At an IAS Term, City Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 28th day of June 2024.

PRESENT:

HON. GINA ABADI,
J.S.C.

JEFFREY LAX, SUSAN ARANOFF, RINA YARMISH, MICHAEL GOLDSTEIN and MICHELLE DAVIDOWITZ,

Plaintiffs,

-against-

THE CITY UNIVERSITY OF NEW YORK, THE PROFESSIONAL STAFF CONGRESS, THE NEW CAUCUS OF THE PROFESSIONAL STAFF CONGRESS, MICHAEL SPEAR, MARGARET FEELEY, DOMINIC WETZEL, EMILY SCHNEE, BARBARA BOWEN, MATTHEW GARTNER, ANTHONY ALESSANDRINI, ELIZABETH DILL, KATHERINE PEREA, LIBBY GARLAND, and PATRICK LLOYD,

Defendants.

Index No.: 504682/2021
Motion Seq: 7

DECISION/ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

Papers	NYSCEF Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed..................................	98-103
Opposing Affidavits (Affirmations)..................................	111, 115
Reply Affidavits (Affirmations)......................................	117-118
Other: CUNY Memorandums of Law..................................	104, 116

Upon the foregoing papers and after oral argument, in this action by plaintiffs Jeffrey Lax (Lax), Susan Aranoff, Rina Yarmish, Michael Goldstein (Goldstein), and Michelle Davidowitz (collectively, plaintiffs) against defendants the City University of New York (CUNY), Dominic Wetzel (Wetzel), Katherine Perea (Perea), and others,

CUNY moves, under motion sequence number seven, for an order, pursuant to CPLR § 3211 (a), dismissing with prejudice the First Amendment and breach of contract cross-claims asserted against it by Wetzel and Perea in their answers.

Facts and Procedural Background

Plaintiffs are observant Jewish professors at Kingsborough Community College (Kingsborough), which is part of CUNY. Defendant Professional Staff Congress (the Union) is the labor union for the faculty. Defendant the New Caucus of the Professional Staff Congress (New Caucus) is a political party of the Union. Wetzel and Perea were professors at Kingsborough and members of the New Caucus.

On February 26, 2021, plaintiffs filed this action alleging a first cause of action for hostile work environment discrimination on the basis of religion in violation of the New York State Human Rights Law, Executive Law § 290 et seq. (the NYSHRL), a second cause of action for retaliation in violation of the NYSHRL, a third cause of action for hostile work environment discrimination on the basis of religion in violation of the New York City Human Rights Law, Administrative Code of the City of New York § 8-107 (the NYCHRL), a fourth cause of action for retaliation in violation of the NYCHRL, and a fifth cause of action by Lax against Wetzel and other individual defendants for assault and false imprisonment.

Plaintiffs allege that they and other observant Jewish faculty and staff members at Kingsborough have faced pervasive, anti-religious discrimination from a particular segment of fellow faculty members who are the leaders of a faculty group called the Progressive Faculty Caucus of Kingsborough Community College (PFC) and are also

members of the New Caucus. Plaintiffs claim that the New Caucus members collaborated with the PFC members to dominate campus elections and call for the removal of observant Jewish faculty members, administrators, department chairs, and others at Kingsborough. Plaintiffs allege that Wetzel and Perea actually participated in, and aided and abetted, the conduct giving rise to their discrimination and retaliation claims.

Plaintiffs assert, among numerous alleged acts of discriminatory conduct, that the PFC denied entry to every observant Jewish applicant, including Lax; that the PFC and the New Caucus members lobbied against Lax and other observant Jewish candidates running in campus elections; that the PFC members called for the removal of observant Jewish faculty members, including Lax; that the PFC and the New Caucus members wrote in a communist newspaper regarding their "struggle" against a "network of Zionists" among the faculty at Kingsborough, and made similar comments in a publicly distributed campus survey; that there were discussions between Wetzel and others that observant Jews were undesirable for PFC membership; that Perea engaged in a malicious and relentless campaign to get Goldstein fired because he was a Zionist; that an internal PFC email mentioned the need to "bring violence to the Zionists on campus"; that anti-Semitic flyers were distributed on the Kingsborough campus; that a portrait of Goldstein's father was defaced; that nails were found in the tires of cars belonging to Lax and Goldstein; and that the PFC members called for plaintiffs' removal from their jobs at Kingsborough.

