

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BARRY D. BRAAN, SR.,

Plaintiff,

v.

UNIVERSITY OF MARYLAND MEDICAL
SYSTEM CORPORATION, *et al.*,

Defendants.

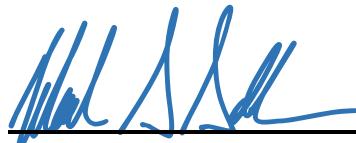
Case No. DKC 21-2023

**MOTION TO DISMISS OF DEFENDANTS UNIVERSITY OF
MARYLAND MEDICAL SYSTEM CORPORATION,
JOAN CRITTENDEN, SUSAN VOGEL,
AND ANNE WEEKLEY**

Defendants the University of Maryland Medical System Corporation, Joan Crittenden, Susan Vogel, and Anne Weekley respectfully move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss in full the December 16, 2022 Amended Complaint [ECF 17] of Plaintiff Barry D. Braan, Sr. for failure to state a claim on which relief may be granted.

Respectfully submitted,

GALLAGHER EVELIUS & JONES LLP



Mark S. Saudek (Fed. Bar #23963)
218 North Charles Street, Suite 400
Baltimore MD 21201
Tel: (410) 347-1365
Fax: (410) 468-2786
msaudek@gejlaw.com

*Attorneys for Defendants
University of Maryland Medical System
Corporation, Joan Crittenden,
Susan Vogel, and Anne Weekley*

Date: February 14, 2023

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
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218 North Charles Street, Suite 400
Baltimore MD 21201
Tel: (410) 347-1365
Fax: (410) 468-2786
msaudek@gejlaw.com

*Attorneys for Defendants
University of Maryland Medical System
Corporation, Joan Crittenden,
Susan Vogel, and Anne Weekley*

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Defendants the University of Maryland Medical System Corporation (“UMMS”), Joan Crittenden, Susan Vogel, and Anne Weekley respectfully move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss in full the December 16, 2022 Amended Complaint [ECF 17] of Plaintiff Barry D. Braan, Sr. for failure to state a claim on which relief may be granted.

SUMMARY OF ARGUMENT

At the heart of the Amended Complaint is an alleged document Braan claims to have created—the alleged “plan.” Braan alleges he created this alleged “plan,” of his own volition, for the Volunteer Chaplain Program of Charles Regional Medical Center (the “Medical Center”), a non-party hospital located in Charles County, Maryland. Notably, Braan neither attaches the alleged “plan” to the Amended Complaint or any other filing before the Court, nor has he produced it despite months of repeated requests by counsel for Defendants. Braan then alleges that he was not hired for a job in the Medical Center’s entirely different Palliative Care Program, but he does not allege that he even applied for the job, much less that any Defendant made or was involved in that hiring decision. Braan further alleges that his free speech rights were abridged when his access to the Medical Center was limited, but he does not allege that any Defendant barred his access, nor does he even allege any speech, protected or otherwise, in which he engaged that could have formed the claimed basis for the decision to limit access.

Without the requisite factual foundation, Braan’s kitchen-sink Amended Complaint alleges a series of claims that lack the mandatory statutory predicate; claims preempted by federal law; claims asserting wrongdoing allegedly engaged in

by someone other than a Defendant; claims barred by statutes of limitation; claims based on a retrospective aspirational hope—not a reasonable likelihood—of being awarded a job for which Braan never even applied and for which no Defendant was a decision-maker; and claims for abridgement of free speech without alleging any speech on his part at all, let alone abridgement by any Defendant. In sum, after eighteen months and two opportunities to allege all viable claims, Braan fails to allege any viable cause of action. UMMS, Crittenden, Vogel, and Weekley have been subjected to this baseless suit for long enough. The Court should now dismiss Braan's claims, in their entirety, with prejudice.

I. Count I (copyright infringement) fails because Braan did not register his copyright before filing, and his claim is time-barred.

Braan fails to state a cause of action for copyright infringement (Count I) because Section 411(a) of the Copyright Act, 17 U.S.C. § 411(a), requires that he have held a registered copyright at the time he filed the Complaint, and he fails to allege that he did so. In addition, Braan's copyright infringement claim is time-barred under 17 U.S.C. § 507(b) because he learned of the alleged infringement more than three years before filing his complaint. For these reasons, Count I must be dismissed in full. Even if Braan had alleged a valid copyright claim—which he does not, he fails to state a claim for statutory damages or attorney's fees under 17 U.S.C. § 412 because any alleged infringement began before copyright registration.

II. Count II (tortious interference with prospective advantage) fails because Braan alleges no reasonable likelihood of a future business relationship.

