defendant Jon Levine's Motion to Dismiss Counts III and IV of the First Amended Third-Party Complaint Pursuant to Section 2-619;
(4) Third Party Defendant Michelle Oeser-Prost's Section 2-619 Motion to Dismiss Counts I and II of the Third Party Complaint;
(5) Third Party Defendant Kazunari Nohara's Section 2-619 Motion to Dismiss Counts V through VIII of the Third Party Complaint; and
(6) Counter-Plaintiff Northwestern University's Amended Motion to Dismiss Plaintiff's third through eighth counterclaims pursuant to section 2-619(a)(5) and to dismiss Plaintiff's third through sixth counterclaims pursuant to section 2-619(a)(4).

based on the Medical Studies Act, *res judicata* grounds, and the expiration of the statute of limitations.

LEGAL STANDARD

The Northwestern Defendants, Wong, and Third Party Defendants Levine, Oeser Prost, and Nohara have all moved to dismiss claims from Plaintiff's Complaint in the Defamation Case, his Amended Third Party Complaint, and his Amended Counterclaims to the University's Counterclaim in the Indemnification case under 735 ILCS 5/2-619.

A motion to dismiss under section 2-619(a)(9) admits the legal sufficiency of the plaintiff's complaint, but asserts that the claim asserted against the defendant is barred by some affirmative matter which avoids the legal effect of or defeats the claim. *Boyar v. Dixon (In re Estate of Boyar)*, 2013 IL 113655, P27 (Ill. 2013). However, a court cannot accept as true any conclusions that are not supported by specific facts. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, P31 (Ill. 2012). When ruling on the motion, the court should construe the pleadings and supporting documents in the light most favorable to the nonmoving party. *Sandholm v. Kuecker*, 2012 IL 111443 (Ill. 2012). The motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Boyar*, 2013 IL 113655 at P27.

The Defendants and Third Party Defendants also move to dismiss Plaintiffs' claims pursuant to section 2-619(a)(4) and section 2-619(a)(5). Section 2-619(a)(4) of the Code permits the involuntary dismissal of an action where it is "barred by a

prior judgment." 735 ILCS 5/2-619(a)(4). This provision allows a party to raise the affirmative defense of *res judicata*. *Morris B. Chapman & Assocs. v. Kitzman*, 193 Ill. 2d 560 (Ill. 2000). Under section 2-619(a)(5), a defendant is entitled to a dismissal if "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5)

ANALYSIS

A. Medical Studies Act

The Northwestern Defendants, Wong, Levine, and Nohara each argue that the Medical Studies Act bars the various claims Plaintiff has alleged against them.[2] The Illinois Medical Studies Act was created to advance the quality of health care by ensuring that members of the medical profession effectively engage in a peer-review process. *Toth v. Jensen*, 272 Ill. App. 3d 382, 385 (Ill. App. Ct. 1st Dist. 1995). The purpose of the Act is based upon the societal interest of encouraging candid and voluntary studies and programs used to improve hospital conditions and patient care or to reduce the rates of death and disease. *Doe v. Illinois Masonic Med. Ctr.*, 297 Ill. App. 3d 240, 245 (Ill. App. Ct. 1st Dist. 1998). Absent a confidentiality provision, physicians may be reluctant to sit on peer-review committees and

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[2] Specifically, the motions are:
(1) The Northwestern Defendants' Motion to Dismiss Counts III through VIII of Plaintiff's Amended Counterclaims to the University's Counterclaims in Case No. 2010 CH 31064 (Indemnification Case) and Counts I through IV of Plaintiff's Complaint in Case No. 2013 L 7324 (Defamation Case) Pursuant to 735 ILCS 2-619(a)(9);
(2) Defendant Winifred Wong's Motion to Dismiss Counts I and II of Case No. 2013 L 7324 (Defamation Case) Pursuant to 735 ILCS 2-619(a)(9) based on the Medical Studies Act;
(3) Third Party Defendant Jon Levine's Motion to Dismiss Counts III and IV of the First Amended Third-Party Complaint Pursuant to Section 2-619; and
(4) Third Party Defendant Kazunari Nohara's Section 2-619 Motion to Dismiss Counts V through VIII of the Third Party Complaint.