Wetzel filed his answer to plaintiffs' complaint dated December 5, 2023, and Perea filed her answer to plaintiffs' complaint dated December 25, 2023. NYSCEF Doc No. 101, 102. Wetzel's answer and Perea's answer both contain the same three cross-claims against

CUNY. Wetzel and Perea's first cross-claim alleges that as employees of CUNY, CUNY is obligated by contract, operation of law, and otherwise to indemnify and hold them harmless from all claims which are the subject of this lawsuit.

Wetzel and Perea's second cross-claim alleges that CUNY is a government entity directly subject to the First Amendment to the U.S. Constitution, and that, in addition, CUNY has promised to protect their academic freedom and freedom of speech in assertions made in its contract with them, in its faculty handbook, on its website, and elsewhere, on which they relied to their detriment. It further alleges that Wetzel and Perea have used their academic freedom and First Amendment rights to utter progressive political views and criticism of Goldstein, which plaintiffs claimed were anti-Semitic. It also alleges that Wetzel and Perea's political criticism of Israel is not anti-Semitic, and that the complaint's specific assertions against them regarding their alleged actions of anti-Semitism are frivolous.

In addition, Wetzel and Perea's second cross-claim alleges that plaintiffs have complained to CUNY about them using available processes and procedures, such as making administrative complaints of discrimination, asserting that they were a danger or security risk to plaintiffs and the CUNY community, and stating that they breached other CUNY codes and rules. It asserts that plaintiffs' intentions that motivated all of their initiatives against Wetzel and Perea are to punish them and retaliate for their politically progressive views and criticism of Goldstein. It alleges that "CUNY has permitted and facilitated such retaliation by its failure to supervise [p]laintiffs and to protect [their] academic freedom."

Wetzel and Perea, in this cross-claim, state that for example, when plaintiffs filed United States Equal Employment Opportunity Commission (EEOC) complaints implicating them in organizing an anti-discrimination event for a Friday night (the Friday Night Event), with the purpose of excluding Sabbath-observant Jewish members, CUNY failed to give them notice that these EEOC complaints had been filed. Wetzel and Perea state, upon information and belief, that CUNY also failed assertively to protect their interests and academic freedom at the EEOC. They allege that plaintiffs' retaliatory measures were carried out with CUNY's complicity and have succeeded in shutting down their free speech and academic freedom, since for example, the Friday Night Event was cancelled.

Wetzel and Perea's third cross-claim against CUNY alleges that they are contractually employed by CUNY as professors, and that pursuant to that contract, CUNY has a duty to assure and protect their academic freedom and to assure them a safe and protective academic environment, free from harassment and threats. They allege that CUNY has breached that contract by its failure to supervise plaintiffs and to intervene to stop and prevent plaintiffs' "relentless false and malicious accusations and incessant solicitation of threats and violence against" them.

On February 2, 2024, CUNY filed its instant motion, under motion sequence 7, to dismiss Wetzel and Perea's second and third cross-claims against it. NYSCEF Doc No. 98. Wetzel and Perea oppose CUNY's motion. NYSCEF Doc No. 111.

Discussion

On a motion to dismiss for failure to state a cause of actiou[1] under CPLR § 3211 (a) (7), a court must "accept the facts as alleged in [a] complaint as true, accord [the cross-claimants] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see also Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 (2017). However, "'allegations consisting of bare legal conclusions . . . are not entitled to any such consideration.'" *Simkin v Blank*, 19 NY3d 46, 52 (2012), quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999); *see also Bailey v City of New York*, __ AD3d __, 2024 NY Slip Op 03156, *2 (2d Dept June 12, 2024). "'[S]uch favorable treatment is not limitless, and dismissal is warranted if the [cross-claimant] fails to assert facts in support of elements of the claim.'" *Kefalas v Pappas*, 226 AD3d 757, 759 (2d Dept 2024), quoting *O'Neill v Wilder*, 204 AD3d 823, 823-824 (2d Dept 2022).

A cross-claim "must contain more than bare legal conclusions unsupported by factual allegations." *Bailey*, 2024 NY Slip Op 03156, *2 (2d Dept June 12, 2024); *see also Doe v Hauppauge Union Free Sch. Dist.*, 213 AD3d 809, 811 (2d Dept 2023). "Conclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss." *Polite v Marquis Marriot Hotel*, 195 AD3d 965, 967 (2d Dept 2021) (internal quotation marks omitted). Furthermore, dismissal of the pleading is warranted if the party alleging the claim "fails to assert facts in support of an element of

[1]A motion to dismiss, pursuant to CPLR 3211 (a), is directed against a cause of action, and may, therefore, be made by a party against a cause of action asserted in a cross-claim.

the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton*, 29 NY3d at 142; *see also Kefalas*, 226 AD3d at 759.

