UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

BIDDEFORD INTERNET CORPORATION D/B/A GREAT WORKS INTERNET and GWI VERMONT, LLC,	)	Civil Action No. 2:25-cv-00354
Plaintiffs,	)	
v.	)	
F.X. FLINN,	)	
Defendant.	)	

MOTION TO DISMISS

Defendant F.X. Flinn, by and through his attorneys, Cooley, Cooley & Foxx, Inc., moves pursuant to Fed. R. Civ. Proc. 12(b)(6) to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. In support of the Motion, Defendant submits the following memorandum of law.

PRELIMINARY BACKGROUND

The following background is provided to the Court for context only, and not for purposes of resolving the motion to dismiss. Mr. Flinn is clear eyed that this Court must accept as true the allegations in the Complaint when deciding a Fed. R. Civ. P. 12(b)(6) motion to dismiss, but given Plaintiffs' malicious and demonstrably false allegations, allegations that have tarnished Mr. Flinn's reputation, he feels compelled to set the record straight. In no uncertain terms, Plaintiffs' lawsuit is frivolous. It was filed with the intent to silence and intimidate Mr. Flinn and prevent him from carrying out his duties as Chairman of the Governing Board for the East Central Vermont Telecommunications District (the "District"). Plaintiffs' lawsuit can be distilled down to a single issue: whether Mr. Flinn may be sued for actions taken by the District. Even if the Court

determines that he may be sued, each of Plaintiffs' claims fails to state a claim upon which relief can be granted.

1. Procedural Maneuvers.

Plaintiffs first filed an action in State Court. (**Exhibit 1**).[1] Plaintiffs' lawsuit is a Strategic Lawsuit Against Public Participation ("SLAPP"). It would be subject to a special motion to strike under Vermont's anti-SLAPP statute, 12 V.S.A. 1041, if this case were pending in State Court. Plaintiffs, keenly aware that their lawsuit targets Mr. Flinn's free speech and conduct, realized this and quickly dismissed the State Court action to avoid application of the anti-SLAPP statute and refiled their Complaint in Federal Court.

2. ECFiber-ValleyNet Operating Agreement.

Formed in 2015, the District is a Communications Union District ("CUD"), a municipal corporation and political subdivision of the State of Vermont that is tasked with building and operating communications infrastructure, including broadband technology. 30 V.S.A. § 3051(a). The District is currently made up of 31 member towns in East Central Vermont. The District's governance is controlled by its legislative body, the Governing Board, in which each town exercises one vote through an appointed delegate. The District's internet service provider business and trade name is ECFiber. Since its formation, ECFiber has built over 1,950 miles of fiber-optic network and services approximately 10,000 locations for more than 9,750 customers.

In 2016, the District entered into a 10-year design, build, and operating agreement with ValleyNet, Inc., a non-profit Internet Service Provider ("ISP"). The operating agreement empowered the District, through its Governing Board, to direct ValleyNet's operation of ECFiber. The operating agreement was carefully structured to conform with the IRS Safe Harbor

[1] This Court may, on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, take judicial notice of Plaintiffs' State Court Complaint. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773-774 (2d Cir. 1991).

provisions that enable the interest earned by municipal bonds that fund the development of the communications infrastructure to be tax free.

As operator of the District's internet service provider business, ValleyNet was not the owner of any of the equipment, supplies, software, vendor relationships, or intellectual property used to design, build and operate ECFiber. Its employees staffed the business, which shielded their compensation from public record requirements and made the municipal revenue bond offerings more attractive to investors because the District carried no liability for pensions.

Historically, and consistent with the operating agreement, ValleyNet employees exclusively serviced ECFiber's network. In only one instance did ValleyNet service another internet service provider's network. Before doing so, however, ValleyNet sought express approval from the District's Governing Board. This approval was necessary due to the inextricable financial link between the District and ValleyNet: the District pays all expenses, including payroll, and maintains budgetary control over the business. All systems, equipment, vendor relationships and the like are in the name of the District, not ValleyNet. The District is the official phone provider, and ISP of record, at the Federal Communications Commission, and for all regulatory matters at the state and local level. ECFiber was inextricably intertwined with ValleyNet in many other respects. ValleyNet employees mostly self-identified as ECFiber staff. Most ValleyNet employees wore garb displaying the name "ECFiber". ECFiber service trucks, which are owned by the District, are emblazoned with the word "ECFiber." When customers would call ValleyNet's South Royalton's office, a ValleyNet employee would generally identify themselves as working for ECFiber.

3. <u>GWI Assumption and Assignment of the Operating Agreement</u>.

GWI Vermont, LLC is a Vermont Corporation and subsidiary of Biddeford Internet Corporation, a Maine-based certified B corporation known by the trade name "GWI".

In approximately 2021, problems with construction delays, regulatory matters, and District dissatisfaction with the quality of reporting, and requests from other CUDs for service by ValleyNet led to ValleyNet and GWI entering into an agreement for additional management services, and within a few months it became clear to the District, ValleyNet, and GWI, that a better solution was to have GWI assume ValleyNet's responsibilities.

In May 2022, the Governing Board approved having GWI assume the operating agreement from ValleyNet. On December 31, 2022, ValleyNet, GWI and the District entered into an Assignment and Assumption Agreement, whereby GWI took over the operating agreement. As part of the assignment and assumption, ECFiber staff switched from being ValleyNet employees to GWI Vermont, LLC employees. These staff continued to operate out of ECFiber's office in South Royalton, Vermont. As was always the case, the newly minted GWI Vermont employees continued to refer to themselves as ECFiber staff. By its terms, the operating agreement is set to expire on December 31, 2025. (Doc. 1, ¶ 11).