Braan's claim for tortious interference (Count II) fails because he fails to allege a claim against a person or entity responsible for making the hiring decision: none of the named Defendants decided whether to hire Braan for a Medical Center position. However, regardless of the named Defendant, this claim would fail: Braan had no reasonable expectation of employment, as he did not apply for the Palliative Care Program job, and his main alleged qualification was an alleged "plan," created for the entirely separate Volunteer Chaplain Program. Braan thus fails to allege that UMMS, Crittenden, Vogel, or Weekley denied him any position, or any reasonable likelihood existed that he would have been hired and so could have anticipated a business relationship. His allegations relating to Count II are mere flights of fancy, not valid assertions of a cause of action.

III. Counts III (quantum meruit) and IV (unjust enrichment) fail because they are preempted by federal law and otherwise fail on their merits.

Braan's *quantum meruit* and unjust enrichment claims (Counts III and IV) fail because they are premised on allegations that Defendant Crittenden misappropriated his alleged "plan" for her own purpose. Because any rights Braan had to control the use of his alleged "plan" fall squarely within protections afforded by the Copyright Act, these claims are subject to complete preemption under Section 301(a) of the Copyright Act, 17 U.S.C. § 301(a). Braan's claim for *quantum meruit* (Count III) fails for the additional, independent reason that he does not allege that anyone—including UMMS, Crittenden, Vogel, or Weekley—intended to

confer any benefit on him. Indeed, the Amended Complaint consistently alleges the contrary: that Defendants specifically intended not to confer any benefit on Braan.

IV. Counts V and VI (First Amendment to the United States Constitution and Maryland Declaration of Rights) fail because Braan identifies no protected speech at all—much less Defendants’ abridgement of any speech.

Counts V and VI (First Amendment to the United States Constitution and Maryland Declaration of Rights) fail because the Amended Complaint fails to allege any protected speech at all, much less any abridgement by a Defendant. Braan alleges that his access badge was deactivated, and he acknowledges the many valid reasons for the deactivation, including his failure to comply with facially neutral, generally applicable hospital training, safety, and service requirements.

Accordingly, Braan’s First Amendment and Declaration of Rights claims fail and must be dismissed.

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Federal Rule of Civil Procedure 12(b)(6) permits a defendant to present a motion to dismiss for failure to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is “to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (citations and internal quotation marks omitted).

To survive a Rule 12(b)(6) motion, “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) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 663. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678–79; *see also Twombly*, 550 U.S. at 545 (“a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.”).

When deciding a motion to dismiss under Rule 12(b)(6), a court “must accept as true all of the factual allegations contained in the complaint,” and must “draw all reasonable inferences [from those facts] in favor of the plaintiff.” *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (citations and internal quotation marks omitted). However, the Court need not accept unsupported legal allegations, *see Revene v. Charles Cnty. Comm’rs*, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979). If the “well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” the complaint has not shown that “the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679 (citation omitted).

ARGUMENT

I. Braan fails to allege any actions by UMMS and fails to state any claim against UMMS.

The Amended Complaint offers no allegations whatsoever of conduct by UMMS. The Amended Complaint references UMMS in only one place—the Introduction—which refers, without any basis, to the independent Medical Center as “a component and arm of” UMMS. Am. Compl. ¶ 2. This allegation is fatally ambiguous and lacks the specificity required to identify any actions allegedly taken by UMMS. Braan further does not allege that Crittenden, Vogel, or Weekley represented, were employed by, or otherwise served as an agent of UMMS.

Braan fails to allege any element of any claim against UMMS because he fails to allege any specific actions taken by UMMS at all:

- **Count I, Copyright Infringement.** Braan does not allege that UMMS did anything at all with his alleged “plan,” including copying it, distributing it, or taking any other action that would infringe on any other exclusive right of a copyright owner. *See* 17 U.S.C. § 106.
- **Count II, Tortious Interference with Business Expectancy.** Braan does not allege that UMMS interfered with any business expectancy he may allege he had.
- **Counts III and IV, Quantum Meruit and Unjust Enrichment.** Braan does not allege any agreement-in-fact or quasi-contract with UMMS, and he does not allege that UMMS was enriched in any way by his alleged “plan.”
- **Counts V & VI, Freedom of Speech.** Braan does not allege that UMMS abridged any speech by Braan, or even that UMMS was involved in any way in the deactivation of his badge, the alleged event upon which he premises his claims for retaliation under the Maryland Declaration of Rights.

The Amended Complaint thus offers no allegation—or even facts on which an inference could be drawn—of pertinent conduct by UMMS. UMMS thus must be dismissed from the suit entirely.

II. Braan fails to state a cause of action for copyright infringement (Count I), or for statutory damages and attorney's fees resulting from alleged infringement.

A. Braan's copyright claim fails because he fails to allege that he held a registered copyright at the time he filed the Complaint.

The Copyright Act requires a person to register a copyright before bringing a claim of copyright infringement: “no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made”¹ **17 U.S.C. § 411(a)**. The Supreme Court recently clarified that this condition precedent not only requires a completed application for registration, but also requires an actual award of a registration before the filing of a complaint. *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, --- U.S. ---, 139 S. Ct. 881, 892, 203 L. Ed. 2d 147 (2019) (holding that “registration . . . has been made within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register [of Copyrights of the United States Copyright Office] has registered a copyright after examining a properly filed application.”).