critically evaluate their colleagues due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to tort actions, and fear of malpractice actions in which the records of the peer-review proceedings might be used. *Illinois Masonic Med. Ctr.*, 297 Ill. App. 3d at 245; *Ardisana v. Northwest Cmty. Hosp., Inc.*, 342 Ill. App. 3d 741, 746 (Ill. App. Ct. 1st Dist. 2003). Thus, the Medical Studies Act protects documents which arise from the workings of a peer-review committee and which are an integral part, but not the result, of the peer-review process. *Ardisana*, 342 Ill. App. 3d at 746. The burden of establishing a privilege under the Medical Studies Act is on the party seeking to invoke it. *Ardisana*, 342 Ill. App. 3d at 746. The Medical Studies Act provides:

> All information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, or other data of the Illinois Department of Public Health, local health departments, the Department of Human Services (as successor to the Department of Mental Health and Developmental Disabilities), the Mental Health and Developmental Disabilities Medical Review Board, Illinois State Medical Society, allied medical societies, health maintenance organizations, medical organizations under contract with health maintenance organizations or with insurance or other health care delivery entities or facilities...used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged, strictly confidential and shall be used only for medical research, increasing organ and tissue donation, the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges or agreements for services...

735 ILCS 5/8-2101. The Northwestern Defendants, Wong, Levine, and Nohara argue that the Medical Studies Act governs entities like the University and that the Medical Studies Act was enacted in part to protect the advancement of science and

improvement of patient care through medical studies. The Defendants also argue that the Act's plain language expressly protects all information used in the course of "medical study" and bars Plaintiff's defamation claims because they arise out of information, interviews, reports, statements, memoranda, recommendations, and other data allegedly generated in ORI proceedings regarding the conduct of Plaintiff's medical studies.

In response, Plaintiff makes numerous arguments against the application of the Medical Studies Act to the claims at issue here. First, he argues that the "law of the case" doctrine bars Defendants' Medical Studies Act argument because the issue has already been litigated and determined by the Appellate Court. Second, Plaintiff argues that the Defendants failed to meet the burden of establishing that the Medical Studies Act privilege applies. Third, he argues that the Medical Studies Act does not apply to universities. Fourth, Plaintiff argues that he is not covered by the Medical Studies Act because he was never a health care practitioner. Fifth, he argues that the alleged defamatory statements were not part of any committee review proceedings and involved administrative personnel, and therefore the statements were not covered by the Act. Sixth, he argues that the Act does not apply because the ORI proceedings had multiple purposes. Finally, Plaintiff argues that the Medical Studies Act is unconstitutional.

a. Constitutionality of the Medical Studies Act

In regards to Plaintiff's constitutional argument, the Illinois Supreme Court has already rejected constitutional challenges to the Medical Studies Act, specifically with regards to equal protection claims. *Jenkins v. Wu*, 102 Ill. 2d 468,

482 (Ill. 1984). Plaintiff offers a two-sentence argument for why the Act is unconstitutional. Plaintiff's broad sweeping claims of unconstitutionality do not sufficiently articulate an actual argument for why the Medical Studies Act is unconstitutional, and this court rejects his argument.

b. The Law of the Case Doctrine

Plaintiff's "law of the case" doctrine argument also fails because the Appellate Court did not address whether the Medical Studies Act bars Plaintiff's claims in its ruling, *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070. Rather, the Appellate Court ruled that the common law absolute privilege did not extend to statements made in the context of a university's research misconduct proceedings. In fact, the Medical Studies Act is not mentioned once in the Appellate Court's decision. *Id.*

c. Waiver of Medical Studies Act Argument

Defendants also did not waive their Medical Studies Act argument simply because they did not include it in their original combined section 2-619.1 motion to dismiss that was ruled upon by Judge Panter in 2011 and eventually appealed. This court is unaware of any case or rule which states that a party must present all of its arguments for why a claim or cause of action must be dismissed in its first opportunity to file a section 2-619 motion or risk waiving these arguments in the event that the trial court's order is appealed and eventually reversed. Filing multiple section 2-619 motions to dismiss in a single lawsuit is common practice, and the Illinois Appellate Court has acknowledged that "the practice of filing of multiple section 2 -- 619 motions to dismiss is not prohibited by the supreme court rules, [and] it was within the trial court's discretion to consider multiple motions for

dismissal and to permit the filing of subsequent motions to dismiss beyond the initial time for pleading." *Inland Real Estate Corp. v. Lyons Sav. & Loan*, 153 Ill. App. 3d 848, 853 (Ill. App. Ct. 2d Dist. 1987). This court does not find Plaintiff's one-sentence waiver argument to be persuasive at all, as it offers no support for why the Defendants' Medical Studies Act arguments should be waived.

d. Burden of Establishing Medical Studies Act Privilege

Plaintiff also argues that the Defendants failed to meet the burden of establishing that the Medical Studies Act privilege applies. However, Plaintiff merely claims that "defendants' blanket assertions of the MSA do not meet the burden" and he does not specify how or why the burden was not met. As a result, the Plaintiff's exceedingly brief one-sentence argument is unpersuasive and fails.

e. Medical Studies Act Applicable to Universities

Plaintiff's remaining arguments as to why the Medical Studies Act is inapplicable merit further consideration by this court and will be addressed here.

