At Part IA 27 of the Supreme Court of the State of New York, held in and for the County of Bronx, at the Courthouse thereof, 851 Grand Concourse, Bronx, New York on the 15th day of April, 2021.

P R E S E N T:
HON. DAWN JIMENEZ-SALTA,
Justice.

----------X

Patricia Catania

Plaintiff,

– against –

Mercedes Liriano, William Woodruff, Jacinth Scott, Jasmine Dickson, Janella Hinds, United Federation of Teachers Union,

Defendants.

DECISION/ORDER

Index No. 21709/2019E

Mot. Seq. 9, 11

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The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	206-232; 281-284
Opposing Affidavits (Affirmations)	240-241; 285
Reply Affidavits (Affirmations)	250; 286-288

Plaintiff Catania's motion for a stay of the hearing and determination as well as a request to file a Supplemental Memorandum of Law pursuant to CPLR Section 2201 is denied (Sequence 11).

Teacher Defendants Liriano, Scott and Dickson's motion to dismiss Plaintiff's Complaint pursuant to CPLR 3016(a), CPLR 3211(a)(1), (a)(5), (a)(7) as well as Sections 70-a and 76-a of the Civil Rights Law and CPLR 3211(g) for dismissal of Plaintiff's lawsuit as an anti-SLAPP proceeding and for sanctions pursuant to NYCRR 130 is denied (Sequence 9). That part of Teacher Defendants' motion to dismiss the Complaint against Teacher Defendant Jacinth Scott pursuant to CPLR 3211(a)(8) is granted.

This constitutes the Decision and Order of this Court.

E N T E R,

Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED	☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER

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P R E S E N T:
HON. DAWN JIMENEZ-SALTA,
Justice.

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PATRICIA CATANIA

Plaintiff,

- against -

MERCEDES LIRIANO, WILLIAM WOODRUFF, JACINTH SCOTT, JASMINE DICKSON, JANELLA HINDS, UNITED FEDERATION OF TEACHERS UNION,

Defendants.

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DECISION/ORDER

Index No. 21709/2019E

Mot. Seq. 9, 11

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Plaintiff Patricia Catania ("Plaintiff" or "Catania") brought this action following a series of incidents in 2018. At that time, Defendants Mercedes Liriano ("Liriano"), William Woodruff ("Woodruff"), Jacinth Scott ("Scott"), Jasmine Dickson ("Dickson"), Janella Hinds ("Hinds") and the United Federation of Teachers Union ("UFT") (collectively "Defendants") allegedly undertook a deliberate course of action to publicly humiliate and stigmatize Plaintiff by calling her a "racist" in articles which appeared in print, media and social media.

Plaintiff alleges that Defendants created, executed and disseminated a wrongful and unlawful narrative and scenario when they allegedly falsely accused Plaintiff as being a racist, white Caucasian Principal who purportedly sought to prevent teachers at the subject school from teaching students Black History during Black History Month.

As a result of Defendants' alleged actions, Plaintiff was removed from her position as Acting Principal of Middle School 224 ("MS 224" or "the school"), a New York City ("NYC") public school located at 345 Brook Avenue in the County of Bronx, City and State of New York. The school's students are predominantly Black and Brown.

When she was transferred to a different school and demoted to the position of Assistant Principal due to Defendants' alleged actions, Plaintiff claims that her salary was reduced by $21,980.00 (Twenty-One Thousand, Nine Hundred Eighty Dollars).

Prior to the allegedly wrongful and unlawful events, Plaintiff purportedly had a distinguished, exemplary, honorable and completely unblemished twenty-five (25) year history as a highly effective, respected and motivated educator and education administrator.

Plaintiff commenced this action with the filing of a Summons with Notice, dated February 9, 2019 and a Complaint, dated June 20, 2019.

She filed a First Amended Complaint, dated November 30, 2019 with causes of action for: 1) tortious interference with an existing and present contract or present and existing contractual relations; 2) tortious interference with present and existing business relations; 3) tortious interference with a prospective future contract; 4) tortious interference with a prospective business relations/economic advantage; 5) misuse of legal procedure/abuse of process; 6) defamation/libel/slander; 7) intentional infliction of emotional distress; 8) negligent infliction of emotional distress; 9) negligence; 10) gross negligence; 11) prima facie tort; 12) negligent supervision of agents, servants and employees as against UFT only; 13) negligent supervision of its organization/association as against UFT only; 14) concerted action; 15) conspiracy; 16) willful misconduct against all Defendants and willful misconduct as against UFT – failure to act; and 17) joint enterprise as against all Defendants.

Defendants Woodruff, Hinds and the UFT (collectively the "UFT Defendants") filed their Motion to Dismiss pursuant to CPLR 3211, dated August 2, 2019 (Sequence #8). Plaintiff filed her Cross Motion for Declaratory Relief and Affirmation in Opposition, dated August 21, 2020. UFT Defendants filed their Reply Affirmation and Opposition to the Cross Motion, dated September 17, 2020. Plaintiff filed her Memorandum of Law in Reply in Further Support of the Cross Motion, dated September 23, 2020.

The Honorable Julia Rodriguez, Bronx County Supreme Court issued her Decision/Order, dated November 6, 2020, dismissing Plaintiff's Complaint against the UFT Defendants and denying Plaintiff's cross motion for declaratory relief (Sequence #8).

