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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 15

Justice

Index Number : 600907/2007

EL-SHERIF, NABIL M.D.

INDEX NO. _____

VS

FREEMAN, RICHARD W., M.D.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

[illegible] on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/16/07

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

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NABIL EL-SHERIF, M.D.,

Plaintiff,

Index No.
600907/07

-against-

RICHARD W. FREEMAN, M.D., EDMUND BOURKE, M.D., JOHN KASSOTIS, M.D., MICHAEL BRENNAN, ALAN SHALITA, M.D., EUGENE FEIGELSON, M.D., JOHN LAROSA, M.D., STEPHEN GOLDFINGER, M.D., STANLEY FISHER, M.D., EUGENE DINKEVICH, M.D., LISA DRESNER, M.D., MARGARET GOLDEN, M.D., and EDWARD CARBONELL, M.D.,

Defendants.

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WALTER TOLUB, J.:

Motion Nos. 001 and 002 are consolidated for disposition. In Motion Sequence No. 001, defendants Richard W. Freeman, M.D., Edmund Bourke, M.D., John Kassotis, M.D., Michael Brennan, Alan Shalita, M.D., John Larosa, M.D., Stephen Goldfinger, M.D., Eugene Dinkevich, M.D., Lisa Dresner, M.D., and Edward Carbonell, M.D. move for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint for failure to state a cause of action. Plaintiff Nabil El-Sherif, M.D. moves for an order granting him leave to amend his complaint.

In Motion Sequence No. 002, the remaining defendants, Euguence Feigelson, M.D., Stanley Fisher, M.D. and Margaret Golden, M.D., also move for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint for failure to state a cause of action. Plaintiff Nabil El-Sherif, M.D. moves for an order

granting him leave to amend his complaint.

Plaintiff, a physician at State University of New York Downstate Medical Center (SUNY Downstate) for over 27 years, commenced this action against 12 physicians, and one labor relations representative, former or current SUNY Downstate employees. Plaintiff claims that defendants acted in concert to effect a suspension of his clinical privileges, to terminate him and to not renew his faculty appointment, with the conspiratorial objective of removing him from his position at SUNY Downstate. The complaint asserts the following six causes of action allegedly arising from the conspiracy: tortious interference with contract rights (first); tortious interference with economic advantage (second); violations of 42 United States Code Annotated (USCA.) §§ 1983, 1985 and 1981 (third, fourth and fifth, respectively); and prima facie tort (sixth).

Defendants now move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action. On a motion pursuant to CPLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (id.; Morone v Morone, 50 NY2d 481 [1980]). Affidavits and other

evidence submitted by plaintiffs may be considered for the limited purpose of remedying any defects in the complaint and thus preserving inartfully pleaded, but potentially meritorious claims (Rovello v Orofino Realty Co., Inc., 40 NY2d 633 [1976]).

Defendants move to dismiss the first cause of action for tortious interference with contract rights.

In order to establish the claim of tortious interference with contract, the following four elements are required: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages resulting therefrom to plaintiff (Kronos, Inc. v. AVX Corp., 81 NY2d 90 [1993]). An essential element of this claim is that the breach of contract would not have occurred but for the activities of the defendant (Cantor Fitzgerald Associates, L.P. v Tradition North America, Inc., 299 AD2d 204 [1st Dept 2002]).

Defendants note that plaintiff bases this claim on what he characterizes as two distinct contracts, the SUNY Downstate's hospital bylaws and the collective bargaining agreement between the United University Professions, plaintiff's union, and the State of New York. Defendants argue that a claim for tortious interference could not be stated with either document, since (1)

the by-laws do not constitute a contract to which plaintiff is a party, and plaintiff does not allege that SUNY Downstate breached its bylaws; and (2) plaintiff was not a party to the collective bargaining agreement, and the collective bargaining agreement was not breached.

It is well settled that an organization's bylaws can form the terms of an enforceable agreement (see Falk v Anesthesia Assocs. of Jamaica, 228 AD2d 326 [1st Dept], lv dismissed 89 NY2d 916 [1996]). Medical or hospital staff bylaws qualify as the foundation for a claim for tortious interference with contract (id.; see also Gianelli v. St. Vincent's Hospital, 160 AD2d 227 [1st Dept 1990]). Thus, physicians denied staff privileges may assert such a claim, provided that the wrong claimed is the failure to comply with the bylaws (see Chuz v St. Vincent's Hosp., 186 AD2d 450, supra; see also Mason v Central Suffolk Hosp., 305 AD2d 556 [2nd Dept 2003], affd 3 NY2d 343 [2004]). However, if the true nature of the claim is the wrongfulness of the termination, and claims of bylaws breach are secondary, then the claims are barred (see Falk v Anesthesia Assocs. of Jamaica, 228 AD2d 326, supra; see also Mason v Central Suffolk Hosp., 305 AD2d 556, supra).

