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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DOMINIC SWAYNE, an individual, Plaintiff, v. NORTH IDAHO COLLEGE, a community college in the State of Idaho, Defendant.	Case No.: CV28-22-7712 *Hon. Cynthia K.C. Meyer* **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION**

COMES NOW, Defendant North Idaho College (NIC), by and through its attorneys of record Gordon Rees Scully Mansukhani, LLP[1], and hereby submits this Memorandum in support of its Motion for Reconsideration. Defendant requests oral argument on its Motion.

[1] The day before this Court heard oral argument on Dr. Swayne's Motion for a Preliminary Injunction, NIC retained two new attorneys from GRSM to represent it in this action. Having reviewed the pleadings on file, including all pleadings submitted pertaining to Dr. Swayne's Motion for a Preliminary Injunction, and having reviewed the evidence presented to this Court in contemplation of the same, NIC's new counsel proffers new evidence, arguments, and authority which defeat Plaintiff's sought injunctive relief.

I. INTRODUCTION

In its Memorandum Decision and Order Granting Plaintiff's Motion for Preliminary Injunction (Order), this Court issued a preliminary injunction requiring that NIC reinstate Plaintiff Dr. Dominic Swayne to his position as President of NIC. In affording Dr. Swayne this extraordinary remedy, the Court determined that he was wrongfully placed on administrative leave in breach of his employment contract (the Agreement) and that he will suffer irreparable harm absent preliminary relief. To reach this determination, the Court relied almost exclusively on Dr. Swayne's testimony, which it found credible. However, NIC respectfully requests that this Court reconsider its findings, based on new legal argument and evidence.

First, new evidence indicates that Dr. Swayne's testimony, most specifically regarding his alleged irreparable harm, lacks credibility. This new evidence and testimony – from members of Dr. Swayne's own Cabinet – precludes a finding of irreparable injury and further calls into question the veracity of all of Dr. Swayne's testimony.

Second, and alternatively, even if Dr. Swayne's testimony regarding irreparable harm was entirely truthful, employment injunctions are disfavored as a matter of law and Dr. Swayne has not established sufficiently extraordinary circumstances of irreparable harm to support an injunction.

Third, equity does not favor Dr. Swayne, who comes to this Court with unclean hands. Specifically, since his reinstatement, Dr. Swayne has engaged in deeply troubling behavior, including advising members of his Cabinet to: "stop digging" and "tread lightly"; not "create documents" in the middle of litigation; not respond directly to questions from defense counsel; and refuse to speak with Board members or general counsel of NIC – all in the name of "protecting" *the College*. Not only does this constitute obstruction of justice and suppression of evidence, but it is antithetical to the equitable relief granted by this Court.

Finally, Dr. Swayne is not likely to prevail on the merits of his lawsuit. As demonstrated by new legal arguments, the Agreement unambiguously allowed for NIC to place him on administrative leave. Alternatively, the Agreement is ambiguous, as a matter of law, and the interpretation of the Agreement presents a complex issue of fact precluding preliminary injunctive relief. As explained by new evidence, Dr. Swayne was placed on administrative leave because NIC is performing an investigation into the validity of the Agreement. This is an appropriate basis upon which to place a college president on administrative leave and further creates a complex issue of fact inconsistent with a preliminary injunction.

II. STATEMENT OF FACTS

On February 24, 2023, Dr. Swayne testified, under oath, in support of his Motion for Preliminary Injunction. He was briefly cross-examined by Defendant's then-counsel, and oral argument followed. In reaching its decision to grant Dr. Swayne's Motion for a Preliminary Injunction, the Court found Dr. Swayne's testimony to be "credible." (Order, p. 21.) The Court relied on Dr. Swayne's credibility to conclude, *inter alia*, the following:

1) Plaintiff will likely suffer irreparable harm by being bound to the decisions being made in his absence…;

2) Plaintiff will likely suffer irreparable harm to his reputation and future evaluations; and

3) Each of these separate, irreparable harms will likely occur absent a preliminary injunction.

(Order, p. 40.)

For the sake of brevity, Defendant will not recite the facts pertaining to Dr. Swayne's request for a preliminary injunction or the events that transpired during the hearing. Since Dr. Swayne's reinstatement, NIC has learned new information from numerous NIC employees that patently contradicts Dr. Swayne's testimony. (Declaration of Greg McKenzie (McKenzie Decl.) ¶ 7; Declaration of Laura Rumpler (Rumpler Decl.), *passim*; Declaration of Sarah Garcia (Garcia Decl.), *passim.*) For example, Dr. Swayne's testimony on the following topics appears to have

been inaccurate: (1) the development of a strategic plan (Rumpler Decl. at ⁋ 7; Garcia Decl. ¶ at 5); (2) the extent to which Dr. Swayne negotiated and developed a presidential evaluation form (Rumpler Decl. at ⁋ ⁋10-11); (3) the hypothetical costs associated with a change in athletic conference and other athletic costs (Garcia Decl. ¶ 6); and (4) the extent to which Dr. Swayne took the initiative to develop various business relationships and goodwill (Rumpler Decl. at ⁋ ⁋16-17).