The Supreme Court has described the Copyright Act’s registration requirement as “akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights.” *Id.*, 139 S. Ct. at 887. Thus,

¹ The limited exceptions to this rule are inapplicable. *See* 17 U.S.C. §§ 408(f) & 411(a); 37 C.F.R. § 202.16 .

a claim for copyright infringement requires not only a registered copyright, but receipt of the certificate of registration prior to institution of the claim. The United States Court of Appeals for the First Circuit recently dismissed a claim on this basis where the plaintiff did not allege that she obtained registration of her copyright before filing suit. *Foss v. Marvic Inc.*, 994 F.3d 57, 62 (1st Cir. 2021); *see also Cortés-Ramos v. Martin-Morales*, 956 F.3d 36, 43 (1st Cir. 2020) (affirming dismissal because the “complaint did not allege that registration had been obtained prior to suit”).

Braan alleges only that he applied for a copyright registration certificate from the U.S. Copyright Office. Am. Compl. ¶ 39. He does not allege receipt of a certificate of registration before filing his complaint on August 10, 2021. *Id.* ¶¶ 1-49. Braan thus fails to state a claim for copyright infringement and this Count should be dismissed.

B. Braan’s claim for copyright infringement fails because it is time-barred.

Even if Braan had alleged receipt of a registered copyright, he missed the window to bring a claim for copyright infringement. The limitations period for civil infringement of a copyright is three years from the date of accrual. 17 U.S.C. § 507(b). “When it appears on the face of the complaint that the limitation period has run, a defendant may properly assert a limitations defense through a Rule 12(b)(6) motion to dismiss.” *Miller v. Pac. Shore Funding*, 224 F. Supp. 2d 977, 985 (D. Md. 2002) (Smalkin, C.J.), aff’d, 92 F. App’x 933 (4th Cir. 2004). The United States Court of Appeals for the Fourth Circuit

recognizes that the “applicable statute of limitations bars civil copyright actions brought more than three years after the claim accrues.” *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997). A civil copyright infringement claim “accrues when one has knowledge of a violation or is chargeable with such knowledge.” *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 796 (4th Cir. 2001) (quoting *Hotaling*, 118 F.3d at 202) (internal quotation marks omitted).

Braan’s claim is time-barred on its face: he alleges that he learned of Vogel’s alleged copying of his alleged “plan” at the February 11, 2016 Volunteer Chaplain Program meeting. Am. Compl. ¶¶ 23 & 40. Thus, at the latest, the limitations period expired in February 2019. Braan did not file his Complaint until August 10, 2021—more than five years after his claim accrued, and two years and eight months past the expiration of the limitations period. *See* Complaint [ECF 1].

This ends the analysis of Braan’s copyright claim, which must be dismissed in full on two independent bases: failure to allege receipt of registration and untimeliness. Solely in the interest of completeness, Defendants explain an additional basis for dismissal of Braan’s claim for copyright statutory damages and attorney’s fees.

C. Braan’s claim for copyright statutory damages or attorney’s fees fails.

Even if Braan could overcome the fatal deficiencies in his allegations of copyright infringement, 17 U.S.C. § 504 limits his potential recovery to actual damages or lost profits. Based on Braan’s own allegations, he is not entitled to the

additional categories of damages—statutory damages and attorney’s fees—that he seeks under the Copyright Act, and his claim for those damages must be dismissed.

No award of statutory damages or attorney’s fees may be made for any infringement of copyright that began before copyright registration. 17 U.S.C. § 412. Section 412 “leaves no room for discretion,” precluding statutory damages “so long as the infringement commenced before registration of the copyright,” which means that “the first act in a series of acts constituting continuing infringement” occurred before registration. *Johnson v. Jones*, 149 F.3d 494, 505-06 (6th Cir. 1998); *see also Bouchat v. Bon-Ton Dept. Stores, Inc.*, 506 F.3d 315, 330 (4th Cir. 2007) (recognizing that “infringement ‘commences’ for the purposes of § 412 when the first act in a series of acts constituting continuing infringement occurs.”) (citation omitted).

Braan seeks statutory damages under 17 U.S.C. § 504(c). Am. Compl. ¶ 47. He also seeks enhanced statutory damages and attorney’s fees for willful infringement pursuant to 17 U.S.C. § 504(c)(2). Braan’s allegations regarding his alleged “plan” take place between 2016 and 2018. Am. Compl. ¶¶ 1-28. As Braan alleges only that he has applied for registration, not that he has obtained registration, *id.* ¶ 39, the acts Braan complains of necessarily began prior to registration. As a result, Braan lacks standing to seek statutory damages or attorney’s fees. Accordingly, even if his Copyright claim survives this motion, this portion of it must be dismissed.