Contrary to defendants' argument, plaintiff, a physician at SUNY Downstate whose privileges were suspended, may maintain a claim for tortious interference with contract based on

violations of the hospital bylaws (see Chuz v St. Vincent's Hosp., 186 AD2d 450, supra). Considering the complaint, plaintiff's affidavit and supporting exhibits, and giving the plaintiff the benefit of every possible favorable inference (see Rovello v Orofino Realty Co., 40 NY2d 633, supra), plaintiff has sufficiently plead a breach of the hospital bylaws by SUNY Downstate. The gravamen of his claim focuses on violations of the hospital bylaws, including; (1) the failure to provide him with a hearing regarding his suspension within 30 days; (2) the failure to provide him with the documents he requested for his defense in the hearing; and (3) the failure to promptly notify him that his admitted privileges had been reinstated as of April 15, 2005.

Additionally, plaintiff asserts special damages arising from the alleged violations in excess of $68,000, consisting of attorneys' fees incurred to defend himself at the hearing and to commence an Article 78 proceeding in the New York State Supreme Court, Kings County for an order compelling that the hearing proceed expeditiously, and subsequently, a motion for contempt for failing to comply with the Judge's order directing the reconvening and continuation of the hearing until its conclusion. Therefore, in liberally construing the complaint, plaintiff's affidavit and exhibits, he sufficiently pleads a claim for tortious interference with contract based on the bylaws.

However, with respect to that branch of his claim purporting to state a claim for tortious interference with contract based on the collective bargaining agreement between the United University Professions and the State of New York, it is dismissed. This court is unable to glean from his papers how this agreement was allegedly breached.

Therefore, plaintiff's first cause of action for tortious interference with contract is dismissed solely to the extent that it is based on the collective bargaining agreement.

The second cause of action purports to state a claim for tortious interference with economic advantage. Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship, but for defendants' wrongful conduct (see Vigoda v DCA Productions Plus Inc., 293 AD2d 265 [1st Dept 2002]).

Here, plaintiff alleges conclusorily that defendants "wrongfully interfered with plaintiff's right to practice medicine and earn a living" (Complaint, ¶ 56). Since plaintiff does not name the parties to any specific contract he would have obtained had his privileges not been suspended, he fails to satisfy the "but for" causation required by this tort (see id.).

Additionally, plaintiff fails to identify the wrongful means used by defendants to interfere with any prospective economic relations. "'Wrongful means' include physical violence,

fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure,' more than simple persuasion is required" (Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 191 [1980]).

Therefore, plaintiff's second cause of action for tortious interference with economic advantage is dismissed.

The third cause of action, characterized as one for the "violation of rights under color of law," alleges that defendants violated his rights to

> earn a living and practice a profession by conspiring to see that his appointment at [SUNY] Downstate was non-renewed on a pretext, obtaining the summary suspension of his privileges at [SUNY] Downstate when there was no legitimate basis to do so, and delaying and obstructing his appeal of that action to an ad hoc committee as if such actions were in compliance with law when in actuality such conduct violated rights protected by the laws and Constitution of the United States and 42 USCA § 1983

(Complaint, ¶ 59).

With respect to this claim, defendants allege that since plaintiff alleges a conspiracy between defendants, this claim must be commenced under 42 USCA § 1985. However, contrary to defendants' argument, a conspiracy claim may also be asserted under section 1983 (see Martinez v Golding, 499 F Supp 2d 561 [SDNY 2007]). In a conspiracy claim under section 1983, plaintiff must demonstrate "'(1) an agreement between two or more state actors or a state actor and a private party[;] (2) to act

in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages'" (id. at 570, quoting Bussey v Phillips, 419 F Supp 2d 569, 586 [SD NY 2006]). "A plaintiff proceeding with a § 1983 claim must specifically identify the constitutional or federal rights that have been violated, and must demonstrate that the defendant acted under color of state law to deprive the plaintiff of those rights" (Newman v Associated Press, Inc., 112 F3d 504, 504 [2nd Cir 1996]; see also Ludwig v City of Jamestown, New York, ___ F Supp 2d ___, 2007 WL 2808561 [WD NY 2007]). Additionally, personal involvement of defendants in the alleged constitutional deprivation is a prerequisite to an award of damages under section 1983 (Dyno v Village of Johnson City, 2007 WL 1544816 [2nd Cir 2007]).