In addition, significant events have transpired to suggest that Dr. Swayne has attempted to interfere with NIC's defense of this lawsuit. In particular, during a meeting for members of the President's Cabinet on March 15, 2023, Dr. Swayne instructed members of the President's Cabinet not to answer questions from NIC's defense counsel on legal matters and not to speak to a member of the Board of Trustees or NIC's general counsel ***at all***. (Rumpler Decl. at ⁋ 3) Regarding issues of his ability to handle accreditation, he also told members of the President's Cabinet to "stop digging" and to "tread lightly." (*Id*.) He further advised that it is "stupid" to "create documents" in the middle of litigation. (*Id.*) These directives appear to be aimed at suppressing evidence in this case and preventing members of his Cabinet from disclosing his untruthful testimony.

III. APPLICABLE LEGAL STANDARD

When considering a motion for reconsideration pursuant to Rule 11.2, "the district could should take into account any new facts, law, or information presented by the moving party." *Arregui v. Gallegos-Main,* 153 Idaho 801, 808, 291 P.3d 1000, 1007 (2012); *see also PHH Mortg. Servs. Corp. v. Perreira,* 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) *(citing Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho,* 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)) (holding that "[o]n a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order."). "However, new evidence is not required and the moving party can re-argue the same issues in addition to new arguments." *Arregui,* 153 Idaho 808. "Such motions allow a party to direct a

Court to errors of law or fact that a party would otherwise have to correct by appeal." *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100, 105 (Ct. App. 2006).

IV. ARGUMENT

A. Dr. Swayne's Testimony Supporting the Determination of Irreparable Harm Was Inaccurate and Misleading.

1. The Court Relied Almost Exclusively on Dr. Swayne's Testimony in Concluding He Would Suffer Irreparable Harm Absent a Preliminary Injunction.

During the hearing, the Court relied almost exclusively on Dr. Swayne's own testimony to conclude the following facts:

13. Dr. Swayne worked toward restoring dual credit opportunities between school divisions in north Idaho high schools and NIC. Dual credit offerings increase income streams to NIC and is one of the primary recruitment tools for NIC. (Order, p. 4, ¶ 13.)

14. In September 2022, Dr. Swayne received an email from NIC Trustee Todd Banducci, which referenced Swayne being done or gone in "52 days." Dr. Swayne interpreted this email as "communicating a threat" to his position as president following the November elections for vacant positions on the NIC Board of Trustees. (Order, p. 4, ¶ 14.)

56. While Dr. Swayne has been on leave, NIC has made, and is contemplating, further significant changes to the organizational structure, administration and operation of NIC. (Order, pp. 18-19, ¶ 56.)

58. NIC has charged Dr. South with conducting research on changing NIC's athletic conference, transitioning athletic coaches from part-time to full-time positions and raising salaries for coaches. These changes in the athletic program will likely result in a $1 to $2 million cost increase, or up to a 4% increase in NIC's budget of $50 million. (Order, p.19, ¶ 58.)

62. The court does not find, nor has NIC claimed, that Dr. Swayne committed any acts of criminality, dishonesty, unprofessional or unethical conduct, violation of policies or abandonment of the responsibilities or inability to perform the essential functions of the position. (Order, p. 19, ¶ 62.)

65. Dr. Swayne testified he would suffer irreparable harm if NIC continues to make operational and organizational changes that would ordinarily be within his purview as President… (Order, p. 19, ¶ 65.)

66. Dr. Swayne testified that he would suffer irreparable harm during his future evaluations by the Board due to changes that would ordinarily be within his purview as president. Dr. Swayne testified that he was concerned that the Board would not properly take his

absence into account when performing his evaluations based on the Board's performance in the past. (Order, p. 20, ⁋ 66.)

67. Dr. Swayne testified that he would suffer irreparable harm as a result of proposed changes to the traditional expenditures of the college while he was on administrative leave…[specifically balancing a budget with greater expenses due to change in athletic conference]. [Dr. Swayne also testified that every decision the Board makes in his absence is a cost to him personally.] (Order, pp. 20-21, ⁋ 67.)

68. The court finds Dr. Swayne's testimony to be credible. (Order, p. 21, ⁋ 68.)

2. Contrary to Dr. Swayne's Testimony, NIC Has Not Calculated the Costs Associated with Changing Athletic Conferences and Has Not Converted Any Coaches from Part-Time to Full-Time.

During the hearing, Dr. Swayne testified that Sarah Garcia (Vice President of Business Administration), advised him that the cost of changing athletic conferences would be $1 million to $2 million:

> *Q: Okay. And based on the communications with the individuals from NIC [specifically, Sarah Garcia and Alex Harris], had they done research in regards to the cost of changing conferences?*
>
> *A: Yes.*
>
> *Q: Okay. And what is your understanding of what the cost to change conferences would be?*
>
> *A: Yeah, likely to be, as I said, $1 to $2 million.*

(Declaration of Kelly Drew (Drew Decl.) ⁋ 3; Ex. A (Hearing Transcript), p. 62:15-63:14.) Dr. Swayne further testified that the increased costs in changing athletic conferences was, in part, because NIC was planning to change the status of several coaches "that were part-time and making them full-time." (*Id.* at p. 60:18-23.) Dr. Swayne further testified that these changes would impact his ability, as President, to stay within budget. (*Id.* at p. 65:19-66:1.)

Significantly, the evidence overwhelmingly refutes Dr. Swayne's testimony. According to Sarah Garcia, ***NIC has not yet done any calculation regarding the costs associated with changing athletic conferences*** and she has never reported an estimated cost increase in the range of $1 to $2 million. (Garcia Decl. ¶ 6; *see also* Declaration of Gregory South (South Decl.) ⁋ 7.)