III. Braan fails to allege a claim for tortious interference (Count II).

Braan's allegations fail to state a prima facie claim for tortious interference against any party because he fails to make the required showing that a business relationship existed or was likely to occur.

Maryland law provides that “[t]he two general types of tort actions for interference with business relationships are inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic relationships in the absence of a breach of contract.” *Blondell v. Littlepage*, 413 Md. 96, 125 (2010) (quoting *Kaser v. Fin. Prot. Mkg., Inc.*, 376 Md. 621, 628 (2003)). “The principle underlying both forms of the tort is the same: under certain circumstances, a party is liable if he interferes with and damages another in his business or occupation.” *Id.* at 125 (quoting *Kaser*, 376 Md. at 628 (internal citation omitted)).

The elements of a claim for intentional interference with business relations are as follows:

- (1) intentional and willful acts;
- (2) calculated to cause damage to the plaintiffs in their lawful business;
- (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and
- (4) actual damage and loss resulting.

Id. (internal quotation and citations omitted).

The Appellate Court of Maryland has held that “[i]n order to sustain a claim for tortious interference with prospective advantage ‘plaintiffs must identify a possible future relationship which is likely to occur, absent the interference, with specificity.’” *Mixter v. Farmer*, 215 Md. App. 536, 549 (2013) (quoting *Baron Fin. Corp. v. Natanzon*, 471 F. Supp. 2d 535, 546 (D. Md. 2006) (Gauvey, J.)).

In *Baron*, the United States District Court for the District of Maryland distinguished between allegations that establish a “reasonable probability” of an anticipated business relationship, which could be actionable, and those that establish only a “mere hope,” which is insufficient to state a claim. *Baron*, 471 F. Supp. 2d at 542-46. The court based this determination on an analysis of Maryland state court opinions, the rule adopted by the majority of courts in other jurisdictions, relevant federal court decisions, restatements of the law, and treatises. *Id.* (collecting cases and other sources). The Appellate Court of Maryland in *Mixter* approvingly cites *Baron*, recognizing that *Baron* appropriately states Maryland law. *Mixter*, 215 Md. App. at 549. The United States Court of Appeals for the First Circuit has construed this element to require “a high level of probability—at least more likely than not—given the ‘but for’ starting point for the causation inquiry.” *APG, Inc. v. MCI Telecomms. Corp.*, 436 F.3d 294, 304 (1st Cir. 2006); *see also United Educ. Distribbs., LLC v. Educ. Testing Serv.*, 564 S.E.2d 324, 329 (S.C. Ct. App. 2002) (holding that “allegations must present facts that give rise to some reasonable expectation of benefits from the alleged lost contracts”); *ISS Cleaning Servs. Grp., Inc. v. Cosby*, 745 So. 2d 460, 462 (Fla. Dist. Ct. App. 1999) (dismissing

claim where plaintiff “failed to present competent substantial evidence of an actual and identifiable agreement” between himself and third party “which in all probability would have been completed had the alleged interference not occurred.”).

Courts require specific allegations of fact that would demonstrate the reasonable likelihood of the future relationship; a plaintiff’s subjective view is not sufficient. In *Democratic State Comm. of D.C. v. Bebchick*, 706 A.2d 569, 573 (D.C. 1998), for example, the District of Columbia Court of Appeals held that to survive a motion to dismiss, plaintiff must allege “business expectancies” that are “commercially reasonable to anticipate.”

In evaluating whether an at-will employment relationship likely would have formed but for an allegedly tortious action, the Court must look to the perception of the prospective employer, as it does in discrimination cases. The plaintiff’s subjective intent is akin to mere hope. The United States Court of Appeals for the Fourth Circuit has held in discrimination cases that it is the employer’s perception, not the employee’s, that is relevant to whether there were valid reasons for the employment decision. In *Beall v. Abbott Laboratories*, 130 F.3d 614, 620 (4th Cir. 1997), for example, the Court held that it “is the perception of the decision maker which is relevant not the self-assessment of the plaintiff.” *Id.* at 620 (internal citations omitted); *see also Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (rejecting as insufficient “bald assertions concerning [the plaintiff’s] own qualifications”); *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980) (recognizing that the plaintiff’s “perception of himself, however, is not

relevant"). The Court should apply similar reasoning in determining the sufficiency of allegations of a reasonable likelihood that someone would be hired for an at-will position but for alleged tortious interference. The prospective employee must make allegations sufficient to establish that the employer intended to hire the plaintiff but for the interference. The plaintiff's empty, subjective assertions of his own qualifications are not sufficient.