Defendants Liriano, Scott and Dickson (collectively the "Teacher Defendants") filed their Motion to Dismiss the Complaint pursuant to CPLR 3016 (a), CPLR 3211 (a)(1), (a)(5), (a)(7) and (a)(8) as well as Sections 70-a and 76-a of the Civil Rights Law and CPLR 3211(g) to dismiss Plaintiff's Complaint because it is an anti-SLAPP lawsuit, dated August 2, 2020 and for sanctions pursuant to NYCRR 130 (Sequence #9). Teacher Defendant Jacinth Scott in this same motion also seeks to dismiss the Summons and Complaint against her on the basis that she was not properly served pursuant to CPLR 3211(a)(8). Plaintiff filed her Memorandum of Law in Opposition, dated September 17, 2020. Teacher Defendants filed their Reply Memorandum in Law, dated September 23, 2020.

Plaintiff filed her Motion to Stay the Proceedings and/or serve a Supplemental Memorandum of Law because of amendments to Sections 70-a and 76-a of the Civil Rights Law as well as CPLR 3211 (g), dated February 16, 2021 (Sequence #11). Teacher Defendants filed their Memorandum of Law in Opposition, dated March 3, 2021. Plaintiff filed her Reply Memorandum of Law, dated March 9, 2021.

COURT RULINGS

Plaintiff's Motion for a Stay of the Hearing and Determination As Well As to File a Supplemental Memorandum of Law Pursuant to CPLR Section 2201:

Plaintiff's motion for a stay of the hearing and determination as well as a request to file a Supplemental Memorandum of Law pursuant to CPLR Section 2201 is denied (Sequence 11). Teacher Defendants motion to dismiss Plaintiff's complaint pursuant to CPLR 3016(a), CPLR 3211(a)(1), (a)(5), (a)(7) as well as Sections 70-a and 76-a of the Civil Rights Law and CPLR 3211(g) for dismissal of Plaintiff's lawsuit as an anti-SLAPP proceeding and for sanctions pursuant to NYCRR 130 is denied (Sequence 9). As part of Teacher Defendants' motion to dismiss, Teacher Defendant Jacinth Scott seeks to dismiss the Complaint against her only because she was not served pursuant to CPLR 3211(a)(8) (Sequence 9). That part of Teacher Defendants' motion to dismiss is granted solely against Teacher Defendant Jacinth Scott because she was not served pursuant to CPLR 3211(a)(8) (Sequence 9).

Plaintiff expresses concern about any retroactive application of the revisions to Section 70-a and 76-a of the Civil Rights Law as well as CPLR 3211(g). However, this Court notes that Teacher Defendants distinctly state that they do not advocate that the revisions to the anti-SLAPP law should be treated as retroactive.

As the U.S. Supreme Court ruled in Landsgraf v. USI Film Products, 114 S. Ct. 1483 (1994), the due process clause protects the important interests of fair notice and harmony which may be compromised by retroactive legislation. It looks to sufficient justification to validate a statute's prospective application under the due process clause in order not to have a retroactive application. See U.S.C.A. Const. Amendment 14. Although constitutional deterrents to retroactive civil legislation are modest, prospective application remains the appropriate default rule. The presumption against retroactivity will generally coincide with legislative and public expectations because of its conformity with a widely held innate sense about how statutes operate. The U.S. Supreme Court specifically noted that retroactivity is a matter on which judges tend to have sound instincts. Familiar considerations of fair notice, reasonable reliance and settled expectations offer sound guidance in determining whether the statute operates "retroactively".

The New York Court of Appeals noted in the Matter of Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal, 130 NYS3d 759 (2020) that a statute has a retroactive effect if it would impair the rights that a party possessed when he or she acted, increase the party's liability for past conduct or impose new duties with respect to transactions already completed, thus impacting substantive rights. A statute is generally presumed to apply only prospectively. The presumption against retroactive application of statutes is based upon elementary considerations of fairness which dictate that individuals should have the opportunity to know what the law is and to conform their conduct accordingly. There must be a clear expression of the legislative purpose to justify retroactive application of the statute.

As the First Department resolved in Aguaiza v. Vantage Properties, LLC, 893 NYS2d 19 (1st Dept., 2010), a new statute is to be applied prospectively. It will not be given retroactive construction unless an intention to make it so can be found from its wording. See McKinney's Statutes Section 51(b); Brennan v. SA-RU Corporation, 95 NYS2d 813 (1st Dept., 1950); People v. Duggins, 192 AD3d 191 (3rd Dept., 2021); Lippa v. General Motors Corp., 796 F.Supp 81 (U.S. Court, W.D. New York).

Thus, out of fundamental fairness to the parties, this Court will only apply prospectively any revisions to Sections 70-a and 76-a of the Civil Rights Law as well as CPLR 3211(g) since the Complaint was already properly filed and pending before this Court well before the laws were amended. See Landgraf v. USI Film Products, supra; Matter of Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal, supra; Aguaiza v. Vantage Properties, LLC, supra.