Here, plaintiff fails to identify any specific constitutional or federal provisions that were infringed by defendants (see Ludwig v City of Jamestown, New York, ___ F Supp 2d ___, 2007 WL 2808561, supra; Chesney v Valley Stream Union Free School Dist. No. 24, 2007 WL 1288137 [ED NY 2007]). Additionally, plaintiff does not allege any facts that would support an inference showing "defendants acted 'in a willful manner, culminating in an agreement, understanding or "meeting of the minds" that violated '[his] rights, privileges, or immunities secured by the Constitution or federal courts'" (Aziz Zarif

Shabazz v Pico, 994 F Supp 460, 467 [SD NY 1998], quoting Hameed v Pundt, 964 F Supp 836, 839 [SD NY 1997]). Thus, plaintiff's third cause of action under 42 USCA § 1983 is dismissed.

The fourth cause of action purports to allege a conspiracy to interfere with his civil rights under 42 § USCA 1985. To state a claim under this section, plaintiff must allege four elements: "'(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States'" (Turturro v Continental Airlines, 334 F Supp 2d 383, 397 [SD NY 2004], quoting United Bhd. of Carpenters and Joiners v. Scott, 463 US 825, 828-29 [1983]; see also Mian v Donaldson, Lufkin & Jenrette Securities Corp., 7 F3d 1085, 1087-1088 [2d Cir 1993]. There must be evidence that the conspirators' action was "motivated by 'some racial or perhaps otherwise class-based invidious discriminatory animus'" (Mian v Donaldson, Lufkin & Jenrette Securities Corp., 7 F3d at 1088 [citation omitted]; see also Grillo v New York City Transit Authority, 291 F3d 231 [2d Cir 2002]). To support a claim for conspiracy under 42 USCA § 1985, a plaintiff "'must provide some factual basis supporting a

meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end'" (Turturro v Continental Airlines, 334 F Supp 2d at 397, quoting Webb v. Goord, 340 F3d 105, 110 [2d Cir 2003]). More than conclusory or vague allegations of a conspiracy are needed to state a claim under section 1985 (see Webb v Goord, 340 F3d 105, supra).

In support of this claim, plaintiff alleges that "defendants have conspired to discriminate against plaintiff, and violated his right to retain an academic appointment and clinical privileges at [SUNY] Downstate in violation of 42 USCA § 1985" (Complaint, ¶ 62). As argued by defendants, plaintiff did not allege any specific facts supporting his allegations either in his complaint, or in his papers in opposition to defendants' dismissal motion demonstrating any type of agreement or meeting of the minds to engage in unlawful conduct between any of the defendants in this action. Further, there are no allegation suggesting that defendants' alleged conduct was motivated by some racial or class-based discriminatory animus. The allegation that "Egypt is plaintiff's country of origin" (Complaint, ¶ 2), without more, is insufficient to state a claim under this section (see Mian v Donaldson, Lufkin & Jenrette Securities Corp., 7 F3d 1085, supra). Accordingly, the fourth cause of action alleging a conspiracy under 42 USCA § 1985 is dismissed.

The fifth cause of action purports to allege a conspiracy under 42 USCA § 1981, claiming that defendants conspired to discriminate against him on account of his national origin, age and religion. To establish a claim under section 1981, a plaintiff must allege facts supporting the following elements: (1) plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.) (Mian v Donaldson, Lufkin & Jenrette Securities Corp., 7 F3d 1085, supra).

In support of this claim, plaintiff alleges that "defendants conspired to discriminate against plaintiff on account of his national origin, age and religion" (Complaint, ¶ 65). This section, however, does not prohibit discrimination on religion, national origin or age (Anderson v Conboy, 156 F3d 167 [2nd Cir 1998]). Further, the instant complaint fails to offer more than conclusory allegations that he was discriminated against because of his race. Therefore, the fifth cause of action alleging a conspiracy under 42 USCA § 1981 is dismissed.