Braan does not make any allegations that would support the conclusion that, but for Crittenden's actions, the non-party Medical Center was likely to hire him for the Palliative Care Chaplain Position. Am. Compl. ¶¶ 1-36. Braan does not allege that anyone informed him of a potential paid Palliative Care Program position or invited him to apply, or allege any other fact to support even a hint of intent by the employer to hire him. *Id.* ¶¶ 1-36. He does not allege that the Medical Center considered his candidacy, or that anyone assured him of any likelihood that he would be hired, whether as a Palliative Care Chaplain or in any other capacity. *Id.*

In fact, the allegations Braan does make directly rebut any conclusion that the Medical Center likely would have hired Braan but for Crittenden's actions. Braan acknowledges that he "was neither offered a paid position as a chaplain at the [non-party] Medical Center, nor informed of any such employment opportunities." *Id.* ¶ 25. He alleges that the first time he even learned of the Palliative Care Chaplain position was the announcement that Defendant Crittenden had received it. *Id.* ¶ 26. As Braan acknowledges, his alleged "plan" addresses the Medical Center's separate Volunteer Chaplain Program. *Id.* ¶¶ 60

& 61. The position he claims he was improperly denied was in an entirely different program within the Medical Center: the Palliative Care Program. *Id.* ¶ 26. Braan does not allege that he was involved with the Palliative Care program in any way. *Id.* ¶¶ 1-36.

Because Braan does not allege facts that, if true, would establish a likelihood or reasonable probability that the Medical Center would have hired him absent Crittenden's actions, Braan's claim for tortious interference must be dismissed.

IV. Braan fails to state a claim for unjust enrichment (Count IV) or *quantum meruit* (Count III).

A. Braan's unjust enrichment and *quantum meruit* claims are preempted by federal law.

Braan's state law claims for unjust enrichment and *quantum meruit* are predicated entirely upon his allegations that his alleged "plan" was copied without authority or compensation. These claims fall squarely within the scope and subject matter of the Copyright Act and therefore are preempted by federal law.

Section 301(a) of the Copyright Act provides for complete preemption of state law tort actions for acts related to alleged copyright infringement:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [of the Copyright Act] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103... are governed exclusively by this title.

17 U.S.C. § 301(a).

Courts interpret Section 301(a) as establishing a two-prong test to determine whether a claim arising under state law is preempted by the Act:

- (i) the work must be within the scope of the subject-matter of copyright as specified in 17 U.S.C. §§ 102, 103; and
- (ii) the rights granted under state law must be equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106.

U.S. ex rel. Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453, 1463 (4th Cir. 1997) (internal quotations and citations omitted); *see also Fischer v. Viacom Int'l, Inc.*, 115 F. Supp. 2d 535 (D. Md. 2000) (Motz, J.) (applying two-prong preemption test to state law claims). Braan's claims for unjust enrichment and *quantum meruit* meet both prongs of this preemption test, and so are preempted.

1. Braan alleges that his alleged “plan” is within the scope of the subject matter of copyright.

An original work that is expressed in a tangible medium, such as a work reduced to writing, falls within the subject matter of the Copyright Act. 17 U.S.C. § 102(a). In *United States ex rel. Berge*, 104 F.3d at 1463, for instance, the United States Court of Appeals for the Fourth Circuit held that a dissertation, abstracts, and drafts fall within the subject matter of copyright and satisfy the first prong of preemption under the Copyright Act.

Braan's claims for unjust enrichment and *quantum meruit* center on the alleged use by Crittenden of Braan's alleged “plan,” to obtain a position, and the alleged benefit the non-party Medical Center received. Braan alleges, as he must, that the alleged “plan” falls within the scope of copyright law, by alleging that he has applied for Copyright registration in the alleged “plan.” Am. Compl., ¶ 39; *see also* 17 U.S.C. § 102(a) (Subject matter of copyright: In general); 17 U.S.C. § 408

(Copyright registration, in general). Thus, Braan's claims for unjust enrichment and *quantum meruit* both meet the first prong for preemption.

2. Braan's unjust enrichment claim (Count IV) seeks to vindicate rights equivalent to his alleged claim under the Copyright Act.

Braan's claim for unjust enrichment meets the second preemption prong because it seeks to enforce rights equivalent to those conferred on Braan by the Copyright Act. The Copyright Act confers on copyright owners the exclusive right to control copying and distribution of their work. 17 U.S.C. § 106(1). The Court has found that similar unjust enrichment claims premised on a defendant's alleged copying, passing off, and misappropriation of a work fall within the Act and so are preempted. In *Costar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 714 (D. Md. 2001) (Chasanow, J.), *aff'd*, 373 F.3d 544 (4th Cir. 2004) the Court held that the plaintiff's unjust enrichment claim was preempted when it was premised upon defendant's alleged copying of photographs and passing them off as its own. In *Thomas v. Artino*, 723 F. Supp. 2d 822, 835 (D. Md. 2010) (Chasanow, J.), the Court similarly held that the defendant's alleged copying of architectural plans and using them to obtain a permit was preempted by the Copyright Act.

Braan's unjust enrichment claim is premised upon his allegations that Defendants copied and misappropriated his alleged "plan" without permission. Am. Compl. ¶¶ 59-62. Accordingly, Braan's unjust enrichment claim satisfies the second preemption prong and is preempted by federal copyright law.