Teacher Defendants' Motion to Dismiss the Complaint Pursuant to CPLR 3211:

When considering a pre-answer motion to dismiss the complaint for failure to state a cause of action, the Court of Appeals held in Chanko v. American Broadcasting Cos. Inc., 27 NY3d 46 (2016) that a court must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiff every possible favorable inference. See Goshen v. Mutual Life Ins. Co., of NY, 98 NY2d 314 (2002). A court may consider affidavits submitted by a plaintiff to remedy any defects in the complaint because the question is whether a plaintiff has a cause of action, not whether a plaintiff has properly labeled or artfully stated one. See Leon v. Martinez, 84 NY2d 83 (1994); Rushaid v. Pictet & Cie, 28 NY3d 316 (2016). Moreover, the First Department ruled in Kenyon & Kenyon LLP v. SightSound Techologies, LLC, 151 AD3d 530 (1st Dept., 2017) that affidavits received on an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading.

Consequently, this Court will give the pleadings a liberal construction, accept the facts as alleged in the complaint to be true and afford Plaintiff every possible inference. See J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 21 NY3d 324 (2013); Chanko v. American Broadcasting Cos., Inc., supra. Whether Plaintiff will ultimately be successful in establishing those allegations is not part of the calculus. See J.P. Morgan Sec. Inc., v. Vigilant Ins. Co., supra; EBC I Inc. v. Goldman Sachs & Co., 5 NY3d 11 (2005); Landon v. Kroll Lab. Specialists, Inc. 22 NY3d 1 (2013).

When considering whether any cause of action is duplicative, this Court notes that CPLR Section 3014 permits causes of action in the alternative. See Plant City Steel Corp. v. National Mach. Exch., 23 NY2d 472 (1969); Man Advisors, Inc. v. Selkoe, 174 AD3d 435 (1st Dept., 2019); Wilson v. Merrill Lynch, Pierce, Fenner & Smith, 66 NY2d 988 (1980); 164 Mulberry St. Corp. v. Columbia Univ., 4 AD3d 49 (1st Dept., 2004).

Although Teacher Defendants have offered affidavits, Plaintiff requests that they not be considered unless and until this Court gives notice that it is converting this motion to one for summary judgment pursuant to CPLR 3211(c). Since Teacher Defendants' motion is to dismiss the Complaint for failure to state a cause of action pursuant to CPLR 3211, this Court will not consider the affidavits submitted by Teacher Defendants as evidentiary support because the Court is not converting the motion to one for summary judgment. See CPLR 3211(a)(7); Rovello v. Orofino Realty Co., 40 NY2d 633 (1976); Kenyon & Kenyon LLP v. SightSound Tech., LLC, supra.

Since Plaintiff Catania's allegations are sufficiently specific, this Court finds that Plaintiff Catania has stated causes of actions for tortious interference with an existing and present contract or present and existing contractual relations; tortious interference with present and existing business relations; tortious interference with a prospective future contract; tortious interference with a prospective business relations/economic advantage; defamation/libel/slander; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence; gross negligence; prima facie tort; concerted action; conspiracy; willful misconduct; and joint enterprise. See CPLR 3016(a); Serano v. Bench-Serao, 149 AD3d 645 (1st Dept., 2017); Kennelly v. Mobius Realty Holdings, LLC, 33 AD3d 380 (1st Dept., 2006).

Tortious Interference with an Existing and Present Contract or Present and Existing Contractual Relations; Tortious Interference with Present and Existing Business Relations; Tortious Interference with a Prospective Future Contract and Tortious Interference with a Prospective Business Relations/Economic Advantage (1st through 4th Causes of Action):

The Appellate Division ruled in Ferrandino & Son, Inc., v. Wheaton Builders, Inc., LLC, 82 AD3d 1035, 920 NYS2d 123 (2nd Dept., 2011) that to state a cause of action alleging tortious interference with a contract, a plaintiff must allege: the existence of a valid contract between it and a third party; the defendant's knowledge of that contract; the defendant's intentional procurement of the third party's breach of that contract without justification; and damages. A plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct. Although a motion to dismiss the allegations in a complaint should be construed liberally, to avoid a dismissal of a tortious interference with a contract claim for failure to state a cause of action, a plaintiff must support his or her claim with more than mere speculation.

In order to state a cause of action for tortious interference with prospective business advantage, the First Department ruled in Jacobs v. Continuum Health Partners, Inc., 7 AD3d 312 (1st Dept, 2004) that there must be an allegation that the conduct by a defendant who allegedly interfered with plaintiff's prospects was undertaken either for the sole purpose of harming plaintiff or that such conduct was wrongful or improper independent of the interference allegedly caused thereby.

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact as tortious interference with present and future contracts and present and future as well as prospective business relations/economic advantage because of Teacher Defendants' alleged actions. As a member of a collective bargaining agreement, Plaintiff is a third party beneficiary. See McGuirk v. City School District of City of Albany, 116 AD2d 363 (3rd Dept., 1986); Newin Corp. v. Hartford Acc. & Indem. Co., 37 NY2d 211 (1975); Matter of Board of Education, Commack Union Free School Dist. V. Ambach, 70 NY2d 501 (1987), cert. denied 485 US 1034 (1988). Thus, she fulfills the contract requirement. Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact that Teacher Defendants were aware of that contract; Teacher Defendants' explicit goal was to ouster Plaintiff from the school by procuring a breach of her agreement and therefore, but for Teacher Defendants' actions, it can be seen by a trier of fact that Plaintiff Catania was removed from her position of Acting Principal with the result of her demotion to a lower paying position within the Department of Education. Therefore, she has stated a claim for tortious interference with an existing and present contract or present and existing contractual relations; tortious interference with present and existing business relations; tortious interference with a prospective future contract; and tortious

interference with a prospective business relations/economic advantage. See Meer Enterprises, LLC v. Kocak, 105 NYS3d 415 (1st Dept., 2019).