The sixth cause of action purports to state a claim for prima facie tort. The elements of a cause of action for prima facie tort are the intentional infliction of harm, which results in special damages, without any excuse or justification, by an

act or series of acts which would otherwise be lawful (see Friehofer v Hearst Corp., 65 NY2d 135 [1985]). Recovery could not be had in an action for prima facie tort unless malevolence is the sole motive for the defendants' otherwise lawful act (Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314 [1983]). Additionally, an essential element of the cause of action for prima facie tort is an allegation that plaintiff suffered specific, measurable damages or special damages (Curiano v Suozzi, 63 NY2d 113 [1984]).

The gravamen of plaintiff's claim rests upon the perceived bad faith and malice of defendants in the manner in which they conducted plaintiff's hearing regarding the summary suspension of his clinical privileges. Plaintiff alleges that "defendants intentionally inflicted harm on plaintiff violating his rights and his standing in the medical community and there was no justification for defendant's wrongful conduct" (Complaint, ¶ 68), that the "conduct was not lawful" (id., ¶ 69), and that as a result of defendants' conduct, plaintiff has been injured "in an amount that exceeds the jurisdictional limit of all lower courts which would otherwise have jurisdiction" (id., ¶ 70). Plaintiff supplements his pleadings, in his opposing papers, by claiming, inter alia, that there was "bad faith and malice and an agreed plan to injure" him on the part of defendants. He also asserts that he incurred special damages in

excess of $68,000 in attorneys' fees (plaintiff's Affidavit, ¶ 25).

In liberally construing the complaint and plaintiff's affidavit, he proffers sufficient allegations supporting a claim that the alleged wrongful conduct of defendants in their management of the hearing process was undertaken with a disinterested malevolence. Further, plaintiff adequately sets forth his specific and measurable loss as a result of defendants' conduct. Thus, plaintiff sufficiently alleges a claim for prima facie tort.

Defendants also argue that this claim is barred by the one year statute of limitations for prima facie tort (see, Havell v Islam, 292 AD2d 210 [1st Dept 2002]). To dismiss a claim on the ground that it is barred by the statute of limitations, defendants bear the initial burden of establishing prima facie that the time in which to sue has expired (see Soscia v Soscia, 35 AD3d 841 [2d Dept 2006]). The burden then shifts to the plaintiff to aver evidentiary facts establishing that the cause of action falls within an exception to the statute of limitations (id.), or raising an issue of fact as to whether such an exception applies (LaRocca v DeRicco, 39 AD3d 486 [2d Dept], lv dismissed 9 NY3d 859 [2007]). A claim for damages for an intentional tort, including a tort not specifically listed in CPLR 215 (3), is subject to a one year limitation period (Havell

v Islam, 292 AD2d 210, supra). Thus, the statute of limitations for a prima facie tort claim is one year (Angel v Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368 [1st Dept 2007]).

Here, defendants claim that, since the material acts complained of, i.e., plaintiff's suspension, disciplinary charges, termination and non-renewal, all occurred in April 2005, the commencement of this action in March 2007 is untimely.

In opposition, plaintiff argues that defendants' alleged wrongful conduct consisted primarily of their continued wrongful actions throughout the hearing process from April 2005 until the final determination of reinstatement in February 2007, which delayed and obstructed the hearing process, thus precluding him from stating all the elements of this claim until after February 2007. Their alleged wrongful conduct consisted of, inter alia, their alleged delay and obstruction of the hearing process regarding his suspension of clinical privileges, their alleged failure to comply with the hospital bylaws throughout the hearing process with respect to, among other things, the expeditious commencement and continuation of the hearing; their alleged non-compliance with the court order directing them to resume the hearing, resulting in plaintiff filing a contempt motion; and their alleged mishandling of the hearing (Complaint, ¶¶ 46 & 47), all allegedly continuing until notification of his reinstatement.

Generally, "it is upon injury that a legal right to relief arises in a tort action and the Statute of Limitations begins to run" (Ackerman v Price Waterhouse, 84 NY2d 535, 541 [1994]). In other words, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint (Kronos, Inc. v AVX Corp., 81 NY2d 90, supra). Here, plaintiff sufficiently set forth a continuous course of intentional tortious conduct by defendants, which extended into the one-year period immediately preceding commencement of this action. Therefore, plaintiff's prima facie tort claim is governed by the continuing tort doctrine, and not barred by the one-year statute of limitation (see Shannon v MTA Metro-North R.R., 269 AD2d 218 [1st Dept 2000]; see also Ain v Glazer, 257 AD2d 422 [1st Dept 1999]). Plaintiff thus establishes the applicability of an exception to the statute of limitations (Savarese v Shatz, 273 AD2d 219 [2nd Dept 2000]).