First, Plaintiff argues that the Act is limited to institutions and entities that render medical care to patients and does not apply to universities. Plaintiff states that the Act is meant to enhance hospital conditions and patient care and reduce the rates of death and disease in hospitals. Plaintiff's reading and application of the Medical Studies Act is too narrow. In *Doe v. Illinois Masonic Med. Ctr.*, the Appellate Court clearly stated that "the Act's plain language expressly protects all information used in the course of 'medical study'" and "that the legislature clearly intended that the statute's purview was not restricted to peer review committees."

Illinois Masonic Med. Ctr., 297 Ill. App. 3d at 243. The Appellate Court interpreted "medical study" to include "voluntary experimental research studies," such as the Illinois Masonic Medical Center's research program that was designed to reduce the incidence of cystic fibrosis. *Id.* at 245. Documents relative to the cystic fibrosis research program and its associated procedures and protocols were found to be privileged under the Act. Similar to the research program in *Illinois Masonic Med. Ctr.*, the Plaintiff's research at the University was also a "medical study" because it focused on the relationship between reproductive hormones and insulin-producing cells and aimed to both find a cure for type 1 diabetes and prevent obesity and type 2 diabetes in predisposed women. Plaintiff's lab clearly constitutes a "medical study for the purpose of reducing morbidity or mortality." *See* 735 ILCS 5/8-2101.

The fact that Plaintiff's research occurred at a university rather than a hospital also does not remove it from the purview of the Act. The Act states that:

> All information, interviews, reports, statements, memoranda, recommendations...or other data of...allied medical societies...used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged, strictly confidential...

735 ILCS 5/8-2101. In *Niven*, the Appellate Court held that documents belonging to the Joint Commission on Accreditation of Hospitals, an organization whose sole purpose was to accredit hospitals and an entity which did not render medical care to patients, was privileged under the Act. *Niven v. Siqueira*, 109 Ill. 2d 357, 363 (Ill. 1985). The *Niven* court found that "allied medical societies" referred to medical societies which are closely related to the purposes of the Act, i.e., those medical

societies that engage in candid and voluntary studies or programs used to improve hospital conditions and patient care or to reduce the rates of death and disease. *See Niven*, 109 Ill. 2d at 366. As stated above, Plaintiff's research constitutes a "medical study" under the Act. Plaintiff's medical study occurred at the University's Feinberg School of Medicine, an entity which engages in voluntary studies and medical research programs designed to reduce morbidity or mortality. The University in the present case is, without a doubt, an "allied medical society," and the Act applies here.

To clarify, this court does not rule that documents relating to any research project or lab associated with the University falls under the protection of the Act. For example, a research project studying earthquakes and seismic activity conducted by the University's geology department would not be covered by the Medical Studies Act because such research is not a "medical study." It is the substance of the research and whether it relates to the purpose of the Act (studies or program used to improve hospital conditions and patient care or to reduce the rates of death and disease) that determines whether or not the Act applies.

f. Medical Studies Act Applicable to Non-Health Care Practitioners

Second, Plaintiff argues that he is not covered by the Act because he was never a health care practitioner. As explained in great detail above, the Medical Studies Act is not limited to solely physician peer review committees because promoting peer review is not the only purpose of the Act. *Illinois Masonic Med. Ctr.*, 297 Ill. App. 3d at 244. Rather the Act states that "[a]ll information, interviews,

v. Shah, 261 Ill. App. 3d 551, 556 (1994). Illinois courts have stated that previously acquired information that is subsequently reported to a peer-review committee is not privileged under the Act. *Grandi*, 261 Ill. App. 3d at 556 (quoting *Roach v. Springfield Clinic*, 157 Ill. 2d 29, 41 (Ill. 1993)). The Illinois Supreme Court in *Roach* specifically stated:

> If the simple act of furnishing a committee with earlier-acquired information were sufficient to cloak that information with the statutory privilege, a hospital could effectively insulate from disclosure virtually all adverse facts known to its medical staff... So protected, those institutions would have scant incentive for advancing the goal of improved patient care.