Wetzel and Perea, in their second cross-claim, assert that CUNY has permitted and facilitated retaliation by plaintiffs by its failure to supervise plaintiffs and to protect cross-claimants' academic freedom. However, they do not specify how CUNY failed to supervise plaintiffs and how such alleged failure amounts to a violation of the First Amendment. This cross claim is also devoid of any factual allegations as to how Wetzel and Perea's interests and academic freedom[2] were not protected by CUNY. While Wetzel and Perea allege that CUNY did not give them notice that EEOC complaints had been filed against it, they fail to cite to any legal authority indicating that CUNY was under any legal obligation to provide them with such notice. To the extent that Wetzel and Perea purport to assert that CUNY was obligated to discourage plaintiffs from "using available processes and procedures, such as the filing of administrative complaints of discrimination," including filing EEOC complaints, any such conduct by CUNY could constitute a violation of federal, state, and local anti-discrimination law. *See Vance v Ball State Univ.*, 570 US 421, 448-449 (2013) (in an action brought by a university employee against a university, the U.S. Supreme Court stated that evidence that an employer "effectively discouraged

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[2]Academic freedom generally "encompasses concepts like the University's right to make its own rules concerning academic standards, . . . its prerogative to determine for itself on academic grounds who may teach, . . . its right to set its own criteria for promotion and then to evaluate a candidate's fitness for promotion under them, . . . and so on." *Heim v Daniel*, 81 F4th 212, 231 (2d Cir 2023) (internal quotation marks and citations omitted). While Wetzel and Perea are professors, and not a university, they, in any event, fail to allege how CUNY did not protect their academic speech or free exchange of ideas in the classroom. *See id.* at 227.

complaints from being filed" are relevant to employer liability for Title VII[3] claims for hostile work environment and retaliation for an employee's complaints about racial harassment).

Wetzel and Perea, in their opposition papers, claim that they have publicly expressed their positions criticizing Israel, which plaintiffs regard as anti-Semitic, and that their speech against Israel is protected by the First Amendment of the U.S. Constitution. They argue that plaintiffs have for years sought to retaliate against them because of this speech, via press interviews, social media posts, filing CUNY and EEOC complaints, and engaging in litigation, which accuse them of anti-Semitism. They assert that plaintiffs' retaliatory measures were endorsed or accepted by CUNY, and that as a result, the PFC, a group who shares these anti-Israel political beliefs, no longer meets, its mailing list is unused, and the Friday Night Event was canceled.

Wetzel and Perea argue that they have stated a valid claim for First Amendment retaliation against CUNY. "'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves v Bartlett*, 587 US 391, 398 (2019), quoting *Hartman v Moore*, 547 US 250, 256 (2006). "To state a First Amendment retaliation claim sufficient to withstand a motion to dismiss, [the party asserting the claim] must allege '(1) that the speech or conduct at issue was protected [by the First Amendment], (2) that the defendant took adverse action against the [party asserting the claim], and (3) that there was a causal

[3] "The standards for recovery under [the NYSHRL] are in accord with Federal standards under title VII of the Civil Rights Act of 1964." *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997).

connection between the protected speech and the adverse action'", i.e., the adverse actions taken by the defendant were motivated by the complaining party's exercise of the protected speech. *Dolan v Connolly*, 794 F3d 290, 294 (2d Cir 2015), quoting *Espinal v Goord*, 558 F3d 119, 128 (2d Cir 2009); *see also Dorsett v County of Nassau*, 732 F3d 157, 160 (2d Cir 2013); *Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569, 569-570 (1st Dept 2014), *lv denied* 26 NY3d 903 (2015) (citing to Second Circuit authority in analyzing Federal and New York State Constitution retaliation claims based upon alleged protected speech).

Here, Wetzel and Perea have not alleged any retaliatory animus by CUNY towards their speech or that CUNY took any adverse action against them. Wetzel and Perea have not alleged that they were disciplined for engaging in anti-Israel speech or retaliated against by CUNY. They only claim that plaintiffs retaliated against them for their anti-Israel speech, progressive views, and criticism of Goldstein (who is an orthodox Jew) by filing EEOC complaints against them and otherwise accusing them of discriminatory and anti-Semitic conduct. They do not allege any retaliation by CUNY itself and do not allege any retaliatory motive by CUNY. Thus, Wetzel and Perea's allegations are patently insufficient to charge CUNY with First Amendment retaliation.