Abuse of Process (5th Cause of Action):

Plaintiff has withdrawn her claim for Abuse of Process.

Defamation/Libel/Slander (6th Cause of Action):

The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. See Brian v. Richardson, 87 NY2d 46 (1995). Since falsity is a necessary element of a libel claim, and only "facts" are capable of being proven false, it follows that "a libel action cannot be maintained unless it is premised on published assertions of fact". See Brian v. Richardson, supra.

Conversely, expressions of opinion are cloaked with the privilege of speech afforded by the First Amendment. See Jaszai v. Christie's, 279 AD2d 186 (2001), citing Gertz v. Robert Welch, Inc., 418 US 323 (1974). Whether they are "false or not", libelous or not, opinions are constitutionally protected and may not be subject of private damage actions. See Rinaldi v. Holt, Rinehart & Winston, 42 NY2d 369 (1977), cert denied 434 US 969 (1977).

Distinguishing between protected expressions of opinion and actionable assertions of fact has proven to be a challenging task for the courts. In the past, the Court of Appeals has cited three (3) factors which should be considered: 1) whether the specific language at issue has a precise meaning which is readily understood; 2) whether the statements are capable of being proven true or false; 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 listeners that which is being read or heard is likely to be opinion, not fact. See Brian v. Richardson, supra; Gross v. New York Times, 82 NY2d 146 (1993); Ollman v. Evans, 750 F2d 970 (1984), cert denied 471 US 1127 (1985); Steinhilber v. Alphonse, 68 NY2d 283. See also Guerrero v. Carva, 10 AD3d 105, (1st Dept., 2004) where the First Department ruled that false accusations of racism were actionable where they tend to disparage a plaintiff in his profession.

Even in cases where a statement falls within the protective shield of expressions of opinion, such opinions will lose their protection and become actionable where the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it. See Steinhilber v. Alphonse, supra; Hotcher v. Castillo-Puche, 551 F2d 910 (2nd Circuit), cert denied sub nom Hotcher v. Doubleday & Co., Inc., 434 US 834 (1977). These are known as "mixed opinions". They are actionable not because of the false opinion itself but rather because of the implication that the speaker knows certain facts, unknown to his audience, which supports his opinion and are detrimental to the person about whom he is speaking. See Steinhilber v. Alphonse, supra; Rand v. New York Times Co., 75 AD2d 417 (1980). See also Guerrero v. Carva, supra.

Under either federal or state law, the Court of Appeals ruled in 600 W. 115th St. Corp. v. Von Futfeld, 80 NY2d 130 (1992) that the dispositive question is whether a reasonable listener at the hearing could have concluded that a defendant was conveying facts about plaintiff. That is a question for the Court in the first instance. See Steinhilber v. Alphonse, supra; Milkovich v. Lorain Journal Co., 497 US 1; Immuno AG v. Moor-Jankowski, 77 NY2d 235. Because falsity is a necessary element in a defamation

claim involving statements of public concern, it follows that only statements alleging facts can properly be the subject of a defamation action.

When a defamatory statement of opinion implies that it is based upon undisclosed detrimental facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and actionable. See Como v. Riley, 287 AD2d 416 (1st Dept., 2001); Steinhilber v. Alphonse, supra. Similarly actionable as a "mixed opinion" is a defamatory opinion which is ostensibly accompanied by a recitation of the underlying facts upon which the opinion is based but those underlying facts are either falsely misrepresented or grossly distorted. See Silsdorf v. Levine, 59 NY2d 8, cert. denied 464 US 831; Chalpin v. Amordian Press, 128 AD2d 81 (1st Dept., 1987); Parks v. Steinbrenner, 131 AD2d 60 (1st Dept., 1987); Enigma Software Group USA, LLC v. Bleeping Computer LLC, 194 F.Supp.3d 263 (S.D. N. Y. 2016). Consequently, if the facts set forth in the opinion are false, the statements of the opinion are actionable. See Silsdorf v. Levine, supra; O'Neil v. Peekskill Faculty Assn., 120 AD2d 36 (2nd Dept., 1986); Ocean State Seafood v. Capital Newspaper, Div. of Hearst Corp., 112 AD2d 662 (2nd Dept., 1985).

Damage to one's reputation is a key consideration in a "defamation per se" action. According to the First Department in Pezhman v. City of New York, 812 NYS2d 14 (1st Dept., 2006), a plaintiff teacher stated a defamation cause of action against a defendant, based upon disparaging statements about her in two letters disseminated by defendant. The letters asserted that plaintiff was a racist. Thus, plaintiff's allegation that the defamation injured her in her profession and caused her economic harm through revocation of her professional teaching license was sufficient to plead defamation per se. The defamation claim was pleaded with the required specificity pursuant to CPLR 3016(a). The content and context of the statements were sufficient to potentially demonstrate malice as to overcome the qualified common interest privilege. The First Department ruled that it was plaintiff's claim that the defamatory statements were part of a campaign of harassment conducted in retaliation. While defendant's letters could have been a legitimate means of advancing defendant's interests, it was also possible as suggested by plaintiff that defendant was motivated solely by ill will towards plaintiff as a result of plaintiff's actions. Thus the question of defendant's motivation was not to be determined here as a matter of law.