4. Plaintiffs' Allegations.

The gist of Plaintiffs' theory is simple: they claim that, starting in late 2024, Mr. Flinn hatched a scheme to create a pretextual basis for the District not to renew the operating agreement so that he could replace the services GWI provided with "his own venture and pay himself a substantial amount of money…." (*Id.* 1, ¶ 12.) The scheme allegedly involved Mr. Flinn having a "GWI employee…furnish him [with] a surreptitiously recorded confidential meeting of GWI personnel in order to gain access to GWI's proprietary information and to falsely contend that GWI was in breach of the Operating Agreement." (*Id.*, ¶ 15). Plaintiffs aver that Mr. Flinn shared this information with the District and the District used the information as the basis for terminating its relationship with GWI (*Id.*, ¶¶ 17-19) and hired a company that he formed, Vermont ISP Operating Company ("VISPO"). (*Id.*, ¶¶ 22-24).

Plaintiffs' allegations have no basis in law or fact. There was no scheme. In the midst of negotiations over a new operating agreement, or alternatively, the extension of the existing agreement, a whistleblowing employee, who had never discussed with Mr. Flinn the District's relationship with GWI before the two spoke on February 11, 2025, contacted Jeff Brand, Secretary of the Governing Board for the District, on her own initiative due to her genuine concerns about GWI's plans. Mr. Brand recommended that she speak with Mr. Flinn, the District's chair.

Mr. Flinn called her to learn more. During their call, the whistleblowing employee informed Mr. Flinn that GWI planned to have GWI employees work on other CUD projects. This plan had not been approved by the Governing Board. The whistleblowing employee also indicated that she had recorded the meeting where this was discussed and forwarded a copy of that video to Mr. Flinn. The recording established GWI's intent to use ECFiber's staff to service other entities and to eliminate ECFiber staff in favor of a regional call center. Neither action is permitted under the operating agreement and requires prior approval by the District.

On February 12, 2025, attorneys for the District, not Mr. Flinn, sent a letter to GWI's CEO Kerem Durdag demanding that GWI cease and desist from implementing the plan as revealed on the recording. (*Id*., ¶ 18; Exh. A). Instead of discussing the issue, GWI replied through counsel, and has attempted to intimidate and silence Mr. Flinn through filing a lawsuit (twice), and at least five attorney letters—one after every communication Mr. Flinn has made in his capacity as District chair related to GWI—threatening Mr. Flinn with legal action.

Ultimately, the municipality itself, not Mr. Flinn, opted to terminate negotiations with GWI. This decision was made on April 8, 2025, following a duly noticed meeting of the District's Governing Board. The meeting was attended by delegates from the District's 31 member towns. These delegates unanimously voted not to renew the operating agreement with

GWI. The reason for the termination was simple: GWI and the District could not reach an agreement on the financial terms for an operating agreement. They were millions of dollars apart. Additionally, and importantly, GWI's recording revealing their plan to terminate many GWI employees that service ECFiber's network and immediately move its customer service office, based in South Royalton, to a regional call center, made it all too apparent that GWI's for-profit mission was incompatible with the District's Vermont community service focus. With the decision in hand not to renew the operating agreement, the District unanimously voted to approve a Memorandum of Understanding ("MOU") between the District and VISPO that tasked VISPO with developing transition plans to become the next ECFiber operator.

Mr. Flinn has no financial stake in VISPO. No person does. It is a public benefit corporation set up to provide essential services to a municipality exempt from taxation under Section 115 of the IRS code. Moreover, Mr. Flinn has no intention of deriving income from VISPO. The simple fact is Mr. Flinn and two other ECFiber officers—Daniel Leavitt and Alessandro Iuppa—formed VISPO with the full support of District's leadership for the sole purpose of setting the groundwork for returning ECFiber to its roots: having its internet service provider business operated by a local non-profit entity. Having accomplished that ministerial goal, VISPO proceeded to elect a seven-member board of directors that does not include Mr. Flinn and his involvement is now identical to his involvement with GWI: overseeing, administering and supervising the contractual relationship with the District in his capacity as Governing Board Chairman.

ARGUMENT

1. Fed. R. Civ. P. 12(b)(6) Standard.

A Court analyzing a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, must take the complaint's "factual allegations to be true and draw[s] all reasonable

inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id*. (internal citations omitted). "A complaint is properly dismissed, where, as a matter of law, 'the allegations in [it], however true, could not raise a claim of entitlement to relief.'" *Thompson v. Pallito*, 949 F. Supp. 2d 558, 570 (D. Vt. 2013) (quoting *Bell Atl. Corp.*, 550 U.S. at 558).

2. Plaintiffs' Claims are Barred by Statutory and Common Law Official Immunity.

The East Central Vermont Telecommunications District is a municipal entity known as a "Communications Union District." 30 V.S.A. § 3051. By statute, the affairs of a communications union districts are the responsibility of a governing board. 30 V.S.A. § 3057. ("The legislative power and authority of a district and the administration and the general supervision of all fiscal, prudential, and governmental affairs thereof shall be vested in a legislative body known as the governing board….") The governing board's officers include a chair, vice chair, and treasurer. 30 V.S.A. § 3067(a). The chair is charged "presid[ing] [over] all meetings of the board… make[ing] and sign[ing] all contracts on behalf of the district [and]….perform[ing] all duties incident to the position and office…." 30 V.S.A. § 3067(b).