The Board of Trustees has also not been presented with any calculation regarding the costs associated with changing athletic conferences. (McKenzie Decl. at ¶ 8.)

Additionally, Dr. Swayne's assertion that NIC was planning to "convert" many part-time coaches to full-time (and accordingly increase the budget) is also an overt misstatement, a***s all of NIC's coaches*** *with the exception of the golf coach* ***are already full-time and have been since before Dr. Swayne signed the employment agreement.*** (Declaration of James Forkum (Forkum Decl.) at ¶ 8.)

Accordingly, Dr. Swayne's hypothesis that a ***potential future—not imminent***—change in athletic conferences would cost NIC between $1 million to $2 million dollars and impact his ability to work within NIC's operating budget is not only an imagined and speculative harm[2], it is unsupported by the evidence.

3. NIC's Board of Trustees Does Not Intend to Evaluate Dr. Swayne on Decisions Made During His Administrative Leave and Dr. Swayne's Testimony About His Evaluation Form Was Spurious.

Dr. Swayne testified at length to his concerns that his future performance reviews would be negatively impacted due to his placement on administrative leave. Specifically, Dr. Swayne's testimony speculates that his future performance reviews will be negatively impacted by

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[2] Because a preliminary injunction is a drastic remedy, the law is clear that plaintiffs seeking preliminary injunctive relief are required to demonstrate that irreparable injury is likely in the absence of an injunction, ***not merely a speculative possibility***. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (reversing 9th Circuit affirmation of preliminary injunction on the basis that the mere possibility of injury was insufficient). As one court aptly explained: "a preliminary injunction should issue not upon a plaintiff's imaginative, worst case scenario of the consequences flowing from the defendant's alleged wrong but upon a concrete showing of imminent irreparable injury." *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488, 491 (S.D.N.Y. 1989); *see also Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction); *Goldie's Bookstore Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (loss of goodwill and customers was speculative and thus, not irreparable harm).

decisions made by NIC while he has been on administrative leave. (Drew Decl. ¶ 3, Ex. A (Hearing Transcript) at p. 107:7-18.)

First, as asserted at the hearing, these concerns are entirely speculative. (See footnote 4, *ante*; *see also, DeNovellis v. Shalala,* 135 F.3d 58, 64 (1st Cir. 1998) (the fact that an employee may be psychologically troubled by an adverse job action does not usually constitute irreparable injury warranting injunctive relief). However, even assuming *arguendo* this these speculative and hypothetical concerns constituted irreparable harm pursuant to Rule 65[3]—which they do not—they are unfounded. Rather, ***any performance evaluations for Dr. Swayne will be individualized assessments based solely upon his performance while serving as NIC President.*** McKenzie Decl. at ¶ 9. To the extent that Dr. Swayne surmises to the contrary, he is mistaken.

In addition, regarding his actual performance evaluation form, Dr. Swayne's testimony again strays from reality and is, at best, imprecise and, at worst, demonstrably false. Specifically, Dr. Swayne testified as follows:

> *Q: Okay. Is there a written form for your evaluation?*
>
> *A: There is.*
>
> *Q: Okay. And how are you aware of that?*
>
> *A:* ***I negotiated that, built that form*** *with the help of an organization called ACCT, they do that sort of thing, so we worked together to make a very professional presidential evaluation.*

(Drew Decl. ¶ 3, Ex. A (Hearing Transcript) at p. 19:21-24.)

Dr. Swayne's testimony regarding his efforts to create a Presidential Evaluation form are quite overstated. In fact, Dr. Swayne's evaluation form is the same exact form from the

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[3] Indeed, if an employee's concerns about possible future performance evaluations could constitute irreparable harm, *any employee suspended for any purpose during their employment* could establish irreparable injury based on a mere fear that they may be evaluated on events that occurred during their absence. This would open the floodgates of employment litigation and make preliminary injunctions routine, as opposed to the extraordinary remedy they are.

Association of Community College Trustees (ACCT) that was copyright protected. (Rumpler Decl. at ⁋ 11; Ex. A (Evaluation Form).) There is no evidence that he "negotiated" the form, nor "built" it, beyond simply copying and pasting it. In sum, Dr. Swayne's testimony on his performance evaluations lacks credibility and his fears regarding his future performance evaluations do not establish the requisite irreparable harm to support a preliminary injunction.

4. The Evidence Does Not Support Irreparable Harm to Dr. Swayne's Goodwill.

In an apparent attempt to demonstrate that Dr. Swayne's reputation and professional goodwill are being tarnished by his placement on administrative leave, Dr. Swayne testified to the following:

> *Q: And were you working on a strategic plan prior to being placed on leave?*
>
> *A: Correct.*
>
> *Q: Okay. And what was part of that strategic plan?*
>
> *A: The big part of the strategic plan was repairing and improving the relationships with the community…*

(Drew Decl. ¶ 3, Ex. A (Hearing Transcript) at p. 49:8-15)

Dr. Swayne further testified to the following:

> *Q: Are you aware of, since you have been placed on administrative leave, whether NIC has lost any of the dual credit agreements with any institutions?*
>
> *A: I have been made aware, yes.*

(*Id*. at p. 70:24-71:2.)

