Della Pietra v Poly Prep Country Day Sch.
2016 NY Slip Op 32916(U)
October 7, 2016
Supreme Court, Kings County
Docket Number: 506586/2015
Judge: Loren Baily-Schiffman

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 7 day of October, 2016.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

LISA DELLA PIETRA, Plaintiffs, - against - POLY PREP COUNTRY DAY SCHOOL AND DAVID HARMAN, Defendants.	Index No.: 506586/2015 Motion Seq. # 3 & 4 DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Notice of Motion, Affidavits, Affirmation and Exhibits & Memorandum of Law	1
Affirmation in Opposition & Memorandum of Law	2
Reply Affirmation & Memorandum of Law	3
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits & Memorandum of Law	4
Affirmation in Opposition to Cross-Motion & Memorandum of Law	5
Reply Affirmation & Memorandum of Law	6

Upon the foregoing papers Defendants, Poly Prep Country Day School ("Poly Prep") and David Harman, move this Court for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing Plaintiff's Second Amended Complaint in its entirety or, in the alternative, an Order pursuant to CPLR §3024(b) striking the following paragraphs: 4-5, 18-19, 24-25, 41, 60-62, 99-101,130-136,137-141, 147-150, 167 and footnotes 3, 9, 11-13, 15, 18-19, 21, 23 and 25. Plaintiff moves separately for an Order compelling Defendants to: (1) preserve any and all documents relied upon by Poly Prep's forensic accountant and reported in the November 20, 2015 public announcement within ten (10) days; (2) provide a copy of the litigation hold issued in this case within ten (10) days; or (3) in the alternative, directing Defendants to issue a litigation hold and provide proof there of within ten (10) days.

Background

Plaintiff commenced the instant action on or about May 28, 2015, by service and filing of a Summons and Complaint. Thereafter, Plaintiff served and filed an Amended Complaint on or about June 30, 2015. In lieu of serving an answer Defendants moved to dismiss the Amended Complaint and Plaintiff cross-moved for leave to serve a Second Amended Complaint.[1] On October 15, 2015, Plaintiff was granted leave to serve and file the Second Amended Complaint and Defendants withdrew the original motion to dismiss. Thereafter, in lieu of serving an answer to the complaint, Defendants made the instant motion to dismiss.

Plaintiff was an employee of Poly Prep Country Day School from 2003 until July 21, 2015, when Defendant de facto terminated Plaintiff's employment and retroactively terminated her benefits, including health care coverage to July 15, 2015. According to Plaintiff, in May of 2013 she learned that her supervisor, Steven Andersen, engaged in alleged misconduct in March of 2013 while he was on a school trip in Cuba with students and alumni. Thereafter, Plaintiff reported this misconduct to David Harman, Poly Prep's Headmaster; Robert Aberlin, Poly Prep's Director of Finance; and Nick Gravante, an Attorney Alumni who sits on Poly Prep's Board on the Audit/Legal Committee. Plaintiff claims that Poly Prep and Mr. Harmon individually failed to keep her identity confidential in violation of N-PCL §715-b. As a result, Plaintiff claims that thereafter Mr. Andersen harassed, bullied, intimidated, retaliated against and defamed her, in further violation of the statute. Moreover, soon after this retaliatory conduct was reported to Mr. Harmon, Plaintiff was terminated from her position at Poly Prep.

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[1] All references to the complaint herein refer to the Second Amended Complaint.

Defendants' Motion to Dismiss Pursuant to CPLR §3211(a)(1)