Although the Federal Complaint contains some fanciful allegations and creative theories about Mr. Flinn,[2] Plaintiffs' claims all arise out of actions taken by Mr. Flinn in his official capacity as chair of the legislative body he oversees and center upon a single event: the District's decision not to renew the operating agreement and plans to replace GWI.[3] That Plaintiffs' Complaint arises from Mr. Flinn's acts as chair and the acts of the District is laid bare by the Complaint allegations:

> (1) The District sent a letter to GWI on February 12, 2025 "alleging various way in which GWI purportedly has breached the parties' Operating Agreement." (*Id.*, ¶ 18, Exh. A);
> (2) The District sent a letter to GWI on February 19, 2025 stating that it "was no longer interested in negotiating an extension of its relationship with GWI." (*Id.*, ¶ 19);[4]
> (3) The District retained two consultants, allegedly selected by Mr. Flinn, that recommended retaining "a new management company whose primary purpose will be to provide strategic guidance, oversee network operations (regardless of the operator), develop in-house expertise, and ensure alignment with ECFiber's mission." (*Id.*, ¶ 20);
> (4) The consultants recommended that the management company "[n]egotiate with GWI employees: If feasible and desirable (and legally permissible), negotiate with selected GWI employees regarding potential transition [.]" (*Id.*, ¶ 21);

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[2] The State Court allegations, though also untruthful, more accurately portray what really happened. A whistleblowing employee, on her own accord, provided a video to Mr. Flinn, who accepted it (Exh. 1, ¶ 62) and then disseminated the recording "for the *benefit of the governing board of ECFiber*." (*Id*. ¶ 59).

[3] Plaintiffs' Negligent Misrepresentation and Promissory Estoppel claims are predicated upon a Limited Offering Memorandum issued by the District to municipal bond investors. Plaintiffs conveniently omit the Limited Offering Memorandum from their Complaint. The document, however, attached as **Exhibit 2**, may be considered by this Court without converting the proceeding to one for summary judgment since it is incorporated into the Complaint by reference, and integral to Plaintiffs' claims. *Intl. Audiotext Network, Inc. v. Am. Tel. and Tel. Co*., 62 F.3d 69, 72 (2d Cir. 1995). As is evident from the offering memorandum, it was prepared by the District's attorneys, on behalf of the District. (Exh. 2. at 1) ("The East Central Vermont Telecommunications District (the "District") is issuing its Project Revenue Bonds, Series 2023A (the "Series 2023A Bonds")). Any role Mr. Flinn allegedly played in the creation of the document would fall squarely within his duties as chair of the Governing Board.

[4] Plaintiffs omitted the February 19, 2025 letter to the Complaint. Accordingly, Defendant attaches the letter as **Exhibit 3** to the Motion to Dismiss. Because the Complaint incorporates the letter by reference, this Court may consider it in deciding the Motion to Dismiss. *See* FN3. Per the letter, the District opted not to renew the operating agreement based on GWI's decision to replace existing local customer service and to eliminate its Vermont-specific department because both actions were "incompatible with the District's goals and fundamental purpose."

> (5) Mr. Flinn notified the District that he, along with two other District delegates, Dan Leavitt and Al Iuppa, created a public benefit non-profit to take over Plaintiffs' operations. (*Id.*, ¶ 22);
> (6) "Mr. Flinn advised ECFiber that "the next actionable task of the GB [Governing Board] will be to approve a contract between the District and" the new management company." (*Id.*, ¶ 23).

The above allegations and various exhibits to the Complaint and appended to the Motion to Dismiss make clear that Mr. Flinn is being sued for carrying out his duties as chair of the Governing Board and for the District's decision not to renew the operating agreement, which was informed, in part, by information provided to Mr. Flinn about GWI's plans for altering its service. GWI's plans and strategies bear directly on the existing operating agreement and on the operating agreement that the two entities were negotiating that Mr. Flinn is duty bound to administer. Indeed, had Mr. Flinn ignored the information provided to him, he would be subjected to a charge of violating fiduciary duties owed to the District.

A. Mr. Flinn Cannot Be Sued under 24 V.S.A. § 901.

Plaintiffs seek to hold Mr. Flinn responsible for the District's decision to terminate the operating agreement and for alleged misrepresentations in a 2023 Limited Offering Memorandum prepared by the District for prospective municipal bond investors. As argued below, Mr. Flinn cannot be sued for these acts under Vermont law.

In their Complaint, Plaintiffs aver that the District, in apparent blind reliance on Mr. Flinn, used information provided to him by a GWI employee as a basis to terminate its relationship with GWI. (Doc. 1, ¶¶ 19, 27, 46). They allege that the District's interpretation of the recording and their business practices was wrong. (*Id.*, ¶ 27) ("ECFiber has taken its cue from its chairman F.X. Flinn in negotiating a renewed Operating Agreement with GWI, taking frivolous positions that are factually incorrect and obviously so.") In essence, what Plaintiffs allege is that

Mr. Flinn was single-handedly responsible for the District's decision not to renew the operating agreement. However, on April 8, 2025, the District, through its delegates and upon a duly noticed Governing Board meeting voted unanimously not to renew the operating agreement. (**Exhibit 4**).[5] It is illogical, and indeed insulting, to suggest that the dozens of delegates who voted to terminate the operating agreement did so thoughtlessly at Mr. Flinn's command. The meeting minutes also establish that the same delegates voted unanimously to approve a MOU between the District and VISPO. (**Exhibit 5**).[6] While Plaintiffs' Complaint suggests some nefarious conduct on the part Mr. Flinn, this is nothing more than a smokescreen. Their real beef is that the District opted not to renew the operating agreement. In this respect, Plaintiffs seek to hold Mr. Flinn responsible for the District's decision and therefore have sued the wrong defendant.