While Wetzel and Perea seek to cast CUNY as responsible for plaintiffs' alleged acts of retaliation against them, "[a]s a general rule, a government official is not liable for failing to prevent another from violating a person's constitutional rights, unless the official is charged with an affirmative duty to act." *Musso v Hourigan*, 836 F2d 736, 743 (2d Cir 1988). Thus, CUNY, as a governmental entity, cannot be held liable for failing to prevent

plaintiffs from allegedly violating Wetzel and Perea's right to free speech since CUNY was not charged with any affirmative duty to silence plaintiffs regarding their complaints of discrimination and anti-Semitism.

Wetzel and Perea contend, however, that they have stated a claim against CUNY on the basis that it condoned plaintiffs' conduct. While condonation may sufficiently implicate an employer in discriminatory acts of its employee to constitute a basis for employer liability under the NYSHRL or the NYCHRL, Wetzel and Perea fail to allege how they were discriminated against under the NYSHRL or the NYCHRL, or how CUNY condoned such discrimination against them. Wetzel and Perea do not claim to be members of a protected group based on race, religion, or gender, under the NYSHRL or the NYCHRL. Having an anti-Israel political agenda is not a protected group under the NYSHRL or the NYCHRL nor is viewpoint discrimination a recognized basis for a discrimination claim under the NYSHRL or the NYCHRL.

Furthermore, Wetzel and Perea fail to allege how CUNY was complicit in plaintiffs' alleged conduct. Wetzel and Perea have not alleged that CUNY instigated or encouraged plaintiffs to file their EEOC complaints or to otherwise accuse them of anti-Semitism.

Wetzel and Perea argue that CUNY should have supervised plaintiffs by stopping them from making accusations against cross-claimants. However, the fact that CUNY permitted and did not prevent plaintiffs from filing EEOC complaints or other complaints of religious discrimination did not constitute condoning discrimination against Wetzel and Perea by CUNY. Plaintiffs were acting within their legal rights and CUNY could not deny them these rights. Indeed, as previously noted, preventing plaintiffs from exercising their

rights to assert claims of discrimination against them based upon their religion would constitute a violation of the laws which afford plaintiffs legal protection from discrimination.

To the extent that Wetzel and Perea purport to allege a claim of viewpoint discrimination, it is noted that viewpoint discrimination occurs when """the government targets not subject matter but particular views taken by speakers on a subject."""
Wandering Dago, Inc. v Destito, 879 F3d 20, 31 (2d Cir 2018), quoting *Make the Rd. by Walking, Inc. v Turner*, 378 F3d 133, 150 (2d Cir 2004), quoting *Rosenberger v Rector & Visitors of Univ. of Va.*, 515 US 819, 828 (1995). The government targets specific views when it seeks to regulate speech and discriminates against viewpoints "when it disfavors certain speech because of 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Wandering Dago, Inc.*, 879 F3d at 31, quoting *Rosenberger*, 515 US at 829.

"Viewpoint discrimination claims generally relate to actions by government officials taken to censor or prohibit a certain message from being communicated at a certain future time and place due to the content of that message." *Wang v Bethlehem Cent. School Dist.*, 2022 WL 3154142, *23, 2022 US Dist LEXIS 140153, *57-58 (ND NY, Aug. 8, 2022, 1:21-CV-1023 [LEK/DJS]). Wetzel and Perea do not allege that CUNY has restricted or sought to restrict their speech regarding the other side of an issue or that CUNY discriminated against them, as speakers, based on their views. Wetzel and Perea have not alleged that CUNY inhibited them from expressing their political views.

Thus, Wetzel and Perea have failed to allege a cognizable First Amendment claim as against CUNY. Therefore, Wetzel and Perea's second cross-claim as against CUNY must be dismissed. *See* CPLR § 3211 (a) (7).