This Court finds that Plaintiff Catania has identified numerous alleged assertions of fact. Each of the statements is reasonably susceptible of a defamatory meaning because they all tend to disparage Plaintiff in her profession as an Assistant Principal in a school whose students are primarily Black and Brown. While the statements standing alone might be too vague to constitute an assertion of fact, when combined with specific instances of racial discrimination, each of the statements becomes precise in meaning and capable of being proven true or correct. See Guerrero v. Carva, supra; Pezhman v. City of New York, supra.

Both the immediate and broader contexts of these statements would reasonably suggest to any reader that Teacher Defendants were personally aware of facts demonstrating the occurrence of racial discrimination based on race and ethnicity. The immediate context of the statements reveals the disclosure of some specifics regarding Plaintiff. Teacher Defendants' inclusion of the names or groups of victims of Plaintiff's discrimination and illegal conduct would signal to any reasonable reader that assertions of fact were being conveyed, not merely Teacher Defendants' opinion. See Guerrero v. Carva, supra; Pezhman v. City of New York, supra.

The broader context of the statements in print, media and social media seems clearly designed to impress the reader that Teacher Defendants are conveying concrete evidence of Plaintiff's misconduct.

Moreover, this was not a situation like a trade union dispute (see Steinhilber v. Alphonse, supra) or a public hearing (see 600 W. 115th St. Corp. v. Von Futfeld, supra). Although Teacher Defendants attempt to portray the situation as a "time of intense controversy" about Black History Month, they fail to include a non-interested person supporting the allegations against Plaintiff. Thus, it suggests that the "intense controversy" is highly personal and more likely limited solely to Teacher Defendants. Moreover, the subject assertions of racial discrimination in the performance of her professional duties only enhances their defamatory nature. See Scott v. Cooper, 226 AD3d 360 (2nd Dept., 1995); Guerrero v. Carva, supra; Pezhman v. City of New York, supra.

As the Appellate Division determined in Calore v. Powell-Savory Corp., 21 AD2d 877 (2nd Dept., 1964), a false charge of being discriminatory against African Americans was libelous per se considering the "temper of the times". Moreover, the First Department ruled in Guerrero v. Carva, supra that false accusations of racism were actionable where they tend to disparage a plaintiff in his profession.

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact as defamation since Teacher Defendants' statements paint her as a racist which harms her reputation. See Calore v. Powell-Savory Corp., supra; Guerrero v. Carva, supra; Pezhman v. City of New York, supra.

This Court finds that Teacher Defendants' statements cannot be shielded by the opinion of privilege in these circumstances since they imply the existence of undisclosed underlying facts that would support Teacher Defendants' opinion and would be detrimental to Plaintiff Catania. See Giffuni v. Feingold, 299 AD2d 266 (1st Dept., 2002). Thus, the alleged defamatory statements fall directly within the "mixed opinion" rule and are actionable. See Giffuni v. Feingold, supra.

This Court determines that Teacher Defendants do not qualify for the "common interest" qualified privilege because they did not limit their statements only to those who might potentially have a common interest in the subject matter at issue. They uttered their statements to people well outside that protected circle by making them public in print, media and social media. See Landon v. Kroll Lab Specialists, Inc., 22 NY3d 1 (2013); Liberman v. Gelstein, 80 NY2d 429 (1992); Wolberg v. IAI N. Am. Inc., 161 AD3d 469 (1st Dept., 2018); Silverman v. Clark, 35 AD3d 1 (1st Dept., 2006); Lampert v. Edelman, 24 AD2d 562 (1st Dept., 1965); Steinhilber v. Alphonse, 115 AD2d 844 (3rd Dept., 1985).

Teacher Defendants maintain that the libel claims must be dismissed because Plaintiff Catania has not shown that they acted with actual malice. In a defamation action against a public figure, a plaintiff has the burden of showing actual malice by a clear and convincing standard. See Freeman v. Johnston, 84 NY2d 52 (1994), cert denied 513 US 1016 (1994); New York Times Co., v. Sullivan, supra; Mahoney v. Adirondack Publ. Co. 71 NY2d 31 (1987). For the purposes of the law of defamation, a statement is made with actual malice when it is made with knowledge that it was false or with reckless disregard of whether it was false or not. See New York Times Co., v. Sullivan, supra; Prozeralik v. Capital Cities Communications, 82 NY2d 466 (1993). The actual malice standard has also been applied to "limited public figures" or those persons who have voluntarily injected themselves or are drawn into a particular public controversy and thereby become public figures. See Gertz v. Robert Welch, Inc., supra.

There is a four part test to determine whether a plaintiff is a limited purpose public figure. To qualify, a plaintiff must have: 1) successfully invited public attention to his/her views in an effort to influence others prior to the incident which is the subject of the litigation; 2) voluntarily injected himself/herself into a public controversy related to the subject of the litigation; 3) assumed a position of prominence in

the public controversy; and 4) maintained regular and continuing access to the media. See Enigma Software Group USA, LLC v. Bleeping Computer LLC, 194 F.Supp3d 263, U.S. District Court, S.D.N.Y. (2016).