Under 24 V.S.A. § 901(a),

> [w]here an action is given to any appointed or elected municipal officer or town school district officer, the action shall be brought in the name of the town in which the officer serves and in the case of a town school district officer in the name of the town school district. If the action is given against such officers, it shall be brought against such town or town school district, as the case may be.

Id.

The Vermont Supreme Court has held than an action against a municipal officer is barred by 24 V.S.A. § 901(a). *Gallipo v. City of Rutland*, 173 Vt. 223, 238, 789 A.2d 942, 953 (2001) (affirming trial court's decision that action against a town officer must be brought against the town, not the municipal officer); *see also In re Town Hwy. No. 20*, 2012 VT 17, ¶ 55, n. 7, 191

[5] The Court may take judicial notice of the meeting minutes on a motion to dismiss because they are public documents that Plaintiffs had notice of and because the District's decision, as set forth in the minutes, is the genesis for Plaintiffs' lawsuit and thus is integral to the Complaint. *See Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991).

[6] The Court may consider the MOU. *See* FN5.

Vt. 231, 45 A.3d 54, 75 (noting that "by statute, Rhodes [an aggrieved landowner] was required to sue the Town for the acts of its officers. 24 V.S.A. § 901(a) (requiring that any suit against town officers 'shall be brought against such town.'"). This Court has also acknowledged that 24 V.S.A. § 901(a) requires suit against the municipality. *Galipeau v. Stemp*, No. 5:14-CV-55, 2016 WL 3190659, at *15 (D. Vt. June 6, 2016). Indeed, a recent decision from the Vermont Supreme supports this interpretation. *Civetti v. Turner*, 2020 VT 23, ¶ 19, 212 Vt. 185, 233 A.3d 1056 ("In 1974, the Legislature amended the statute [24 V.S.A. § 901] to require that actions against any municipal officer be brought against the municipality….")

Because Mr. Flinn is being sued for his role in the District's decision not to renew its operating agreement with GWI, and for alleged misrepresentations made in a Limited Offering Memorandum issued by the District, Plaintiffs cannot maintain their action against him. To the extent that they have a cause of action at all, it lies against the District. *Bates v. Town of Cavendish, Vermont*, 735 F. Supp. 3d 479, 501, n. 11 (D. Vt. 2024).

B. Mr. Flinn is Entitled to Statutory Immunity Under 24 V.S.A. § 901a.

In 2002, the Vermont legislature passed the municipal immunity statute, seeking "to ensure more comprehensive protection against tort liability for municipal employees, analogous to that enjoyed by state employees." *Civetti*, 2020 VT 23, ¶ 28. The statute— 24 V.S.A. § 901a(b)—provides that "[w]hen the act … of a municipal employee acting within the scope of employment is alleged to have caused … injury to persons … the exclusive right of action shall lie against the municipality that employed the employee…;and no such action may be maintained against the municipal employee…."

The statutory definition for a "municipal employee" is broad and includes "a volunteer whose services have been requested by the legislative body of a municipality; a volunteer whose services have been requested by a municipal officer." 24 V.S.A. § 901a(a); *see also Civetti*, 2020

VT 23, ¶¶ 15 (noting that § 901a broadly defines the class of employees covered by the statute). Mr. Flinn is unquestionably a municipal employee under the statute. As chair of the Governing Board, he provides his services on a volunteer basis and provides those services at the request, and for the benefit of, a legislative body. (Exh. 1, ¶ 47); 30 V.S.A. §§ 3057, 3059-3060.

The conduct at issue, Mr. Flinn's and the District's action on information contained in a video that Mr. Flinn received concerning GWI's plans for servicing the District's network falls squarely within the scope of his authority and the services he provided the District. As chair, Mr. Flinn was duty bound to pass along relevant information to the Governing Board and to take GWI's plans into consideration as part of contract negotiations with GWI. Indeed, it would have been a gross abdication and neglect of his duties had Mr. Flinn not shared this information with other board members.

Likewise, any misrepresentations—which there are none—contained in the Limited Offering Memorandum are not actionable because they arise from the District's actions. Any role Mr. Flinn played in the creation of that document would fall squarely within his role as chair of the District entitling him to statutory immunity.

C. Common Law Official Immunity Bars Plaintiffs' Claims.

Mr. Flinn is also entitled to common law official immunity. Vermont recognizes two types of official immunity:

> Absolute immunity is generally afforded to judges ... legislators, and the highest executive officers, where the acts complained of are performed within their respective authorities. Only qualified immunity is extended to lower level officers, employees, and agents. The latter form of immunity is qualified in the sense that it requires several elements, including a showing that the government officials were 1) acting during the course of their employment and ...

> within the scope of their authority; 2) acting in good faith; and 3) performing discretionary, as opposed to ministerial acts.

O'Connor v. Donovan, 2012 VT 27, ¶ 6, 191 Vt. 412, 48 A.3d 584.

Absolute immunity applies to officials who occupy a significantly high position within government. *See Abdel-Fakhara v. Vermont, No*. 5:21-CV-198, 2022 WL 4079491, at *14 (D. Vt. Sept. 6, 2022), aff'd, No. 22-2543, 2023 WL 3486236 (2d Cir. May 17, 2023). The Vermont Supreme Court has extended this immunity to state attorneys. *O'Connor,* 2012 VT. at ¶ 21. It also applies to government agency commissioners and department heads. *Curran v. Marcille,* 152 Vt. 247, 565 A.2d 1362 (1989).