Wetzel and Perea, in their third cross-claim, allege that CUNY breached their employment contract. However, in this cross-claim, Wetzel and Perea fail to specify any provision in the contract between CUNY and their Union, the Professional Staff Congress (the collective bargaining agreement), that was allegedly breached. Wetzel and Perea merely allege that pursuant to that contract, CUNY has a duty to assure and protect their "academic freedom and to assure them a safe and protective academic environment, free from harassment and threats," that CUNY "breached that contract by its failure to supervise [p]laintiffs and to intervene to stop and prevent [p]laintiffs' relentless false and malicious accusations and incessant solicitation of threats and violence against" them, and that the damages sustained by this alleged breach was their "loss of academic freedom, reputation, safety, peace of mind, and the ability to concentrate and to perform services without malicious interruption." CUNY, in moving to dismiss this cross-claim, contended that in the absence of citing any provision of the contract that was allegedly breached, Wetzel and Perea could not set forth a viable breach of contract cross-claim.

In response, Wetzel and Perea, in their opposition papers, disavow any reliance on the collective bargaining agreement in asserting their breach of contract cross-claim.[4]

[4]Defendants Professional Staff Congress and Barbara Bowen, who is the former president of Professional Staff Congress, have submitted papers asserting that the court need not interpret the collective bargaining agreement to resolve CUNY's motion to dismiss since they are relying on the Henderson Rules, and not the collective bargaining agreement, to support their breach of contract cross-claim. NYSCEF Doc Nos. 112, 115.

Instead, Wetzel and Perea contend that CUNY breached the Henderson Rules to Maintain Public Order (the Henderson Rules), a code of conduct adopted by Kingsborough and other CUNY units, posted on Kingsborough's web site. NYSCEF Doc No. 118. Wetzel and Perea do not allege that CUNY itself breached the Henderson Rules, but claim that plaintiffs violated the Henderson Rules, that CUNY received notice of these violations, and that plaintiffs' "unendingly repeated actions and CUNY's tolerance, acceptance and facilitation of them" constituted "a pattern and practice of First Amendment retaliation and viewpoint discrimination." NYSCEF Doc No. 111 at paragraph 26.

Wetzel and Perea, however, fail to allege what actions plaintiffs took in violation of the Henderson Rules or how CUNY tolerated, accepted, or facilitated any of those actions. Furthermore, as discussed above with respect to the second cross-claim, Wetzel and Perea fail to allege a viable First Amendment retaliation claim or a viewpoint discrimination claim.

Moreover, while Wetzel and Perea attempt to set forth a breach of contract cross-claim premised on the Henderson Rules, the Henderson Rules do not constitute a binding contract between Wetzel and Perea and CUNY. Rather, the Henderson Rules constitute "rules and regulations" governing "the maintenance of public order on college campuses," including Kingsborough, which were adopted by the CUNY Board of Trustees. The Henderson Rules contain a wide array of rules and regulations addressing, among other things, the failure to comply with lawful directions issued by representatives of the University/College when they are acting in their official capacities, the unauthorized occupancy of University/College facilities, the prohibition of theft from, or damage to

University/College premises or property, or theft of or damage to property of any person on University/College premises, the prohibition of disorderly or indecent conduct, the prohibition of firearms, and the prohibition of illegal drugs and the unlawful use of alcohol.

Wetzel and Perea rely upon the general policy statement preceding the Henderson Rules, which provides that academic freedom and the sanctuary of the university campus "cannot be invoked by those who would subordinate intellectual freedom to political ends, or who violate the norms of conduct established to protect that freedom." They also rely upon Rule 1 and Rule 5 of the Henderson Rules.

Rule 1 of the Henderson Rules provides:

> "A member of the academic community shall not intentionally obstruct and/or forcibly prevent others from the exercise of their rights. Nor shall he [or she] interfere with the institution's educational processes or facilities, or the rights of those who wish to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services."

Rule 5 of the Henderson Rules provides:

> "Each member of the academic community or an invited guest has the right to advocate his position without having to fear abuse, physical, verbal, or otherwise, from others supporting conflicting points of view. Members of the academic community and other persons on the college grounds shall not use language or take actions reasonably likely to provoke or encourage physical violence by demonstrators, those demonstrated against, or spectators."

The Henderson Rules do not set forth any specific disciplinary action, procedure, or remedy that CUNY is required to follow in responding to an alleged violation of such rules. Instead, the Henderson Rules provide that the President of the CUNY Board holds "full discretionary power in carrying [the Henderson Rules] into effect." The court also notes that in the "Additional Policies" section of the Henderson Rules, it sets forth that "[a]s a

public university system, CUNY adheres to federal, state and city laws and regulations regarding non-discrimination." Thus, assertions that CUNY should have enforced the Henderson Rules by stifling plaintiffs from complaining of religious discrimination against them would violate this policy.