Roach, 157 Ill. 2d at 41-42. However, the concerns in *Roach* are not present here because this case does not involve the traditional hospital peer review committees at issue in medical malpractice cases such as *Grandi* and *Roach*. Rather, the present lawsuit falls within the line of cases that include *Niven* and *Illinois Masonic Med. Ctr.*, where the "committee" included under the Act is not a physician "peer review committee." *Illinois Masonic Med. Ctr.*, 297 Ill. App. 3d at 244.

Plaintiff appears to argue that because the charge letters issued by Walsh and Qualkenbush and the e-mail exchange between Qualkenbush and Wong were generated before the ORI investigative proceedings began, then they occurred outside of the peer-review proceedings and are not privileged. This court notes that "the plain language of the Medical Studies Act provides that 'recommendations' used in the course of internal quality control are to receive its protection," and the charge letters sent by Walsh and Qualkenbush to Plaintiff and other University officials are surely "recommendations" from the University's Vice President of

Research and Director of Office of Research Integrity, respectively, to investigate the charges of research misconduct alleged against Plaintiff. *Ardisana*, 342 Ill. App. 3d at 747.

In addition, the charge letters and e-mail exchange in the present case are markedly different from the routine reports and physician conversations at issue in *Roach* because each of the charge letters and the e-mail exchange "establishes, by its own content, that it served an integral function in the peer-review information-gathering, and decision-making process." *Roach*, 157 Ill. 2d at 41-42; *Ardisana*, 342 Ill. App. 3d at 748; *Toth*, 272 Ill. App. 3d at 386. Similar to the documents in *Ardisana*, the charge letters, e-mail exchange, and statements in the present case "self-evidently constitute 'investigative and deliberative materials generated by a [committee] in formulating its recommendations' and they are therefore privileged under the Act." *Ardisana*, 342 Ill. App. 3d at 749.

This court finds that the "Committee proceedings" are not confined solely to the documents, interviews, and data generated during the ORI investigative proceedings. (Pl.'s Resp. Br. 9). Rather, the "Committee proceedings" also include the time period where the ORI inquiry committee was formed and when Levine and Oeser, and later Wong, first notified Qualkenbush of the research misconduct charges. If such information were not privileged, then this would subvert the purpose of the Act which is to encourage candid and voluntary engagement in a peer-review process for the purpose of improving patient care or to reduce the rates of death and disease. *See Niven*, 109 Ill. 2d at 366; *Ardisana*, 342 Ill. App. 3d at 746-

747. Plaintiff's temporal limitations argument also clearly fails in regards to the alleged defamatory statements made by Levine, Oeser Prost, and Nohara, because these statements were given during the actual ORI investigative proceedings.

Also, the Medical Studies Act still covers the statements at issue even though the University's administrative personnel were involved in the ORI proceedings. This court acknowledges that the Appellate Court in *Grandi* stated that "an investigation generally undertaken by hospital administration is not protected by the Act." *Grandi*, 261 Ill. App. 3d at 557. However, *Grandi* is distinguishable because it involved a hospital peer review committee and the evaluation of a physician's performance. In cases involving incidents of alleged medical malpractice, such as *Grandi*, it is true that a peer review committee should consist of peer physicians and not hospital administrative personnel. Unlike *Grandi*, the present case concerns research misconduct allegations relating to a medical study, not medical malpractice. Also, Plaintiff interprets *Grandi* far too broadly, as the Appellate Court never stated that the Act does not apply to any investigation undertaken by or involving a covered entity's administrative staff. (Pl.'s Resp. Br. 9). This is especially the case when the Medical Studies Act has been applied to instances involving evaluations of a physician's reappointment and granting of additional privileges and to committees which included a member who was not a part of the medical staff. *Toth*, 272 Ill. App. 3d at 386; *Illinois Masonic Med. Ctr.*, 297 Ill. App. 3d at 244.

h. Dual Purpose and the Medical Studies Act

Finally, Plaintiff argues that the Act does not apply because the ORI proceedings had multiple purposes. However, Plaintiff either misinterprets or misconstrues *Webb v. Mount Sinai Hosp. & Med. Ctr. of Chicago, Inc.* in making this argument, as nowhere in the opinion does the Appellate Court state that the Act does not apply where there is a dual purpose to a committee's inquiry. (Pl.'s Resp. Br. 8); *Webb v. Mount Sinai Hosp. & Med. Ctr. of Chicago, Inc.*, 347 Ill. App. 3d 817, 825 (Ill. App. Ct. 1st Dist. 2004). Rather, *Webb* states that the Medical Studies Act does not protect all information used for internal quality control, such as a "document created 'in the ordinary course of the hospital's medical business, or for the purpose of rendering legal opinions or to weigh potential liability risk or for later corrective action by the hospital staff.'" *Webb*, 347 Ill. App. 3d at 825. Even when the aforementioned documents are later used by a committee in the peer-review process, this does not render them privileged because "the Act does not 'protect against disclosure of information generated before a peer-review process begins or after it ends.'" *Id.* (citing to *Ardisana*, 342 Ill. App. 3d at 748).