Once the Court determines that an official qualifies for absolute immunity, the only consideration left for the Court is whether "the acts complained of are performed within their respective authorities." *O'Connor*, 2012 VT at ¶ 6. This is because "[a]n official's malicious motive or intent is "irrelevant, since a good-faith test is imposed only when qualified immunity is available." *Id*. ¶ 6, n. 2 (quoting *Levinsky v. Diamond*, 151 Vt. 178, 193–94, 559 A.2d 1073 (1989)); *see also Abdel-Fakhara*, 5:21-CV-198, 2022 WL 4079491, at *16 (Absolute immunity "applies to actions motivated by malice."). Because the motives and intent of an official are irrelevant, the doctrine provides not only immunity from liability, but immunity from suit. *O'Connor*, 2012 VT at ¶ 6, n. 2 (emphasis added).

Mr. Flinn is entitled to absolute immunity against Plaintiffs' claims. As chair of a legislative body (the Governing Board), he is charged with overseeing, administering and supervising a vast and sprawling communications network that services 31 Vermont Towns. His actions affect thousands of people, people that have come to depend on robust phone and internet connection for work, medical care, banking, and access to information that affects all aspects of their lives. *See Scheuer v. Rhodes*, 416 U.S. 232, 246–47, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)

(recognizing that "higher officers of the executive branch" may require greater protection "since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite" and therefore the range of protected discretion "must be comparably broad"). The buck stops with him. There is no higher official. No one has a broader range of responsibilities and duties than him. *Barr*, 360 U.S. at 573–74. Given his position, he is cloaked with absolute immunity.

Even if this Court determines that absolute immunity does not apply, Mr. Flinn is unquestionably entitled to qualified immunity. Qualified immunity "protects '[l]ower-level officers, employees and agents' who act in good faith within the scope of their authority and who 'perform[ ] discretionary, as opposed to ministerial acts.'" *Civetti*, 2020 VT 23, ¶ 34 (quoting *Levinsky v. Diamond*, 151 Vt. 178, 183-85, 559 A.2d 1073 (1989). The doctrine's purpose is "to protect officials from exposure to personal tort liability that could (1) hamper their ability to effectively discharge their duties and (2) subject their discretionary determinations to review by a judicial system ill-suited to assess the full scope of factors involved in such determinations." *Baptie v. Bruno*, 88 A.3d 1212, 1216 (Vt. 2013). The defense applies to municipal officers and employees. *Civetti*, 2020 VT 23, ¶ 34. It shields police officers from liability. *Baptie*, 2013 VT 117, ¶ 13, 88 A.3d 1212.

Here, Mr. Flinn is undeniably entitled to qualified immunity. He is a municipal director and officer, who, as argued above, is being sued for carrying out his statutory duties. These duties, the sharing of information with his constituents, and use of that information in contract negotiations (and alleged role in the creation of the Limited Offering Memorandum) are clearly discretionary in nature.

In sum, because Mr. Flinn is entitled to official immunity, Plaintiffs' Complaint fails to state a claim upon which relief can be granted and should be dismissed.

3. Plaintiffs' Complaint Fails to Allege a Trade Secrets Violation.

Mr. Flinn moves to dismiss Plaintiffs' statutory trade secrets claim because the Complaint does not identify the specific trade secrets that were allegedly misappropriated. To establish a prima facie trade secrets violation, Plaintiffs must allege facts that plausibly show that Mr. Flinn obtained information that meets the statutory definition of a trade secret. *Synventive Molding Sols., Inc. v. Injection Molding Sys., Inc*., No. 2:08-CV-136, 2009 WL 10678880, at *2 (D. Vt. Dec. 7, 2009) (granting Defendant's motion to dismiss for failure to state a trade secrets violation claim). 9 V.S.A. § 4601(3) defines a "trade secret" as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other person who can obtain economic value from its disclosure or use."

"Alleging the existence of general categories of confidential information, without providing any details to generally define the trade secrets at issue, does not give rise to a plausible allegation of a trade secret's existence." *Elsevier Inc. v. Dr. Evid., LLC*, No. 17-CV-5540 (KBF), 2018 WL 557906, at *6 (S.D.N.Y. Jan. 23, 2018); *see also I Candy by JW LLC v. Spin Master Ltd*., No. 17-CV-3131(SJF)(SIL), 2018 WL 11697440, at *18 (E.D.N.Y. June 19, 2018) ("[T]o survive a motion to dismiss, a party alleging that it owns a trade secret must put forth specific allegations as to the information owned and its value.") Boiler plate conclusory allegations that a defendant misappropriated "pricing," "marketing strategies", "business plans," "business model," "manufacturing processes," and "distribution network" are not sufficient to give rise to a plausible allegation of a trade secret's existence. *Id*. The rationale for requiring more than a general category of information is simple, "otherwise any claimant could survive a

motion to dismiss a trade secrets claim with conclusory statements that simply restate the elements of a trade secret." *Elsevier*, 2018 WL 557906, at * 6.

Plaintiffs allege that Mr. Flinn violated Vermont's trade secrets statute by misappropriating a recording that contained "GWI's economics, sales strategy, business processes…[and] strategies for reaching a renewed Operating Agreement." (Doc 1., ¶ 16). These conclusory allegations are insufficient to state a claim upon which relief may be granted. To support their claim, Plaintiffs must put forth something more than the general categories of information. *Elsevier*, 2018 WL 557906, at * 6. For example, Plaintiffs could have identified and briefly explained the type of business processes and economic strategies that were allegedly misappropriated. The Complaint, however, contains no such details and only includes general allegations that simply do not give rise to a plausible trade secrets claim.