3. Braan's *quantum meruit* claim (Count III) seeks to vindicate rights equivalent to Braan's rights under the Copyright Act.

Braan's claim for *quantum meruit* also meets the second preemption prong because it seeks to enforce rights equivalent to those conferred on Braan by the Copyright Act. Maryland recognizes two forms of *quantum meruit*: “*quantum meruit* based on an implied-in-fact contract, and *quantum meruit* based on a quasi-contract.” *Mohiuddin v. Drs. Billing & Mgmt. Sols., Inc.*, 196 Md. App. 439, 447 (2010). Because a “quasi-contractual *quantum meruit* claim is identical to a charge of unjust enrichment,” a claim Braan has also alleged (Am. Compl., Count IV), the Court may construe his allegations as “not redundant” and presume “that his *quantum meruit* claim sounds in implied-in-fact contract law.” *Mohiuddin*, 196 Md. App. at 447. Implied-in-fact contracts are “actual contracts.” *Id.* Accordingly, for purposes of this Motion to Dismiss, Defendants afford Braan the benefit of this interpretation and address the *quantum meruit* claim as a contract-in-fact claim.

Contract claims are preempted by the Copyright Act “where the essential claim is that the defendant misappropriated the plaintiff's materials.” *Nichols Agency, Inc. v. Enchanted Child Care, Inc.*, 537 F. Supp. 2d 774, 783 (D. Md. 2008) (Blake, J.). “A claim ordinarily would not survive, for example, where the essential claim is that the defendant misappropriated the plaintiff's materials.” *Id.* at 783 (citing *Miller v. CP Chemicals, Inc.*, 808 F. Supp. 1238, 1245-46 (D.S.C.1992)).

As with Braan's unjust enrichment claim, his *quantum meruit* claim is premised upon his allegations that Defendants copied and misappropriated his alleged “plan” without permission. Am. Compl. ¶¶ 54-58. Accordingly, Braan's

quantum meruit claim meets the second prong and is preempted by federal copyright law.

B. Braan's claim for *quantum meruit* (Count III) further fails because he does not allege sufficient mutual intent.

Braan's claim for contract-in-fact *quantum meruit* fails for another reason: Braan fails to allege the existence of any "mutual agreement or consent." An implied-in-fact contract is "dependent on mutual agreement or consent, and on the intention of the parties; and a meeting of the minds is required." *Mogavero v. Silverstein*, 142 Md. App. 259, 275 (2002) (citations omitted). In *Mohiuddin*, for instance, the Appellate Court of Maryland held that the plaintiff's failure to allege a meeting of the parties' minds as to the intent for the defendant to pay him for his services was "fatal" to his *quantum meruit* implied-in-fact claim. *Mohiuddin*, 196 Md. App. at 447-49.

Braan's claim for *quantum meruit* is based solely on the alleged development and sharing of his alleged "plan": he alleges that he "rendered valuable services to" the non-party Medical Center "when he spent valuable time and labor creating a program plan for professional chaplaincy at the hospital." Am. Compl. ¶ 55. Yet Braan does not allege that anyone asked him to create this alleged "plan" or agreed to pay him for it. *Id.* ¶¶ 19-21. Instead, he alleges that he created a document no one expected or requested. *Id.* Based upon his own factual recitation, he did so of his own volition and without any alleged expectation of remuneration, let alone a meeting of the minds between himself and Crittenden, Vogel, or Weekley, or even

the non-party Medical Center. *Id.* Accordingly, Braan's *quantum meruit* claim does not establish a mutual interest and must be dismissed.

V. Braan fails to state a claim for retaliation under either the First Amendment or the Maryland Declaration of Rights because he identifies no protected speech any Defendant abridged.

The Supreme Court of Maryland has held that free speech rights under the Maryland Declaration of Rights are "co-extensive with . . . the First Amendment." *Jakanna Woodworks, Inc. v. Montgomery Cnty.*, 344 Md. 584, 595 (1997); *see also DiPino v. Davis*, 354 Md. 18, 43 (1999). Accordingly, the court may undertake a single analysis to evaluate claims under the First Amendment and the Declaration of Rights. *Rivero v. Montgomery Cnty.*, 259 F. Supp. 3d 334, 349 (D. Md. 2017) (Grimm, J.). Consistent with the anticipated treatment by this Court, we respond to the two allegations together.

To state a claim of retaliation for protected speech in violation of the U.S. Constitution or the Maryland Declaration of Rights, a plaintiff must establish three elements:

First, the plaintiff must demonstrate that his or her speech was protected.

Second, the plaintiff must demonstrate that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech.

Third, the plaintiff must demonstrate that a causal relationship exists between its speech and the defendant's retaliatory action.

Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000); *see also Jakanna*, 344 Md. at 595; *Constantine v. Rectors & Visitors of George Mason Univ.*,

411 F.3d 474, 499 (4th Cir. 2005). Braan fails to allege facts that could meet any element of this test.

A. Braan fails to allege that he engaged in any protected speech, let alone any abridgement of protected speech.

To establish protected speech, a plaintiff must allege that he made “expressions which are alleged to have provoked the retaliatory action” and which “relate to matters of public concern.” *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)). The United States Court of Appeals for the Fourth Circuit characterizes the causation requirement as “rigorous.” *Id.* at 1140. The protected speech must not only have “played a role” or been “a motivating factor in the retaliation,” but a plaintiff must allege “that ‘but for’ the protected expression the employer would not have taken the alleged retaliatory action.” *Id.* The United States District Court for the Eastern District of Virginia asserts that the appropriate test is not “but for” causation but, rather, that the “constitutionally protected conduct played a ‘substantial’ role in the employer’s decision. *Flickinger v. Sch. Bd. of Norfolk*, 799 F. Supp. 586, 591 (1992) (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 416 (1979)). Braan fails either standard.

Braan does not allege any speech of his own, let alone any speech against which any Defendant retaliated. The Amended Complaint references “speech” in three places: Paragraph 36 and Counts V and VI. None of these Paragraphs contains an allegation of speech by Braan. Am. Compl. ¶¶ 36 & 63-71.

Counts V and VI contain only a rote recitation of the elements of a First Amendment retaliation claim. *Id.* ¶¶ 63-71. Conclusory allegations such as these are insufficient to survive a motion to dismiss. *Twombly*, 550 U.S. at 556. In its seminal *Twombly* holding, the Supreme Court affirmed the district court's dismissal of a Sherman Antitrust Act claim because the plaintiffs made only an "allegation of parallel conduct and a bare assertion of conspiracy." *Id.* The Supreme Court held that these allegations "will not suffice" because a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Id.* at 545. Counts V and VI allege no specific facts, so they cannot independently support or sustain a claim.

Braan's only reference to actual speech is to "assertions" made by a representative of the non-party Medical Center. Am. Compl. ¶¶ 35 & 36. The Amended Complaint alleges only that a Medical Center representative issued Braan a letter that identified five ways in which Braan failed to comply with the Medical Center's requirements, none of which even involved speech by Braan, let alone protected speech:

- Braan failed to be on the on-call schedule for six months, as required;
- Braan failed to have the required flu shot;
- Braan failed to complete required competency training;
- Braan failed to complete required annual department training; and

- . When informed of these instances of non-compliance, Braan became “irate and inappropriate.”²

Id. ¶ 35. Braan’s solitary focus on statements of the non-party Medical Center constitutes a failure to allege that Braan himself engaged in any speech for which any Defendant could have retaliated.

The analysis stops here. Braan’s First Amendment and Declaration of Rights claims should be dismissed on this basis alone. But, for purposes of completeness, Defendants analyze the remaining elements of Braan’s claim below.

B. Braan does not allege any causal connection between any speech and any action by any Defendant.

Braan fails to allege the requisite “but-for” causative link between any “speech” on his part and any conduct by UMMS, Crittenden, Vogel, or Weekley to limit that speech. He alleges only that he was barred—and not by any named Defendant. Indeed, the Amended Complaint itself recognizes that even if Braan had engaged in some protected speech, the non-party Medical Center—not any Defendant—deactivated his access badge. *Id.* ¶ 35. Furthermore, the Amended Complaint recognizes five legitimate stated reasons for the Medical Center’s doing so, each a violation of a core Medical Center safety policy.³ *Id.* Braan thus fails the

² Even if this reaction by Braan were considered “speech,” it is not protected speech because it does not “relate to matters of public concern.” *See Huang*, 902 F.2d at 1140.

³ Braan’s host of egregious policy compliance failures constitutes more than sufficient justification to deny access and, by offering only an unsupported denial, Braan offers no basis to question these documented failures. *See Am. Compl.* ¶ 35.

causation element because the Medical Center, not any Defendant, engaged in the conduct Braan alleges prevented him from “exercising his free speech rights,” and the Amended Complaint recognizes the stated and facially valid reasons of the Medical Center for doing so.

Accordingly, Braan’s First Amendment and Declaration of Rights claims fail each element of a free speech claim and must be dismissed.

VI. If any of Braan’s claims were to survive, they must be dismissed as to certain defendants because Braan does not allege conduct by all defendants for each claim.

Section I, *supra*, addresses Braan’s failure to allege any conduct, wrongful or otherwise, by UMMS. As a result, this section addresses only whether Braan has alleged any conduct by Crittenden, Vogel, or Weekley.