CPLR §3211(a)(1) provides that a party may move to dismiss an action based upon a defense that is supported by documentary evidence. "A party seeking dismissal on the ground that its defense is founded upon documentary evidence pursuant to CPLR §3211(a)(1) has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." ***Flushing Savings Bank v Rahim Siunykalimi, 94 AD3d 807, 808 (2d Dept 2012), citing Mazur Bros Realty, LLC v State of New York, 59 AD3d 401, 402 (2d Dept 2009) [internal quotation marks omitted]; see Leon v Martinez, 84 NY2d 83, 87-88 (1994); Epifani v Johnson, 65 AD3d 224, 229-230 (2d Dept 2009).*** The documentary evidence must utterly refute a plaintiff's factual allegations, conclusively establishing a defense as a matter of law. ***Goshen v Mutual Life Ins Co of NY, 98 NY2d 314, 326 (2002), citing Leon v Martinez, supra at 88; see also, Parkoff v Stavsky, 109 AD3d 646, 647 (2d Dept 2013).*** "However, not all printed materials constitute documentary evidence under CPLR §3211(a)(1)."***Flushing Savings Bank v Rahim Siunykalimi, supra at 808, citing Fontanetta v John Doe 1, 73 AD3d 78, 84-85 (2d Dept 2010).*** To be considered "documentary," the evidence must be unambiguous, authentic and essentially undeniable. ***Sunset Café, Inc, v Mett's Surf & Sports Corp, 103 AD3d 707, 708 (2d Dept 2013); Parekh v Cain, 96 AD3d 812, 815 (2d Dept 2012***). Defendants have not submitted any documentary evidence in support of the instant motion that "utterly refutes Plaintiff's factual allegations thereby conclusively establishing a defense as a matter of law." ***Goshen v Mutual Life Ins Co of NY, supra at 326.*** Accordingly, Defendants are not entitled to an order dismissing the complaint pursuant to CPLR §3211(a)(1).

Defendants' Motion to DismissPursuant to CPLR §3211(a)(7)

Upon a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR §3211(a)(7) all of the facts alleged in the Complaint are accepted as true, the allegations are afforded the benefit of every possible favorable inference and the Court "determines only whether the facts as alleged fit within any cognizable legal theory." ***Leon v Martinez, 84 NY2d 83, 87-88 (1994); Nunez v Mohammed, 104 AD3d 921, 922 (2d Dept 2013), citing Reitschel v Maimonides, 83 AD3d 810 (2d Dept 2011); Cottone v Selective Surfaces, Inc, 68 AD3d 1038, 1039 (2d Dept 2009).*** Courts have consistently held that the real question raised upon a motion to dismiss pursuant to CPLR §3211(a)(7) is not whether or not Plaintiff ***has stated a cause of action*** but, rather whether or not Plaintiff ***has a cause of action***. ***Nunez v Mohammed, supra at 922 (emphasis added).*** Therefore, a Defendant's burden upon a CPLR §3211(a)(7) motion is to establish definitively that the facts as alleged in the complaint are not facts at all. ***Id at 922; Cog-Net Bldg Corp v Travelers Indem Co, 86 AD3d 585, 586 (2d Dept 2011); Stewart v NYC Transit Authority, 50 AD3d 1013-1014 (2d Dept 2008).***

Plaintiff's First Cause of Action

Plaintiff's first cause of action seeks monetary damages for the "mental anguish and humiliation"[2] allegedly resulting from Defendant, Poly Prep's failure to comply with the New York Non-Profit Revitalization Act of 2013("Act"). Specifically, Plaintiff alleges that Defendants failed to comply with N-PCL §715-b, the "Whistleblower Policy" requirement of the Act. Defendants contend that this cause of action must be dismissed as no private right of action exists pursuant to the Act. Plaintiff acknowledges that the statute does not afford her an express right of action

[2] Exhibit #3 annexed to the Affirmation in Support by Karen Bitar, Esq.

but rather argues that an implied right of action exists. Where a statute does not expressly confer a private right of action upon those it is intended to benefit, a private party may seek relief under the statute "only if a legislative intent to create such a right of action is `fairly implied' in the statutory provisions and their legislative history." ***Maimonides Medical Ctr v First United American Life Ins Co, 116 AD3d 207, 211 (2d Dept 2014), citing Brian Hoxie's Painting Co v Cato-Meridian Cent School Dist, 76 NY2d 207, 211 (1990), citing Sheehy v Big Flats Community Day, 73 NY2d 629, 633 (1989); see Carrier v Salvation Army, 88 NY2d 298, 302 (1996); Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 325 (1983).***