Whether a document is privileged or not depends upon when and why it was generated, not upon how many purposes the document may be used for. In fact, a "document that 'was initiated, created, prepared, or generated by a peer-review committee' is privileged under the Act, 'even though it was later disseminated outside the peer-review process.'" *Webb*, 347 Ill. App. 3d at 825. Even if the charge letters, e-mail exchange, and statements given during the ORI investigative

proceedings were later used for other purposes, they remained privileged under the Medical Studies Act. Plaintiff's "dual purpose" argument carries no weight and fails here.

For the reasons stated above, this court rules that the alleged defamatory statements which form the basis for Plaintiff's claims are privileged under the Medical Studies Act. Accordingly, Counts I through IV of Plaintiff's Complaint in the Defamation Case, Counts I through VIII of the First Amended Third Party Complaint, and Plaintiff's third through sixth Counterclaims in Response to the University's Counterclaim in the Indemnification Case are barred and must be dismissed with prejudice.

B. Res Judicata

Even though the Medical Studies Act applies to the present case, this court will still address the *res judicata* arguments made by the Northwestern Defendants, Oeser Prost, and Levine in their section 2-619 motions to dismiss.

Oeser Prost and Levine move to dismiss the counts of tortious interference with contract and tortious interference with prospective business advantage alleged against them in the Amended Third Party Complaint. These counts of tortious interference are based upon the alleged false statements Oeser Prost and Levine made to the Committee of Academics during the ORI investigative proceedings on November 17, 2011 and November 28, 2011, respectively. Oeser Prost and Levine's alleged false statements are included in the section above.

Oeser Prost and Levine both argue that *res judicata* bars the current claims against them. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, P15 (Ill. App. Ct. 1st Dist. 2013) (citing *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (Ill. 2008)). Three requirements must be satisfied for *res judicata* to apply: (1) the parties or their privies are identical in both actions; (2) an identity of cause of action exists; and (3) a final judgment on the merits has been rendered by a court of competent jurisdiction. *Oshana*, 2013 IL App (1st) 120851 at P15. If the three elements necessary to invoke *res judicata* are present, *res judicata* will bar not only every matter that was actually determined in the first suit, but also every matter and any claim that is based or arose from the same incident, events, transaction, or circumstances that could have been raised and determined in that prior suit. *See Id.*; *Torcasso v. Standard Outdoor Sales*, 157 Ill. 2d 484, 490 (Ill. 1993).

A plaintiff is not permitted to engage in claim splitting. *Oshana*, 2013 IL App (1st) 120851, P15 (citing *Hudson*, 228 Ill. 2d at 474). *Res judicata* thereby prevents repetitive lawsuits and protects parties from being forced to bear the burden of relitigating essentially the same claim. *Oshana*, 2013 IL App (1st) 120851, P15. The party invoking the defense of *res judicata* bears the burden of demonstrating it applies. *Id.*

a. Identical Parties in Both Actions

In regards to the first element, there is an identity of parties because both Plaintiff and the defendants Oeser Prost and Levine were parties in the Defamation Case. Plaintiff had originally alleged civil conspiracy claims against Oeser Prost and Levine in his Complaint, and Plaintiff now brings tortious interference claims against Oeser Prost and Levine in his First Amended Third Party Complaint. It is clear that the first element of *res judicata* is met here.

b. Identity of Cause of Action

As for the second element, Illinois uses a "transactional test" to determine if there is an identity of the causes of action. *Oshana*, 2013 IL App (1st) 120851, P34. The main inquiry of the "transaction test" focuses on whether the two actions are based on the same nucleus of operative facts. *Id.* In his Complaint in the Defamation Case, Plaintiff alleged that Oeser Prost, Levine, and Wong engaged in a conspiracy to destroy his professional career by making false and defamatory accusations against him in 2008. The civil conspiracy claim against Wong, Oeser Prost, and Levine was specifically addressed on appeal:

> The parties agree that the conspiracy to defame claim against these three defendants is based upon statements they made in 2008, when the initial research misconduct allegations were brought to the attention of Northwestern's ORI by Levine and Oeser. The parties also agree that Mauvais-Jarvis did not file his complaint until three years later, in 2011...we disagree with [Plaintiff] and find that his civil conspiracy claim against Wong, Oeser and Levine was properly dismissed as time-barred pursuant to *section 13-201* of the Civil Procedure Code.