Thus, this Court finds that Plaintiff is a "limited public figure" because she was drawn into a particular public controversy regarding Black History Month. See Gerz v. Robert Welch, Inc., supra. Consequently she must plead malice. As the First Department found in Pezhman v. City of New York, 29 AD3d 164 (1st Dept., 2006), malice which is defined as personal spite or ill will, or culpable recklessness or negligence refers not to a defendant's general feelings about a plaintiff but to the speaker's motivation for making the defamatory statements. See Liberman v. Gelstein, 80 NY2d 429 (1992); New York Times Co. v. Sullivan, 376 US 254 (1964); Landon v. Kroll Lab Specialists, Inc., 22 NY3d 1 (2013). Where false statements about a plaintiff made with malice impacted a plaintiff's professional career, the Court of Appeals ruled in Loughtey v. Lincoln First Bank, 67 NY2d 369 (1969) that the statements were actionable. See also Pontarelli v. Shapiro, 231 AD2d 407 (1st Dept., 1996) where the First Department found that a plaintiff properly stated malice where the gravamen of plaintiff's action was that a defendant ousted her from her position for defendant's own purposes.

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff Catania can be seen by a trier of fact that Teacher Defendants acted with actual malice by a clear and convincing standard. Teacher Defendants' statements to the media can be seen by a trier of fact that they were made with either knowledge that they were false or with reckless disregard of whether they were false or not. Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact that Teacher Defendants sought her removal as Acting Principal because she was recruited to improve the academic success of the school. Thus, Plaintiff has stated a cause of action for malice since it can be seen by a trier of fact that Teacher Defendants' quest to remove her as Acting Principal from the school was because she was recruited to improve the school's academic success. See New York Times Co., v. Sullivan, supra; Prozeralk v. Captial Cities Communications, supra; Gerz v. Robert Welch, Inc., supra; Loughtey v. Lincoln First Bank, supra; Pontarelli v. Shapiro, supra; Liberman v. Gelstein, supra; Landon v. Kroll Lab Specialists, Inc., supra.

Because Plaintiff is a limited public figure, this Court finds that the gross irresponsibility standard does not apply since it pertains to private plaintiffs. See Khan; Chopodeau; Mahoney v. Adirondack Publ. Co., 71 NY2d 31 (1987); McGill v. Parker, 179 AD2d 98 (1st Dept., 1992); Sweeney v. Prisoners' Legal Svs. Of NY, 146 AD2d 1 (3rd Dept., 1989); Udell v. New York News, 124 AD2d 656 (2nd Dept., 1986); Zucker v. County of Rockland, 111 AD2d 325; Bruno v. New York Daily News Co., 89 AD2d; Hogan v. Herald Co., 84 AD2d 470, 58 NY2d 630..

Thus, this Court finds that Plaintiff has stated a cause of action for defamation per se because the defamatory words impugn Plaintiff's profession with specificity. See CPLR 3016(a); Meer Enters., LLC v. Kocak, 173 AD3d 629 (1st Dept., 2019); Pezhman v. City of New York, 29 AD3d 164 (1st Dept., 2006); Roche v. Claverach Coop. Ins. Co., 59 AD3d 914 (3rd Dept., 2019); Rosenbaum v. City of New York, 5 AD3d 154 (1st Dept, 2004).

Intentional Infliction of Emotional Distress (7th Cause of Action):

Where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, the First Department reasoned in Vasarhelvi v. New School for Social Research et al, 646 NYS2d 795 (1st Dept., 1996) that an action for intentional infliction of emotional

distress is available because a defendant was in the position with apparent power to impair plaintiff's professional standing. Outrageous threats or groundless litigation could be found to amount to extreme and outrageous conduct which cannot be tolerated in civilized community. The extreme and outrageous nature of the conduct may arise not so much from what is done as from the abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests. See Prosser & Keeton, Torts Section 12 at 61 (5th ed).

As the First Department underscored in Carter v. Andriani, 443 NYS2d 157 (1st Dept., 1981), where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, an action for intentional infliction of emotional distress is available. The allegations taken together have shown a planned program of harassment or threats with outrageous actions and deliberate, continuous course of conduct of defendants and resulting emotional upset, proof of which will be best left for trial.

Although a defendant might not have intended harassment, the First Department ruled in 164 Mulberry St. Corp. v. Columbia Univ., 4 AD3d 49 (1st Dept., 2004) that he or she intended to elicit a response. By doing so, he or she may have recklessly disregarded the potential consequences of that conduct since defendant's actions allegedly tainted plaintiff's reputation.

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact as intentional infliction of emotional distress since Teacher Defendants' alleged acts of a deliberate and malicious campaign of harassment or intimidation and an alleged planned program of harassment or threats can be seen to amount to extreme and outrageous conduct which cannot be tolerated in a civilized community. Thus, they are actionable. See Vasarhelvi v. New School for Social Research et al, supra; Carter v. Andriani, supra; Nader v. General Motors Corp., 25 NY2d 560 (1970); 164 Mulberry St. Corp. v. Columbia Univ., supra.