Accordingly, defendants' motions to dismiss the complaint is granted only to the extent of dismissing the first cause of action for tortious interference with contract based on the collective bargaining agreement between the United University Professions and the State of New York; and the second through fifth causes of action.

Plaintiff cross-moves for leave to amend the complaint to add claims for intentional infliction of emotional distress

and malicious prosecution.

Leave to amend a pleading should be freely given (see CPLR 3025 [b]), except where the proposed amended pleading clearly lacks merit or there is prejudice or surprise resulting directly from the delay (see Barbour v Hospital for Special Surgery, 169 AD2d 385 [1st Dept 1991]). On a motion to amend pleadings, the court should examine, but need not decide, the merits of the proposed new pleading, unless it is patently insufficient on its face (Hospital for Joint Diseases Orthopaedic Institute v James Katsikis Environmental Contractors, 173 AD2d 210 [1st Dept 1991]). The decision as to whether to grant such leave is within the court's sound discretion, and its determination will not be lightly disturbed (see Hickey v Hutton, 182 AD2d 801 [2d Dept 1992]).

To prevail on a cause of action for intentional infliction of emotional distress, a plaintiff must prove four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard the substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress (Marmelstein v Kehillat New Hempstead, __ AD23d ___, 841 NYS2d 493 [1st Dept 2007]). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be

regarded as atrocious and utterly intolerable in a civilized community" (Howell v Post Company, 81 NY2d 115 [1993] [internal quotation marks and citations omitted]).

Here, the complaint and plaintiff's affidavit fail to assert the elements required to support a claim for intentional infliction of emotional distress. This court notes that the conduct ascribed to defendants essentially relates to their failure to comply with the hospital bylaws, and proceed with the hearing in good faith. The conduct complained of does not rise to the necessary level of extreme and outrageous conduct required for this claim (see id.; see also Chime v Sicuranza, 221 AD2d 401 [2nd Dept 1995]). Further, plaintiff fails to allege that defendants intended to cause him severe emotional distress, or that he sustained any emotional duress as a result of defendants' conduct, the other elements required to state this type of claim. Thus, that branch of plaintiff's cross motion for leave to amend the complaint to add a claim for intentional infliction of emotional duress is denied.

The elements of malicious prosecution consist of the initiation of a legal action against plaintiff by defendants, begun with malice and without probable cause to believe it can succeed, and ending in the accused's favor (Purdue Frederick Co. v Steadfast Ins. Co., 40 AD3d 285 [1st Dept 2007]). The legal action can be civil in nature, as long as it interferes in some

way with plaintiff's person or property (id.). "A plaintiff must also allege and prove 'special injury'" (Wilhelmina Models, Inc. v Fleisher, 19 AD3d 267, 269 [1st Dept 2005], quoting Engel v CBS, Inc., 93 NY2d 195, 201 [1999]). A "special injury" must entail "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (Engel v CBS, Inc., 93 NY2d at 205).

Plaintiff here fails to allege special injury beyond "'physical, psychological or financial demands of defending'" the disciplinary hearing (see Howard v City of New York, 294 AD2d 184, 184 [2d Dept 2002], quoting Engel v CBS, Inc., 93 NY2d at 205), or that he suffered "'a highly substantial and identifiable interference with person, property or business'" (id., quoting Engel; see also Fowler v Leahey & Johnson, P.C., 272 AD2d 240 [1st Dept 2000]). Thus, that branch of plaintiff's application for leave to amend the complaint to add a claim for malicious prosecution is denied.

In view of the foregoing, plaintiff's cross motions for leave to amend is denied.

Accordingly, it is

ORDERED that defendants' motions, in Motion Sequence Nos. 001 and 002, to dismiss the complaint is granted only to the extent of dismissing the first cause of action for tortious interference with contract based on the collective bargaining

agreement between the United University Professions and the State of New York; and the second through fifth causes of action; and it is further

ORDERED that plaintiff's cross motions, in Motion Sequence Nos. 001 and 002, for leave to amend is denied; and it is further

ORDERED that defendants are directed to serve an answer or answers to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: 11/16/07

ENTER:

WALTER B. TOLUB J. S. C.