Mauvais-Jarvis v. Wong, 2013 IL App (1st) 120070, P105; P108. The Appellate Court stated that it is the underlying tortious acts performed pursuant to the agreement that give rise to a claim of civil conspiracy. *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, P109. Plaintiff's conspiracy claim was governed by the one-year statute of limitations for the underlying tort, defamation. *Id.* at P110. The Appellate Court found that Plaintiff's civil conspiracy claims against Wong, Oeser, and Levine were properly dismissed as time-barred because the defamatory statements were made in 2008 and Plaintiff did not file his Complaint until 2011. *Id.* at P111; 735 ILCS 5/13-201.

There is an identity of causes of action because the tortious interference claims in the Amended Third Party Complaint all arise from the original alleged defamatory statements made by Oeser Prost and Levine in 2008. As stated above, a plaintiff is not permitted to engage in claim splitting. *Oshana*, 2013 IL App (1st) 120851, P15 (citing *Hudson*, 228 Ill. 2d at 474). When Plaintiff brought his complaint in the Defamation Case, he could have also alleged tortious interference with contract and business prospective claims against Oeser Prost, Levine, and Wong instead of merely bringing a civil conspiracy claim against the three defendants. While these claims may have eventually been deemed time-barred anyway due to the one-year statute of limitations for defamation actions, this does not change the fact that all of Plaintiff's claims arise from the same core operative facts—the alleged defamatory statements made by Oeser Prost and Levine in 2008.

Also, *res judicata* still applies even if Plaintiff's tortious interference claims involve different elements of proof compared to his original civil conspiracy to defame claims, because both types of claims are considered part of the same cause of action. *See River Park, Inc. v. City of Highland* Park, 184 Ill. 2d 290, 311 (Ill. 1998). *Res judicata* prevents repetitive lawsuits and protects parties from being forced to bear the burden of relitigating essentially the same claim, and that is exactly the situation here. *Oshana*, 2013 IL App (1st) 120851, P15.

This court also notes that even though the Amended Third Party Complaint references statements made by Oeser Prost and Levine on November 17, 2011 and November 28, 2011, respectively, these statements were made during the ORI investigative proceedings where Oeser Prost and Levine were asked to repeat the research misconduct allegations they made in 2008. Thus, even though Oeser Prost and Levine repeated their allegations in 2011, the statements still arose from the same instance where Oeser Prost and Levine made their original research misconduct allegations against Plaintiff in 2008. In fact, the substance, content, and even the language of the alleged defamatory statements stated in Plaintiff's Amended Third Party Complaint mirror the allegations against Oeser and Prost in Plaintiff's Complaint in the Defamation Case. Finally, Plaintiff may have incurred further damages once the ORI proceeding concluded, such as being denied tenure, but these later injuries do not create an independent identity for the tortious interference claims. When judgment is entered on a claim, the claim is merged into the judgment and may not be split "even when the injury caused by an actionable

wrong extends into the future and will be felt beyond the date of judgment." Restatement (Second) of Judgments § 25, Comment *c* at 211 (1982). Because the tortious interference claims arise from the same nucleus of operative facts, the second element required for *res judicata* is met here.

c. Final Judgment on the Merits by a Court of Competent Jurisdiction

The third and final prong of *res judicata* is that the prior judgment was rendered by a court of competent jurisdiction and was a final judgment on the merits. *Hudson*, 228 Ill. 2d at 46. The trial court dismissed the civil conspiracy count against Oeser Prost and Levine with prejudice on December 21, 2011. The Appellate Court affirmed the trial court's dismissal of Plaintiff's civil conspiracy claims against Oeser Prost, Levine, and Wong on March 28, 2013. *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, P108. The involuntary dismissal of Plaintiff's conspiracy claim constituted an adjudication on the merits for *res judicata* purposes. *Hudson*, 228 Ill. 2d at 468; Ill. Sup. Ct., R 273.