4. Plaintiffs' Complaint Fails to Allege Tortious Interference Claims.

Plaintiffs allege two tortious interference claims – (1) tortious interference with contract and (2) tortious interference with prospective business relationship.[7] Both claims fail as a matter of law because as the chairman of the District, Mr. Flinn is the District, not a third party to the contract negotiations.

A. Plaintiffs' Tortious Interference with Contract Claim Fails.

Plaintiffs' tortious interference with contract claim fails because as chair of one of the contracting parties (the District), Mr. Flinn cannot be liable for interfering with GWI's contract and Plaintiffs fail to allege that Mr. Flinn's actions caused the District not to perform with GWI.

In *Williams v. Chittenden Tr. Co*., 145 Vt. 76, 80, 484 A.2d 911 (1984), the Vermont Supreme Court described the elements for a tortious inference with contract claim:

[7] In Vermont, this tort is referred to as tortious interference with prospective *contractual relations*.

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) *between another* and a third person *by inducing or otherwise causing the third person not to perform the contract*, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Id. (emphasis added).

At its very core, the tort requires that the interference come from a third party to the contract. *Stone v. Town of Irasburg*, 2014 VT 43, ¶ 66, 98 A.3d 769 ("While the elements are described by courts in various ways, under any definition of this tort, the interference with the contract…must come from a third party."); *see also Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454, 459 (1994) (delineating elements of intentional interference claim and emphasizing that tort requires interference from third party, who has no interest in *383 contract); *Diederich v. Yarnevich*, 40 Kan.App.2d 801, 196 P.3d 411, 418 (2008) (affirming dismissal of tortious interference claim on grounds that claim requires interference from third party unrelated to employment contract); *Farrow v. St. Francis Med. Ctr*., 407 S.W.3d 579, 602 (Mo.2013) (setting forth elements of tortious interference with contract or business expectancy and explaining that action will lie against third party only); *Rutherfoord v. Presbyterian–Univ. Hosp*., 417 Pa. Super. 316, 612 A.2d 500, 507–08 (1992) (explaining that cause of action "requires three separate parties; parties to a contract or employment relationship cannot assert this cause of action against each other").

In *Stone*, the Vermont Supreme Court held that Plaintiff, Treasurer of the Town of Irasburg, failed to allege a prima facie tortious interference claim against the Town based on the selectboard acting unlawfully and requiring her to raise a bond due to her alleged mistakes. *Stone*, 2014 VT 43, ¶ 1. In reaching this decision, the Court found that "[b]ecause the selectboard members are agents of the Town and not third parties, plaintiff has failed to allege interference

by a third party, and has not pled a prima facie case for tortious interference." *Id*. at ¶ 67. The same logic applies here. As chair of the Governing Board of the District, statutorily charged with administering the District's contract with GWI, Plaintiff cannot show tortious interference by a third party.

Additionally, Plaintiffs do not allege that Mr. Flinn's actions were done with the purpose of causing the District to breach its existing contract with GWI. Plaintiffs allege only that Mr. Flinn's action in "commandeering and directing Employee 1" "violate the Operating Agreement." (Doc. 1, ¶¶ 50-51). "To be liable for interference with a contractual relationship, the defendant must have intentionally and improperly induced or caused the owner not to perform under its contract with the plaintiff." *Williams,* 145 Vt at 82 (emphasis added).

Finally, Plaintiffs do not allege—as they have no factual basis to—that Mr. Flinn's actions caused them damage or pecuniary loss. This is because the District has not breached its existing operating agreement with GWI and thus GWI has no breach of contract damages.

In short, Plaintiffs' tortious interference with contract claim fails as a matter of law and should be dismissed.

B. Plaintiffs' Tortious Interference with Prospective Business Relationship Fails.

A claim for tortious interference with prospective contractual relations "protects the same interest in stable economic relationships as does the tort of interference with contract, but applies to business relationships not formally reduced to contract." *Gifford v. Sun Data, Inc*., 165 Vt. 611, 613, 686 A.2d 472 (1996). "To prevail on a claim of tortious interference with prospective contractual relations, a plaintiff must prove that the defendant interfered with business relations existing between the plaintiff and a third party, either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair, or improper." *Id*. Plaintiffs' tortious interference with prospective contractual relations fails for the same reasons as Plaintiffs' tortious

interference with contract claim: lack of a third party. Additionally, not all competitive business practices give rise to a claim, and a defendant is not liable merely for advancing its own interest unless defendants' methods are criminal or fraudulent. *Id*. Plaintiffs' Complaint neither alleges that Mr. Flinn's acceptance and dissemination of the GWI employee video was criminal, nor that Mr. Flinn obtained the information through fraud.

Finally, it is worth emphasizing that Plaintiffs' tortious interference with prospective contractual relations claim is predicated upon the District's decision not to renew its operating agreement with GWI—an operating agreement that by its own terms is due to expire. Thus. Plaintiffs' expectations about the profits they expected to receive are far from realistic and do not support a claim for damages caused by Mr. Flinn. *Id*. at 614, FN2 (noting that the elements of the tort include "damage to the party whose relationship or expectancy was disrupted; and […] proof that the interference caused the harm sustained.")

Based on the foregoing, Plaintiffs' tortious interference with prospective contractual relations claim fails as a matter of law and should be dismissed.