A. As to Count I, Braan fails to allege any “copying” by Crittenden or Weekley.

Braan fails to allege that Crittenden or Weekley took any action that could possibly constitute copyright infringement. The amended complaint simply does not allege any copying of Braan’s alleged “plan” by these defendants. Am. Compl. ¶¶ 22 & 23. The only person alleged to have copied the alleged “plan” is Helen Burroughs, a non-party. Indeed, the only action Braan alleges by any Defendant even related to one of the exclusive rights protected by the Copyright Act is that Vogel allegedly “reproduced and distributed” his alleged “plan.” *Id.* ¶ 40. Braan alleges absolutely no act of copying or even provision of a copy by Crittenden or Weekley. *Id.*

Thus, Even if Braan had standing to proceed under the Copyright Act and his claim were timely, Braan's claim copyright infringement claim could not possibly proceed against Crittenden or Weekley. Count I must be dismissed against them.

B. As to Count II, Braan fails to allege that any Defendant awarded the Palliative Care Program position to Crittenden.

Braan does not allege that Crittenden, Vogel, or Weekley failed to award the Palliative Care Program position to him. To the contrary, he recognizes that the position was exclusively a Medical Center position within the non-party Medical Center's Palliative Care Program. *Id.* ¶¶ 26-28. As Braan alleges, a Medical Center representative, Carol Kenney, the Medical Center's Chaplain Coordinator, announced the hiring, demonstrating the Medical Center's decision making authority. None of Crittenden, Vogel, or Weekley had authority to award this position, none was a decision maker, and none participated in the decision to award the position to Crittenden. *Id.* Accordingly, Braan cannot allege that any Defendant caused him not to receive the Palliative Care Program position. Thus, neither Crittenden, Vogel, nor Weekley could have tortiously interfered with Braan's alleged business opportunity, even if such an opportunity existed. Braan's Count II claims against Crittenden, Vogel, and Weekley must be dismissed.

C. As to Counts III and IV, Braan fails to allege that Crittenden, Vogel, or Weekley received a benefit from him.

Braan does not allege that Crittenden, Vogel, or Weekley received a benefit for which Braan expected payment, or which it would be unjust to permit Crittenden, Vogel, or Weekley to retain without payment to Braan. Braan alleges

in Count III (*quantum meruit*) that he “rendered valuable services to Defendant UMCRMC”—the Medical Center, which is not actually a defendant. *Id.* ¶ 55. He further alleges that the “services were accepted by UMCRMC.” *Id.* ¶ 57. Braan does not allege that he rendered services that benefited or were accepted by Crittenden, Vogel, or Weekley.

Braan again alleges in Count IV that he spent valuable time and labor creating a plan for chaplaincy at the Medical Center, and that the “plan” was used to reform the hospital’s program. He does not allege that Crittenden, Vogel, or Weekley received a benefit that it would be inequitable for them to retain without payment. Braan thus fails to allege *quantum meruit* or unjust enrichment claims against Crittenden, Vogel, or Weekley.

D. As to Counts V and VI, Braan fails to allege that any Defendant abridged his speech.

Braan does not allege that any Defendant took action “to prevent him from exercising his rights to free speech.” *Id.* ¶ 36. A non-party allegedly deactivated Braan’s access badge, the only act alleged to have deprived him of his free speech rights. The badge deactivation was based on Braan’s failure to meet facially neutral, generally applicable hospital training, safety, and service requirements, each of which defeats any allegation of causation. *Id.* ¶¶ 35 & 36. Braan thus fails to allege that Crittenden, Vogel, or Weekley took any action to abridge any free speech rights.

CONCLUSION

Braan was a volunteer chaplain who unilaterally undertook a pet project that no one requested of him, and who claims he was denied a job for which he never even applied. Despite Braan's attempts to articulate some theory that would make UMMS, Crittenden, Vogel, and Weekly liable for some harm, he has failed, for eighteen months, to plead a cause of action for which relief may be granted. UMMS, Crittenden, Vogel, and Weekley respectfully request that, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court dismiss Braan's complaint in full with prejudice.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BARRY D. BRAAN, SR.,

Plaintiff,

v.

UNIVERSITY OF MARYLAND MEDICAL
SYSTEM CORPORATION, *et al.*,

Defendants.

Case No. DKC 21-2023

ORDER

Upon consideration of the February 14, 2023 Motion to Dismiss of Defendants the University of Maryland Medical System Corporation, Joan Crittenden, Susan Vogel, and Anne Weekley, the memorandum support of the Motion to Dismiss, any opposition and reply to the Motion to Dismiss, and the entire record in this case, it is hereby:

1. **ORDERED** that the February 14, 2023 Motion to Dismiss of Defendants the University of Maryland Medical System Corporation, Joan Crittenden, Susan Vogel, and Anne Weekley shall be and hereby is **GRANTED** in full; and it is further
2. **ORDERED** that Counts I, II, III, IV, V, and VI of the Amended Complaint of Plaintiff Barry D. Braan, Sr. [ECF 17] shall be and hereby are **DISMISSED** in full, with prejudice; and it is further

3. **ORDERED** that copies of this Order shall be delivered to all parties of record.

So **ORDERED** this _____ day of _____, 2023.

Deborah K. Chasanow
District Judge