In sum, Dr. Swayne would have this Court believe that in four months of employment, he had made monumental progress into "repairing" NIC's relationships in the community by developing a new strategic plan and that, in his absence, NIC has lost dual credit agreements with a local institution. He also tangentially suggests that his professional reputation has been damaged, which constitutes an "intrinsic" irreparable harm. The Court considered Dr. Swayne's testimony on these issues to be relevant, credible, and supportive of Dr. Swayne's request for a

preliminary injunction. (Order p. 40 ("Plaintiff will likely suffer irreparable harm to his reputation…").)[4] However, his testimony to support these allegations was factually incorrect.

First, any strategic plan allegedly developed by Dr. Swayne was in its infancy, at best. In fact, there has not been any coordinated or formal process to update or revise NIC's strategic plan. (Rumpler Decl. at ¶ 7; Garcia Decl. ¶ 5.) Second, ***it is unequivocally false that NIC has lost any dual credit agreements with any institutions in Dr. Swayne's absence.*** (Rumpler Decl. at ¶ 13.) Dr. Swayne's testimony to this fact is inflammatory and needlessly damages the business reputation of NIC – the very institution that Dr. Swayne claims to be dedicated to protecting.

Finally, Dr. Swayne repeatedly testified that he is irreparably harmed because he will have to start over, rebuild relationships, and "reset and restart" all of these processes. (Drew Decl. ¶ 3, Ex. A (Hearing Transcript) at p. 96:4). Despite the fact that Dr. Swayne touts his apparent strength of relationships among community members, witness testimony refutes that Dr. Swayne went to the apparent lengths to which he testified. Moreover, NIC worked diligently to maintain Dr. Swayne's professional reputation while he was on administrative leave, including instructing employees and staff to maintain a culture of professionalism that protected any alleged goodwill associated with Dr. Swayne's name. (South Dec. at ¶ 9; *see also* Forkum Dec. at ¶ 10.) Accordingly, even if this Court does consider these reputational concerns to constitute "irreparable harm," Dr. Swayne's testimony on these issues was not accurate.

5. Based on this New Evidence, Dr. Swayne Cannot Establish Irreparable Harm.

[4] As discussed in Legal Argument, section B *infra*, the United States Supreme Court has unequivocally held that loss of reputation does not afford a basis for finding irreparable injury and does not provide a basis for temporary injunctive relief. *Sampson v. Murray*, 415 U.S. 61, 89, 94 S. Ct. 937, 952, 39 L. Ed. 2d 166 (1974) (holding: "the Court of Appeals intimated that either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury and provide a basis for temporary injunctive relief. We disagree.")

Dr. Swayne's testimony and credibility provided the primary basis upon which the Court issued the preliminary injunction; however, Dr. Swayne's testimony and credibility are now significantly disputed by the evidence. Where credibility determinations must be made to resolve factual disputes about essential issues, a preliminary injunction is not an appropriate remedy. *See Harris v. Cassia Cnty*., 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (holding that a party requesting a preliminary injunction ***cannot*** show a "substantial likelihood of success" where "[...] ***complex issues of law or fact exist*** which are not free from doubt."); *see also Spencer Cos. v. Armonk Industries, Inc.,* 489 F.2d 704, 707 (1st Cir. 1973) (affirming denial of preliminary injunction due to "major factual dispute"); *General Electric Co. v. American Wholesale Co.,* 235 F.2d 606, 608–09 (7th Cir.1956) (where critical question of fact was hotly contested, preliminary injunction is inappropriate).

In sum, Dr. Swayne did not accurately attest to the irreparable harm he claims.[5] Moreover, the weight of the evidence indicates that Dr. Swayne cannot show irreparable harm, as a matter of law.

B. Even if Dr. Swayne's Testimony Was Wholly Truthful, Loss of Employment, Reputation, or Career Potential Are Not Irreparable Harms, as a Matter of Law, and Employment Injunctions Are Disfavored Absent Extraordinary Circumstances Not Present Here.

[5] Dr. Swayne also testified that NIC Board Trustee Todd Banducci sent him an email "that said basically just wait, you only have 52 days left." (Drew Decl. ⁋ 3; Ex. A (Hearing Transcript), p. 118:22-24.) Dr. Swayne further testified that this email caused him "concern" because it "appeared to be communicating a threat." (*Id.* p. 119:24-120:4.) This testimony appeared to be part of the Court's ultimate conclusion that Defendant's decision to place Dr. Swayne on administrative leave was pretext for his removal. Order, p. 39. However, Dr. Swayne's testimony regarding this email is grossly exaggerated. (Declaration of Todd Banducci (Banducci Decl.) at ¶ 4; Ex. A (Banducci Email).) First, the email was not communicated solely and directly to Plaintiff; it was a group email. (*Id.* at ¶ 6; Ex. A (Banducci Email).) Second the email itself was in no way intended to be communicating a threat. (*Id.* at ¶ 4; Ex. A (Banducci Email).) And no part of the email stated that Plaintiff had only "52 days ***left***" as he testified to under oath. (*Id.* (emphasis added).).