5. Plaintiffs' Complaint Fails to State A Claim for Unfair Competition.

Plaintiffs assert a common law claim for unfair competition based on Mr. Flinn's alleged misappropriation of information contained on an internal recording and use of that information "to unfairly disadvantage GWI as part of an ongoing negotiation to renew the Operating Agreement and to bolster F.X. Flinn's scheme to establish a management company…." (Doc. 1, ¶¶ 36-37). Plaintiffs' allegations do not support a prima facie claim for unfair competition because Plaintiffs do not allege that Mr. Flinn has used allegedly misappropriated information in competition.

To establish a common law claim for unfair competition based on misappropriation, Plaintiffs must allege that Defendant used Plaintiffs' product or business assets in competition

and that use resulted in an unfair advantage. *See Maguire v. Gorruso*, 174 Vt. 1, 7, 800 A.2d 1085 (2002) ("[t]he gravamen of unfair competition through misappropriation—in contrast—is the unfair competitive use to which defendants put the property); *see also United States Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc*., 865 S.W.2d 214, 218 (Tex.App.1993) (elements of misappropriation include defendant's unfair use of plaintiff's product in competition, thereby gaining unfair advantage); *Mercury Record Prods., Inc. v. Econ. Consultants, Inc*., 64 Wis.2d 163, 218 N.W.2d 705, 710 (1974) ("essence" of unfair competition-misappropriation claim is "defendant's use of the plaintiff's product or a copy of it in competition with the plaintiff and gaining an advantage in that competition"). Plaintiffs' Complaint makes clear that Mr. Flinn does not have an operational company that is in direct competition with GWI yet. (Doc. 1, ¶¶ 21-24, 26.) Said another way, Plaintiffs' unfair competition claim is not ripe; allegations of some future risk that Mr. Flinn will use misappropriated information in competition are not enough to give rise to a plausible claim for unfair competition.

Because Plaintiffs fail to allege that Mr. Flinn has used information in direct competition, Plaintiffs' unfair competition claim should be dismissed.

6. <u>Plaintiffs' Complaint Fails to State A Claim for Negligent Misrepresentation</u>.

Plaintiffs' negligent misrepresentation claim is predicated upon representations made in a Limited Offering Memorandum accompanying the District's sale to the public of $7,530,000 in municipal revenue bonds. (*Id*., ¶¶ 13, 24, 25, 27). Plaintiffs aver that ECFiber, and Mr. Flinn, as Chair of the Governing Board of ECFiber, made representations in a Limited Offering Memorandum concerning the District's historical relationship with GWI that it relied upon in investing capital and deploying human resources to the ECFiber network. (*Id*., ¶¶ 54-62). The gist of Plaintiffs' claim is that the 2023 offering memorandum, created for the explicit purpose of soliciting revenue bond investors, obligates the District to have GWI service its network in

perpetuity. As preposterous as this theory is, the claim fails because the offering memorandum was not prepared by Mr. Flinn, the information conveyed in the offering memorandum was not intended for the Plaintiffs, and Plaintiffs' allegations are based on future events.[8]

The Vermont Supreme Court has adopted the Restatement (Second) of Torts § 552(1) definition of negligent misrepresentation, which states:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Limoge v. People's Trust Co., 168 Vt. 265, 268-69 (1998).

The Limited Offering Memorandum was prepared by the District's attorneys, on behalf of the District, not Mr. Flinn. (Exh. 2. at 1)[9] ("The East Central Vermont Telecommunications District (the "District") is issuing its Project Revenue Bonds, Series 2023A (the "Series 2023A Bonds")). Because the document was created by the District, and its attorneys (not Mr. Flinn), Plaintiffs cannot as a matter of law establish that he supplied or communicated a false statement.

Additionally, the offering memorandum was issued to a limited class of persons: "Qualified Institutional Buyers" and "Accredited Investors". (*Id*.) ("The series 2023A bonds will be offered only to "Qualified Institutional Buyers"…and "Accredited Investors"…to whom this limited offering memorandum has been furnished."); *see also Id*. at 9 ("This Limited Offering Memorandum is being furnished solely for consideration by qualified institutional buyers and

[8] Although the District could conceivably be liable for a Board Chairman's negligent misrepresentations under a theory of *respondeat superior*, the doctrine is a one-way street; the person filling the role of a Board Chairman cannot be liable for the District's conduct.

[9] The page numbers referenced in this motion are based on the bates numbers that appear in the lower right-hand corner of the exhibit.

accredited investors….") It was never intended for GWI. Because Plaintiffs are neither qualified institutional buyers nor accredited investors (nor do they claim to be), neither the District (nor Mr. Flinn) owed them a duty of care with respect to alleged representations made in the document. *Glassford v. Dufresne & Associates, P.C.*, 2015 VT 77, ¶¶ 12 -16.

In *Glassford*, the Vermont Supreme Court made clear that liability under Section 552, Subsection (1) is limited:

> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Id. at ¶ 13.

Liability under subsection 2 is limited to persons whose use the document was intended. *Id*. at ¶ 14-15; Restatement (Second) of Torts § 552 (1977), cmt. h. ("The rule stated in this Section subjects the negligent supplier of misinformation to liability only to those persons for whose benefit and guidance it is supplied.") As is evident from the Limited Offering Memorandum, the document was intended solely for investors. Therefore, there is no cause of action under subsection 2. Nor is there liability under subsection 3. As made clear by the decision in *Dufresne*, liability under subsection 3 is limited "to any of the class of persons for whose benefit the duty is created." *Id*. at ¶ 16. Again, to the extent the District (or Mr. Flinn for that matter) had any duty with respect to the District's issuance of the Limited Offering Memorandum, that duty extended only so far as the bond holders.