The following three factors are required for a finding that the legislative intent was to create an implied private right of action. (1) Plaintiff must be in the class of people for whose particular benefit the statute was enacted; (2) Recognition of such a right must promote the legislative purpose for which the statute was enacted; and (3) "(W)hether creation of such a right would be consistent with the legislative scheme." ***Sheehy v Big Flats Community Day, Inc, supra at 633 (1989); Jackson v Bank of Am, NA, 40 Misc3d 949, 958 (2013); Allison v New York City Landmarks Preservation Com'n, 944 NYS2d 408 (2011).*** The whistleblower policy relied upon by Plaintiff in the instant action expressly provides in relevant part, that its purpose is ". . . to protect from retaliation persons who report suspected improper conduct . . . **no** director, officer, **employee** or volunteer . . . who in good faith reports . . . **shall suffer** intimidation, harassment, discrimination or other retaliation or, in the case of employees, **adverse employment consequence**. ***N-PCL §715-b (a), (emphasis added).*** Plaintiff therefore, as a former employee, is clearly in the class of people the statute intended to protect. Plaintiff alleges that she was harassed and her employment terminated as a result of whistleblowing; i.e., reporting Andersen's

misconduct. One of the stated legislative purposes of enacting ***N-PCL §715-b (a)*** was specifically to protect someone like Plaintiff from such retaliation. Accordingly, factors one and two as set forth above have been met. The Court of Appeals has repeatedly recognized the third factor as the most important in determining whether or not an implied right of action exists, because "[t]he Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves." ***Carrier v Salvation Army, supra at 303, citing Sheehy v Big Flats Community Day, supra at 634–635;*** Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the overall statutory scheme." ***Id at 303, citing Sheehy v Big Flats Community Day, supra at 634–635; CPC Intl v McKesson Corp, 70 NY2d 268 (1987); Uhr v East Greenbush Central School Dist, 94 NY2d 32, 38 (1999).***

Defendants argue that affording a private right of action is incompatible with the enforcement mechanism chosen by the legislature. Moreover, relying upon the decision in ***Abdale v N Shore Long Is Jewish Health Sys, Inc, 19 NYS3d 850, 858 (2015)*** the Defendants contend that only the Attorney General or Poly Prep's Board of Directors is empowered pursuant to N-PCL §720 to bring an action for violation of the Act.[3] However, the issue in ***Abdale*** was whether a private right of action could be implied when the Attorney General was given the exclusive authority to commence an action for violations of GBL §899(6). N-PCL §720 does not give the Attorney General **exclusive authority** and specifically refers only to actions brought pursuant to N-PCL §720 and §719, not N-PCL §715-b(a). A private right of action is consistent with a legislative scheme when

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[3] Defendants' Memo of Law p 10 in support of motion to dismiss.

the statute does ". . . more than create an enforcement mechanism" but additionally affords certain rights to individuals. ***Maimonides Medical Ctr v First United American Life Ins Co, supra at 214-215.*** In the instant case as well, N-PCL §715-b(a) established not only an enforcement mechanism to ensure compliance with the statute but also afforded rights to the persons specified therein. As set forth above it is clear that affording Plaintiff an implied right of action and thus the ability to litigate her claim pursuant to N-PCL §715-b(a) is consistent with the legislative scheme. Therefore, the third factor necessary to recognize an implied private right of action pursuant to N-PCL §715-b has been met. Utilizing the three prong test as set forth in ***Sheehy v Big Flats Community Day, supra at 633*** this Court finds that the Legislature intended to create an implied private right of action under the Act. Therefore, the motion to dimiss the first cause of action is DENIED.

Plaintiff's Second, Third and Fourth Causes of Action

Plaintiff's second, third and fourth causes of action allege claims for breach of contract against Poly Prep. These claims are predicated upon a finding that the guidelines in the "Harassment Policy" were actually explicit promises. Additionally, Plaintiff asserts that the policy conferred certain obligations on Plaintiff and thus established a contract that became part of her Employment Agreement. It is well settled that, "absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party." ***Campbell v Self Initiated Living Options, Inc, 134 AD3d 757, 758 (2d Dept 2015); Sabetay v Sterling Drug, 69 NY2d 329, 333 (1987); see Lobosco v New York Tel Co/NYNEX, 96 NY2d 312, 316 (2001); Matter of De Petris v Union Settlement Assn, 86 NY2d 406, 410 (1995); Murphy v American Home Prods Corp, 58 NY2d 293, 300-301 (1983)***. This presumption may be rebutted by

proof establishing that "the employer made the employee aware of its express written policy limiting its right of discharge and that the employee detrimentally relied on that policy in accepting the employment" ***Matter of De Petris v Union Settlement Assn, 86 NY2d 406, 410 (1995); see Weiner v McGraw-Hill, Inc, 57 NY2d 458, 465-466 (1982); Fitzgerald v Martin-Marietta, 256 AD2d 959, 960 (3d Dept 1998); Novinger v Eden Park Health Servs, 167 AD2d 590, 591 (3d Dept 1990), lv denied 77 NY2d 810 (1991)***.