The United States Supreme Court has set a high standard for obtaining preliminary injunctions restraining adverse employment actions. *Sampson v. Murray,* 415 U.S. 61 (1974).[6] Specifically, the case must present a "genuinely extraordinary situation" to support granting an injunction. *Sampson,* 415 U.S. at 92 n. 68 (allegations of "humiliation, damage to reputation, and loss of income" stemming from an adverse employment action are insufficient to meet that standard). To this end, courts generally do not grant preliminary injunctions to enjoin employment actions such as termination, because "the termination ... of employment typically [is] not found to result in irreparable injury." 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (3d ed. 2021); see also *Together Emps. v. Mass Gen. Brigham Inc.,* 19 F.4th 1, 8 (1st Cir. 2021) (denying preliminary injunction to reinstate employees put on unpaid leave after denial of their requests for exemption from employer's mandatory vaccination policy, since money damages would adequately resolve all alleged harms, and irreparable harm cannot be created by plaintiffs' "artful pleading" in failing to seek money damages); *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 301 (8th Cir. 1996) (employee placed on unpaid administrative leave could not establish irreparable harm); *Anderson v. U.S.F. Logistics (IMC), Inc.* (7th Cir. 2001) 274 F3d 470, 475 ("preliminary injunctions are disfavored in the employment context"); *Farris v. Rice,* 453 F. Supp. 2d 76, 79 (D.D.C. 2006) ("cases are legion holding that loss of employment does not constitute irreparable injury").

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[6] As the Court noted in the Order, the Idaho Supreme Court frequently relies on federal precedent governing preliminary injunctive relief. (Order, p. 36; see, also, *Planned Parenthood Great Nw. v. State,* No. 49615, 2022 WL 3335696, at *5 (Idaho Aug. 12, 2022) ("In the federal system, a preliminary injunction will only issue when the requesting party can show, among other factors, 'that he is likely to succeed on the merits' and 'that he is likely to suffer irreparable harm in the absence of preliminary relief[.]'", citing *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); see also *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131–32 (9th Cir. 2011).

Indeed, courts have generally found that there is no irreparable harm when the alleged harm is *consistent with the harm normally caused* by the adverse employment action at issue. (*Sampson*, 415 U.S. at 92 n. 68 ("external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself – will not support a finding of irreparable injury, however severely they may affect a particular individual"); *see also DeNovellis v. Shalala*, 135 F.3d 58, 63 (1st Cir. 1998) (salary loss, emotional distress, and loss of prestige "[n]either in sum nor in individual parts ... amount to irreparable injury ....").[7]

Here, the Court found that Dr. Swayne has suffered irreparable injury: (1) in the form of "interference with his authority as Chief Executive Officer;" (2) because he will be bound to decisions made in his absence; and (3) in the form of damage to his reputation and future evaluations. (Order, p. 40.) However, as courts have routinely held, these are the types of damages ***attendant to any adverse employment action*** (including a termination or placement on an administrative leave) and these alleged injuries do not constitute the type of extraordinary irreparable harm necessary to support equitable reinstatement.

D. <u>Dr. Swayne Has Engaged in Disconcerting and Suppressive Behavior Since His Reinstatement, Including Directives to His Cabinet to "Stop Digging" and Not Speak with Legal Counsel or Board Members.</u>

"He who comes into Equity must come with clean hands." As explained by the Supreme Court, this well-established equitable maxim is "far more than a mere banality" and states a fundamental principle of equity jurisprudence. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S. Ct. 993, 997, 89 L. Ed. 1381 (1945). The doctrine demands

[7] Moreover, court restraint on preliminary injunctions is especially appropriate in a case concerning dismissal of a government employee since courts traditionally allow the government wide latitude in the "dispatch of its own internal affairs." *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) ("an injunction against a government agency must be structured to take into account 'the well-established rule that the government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'").

that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim. *Id.; Jones v. Lynn,* 169 Idaho 545, 560, 498 P.3d 1174, 1189 (2021) ("…a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.")

Since the 19th century, courts have regularly invoked the unclean hands doctrine where a litigant engages in conduct "offensive to the dictates of natural justice," including litgation misconduct, such as suppression of evidence and witness intimidation. *Deweese v. Reinhard,* 165 U.S. 386, 390, 17 S. Ct. 340, 341, 41 L. Ed. 757 (1897); *Keystone Driller Co. v. General Excavator, Co.,* 290 U.S. 240, 245, 54 S. Ct. 146 (litigant had unclean hands based on suppression of evidence and witness tampering); *see also, Hazel–Atlas Glass Co. v. Hartford–Empire Co.,* 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944) ("[T]ampering with the administration of justice ... is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.") [8]

Here, new evidence indicates that Dr. Swayne comes to this court with unclean hands. Specifically, since his reinstatement, Dr. Swayne has expressly advised members of his Cabinet to thwart the judicial process and, in so doing, has instilled a culture of fear and intimidation if anyone speaks out against him. Specifically, at a President's Cabinet meeting on March 15, 2022, Dr. Swayne instructed members of his Cabinet: not to communicate with defense counsel

[8] Courts have also applied the unclean hands doctrine in the educational employment context, where a college employee deliberately seeks to undermine the college administration. See *Skehan v. Bd. of Trs. of Bloomsburg State College,* 436 F.Supp. 657, 663–64 (M.D. Pa.1977) (applying unclean hands doctrine to bar a professor from being fully reinstated as a faculty member when full reinstatement "after his blatant disregard for administrative directives would seriously undermine respect for the college administration ..., would have the potential of impairing the college's ability to operate its own affairs and would result in a grave miscarriage of justice").

for NIC; not to speak to anyone on the Board of Trustees or NIC's general counsel; not to "create documents" in the middle of litigation; and – perhaps most overtly – to "tread lightly" and to "stop digging." (Rumpler Decl. at ¶ 3). These directives have resulted in at least one Cabinet members admittedly being fearful for their jobs if they speak the truth or contradicts Dr. Swayne. (*Id.*)

Dr. Swayne's actions and directives to his Cabinet are an affront to the truth-seeking function of this Court. He should not be awarded equitable relief when he, himself, has not acted equitably.