As the Court of Appeals ruled in Plant City Steel Corp. v. National Mach. Exch., 23 NY2d 472 (1969), the liberal pleading requirement pursuant to CPLR 3014 does not force a plaintiff to elect between hypothetical or alternative causes of action at the pleading stage. See also Man Advisors, Inc. v. Selkoe, 101 NYS3d 843 (1st Dept., 2019)

Thus, this Court finds that it is not duplicative of the defamation claim because CPLR Section 3014 permits causes of action in the alternative. See Plant City Steel Corp. v. National Mach. Exch., supra; Man Advisors, Inc. v. Selkoe, supra; Wilson v. Merrill Lynch, Pierce, Fenner & Smith, 66 NY2d 988 (1980); 164 Mulberry St. Corp. v. Columbia Univ., supra.

Negligent Infliction of Emotional Distress (8th Cause of Action):

According to the Court of Appeals in Johnson v. State of New York, 37 NY2d 378 (1975), recovery for negligent infliction of emotional distress should be allowed if evidence shows: 1) causation, 2) substantial harm and 3) guarantee of genuineness. The key to liability focuses upon defendant's duty. One to whom a duty of care is owed may recover for harm sustained solely as a result of an initial, negligently caused psychological trauma but with ensuing psychic harm with residual physical manifestations. In order to be held liable in negligence, he or she need not foresee novel or extraordinary consequences. It is enough that he or she be aware of the risk of danger. If the consequences were all within the "orbit of danger", they are therefore within the "orbit of duty" for the breach of which a wrongdoer may be held liable. See Palsgraf v. Long Is. R. R. Co., 248 NY 339. The false message and

the events flowing from its receipt were the proximate cause of claimant's emotional harm. Thus, claimant is entitled to recover for that harm, especially if supported by objective manifestations of that harm. See also Schulman v. Prudential Insurance Company of America, 226 AD2d 164 (1st Dept., 1996).

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact as negligent infliction of emotional distress because Teacher Defendants' alleged actions can amount to extreme and outrageous conduct based upon: 1) causation by the stories in the print, media and social media regarding a planned program of harassment; 2) substantial harm to her reputation; and 3) guarantee of genuineness by the manifestation of Plaintiff's physical symptoms and psychological trauma. Since the consequences were all within the "orbit of danger", they are therefore within the "orbit of duty". See Johnson v. State of New York, supra; Palsgraf v. Long Is. R.R. Co., supra. Thus, Plaintiff has a claim for negligent infliction of emotional distress. See E.J. Brooks Co. v. Cambridge Sec. Seals, 31 NY3d 441 (2018); Mandarin Trading Ltd. V. Wildenstein, 65 AD3d 448 (1st Dept., 2009); Eagle v. Jakob, 97 NY2d 165 (2001); DeAngelis v. Lutheran Medical Ctr., 58 NY2d 1053 (1983); Becker v. Schwartz, 46 NY2d 401 (1978)' Palsgraf v. Long Island R. Co., supra; Rugova v. City of New York, 132 AD3d 220 (1st Dept., 2015); Johnson v. State of New York, 37 NY2d 378 (1975); Schulman v. Prudential Ins. Co. of Am., 226 AD2d 164 (1st Dept., 1996).

This Court also finds that the negligent infliction of emotional distress cause of action is not duplicative of the defamation claim because CPLR Section 3014 permits causes of action in the alternative. See Cosmopolitan Mut. Ins. Co. v. Trapier, 20 AD2d 885 (1st Dept., 1964), aff'd 15 NY2d 503 (1964); Maines v. Cronomer Val. Fire Dept., 50 NY2d 535 (1980); Mayes v. UVI Holdings, 280 AD2d 153 (1st Dept., 2001).

Negligence (9th Cause of Action):

A negligent statement may be the basis of recovery of damages, There must be a carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage. However, such information is not actionable unless expressed directly, with knowledge or notice that it will be acted upon, to one to whom the author is bound by some relation or duty, arising out of contract or otherwise, to act with care if he or she acts at all. See European American Bank and Trust Company v. Strauhs & Kaye et al, 477 NYS2d 146 (1st Dept., 1984); Ultramares Corp. v. Touche, 255 NY 170.

Without a duty of care running directly to the injured person, the Court of Appeals determined in Landon v. Kroll Laboratory Specialists, Inc., 999 NE2d 1121 (2013) that there can be no liability of damages however careless the conduct or foreseeable harm. Although the existence of a contractual relationship by itself is not a source of tort liability to third parties, there are certain circumstances where a duty of care is assumed to certain individuals outside the contract. Such a duty of care may arise where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm. See Espinal v. Melville Snow Contrs., 98 NY2d 136 (2002). Consequently, this principle recognizes the duty to avoid harm to others is distinct from the contractual duty of performance.

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact to amount to negligence since there is a question about whether Teacher Defendants did not exercise reasonable care regarding their actions during Black History Month by having their statements against Plaintiff Catania published in print, media and social media. Additionally it can be seen by a trier of fact that there remain strong policy-based considerations regarding a finding that Teacher

Defendants owed a duty to Plaintiff Catania because of the potential for the statements to have a profound, life-altering consequences for her, thus evincing a duty of care. See Landon v. Kroll Laboratory Specialists, Inc., supra; Espinal v. Melville Snow Contrs., supra.