Notably, "[t]he requirements for such an implied contract of employment have been strictly construed and the successful plaintiff must sustain an 'explicit and difficult pleading burden' " ***Preston v Champion Home Bldrs, 187 AD2d 795, 796-797 (3d Dept 1992), quoting Sabetay v Sterling Drug, supra at 334-335; see Matter of LaDuke v Hepburn Med Ctr, 239 AD2d 750, 753 (3d Dept 1997), lv denied 91 NY2d 802 (1997)***. Here, even accepting the facts alleged in the amended complaint as true and affording the Plaintiff the benefit of every favorable inference, this Court finds that Plaintiff has failed to establish her reliance upon the Harassment Policy in accepting employment at Poly Prep. ***Mandarin Trading Ltd v Wildenstein, 16 NY3d 173, 178 (2011); Berry v Ambulance Serv of Fulton County, Inc, 39 AD3d 1123, 1124 (3d Dept 2007), see CPLR 3211(a)(7); Campaign for Fiscal Equity v State of New York, 86 NY2d 307, 318 (1995); see also Sokoloff v Harriman Estates Dev Corp, 96 NY2d 409, 414 (2001); Leon v Martinez, supra at 87–88.*** Accordingly, Plaintiff was an at-will employee of Poly Prep and the second, third and fourth causes of action for breach of an implied employment contract cannot be sustained. ***CPLR 3211(a)(7); Weiner v McGraw–Hill, Inc, 57 NY2d 458 (1982); Waddell v Boyce Thompson Inst for Plant Research, Inc, 92 AD3d 1172, (3rd Dept, 2012).*** Accordingly, the motion to dismiss the second, third and fourth causes of action is GRANTED.

Plaintiff's Fifth Cause of Action

Plaintiff's fifth cause of action alleges that Poly Prep and Mr. Harmon defamed Plaintiff and specifically seeks damages for libel per se. According to Plaintiff, Harmon sent an email one day after the complaint was filed in the instant action, stating that Plaintiff was a "disgruntled employee" who commenced a "vindictive lawsuit" that was "without merit" and had no "substantial legal foundation."[4] Plaintiff also alleges that Poly Prep misrepresented the circumstances that resulted in Plaintiff's placement on paid leave, her hiring an attorney and that the filing of the lawsuit was "unexpected."[5] Further, Plaintiff claims that Poly Prep chose accusatory language in the June 2, 2015, email expressing "sadness" that the "reputation of the school we [the trustees] love is again being tarnished."[6]

A cause of action for defamation requires that a false statement was made without privilege or authorization to a third party and must either cause special harm or constitute defamation per se. ***Epifani v Johnson, supra at 233, citing Mann v Abel 10 NY3d 271 (2008); Knutt v Metro Intl, SA, 91 AD3d 915, 916 (2d Dept 2012).*** Defendants contend that the challenged statements are not susceptible to a defamatory meaning. The question of whether the particular words are "reasonably susceptible of a defamatory connotation" is a legal question to be resolved by the Court in the first instance. ***Rosen v Piluso, 235 AD2d 412 (2d Dept, 1997), citing Weiner v Doubleday & Co, 74 NY2d 586, 592 (1989), cert denied 495 US 930 (1990), Aronson v Wiersma, 65 NY2d 592, 593-594 (1985); Goldberg v Coldwell Banker, 159 AD2d 684 (2d Dept 1990).*** The law

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[4] May 29, 2015 email attached as Exhibit 6 to Affirmation in Support by Karen Bitar, Esq.

[5] June 2, 2015 email attached as Exhibit 8 to Affirmation in Support by Karen Bitar, Esq.,paragraph 204 of Plaintiff's complaint.