E. <u>Dr. Swayne Is Not Entitled to a Preliminary Injunction Because He Is Unlikely to Prevail on the Merits.</u>

1. The Plain Language of the Agreement Does Not Deprive the College from Placing Dr. Swayne on Paid Administrative Leave; to the Contrary, the Agreement Provides Placement on Administrative Leave Is within the Board's General Discretion.

The Court adopted Dr. Swayne's primary argument that NIC lacked the ability to place him on administrative leave because the Agreement provides that the Board could ***only*** place him on administrative leave in the event he provided 60-day notice of his termination. The specific term Dr. Swayne and the Court cite for this proposition is, under the heading "Termination," and provides as follows:

> *If, during its term, this Agreement is terminated by the President without cause, the termination shall become effective 60 days after receipt of written notice of termination. The obligations of both parties under this Agreement ease when the termination is effective. The Board may, in its discretion, place the President on administrative leave during part or all of the 60-day notice period.*

(Order, p. 26.)

This provision exclusively addresses events that may occur if the President terminates the Agreement without cause. It provides that the Board may place the President on administrative leave during the 60-day notice period pre-termination, but ***it does not expressly state nor***

remotely suggest that this is the <u>only circumstance</u> in which the Board may place the President on administrative leave.

Indeed, the language "The Board may, ***in its discretion***, place the President on administrative leave…" evidences the Board's authority and ***broad discretion*** to place the President on administrative leave ***in all circumstances where it deems such action in NIC's best interests.*** Moreover, the Agreement is abundantly clear that the President's role is subject to the "policies, rules, and regulations approved and/or sanctioned by the Board."[9] Specifically, Section 2, under the heading "Responsibilities," provides *inter alia*:

> *… The President is authorized and responsible for the administration of NIC and has authority over all matters affecting NIC at the operational level, <u>in accordance with applicable laws as well as the policies, rules and regulations approved and/or **sanctioned by the Board**</u>**.** In addition to the foregoing, the President shall also be responsible for carrying out all duties requested by the Board.*

(McKenzie Dec. at ⁋ 2; Ex A (Agreement).)

Here, the Board's decision to place Dr. Swayne on administrative leave was undeniably a regulation approved and sanctioned by the Board. Thus, the plain language of the Agreement expressly establishes Defendant's authority to place Dr. Swayne on administrative leave.

2. Idaho Case Law Supports Defendant's Legal Argument that the Power to Remove Is a General Power of the Board of Trustees.

The Court's Opinion notes that Defendant's argument that placing Dr. Swayne on administrative leave was a subset of the Board's general powers is devoid of citations to legal authority. (Order, p. 31) But under Idaho case law (and pursuant to Idaho Code 33-2107) the power to appoint is incident to the power to remove. For example, in *Gowey v. Siggelkow*, 85 Idaho 574, 588, 382 P.2d 764, 774 (1963), the Idaho Supreme Court noted that the power to appoint public officials "carries with it the power of removal." (interpreting I.C. § 50–711 in the absence of a statute or regulation fixing the terms of office and holding that "the authority to

[9] NIC Policy is also clear on this point. *See* (McKenzie Dec. at ⁋ 6; Ex C (Policy).)

appoint an officer carries with it the authority to remove such officer in the absence of any constitutional or statutory restriction."). Other Idaho courts have reached the same conclusion when analyzing the removal of civil officers who, like Dr. Swayne, do not have a statutorily-recognized "fixed period of service." *Conwell v. Vill. of Culdesac*, 13 Idaho 575, 92 P. 535, 535 (1907). Accordingly, where a Board of Trustees has the general power to "select, appoint, and evaluate" (as it does here), the power to remove is incident to these general powers. (McKenzie Decl. ¶ 5, Ex. B (NIC Policy).) Defendant's decision to place Dr. Swayne on administrative leave was thus in accordance with these general powers.

3. At the Very Least, the Agreement Is Ambiguous; Resolution of the Ambiguity Indicates that the College Could Place Dr. Swayne on Administrative Leave, But Presents a Complex Issue of Fact, Making Preliminary Injunctive Relief Improper.

The Court's Order pointed out that neither party argued the Agreement was ambiguous, and therefore the Court applied corresponding precedent pertaining to unambiguous contracts. (Order, p. 25)

However, if the Court rejects the argument that the Agreement unambiguously allows for NIC to place Dr. Swayne on administrative leave, as set forth in Legal Argument, section D(2) *ante*, the Court should conclude that the Agreement is ambiguous, ***because it is reasonably susceptible to two differing interpretations or is silent on circumstances in which the Board can place Dr. Swayne on paid administrative leave.***[10] As such, a finder of fact must look to the law, the policies of the College and reasonable industry standards to interpret the Agreement. As set forth below, such evidence indicates that the College had the authority to place Dr. Swayne

[10] The Court states in its Order: "The analysis in this case is simple. The Agreement contains no provision ***permitting*** NIC to place Dr. Swayne on administrative leave, nor does the plain language permit the court to infer such provision." (Order, p. 30 (emphasis added).) However, the Agreement contains no provision expressly ***prohibiting*** NIC from placing Dr. Swayne on administrative leave – rendering the Agreement arguably silent on this issue and requiring extrinsic evidence regarding intent.

on administrative leave. Moreover, this is a complex question of fact, precluding a preliminary injunction.