Finally, the alleged actionable statements, all taken out of context and cherry picked from the Limited Offering Memorandum do not plausibly support the element of falsity or justifiable reliance. The statements, include the District's (1) historical use of an "experienced internet service provider to run the ECFiber business" (Doc. 1, ¶ 13);[10] (2) plans (in 2023) to "undertake the current and future phases of the construction of the Network, and operate and manage the Network with GWI Vermont" (*Id*., ¶ 24);[11] and (3) (2023) financial projections "based on the expected average of all purchase services." (*Id*., ¶ 25).[12] Put another way, Plaintiffs' Complaint allegations do not relate to then existing misrepresentations but to future events, the renewal of the operating agreement, a renewal that was never guaranteed. Such allegations do not support a negligent misrepresentation claim in the Second Circuit. *Hydro Inv'rs, Inc. v. Trafalgar Power Inc*., 227 F.3d 8, 20–21 (2d Cir. 2000) (A negligent misrepresentation claim must be based on an "alleged misrepresentation [that is] be factual in nature and not promissory or relating to future events that might never come to fruition.") This Court need not engage in any fact finding, however, to dismiss this claim because the statements were not made by Mr. Flinn and were intended for investors only. Therefore, Plaintiffs fail to allege a plausible negligent misrepresentation claim.

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[10] This statement is taken from the background section provided to prospective investors about the historical development of the district and reads, "Both ECF [*note: interlocal contract based ECF Holdings LLC was the predecessor to the CUD 2008-2015*] and the District have always contracted with an experienced internet service provider to run the ECFiber business subject to broad policies established by the board through contractual mechanisms designed to prevent interference with proper business practices." (Exh. 2, at 17).

[11] This statement provides prospective investors with an overview of the Network. The full sentence reads, "The District will undertake the current and future phases of the construction of the Network, and operate and manage the Network with GWI Vermont under the Operating Agreement and Assignment from ValleyNet to GWI Vermont, described below and attached as APPENDIX E." (Exh. 2, at 39). Nothing about this statement is false, the District currently operates and manages the Network with GWI and will continue to do so until December 31, 2025. Plaintiffs do not allege otherwise.

[12] This statement is taken out of the section concerning the risk factors posed by investing in the municipal bonds being offered. It puts prospective investors on notice that District revenue streams may fluctuate. (Exh. 2, at 46).

7. Plaintiffs' Complaint Fails to State A Claim for Promissory Estoppel.

Plaintiffs' promissory estoppel claim must be dismissed because it suffers from the same fatal defect as the negligent misrepresentation claim: it is based on statements made by the District, not Mr. Flinn.

To establish a prima facie claim for promissory estoppel, Plaintiff must allege a promise made by the defendant, that the defendant should reasonably expect to induce action or forbearance by the promisee or third party, and which does induce such action or forbearance. *Nelson v. Town of Johnsbury Selectboard*, 2015 VT 5, ¶ 55, 115 A.3d 423 (emphasis added). "The promise must be more than a mere expression of intention, hope, desire, or opinion, which shows no real commitment. *Id*. (internal citation omitted). In the absence of an actual promise, a claim for promissory estoppel fails as a matter of law. *Id*. at ¶ 57.

Plaintiffs allege that in the Limited Offering Memorandum, Mr. Flinn represented that "ECFiber 'will undertake the current and future phrases [sic] of the construction of the Network, and operate and manage the Network with GWI Vermont under the Operating Agreement and Assignment from ValleyNet to GWI Vermont." (Doc. 1, ¶ 65). Plaintiffs contend that this representation constitutes a promise to GWI that Mr. Flinn should have reasonably expected to induce action or forbearance. (*Id*. at ¶ 66).

Plaintiffs' Complaint fails to allege a claim for promissory estoppel because the statements were not made by Mr. Flinn. Moreover, the District's statement in the offering memorandum does not constitute a promise. Far from being a promise, the cherry-picked statement, wholly taken out of context, was made in the opening sentence of the Limited Offering Memorandum providing investors with a summary of the Network including among other things, District policies, finances, future construction plans, customer connections, technology, physical security, billing practice, etc. (Exh. 2, at 39). In sum, because Plaintiffs fail

to plausibly allege a promise made by Mr. Flinn, Plaintiffs' promissory estoppel claim fails as a matter of law.

8. Plaintiffs' Complaint Fail to State A Claim for Unjust Enrichment.

Plaintiffs' unjust enrichment claim fails to state a claim upon which relief may be granted because the Complaint does not allege that Plaintiffs conferred a benefit on Mr. Flinn. (Doc. 1, ¶ 74) ("GWI has conferred numerous benefits to ECFiber pursuant to the Operating Agreement.") (Emphasis added). To establish a claim for unjust enrichment, Plaintiffs' must allege that "(1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value." *Reed v. Zurn*, 2010 VT 14, ¶ 11, 992 A.2d 1061 (quoting *Center v. Mad River Corp*., 151 Vt. 408, 412, 561 A.2d 90, 93 (1989). Because the Complaint does not establish all of the elements of a prima facie cause of action for unjust enrichment, the claim must be dismissed.

CONCLUSION

In conclusion, Plaintiffs' Complaint fails to state a claim upon which relief may be granted. Accordingly, Defendant's Motion to Dismiss should be granted and Plaintiffs' Complaint dismissed with prejudice.

Dated at Burlington, Vermont, this 28th day of April 2025.

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