[6] June 2, 2015 email attached as Exhibit 8 to Affirmation in Support by Karen Bitar, Esq., paragraph 204 of Plaintiff's complaint.

is clearly established that a cause of action for defamation cannot be sustained if the alleged words either were true or were pure opinion as a matter of law. ***Silverman v Clark, 35 AD3d 1, 8 (1st Dept 2006), citing Cahill v County of Nassau, 17 AD3d 497, 498 (2d Dept 2005); Yan v Potter, 2 AD3d 842 (2d Dept 2003); Dillon v City of New York, 261 AD2d 34 (1st Dept 1999)***. Whether a particular statement constitutes an opinion or an objective fact is a question of law. ***Mann v Abel 10 NY3d 271 (2008), citing Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 381 (1977), cert denied 434 US 969 (1977)***. Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation. ***Citing Weiner v Doubleday & Co, supra at 593, citing Steinhilber v Alphonse, 68 NY2d 283 (1986).***

Courts have consistently held that distinguishing between opinion and fact is difficult and has set forth the following factors to be considered:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact. ***Suarez v Angelet 90 AD3D 906, 907 (2d Dept 2011); citing Mann v Abel, 10 NY3d 271, 276 (2008), cert denied 555 US 1170 (2009). Brian v Richardson, 87 NY2d 46, 51 (1995), quoting Gross v New York Times Co, 82 NY2d 146, 153 (1993), quoting Steinhilber, 68 NY2d at 292."***

Applying the criteria as set forth above to the facts of the instant case, this Court finds that the language alleged by plaintiff to be defamatory reflect non-actionable opinions by Defendants. Accordingly, Plaintiff has failed to state a cause of action for defamation and the motion to dismiss the fifth cause of action is GRANTED.

Defendant's Motion to Strike Portions of the Complaint Pursuant to CPLR §3024(b)

CPLR §3024(b) provides in relevant part "A party may move to strike any scandalous or

prejudicial matter **unnecessarily inserted in a pleading**" (emphasis added). The moving party must show not only that the matter to be struck is scandalous or prejudicial but also that it is not relevant to the cause of action. ***Soumayah v Minnelli, 41 AD3d 390, 392 (1st Dept 2007); see Wegman v Dairylea Coop, 50 AD2d 108, 111 (4th Dept 1975)***. Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to the defendants should be stricken from the pleading or bill of particulars. ***Kinzer v Bederman, 59 AD3d 496, 497 (2d Dept 2009); Matter of Plaza at Patterson, LLC v Clover Lake Holdings, Inc, 51 AD3d 931, 932 (2d Dept 2008); Aronis v TLC Vision Ctrs, Inc, 49 AD3d 576, 578 (2d Dept 2008); Van Caloen v Poglinco, 214 AD2d 555, 557 (2d Dept 1995); JC Mfg v NPI Elec, 178 AD2d 505, 506 (2d Dept 1991).*** Scandalous and prejudicial matter alone is not a sufficient basis for a motion to strike. The moving party must also show that the matter is not relevant. ***Cassissi v Yee, 46 Misc3d 552, 557 (S Ct, Westchester County, 2014), citing New York City Health and Hospitals Corp v St Barnabas Community Health Plan, 22 AD3d 391 (1st Dept 2005), citing Bristol Harbour Assoc v Home Ins Co, 244 AD2d 885 (4th Dept 1997).*** "If the material included in the pleading is relevant to the cause of action it will not be struck from the pleading even though it is scandalous or prejudicial." ***Irving v Four Seasons Nursing & Rehabilitation 121 AD3d 1046, 1047-1048 (2d Dept 2014)***. In determining relevancy, courts should be guided by whether the matter "would be admissible in evidence at the trial." ***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §3024:4, at 380; cf Schachter v Massachusetts Protective Association Inc, 30 AD2d 540 (2nd Dept 1968).***

Defendants contend that the alleged offending paragraphs and footnotes constitute character evidence and are irrelevant and inadmissible in civil litigation[7]. However, this Court

[7] Defendants' Memo of Law p 30, Point IV(B)

disagrees and finds this argument unavailing. Applying the aforementioned law, this Court finds that all of the referenced paragraphs and footnotes are relevant to the first cause of action. The recited instances set forth the facts supporting Plaintiff's claim that she repeatedly reported improper conduct in good faith and that Poly Prep violated ***N-PCL §715-b(a).*** Moreover, even the reference to the 2009 sexual abuse lawsuit against Coach Foglietta reflects Poly Prep's history of failing to properly respond to notices of an employee's grievous acts, failing to conduct an investigation, by covering up and withholding relevant and necessary information from its Board of Directors. Accordingly, the paragraphs and footnotes Defendants sought to be stricken as scandalous and prejudicial, are relevant to Plaintiff's claim that Defendants violated ***N-PCL §715-b(a)***, and therefore Defendant's motion to strike those portions of the complaint is DENIED.