When interpreting a contract, a court's primary objective is to discover the mutual intent of the parties at the time they entered the contract. *Stanger v. Walker Land & Cattle, LLC,* 169 Idaho 566, 573, 498 P.3d 1195, 1202 (2021) citing *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC,* 157 Idaho 600, 610, 338 P.3d 1204, 1214 (2014). "Where an instrument is 'reasonably subject to conflicting interpretation,' it is ambiguous and inappropriate for [dispositive adjudications] due to the factual determinations that must be made. *Id.*, citing *Hap Taylor & Sons, Inc.*, 157 Idaho at 610, 338 P.3d at 1214.

Ambiguity may also arise when contract terms are *silent* as to certain issues arising between contracting parties. *Dr. James Cool, D.D.S. v. Mountainview Landowners Co-op. Ass'n, Inc.*, 139 Idaho 770, 773, 86 P.3d 484, 487 (2004) ("usage or custom is admissible ... to ascertain the intention of the parties in reference to matters about which the contract is silent"). The law is also clear that the fact that there are no express contractual terms does not mean that the parties do not have any reasonable expectations regarding the agreement. *See Star Phoenix Min. Co. v. Hecla Min. Co.*, 130 Idaho 223, 231, 939 P.2d 542, 550 (1997) (holding that implied terms are as much a part of the contract as express terms). In fact, implied contractual terms may co-exist with express contractual terms. *Id.*

If a court determines that a contract is ambiguous, then interpreting critical contractual terms presents a question of fact for the jury. *Pocatello Industrial Park Co. v. Steel West, Inc*., 101 Idaho 783, 789, 621 P.2d 399 (1980). "[W]here the contract is ambiguous, intent can be divined 'by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.'" *Id.* quoting *J.R. Simplot Co. v. Bosen,* 144 Idaho 611, 614, 167 P.3d 748, 751 (2006).

Here, the Court did not consider whether the Agreement is ambiguous. The Court concluded that the plain language of the Agreement did not allow for NIC to place Dr. Swayne

on an administrative leave. However, as set forth above, there is another reasonable interpretation: that the Agreement expressly acknowledges the Board's discretion to place Dr. Swayne on administrative leave. Alternatively, the Agreement is silent as to whether and under what circumstances NIC may place Dr. Swayne on administrative leave.

To the extent that Dr. Swayne's Agreement is ambiguous, it should be interpreted in accordance with extrinsic evidence such as NIC policy. *See Simons v. Simons, 134* Idaho 824, 828, 11 P.3d 20, 24 (2000). In fact, the Agreement itself repeatedly states that various items in the Agreement should be interpreted in accordance with NIC policy. (*See, e.g.*, McKenzie Decl. ¶ 3, Exhibit A (Employment Agreement) § 2, "Performance Reviews.") NIC policy 2.01.02 delegates to the Board of Trustees the responsibility "[t]o select, appoint, and evaluate the president of the college…" (*See, e.g.*, McKenzie Decl. ¶ 5, Exhibit B (NIC Policy).) Thus, if the Agreement is ambiguous as to what powers the Board of Trustees has in terms of placing Dr. Swayne on administrative leave, this ambiguity should be resolved in favor of a broad interpretation that allows the Board of Trustees to take any personnel action related to selecting, appointing, and evaluating the president.

Defendant's position on this point is also consistent with industry standard. (McKenzie Dec. at ¶ 13.) NIC's decision to place Dr. Swayne on administrative leave is standard in the higher education industry. Last week, the President of Jackson State University was placed on administrative leave with pay pending an investigation.[11] Last year, the President of Clovis Community College was placed on paid administrative leave during the pendency of an investigation into the President.[12] In 2019, Palomar College did the same thing.[13] These

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[11] https://www.cbs42.com/regional/mississippi-news/mississippi-college-president-placed-on-administrative-leave/

[12] https://www.easternnewmexiconews.com/story/2022/08/03/news/clovis-community-college-president-placed-on-administrative-leave/172533.html

[13] https://thecoastnews.com/palomar-college-board-places-president-blake-on-leave-under-investigation/

examples illustrate that NIC's decision to place Dr. Swayne on administrative leave was certainly not an anomaly; rather, it was in keeping with industry standard during the pendency of investigations that may pertain to the President or in which the President could have an inherent conflict. Interpreting the Agreement to limit the Board's discretion to put Dr. Swayne on administrative leave conflicts with its authority to do so under NIC policy and results in harm to the operations of NIC. The Board—in its discretion—acted to protect NIC during the investigation of the formation of Dr. Swayne's Agreement and his concurrent rise to power as President of NIC. By ordering Dr. Swayne's immediate reinstatement, the Court has substituted its discretion for that of a duly-elected Board having the responsibility and authority to make that decision.

Moreover, the ambiguity presents a complex issue of fact, rendering preliminary injunctive relief inappropriate. See *Gordon v. U.S. Bank Nat'l Ass'n*, 166 Idaho 105, 115, 455 P.3d 374, 384 (2019) ("The substantial likelihood of success necessary to demonstrate that ... [the moving party is] entitled to the relief ... demanded cannot exist where complex issues of law or fact exist which are not free from doubt"); *see also, Zoom Video Commc'ns, Inc. v. RingCentral, Inc.*, No. 21-15792, 2021 WL 4804962, at *1 (9th Cir. Oct. 14, 2021) (affirming the denial of a preliminary injunction where both parties offered plausible construction of the subject contract, presenting "serious factual questions").