Thus, all three elements of *res judicata* have been met here, and the claims of tortious interference alleged against Oeser Prost and Levine in Counts I through IV of Plaintiff's Amended Third Party Complaint are barred as a result and should be dismissed with prejudice.

For the reasons stated above, the Northwestern Defendants' motion pursuant to section 2-619(a)(4) to dismiss Plaintiff's third and fourth counterclaims must also be granted. Plaintiff's third through sixth counterclaims against the Northwestern Defendants are based upon the alleged false and defamatory statements made by

Levine, Oeser Prost, and Nohara during the ORI investigation. Specifically, Plaintiff's third and fourth counterclaims are premised upon defamation *per se* and defamation *per quod* claims against Levine and Oeser Prost. This court has ruled that Plaintiff's tortious interference claims against Oeser Prost and Levine are barred on the grounds of *res judicata*. It follows that Plaintiff's third and fourth counterclaims against the Northwestern Defendants are also barred by *res judicata*, as a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Oshana*, 2013 IL App (1st) 120851, P15. *See Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, P108. Just as Plaintiff had an opportunity to allege tortious interference claims against Oeser Prost and Levine in his Complaint in the Defamation Case, Plaintiff also could have sued the Northwestern Defendants via *respondeat superior* for the alleged defamatory statements made by Levine, Oeser Prost, and Wong at that time. The Northwestern Defendants' motion to dismiss Plaintiff's third and fourth counterclaims are dismissed as a result.

C. Statute of Limitations

While this court has already found that the alleged defamatory statements are privileged under the Medical Studies Act and Plaintiff's claims against the Northwestern Defendants and Third Party Defendant Nohara are barred as a result, this court will still address the statute of limitations arguments brought forth in the Northwestern Defendants and Nohara's section 2-619 motions to dismiss.

a. Third Party Defamation Claims Against Nohara

This court will first address Nohara's section 2-619(a)(5) motion to dismiss Count VII (defamation *per se*) and Count VIII (defamation *per quod*) of Plaintiff's Amended Third Party Complaint. Nohara argues that Plaintiff's defamation claims are time-barred because the one-year statute of limitations applicable to defamation actions has expired. 735 ILCS 5/13-201. Nohara made his alleged false statements to the Committee of Academics during the ORI investigative proceedings on December 16, 2011. Plaintiff did not file his Third Party Complaint and defamation claims against Nohara until December 10, 2013. Thus, Plaintiff's defamation claims against Nohara are time-barred.

b. Tolling of Statute of Limitations by Appeal

Plaintiff counters by arguing that the statute of limitations was tolled by the pending appeal in the Defamation Case. Plaintiff claims that he could not have brought his defamation claims against Nohara until the Appellate Court reversed the trial court's order and ruled that an absolute privilege did not apply. The Appellate Court issued its opinion, *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, on March 28, 2013.

However, Plaintiff is incorrect in arguing that he can delay the filing of his claim until the pending appeal is resolved. The applicable limitations period is not tolled during the pendency of an appeal. *Block v. Pepper Constr. Co.*, 304 Ill. App. 3d 809, 816 (Ill. App. Ct. 1st Dist. 1999). Even though the Appellate Court ultimately reversed Judge Panter's ruling regarding the absolute privilege issue for the

Plaintiff's defamation claims, Plaintiff took absolutely no action to preserve his claims against Third Party Defendant Nohara. Plaintiff waited until after 23 months had passed since Nohara made his alleged defamatory statements on December 16, 2011 and eight months after the Appellate Court issued its opinion on March 28, 2013 to file his Third Party Complaint and his claims against Nohara on December 10, 2013.

Essentially, it is Plaintiff's duty to preserve his claims when the case's appeal is pending, and the statute of limitations is not tolled during the pendency of the appeal. *See Block*, 304 Ill. App. 3d at 816. The defamation claims against Nohara in Counts VII and VIII of Plaintiff's First Amended Third Party Complaint are time-barred.

c. Plaintiff's Third Through Sixth Counterclaims in the Indemnification Case

The Northwestern Defendants also moved to dismiss Plaintiff's third through sixth counterclaims in the Indemnification Case pursuant to section 2-619(a)(5).[3] Plaintiff's third and fourth counterclaims against the Northwestern Defendants are based upon defamation *per se* and defamation *per quod* claims against Levine and Oeser Prost. Plaintiff's fifth and sixth counterclaims are based upon defamation *per se* and defamation *per quod* claims against Nohara.