Plaintiff's Motion to Compel

Plaintiff seeks an order directing Defendants to: (1) preserve any and all documents related to the investigation by Poly Prep's forensic accountant including, but not limited to, witnesses statements, documents, notes and other information relied upon in forming the conclusion that Defendants allegedly reached and disseminated widely to the Poly Prep community concerning Plaintiff' s allegations as stated in the November 20, 2015 public announcement to Plaintiff within ten (10) days; (2) produce the litigation hold issued in this case, including a list of recipients; and (3) in the alternative, if Defendants have not issued a litigation hold, ordering Defendants to do so and provide proof to Plaintiff's counsel and the Court, including a list of recipients, within ten (10) days.

The law is clearly established that once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of

electronic data. ***VOOM HD Holdings LLC v EchoStar Satellite LLC, 93 AD3d 33, (1st Dept 2012), citing Pension Comm of Univ of Montreal Pension Plan v Banc of America, 685 FSupp2d 456, 473 (SDNY 2010)***. A litigation hold must direct the appropriate employees to preserve all relevant records, electronic or otherwise, and create a procedure for collecting the preserved records so that they might be searched by someone other than the employee. The hold should be as specific as possible and describe the electronically stored information (ESI) at issue and direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve ESI. ***VOOM HD Holdings LLC v EchoStar Satellite LLC, supra at 41; Arbor Realty Funding, LLC v Herrick, Feinstein LLP, 140 AD3d 607 (1st Dept 2016); Zubulake v UBS Warburg LLC, 220 FRD212 (SDNY 2003); Schantz v Fish, 79 AD3d 481, (1st Dept 2010).***

In addition to the obligation to issue a written litigation hold, a party must identify all the key players and ensure that their electronic records are preserved and that they must cease the deletion of emails, upon a reasonable anticipation of ligation ***Arbor Realty Funding, LLC v Herrick, Feinstein LLP, supra***. While Defendants' Counsel states in her Affirmation in Opposition to the instant motion that three separate litigation holds were issued on March 11, 2015, June 15, 2015 and January 6, 201[5],[8] no copies with the attending distribution lists were submitted for this Court's review. Under certain circumstances, it is insufficient in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel. ***VOOM HD Holdings LLC v EchoStar Satellite LLC, supra at 40, citing Pension Comm of Univ of Montreal Pension Plan v Banc of***

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[8] It appears that Defendants' counsel inadvertently referred to 2015 instead 2016. Par. 5, Affirmation in Opposition by Karen Bitar, Esq.

America, 685 FSupp2d 456, 473-474 (SDNY 2010); Pegasus Aviation v Varig Logistica, 26 NY3d 543 (2015). This Court notes, as pointed out by Plaintiff's Counsel[9] that Poly Prep was sanctioned for spoliation of evidence in ***Zimmerman v Poly Prep Country Day Sch 888 FSupp2d 317, 333 (EDNY 2012).*** A party's history of failing to issue a proper litigation hold in a non-related action, as we have in this case, is relevant. ***VOOM HD Holdings LLC v EchoStar Satellite LLC, supra at 40; citing Broccoli v EchoStar Communications Corp, 229 FRD 506 (D Md 2005).*** Therefore, contrary to Defendants' assertions, Plaintiff is entitled to an order directing Poly Prep to preserve the documents as requested and copies of all litigation holds issued in the instant action and the list of recipients. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted as to Plaintiff's causes of action #s 2, 3, 4 and 5; and it is further

ORDERED that Defendants' motion to strike specific paragraphs and footnotes of the complaint is denied; and it is further

ORDERED that Plaintiff's Order to Show Cause is granted in its entirety and Defendants are directed to: 1) preserve any and all documents as described in the Order to Show Cause and to produce documentation including a list of recipients and notify Plaintiff that this has been effectuated; and 2) produce copies of all litigation holds that have been issued in th instant matter within ten (10) days of the entry date of this order.

This is the decision and order of the Court.

ENTER,

LOREN BAILY-SCHIFFMAN
JSC

[9] Affidavit of Anne C. Vladeck, Esq., paragraphs 7-8.