4. Dr. Swayne Is Not Likely to Prevail on the Merits Because NIC Had a Legitimate Basis to Place Him on Administrative Leave; Again, this Presents Complex Issues of Law and Fact Precluding Preliminary Injunctive Relief.

Employers irrefutably have the right to manage tensions in their workplace and conduct investigations into misconduct or other concerns. To this end, employers routinely place employees on administrative leave during the pendency of an investigation, both to protect the

integrity of the investigation, and to protect the employee from any aspersions of inappropriate conduct with regard to the investigation.[14]

Here, Dr. Swayne was placed on administrative leave pending an investigation into his hiring and the validity of the Agreement. It is axiomatic that for a contract to be formed there must be a meeting of the minds. *Inland Title Co. v. Comstock*, 116 Idaho 701, 703, 779 P.2d 15, 17 (1989). The "meeting of the minds" must occur on all material terms to the contract. *Dursteler v. Dursteler*, 108 Idaho 230, 233–34, 697 P.2d 1244, 1247–48 (Ct.App.1985) (emphasis added). Even where courts find that a meeting of the minds has occurred, illegal contracts are void. *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445 (2004); *see also Farrell v. Whiteman*, 146 Idaho 604, 609, 200 P.3d 1153, 1158 (2009) (holding that courts will refuse to enforce illegal contracts and will instead "leave the parties as it finds them."). Under Idaho law, any contract that cannot be cannot be performed without violating applicable law is illegal and void. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 299 P.3d 232 (2013).

Here, NIC placed Dr. Swayne on administrative leave to investigate the process through which Dr. Swayne was hired and whether the Agreement was legally executed. (McKenzie Dec. at ¶ 10.) Dr. Swayne was hired by a three-to-two Board of Trustees vote during a meeting that was not preceded by an executive session. (*Id.*) If an executive session had been held, the three appointed and the two elected Trustees could have discussed the merits of all four presidential candidates. (*Id.*) That did not happen; rather, it appears as though the decision was pre-determined. (*Id.*) This raises concerns as to whether deliberations and/or pre-agreement existed

[14] Indeed, numerous courts have held that paid administrative leave does not even constitute an adverse employment action. See *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006); *Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 889, 892 (8th Cir. 2005); *Peltier v. United States*, 388 F.3d 984, 986, 988 (6th Cir. 2004); *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001); *Breaux v. City of Garland*, 205 F.3d 150, 154–55, 158 (5th Cir.2000).

before the meeting between the three appointed Trustees. (*Id.*) The investigation into these issues is ongoing and is in accordance with NIC Policy 2.01.10.[15] (McKenzie Dec. at ¶ 11).

Further, Dr. Swayne's contract requires a super-majority four-to-one vote for the Board to terminate that contract, which constrains the Board beyond its normal majority decision-making powers. (*Id.*) These issues are central to NIC's investigation into Dr. Swayne's Agreement, including the legality of the contract itself. [16] To the extent that Defendant's prior counsel advised Defendant as to the propriety of this clause, this advice also warrants investigation. (*Id.*) The investigation into these issues is ongoing. (*Id.*)

As such, the Board's decision to place Dr. Swayne on a ***paid*** administrative leave while conducting this investigation is not "hostile" or "arbitrary," but attendant to a legitimate investigation. Moreover, the issues associated with the formation and execution of Dr. Swayne's

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[15] Understanding that the Court's Order discussing the time period pursuant to Idaho Code §74-208 (6) pertaining to investigating Open Meeting Act violations, that statutory section specifically pertains to lawsuits filed by third parties, not internal investigations as is the case here. In fact, pursuant to Idaho Code §74-208 (7) there is no time frame for a public entity to address or investigate these issues and this subsection is reflected in various NIC Board policies.

[16] In other words, NIC is investigating whether the prior Board could legally tie the hands of the current Board by only allowing the termination of the President in extraordinary circumstances, i.e., via vote by a super-majority. Specifically, it appears that the prior board improperly attempted to re-write IC 33-2106(7) (which provides that "three (3) members of the board shall constitute a quorum for the transaction of official business"), rendering the Agreement void *ab initio.* Not only does this contravene the directives of the Idaho Legislature, but such hamstringing deprives the current successor Board of the power to choose for themselves the best person to lead NIC. As colorfully explained by the 7th Circuit: "Like a perpetual ping-pong match, control over governments changes hands from one political party to another and back again. Generally, a change in administration, with its corresponding shift in policy goals and priorities, does not affect government employees… Some jobs, however, can be performed satisfactorily only when the employee supports the administration's ideas about policy and governing. ***If these jobs are filled with employees who take a view different from the administration, then these employees could thwart the government's ability to enact the policies it had been elected to advance***." *Powers v. Richards,* 549 F.3d 505, 509 (7th Cir. 2008).

contract presents a complex issue of law and fact, rendering preliminary injunctive inappropriate. *See Planned Parenthood Great Nw.* No. 49615, 2022 WL 3335696, at *6.

V. CONCLUSION

For the foregoing reasons, North Idaho College respectfully requests that the Court reconsider its decision to grant Dr. Swayne's Motion for a Preliminary Injunction and issue an Order denying Dr. Swayne's requested injunctive relief.

Respectfully submitted: March 17, 2023.

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CERTIFICATE OF SERVICE

On March 17 2023, I caused the foregoing document to be filed via the Court's iCourt CM/ECF system which will send same to all counsel of record in this matter.

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