While Wetzel and Perea argue that they have a claim for breach of contract against CUNY, in order to establish prima facie entitlement to judgment as a matter of law on a cause of action alleging breach of contract, a party is required to demonstrate the existence of a contract, the party's performance under the contract, the other party's breach of the contract, and that the party suffered harm as a result. *See Sammy v First Am. Tit. Ins. Co.*, 205 AD3d 949, 957 (2d Dept 2022). Wetzel and Perea have not alleged any facts indicating that the Henderson Rules form a binding contract between themselves and CUNY. "'To establish the existence of an enforceable agreement,' there must be 'an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound.'" *Matter of Civil Serv. Empls. Assn., Inc. v Baldwin Union Free School Dist.*, 84 AD3d 1232, 1233-1234 (2d Dept 2011), quoting *Kowalchuk v Stroup*, 61 AD3d 118, 121 (1st Dept 2009). Wetzel and Perea do not allege any facts whatsoever to show that any of these five elements are present here.

CUNY nowhere reflected an intent that the provisions of the Henderson Rules would become terms of a discrete, implied-in-fact agreement, for purposes such as are alleged in Wetzel and Perea's third cross-claim. The Henderson Rules are informational in nature and do not express or support the implication of any promise on the part of CUNY. They do not reflect an intent by CUNY to be contractually bound to Wetzel and Perea with respect to such rules. While the Henderson Rules promulgate CUNY's policies, they do

not imply a contract between CUNY and its professors that is enforceable by a breach of contract action by its professors against CUNY.

Moreover, the Court of Appeals has held that an educational code of conduct does not create contractual obligations between a university and its professors so as to state a claim for breach of contract. *See Maas v Cornell Univ.*, 94 NY2d 87, 93 (1999). Specifically, the Court of Appeals expressly held that a "professor could not sue for breach of contract based on the university's 'failure to observe bylaws and procedures.'" *Mason v Central Suffolk Hosp.*, 3 NY3d 343, 349 (2004), quoting *Maas*, 94 NY2d at 90; *see also Koul v Univ. of Rochester*, 285 F Supp 3d 595, 602-603 (WD NY 2018); *Richter v Yeshiva Univ.*, 55 Misc 3d 1220(A), 2017 NY Slip Op 50691(U), *4 (Sup Ct, NY County 2017).

Wetzel and Perea's reliance on *Tedeschi v Wagner College* (49 NY2d 652 [1980]) is misplaced. In *Tedeschi* (49 NY2d at 653), a college student challenged her suspension from college, alleging that she "had not been granted a hearing or afforded an opportunity to defend herself." The Court of Appeals, in *Tedeschi* (49 NY2d at 660), held, in the context of the relationship between a university and a student, that "when a university has adopted a rule or guideline establishing the *procedure* to be followed *in relation to suspension or expulsion* that *procedure* must be substantially observed" (emphasis added). *Tedeschi* is readily distinguishable from the instant case since this case does not involve a student challenging his or her suspension or expulsion. *See Maas*, 94 NY2d at 95 (holding that *Tedeschi* provided no support for [a professor's] claim under an alleged breach of contract theory based on a University's code of conduct). Moreover, Wetzel and Perea fail

to identify any specific procedure set forth in the Henderson Rules that CUNY failed to follow.

Thus, since the Henderson Rules do not constitute a contract, and Wetzel and Perea have, therefore, failed to identify any contractual provision allegedly breached by CUNY, their breach of contract cross-claim fails to state a legally viable claim. *See Gianelli v RE/MAX of N.Y., Inc.*, 144 AD3d 861, 862 (2d Dept 2016) (holding that "(a) breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of (a) contract was breached"); *Trump on Ocean, LLC v State of New York*, 79 AD3d 1325, 1326 (3d Dept 2010), *lv dismissed in part, denied in part* 17 NY3d 770 (2011) (same). Consequently, dismissal of Wetzel and Perea's third cross-claim is mandated. *See* CPLR § 3211 (a) (7).

Conclusion

Accordingly, CUNY's motion, under motion sequence number 7, to dismiss Wetzel and Perea's second cross-claim and third cross-claim against it is granted.

This constitutes the decision and order of the court.

E N T E R,

HON. GINA ABADI
J.S.C.

HON. GINA ABADI
J. S. C.

KINGS COUNTY CLERK
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