[3] The court is referring to the motion titled, "Counter-Plaintiff Northwestern University's Amended Motion to Dismiss Pursuant to Section 2-619" that was filed on April 15, 2014. While the Northwestern Defendants moved to dismiss Plaintiff's "third through eighth counterclaims," this appears to be a typo because Plaintiff only filed six counterclaims. (Northwestern Defs.'s Mo. 1) (Pl.'s Counterclaims in Resp. to University's Counterclaim).

As explained above, Plaintiff's defamation claims against Nohara are time-barred and subsequently, Plaintiff cannot seek to hold the Northwestern Defendants liable under the principles of *respondeat superior* for those claims. However, in his response brief to the Northwestern Defendants' 2-619(a)(5) motion to dismiss Plaintiff's third through sixth counterclaims, Plaintiff argues that the savings provision of Section 13-207 tolls the statute of limitations. *See* 735 ILCS 5/13-207.

d. Savings Provision of Section 13-207

Section 13-207 states: "A defendant may bring a counterclaim after the period authorized in the applicable statute of limitations has elapsed, as long as the plaintiff's claim arose before the cause of action brought as a counterclaim was barred." 735 ILCS 5/13-207. For the purposes of the Northwestern Defendants' section 2-619 motion to dismiss, the "defendant" bringing the "counterclaim" is Plaintiff, or Franck Mauvais-Jarvis, and the "plaintiff' who filed the "claim" is the University. *See* 735 ILCS 5/13-207. Thus, Mauvais-Jarvis argues that he could have brought his currently time-barred defamation-based counterclaims against the Northwestern Defendants as long as the Northwestern Defendants' "claim", or Counterclaim for Breach of Indemnification Agreement in the Indemnification Case, arose before the "cause of action brought as a counterclaim was barred," or before the statute of limitations for Mauvais-Jarvis's defamation-based claims expired.

Mauvais-Jarvis's defamation claims expired in November and December of 2012, because Levine, Oeser Prost, and Nohara made their alleged defamatory

statements in November and December of 2011. However, the Northwestern Defendants could not have brought their counterclaim (for the repayment of legal fees and expenses) against Mauvais-Jarvis in the Indemnification Case until September 20, 2013, the day the University's Board of Trustees made the requisite determination regarding the research misconduct allegations against Mauvais-Jarvis. As result, the Northwestern Defendants' "claim" did not arise before the statute of limitations for Mauvais-Jarvis's defamation-based counterclaims expired. The savings provision of Section 13-207 does not apply here.

Yet, the parties also dispute when the Northwestern Defendants "owned" its counterclaim. The Northwestern Defendants "owned" its counterclaim for recovery of the legal fees and expenses it advanced to Mauvais-Jarvis when that counterclaim accrued, or when the Board of Trustees made its determination on September 20, 2013. The Northwestern Defendants could not have filed their counterclaim until the Board of Trustees made its decision. Therefore, Mauvais-Jarvis cannot revive his previously time-barred defamation claims via the savings provision of Section 13-207. Plaintiff Mauvais-Jarvis's third through sixth counterclaims against the Northwestern Defendants must be dismissed with prejudice.

COURT'S RULING

Therefore, based upon the pleadings, briefs, oral arguments, and case law cited above, this court hereby orders:

(1) The Northwestern Defendants' Motion to Dismiss Counts III through VI of Plaintiff's Amended Counterclaims to the University's Counterclaim in the Indemnification Case and Counts I through IV of Plaintiff's Complaint in the Defamation Case pursuant to section 2-619(a)(9) is granted with prejudice;

(2) Defendant Winifred Wong's Motion to Dismiss Counts I and II of the Defamation Case pursuant to section 2-619(a)(9) is granted with prejudice;

(3) Third Party Defendant Jon Levine's Motion to Dismiss Counts III and IV of the Amended Third Party Complaint pursuant to section 2-619(a)(4) and (a)(9) is granted with prejudice;

(4) Third Party Defendant Michelle Oeser-Prost's Motion to Dismiss Counts I and II of the Amended Third Party Complaint pursuant to 2-619(a)(4) is granted with prejudice;

(5) Third Party Defendant Kazunari Nohara's Motion to Dismiss Counts V through VIII of the Third Party Complaint pursuant to section 2-619(a)(5) and (a)(9) is granted with prejudice; and

(6) Counter-Plaintiff Northwestern University's Amended Motion to Dismiss Plaintiff's third through sixth counterclaims pursuant to section 2-619(a)(4) and (a)(5) is granted with prejudice.

ENTERED:

Judge William E. Gomolinski
NOV 18 2014
Circuit Court-1973

Judge William E. Gomolinski #1973