This Court finds that the cause of action for negligence is not duplicative because CPLR Section 3014 allows causes of action in the alternative. See Butler v. Delaware Otsego Corp., 203 AD2d 783 (3rd Dept., 1984); Plant City Steel Corp. v. National Mach. Exch., supra; Man Advisors, Inc. v. Selkoe, supra; Wilson v. Merrill Lynch, Pierce, Fenner & Smith, 66 NY2d 988 (1980); 164 Mulberry St. Corp. v. Columbia Univ., supra.

Gross Negligence (10th Cause of Action):

To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others. A party is grossly negligent when it fails to exercise even slight care or slight diligence. See Ryan v. IM Kapco, Inc., 930 NYS2d 627, 88 AD3d 682 (2nd Dept., 2011); Dolphin Holdings Ltd. V. Gander & White Shipping, Inc., 998 NYS2d 107, 122 AD3d 901 (2nd Dept., 2014); Bennett v. State Farm Fire and Casualty Company, 78 NYS3d 169 (2nd Dept., 2018); Food Pageant, Inc. v. Consolidated Edison, Inc., 429 NE2d 738, 445 NYS2d 60, 54 NY2d 167 (1981);

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact as gross negligence because all Teacher Defendants' alleged actions can evince a "reckless indifference" to her rights during their Black History Month protest due to their interviews with print, media and social media See CPLR Section 3014; Credit Alliance Corp. v. Arthur Andersen & Co., 65 NY2d 536 (1985)

This Court finds that the cause of action for gross negligence is not duplicative because CPLR Section 3014 allows causes of action in the alternative. See Plant City Steel Corp. v. National Mach. Exch., supra; Man Advisors, Inc. v. Selkoe, supra; Wilson v. Merrill Lynch, Pierce, Fenner & Smith, 66 NY2d 988 (1980); 164 Mulberry St. Corp. v. Columbia Univ., supra.

Prima Facie Tort (11th Cause of Action):

Prima facie tort is established when a defendant intentionally inflicts harm, without excuse or justification, through acts which would otherwise be lawful, and special damages are suffered. See Roche v. Claverack Coop. Ins. Co., 59 AD3d 914 (2009);Freihofer v. Hearst Corp., 65 NY2d 135 (1985).

The First Department found in Bernstein v. 1995 Associates et al, 586 NYS2d 115 (1st Dept., 1992) that prima facie tort allows a remedy for 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.

The First Department determined in Starishevsky v. Parker, 639 NYS2d 377 (1st Dept., 1996) that defendant created a hostile atmosphere by divulging confidential harassment proceedings to a newspaper reporter for publication. Because Defendant was motivated by a personal vendetta against plaintiff, it was sufficient to show that defendant acted solely with disinterested malevolence in seeing plaintiff fired. Since they are accompanied by a particularized claim of special damages in the form of identifiable lost wages and benefits, they are sufficient to state a cause of action for prima facie tort. See Burns Jackson Miller Summit & Spitzer v. Lindner, 59 NY2d 314 (1983).

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact that Teacher Defendants' actions created a hostile atmosphere by divulging confidential information to a newspaper reporter for publication in print, media and social media. Since the articles can be seen by a trier of fact as motivated by a personal vendetta against Plaintiff, Defendant Teachers' actions can be seen as a disinterested malevolence by having Plaintiff removed from her position and demoted with a lesser salary. See CPLR Section 3014; Bernstein v. 1995 Assoc., 185 AD2d 160 (1st Dept., 1992); Starishevsky v. Parker, 225 AD2d 480 (1st Dept., 1996); Stallings v. U.S. Elecs., 270 AD2d 188 (1st Dept., 2000).

Negligent Supervision of Agents, Servants and Employees As Against UFT Only (12th Cause of Action):

Not applicable to Teacher Defendants. This cause of action was dismissed against UFT Defendants pursuant to the Decision/Order, dated November 6, 2020 by the Honorable Julia Rodriguez.

Negligent Supervision of Its Organization/Association as Against UFT Only (13th Cause of Action):

Not applicable to Teacher Defendants. This cause if action was dismissed against UFT Defendants pursuant to the Decision/Order, dated November 6, 2020 by the Honorable Julia Rodriguez.

Concerted Action (14th Cause of Action):

A theory of concerted action liability rests upon the principle that all those persons who pursue a common plan or design to commit a tortious act actively take part or further it. They do so by cooperation or request or lend aid or encouragement to the wrongdoer or ratify and adopt his completed acts for their benefit. Thus, they are equally liable with the wrong doer. It is essential that each defendant charged with acting in concert for the purposes of concerted action liability in tort cases have acted tortiously and that one of the defendants committed an act in pursuance of the agreement which constitutes a tort. Parallel activity among defendants without more is insufficient to establish an agreement element necessary to maintain concerted action claim. An agreement cannot be inferred among the defendants for purposes of concerted action tort liability from common occurrence of parallel activity alone. See Rodriguez v. City of New York, 112 AD3d 905 (2nd Dept., 2013); Bichler v. Eli Lilly & Co., 55 NY2d 571 (1982); Rustelli v. Goodyear Tire & Rubber Company, 79 NY2d 289 (1992).

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact to amount to concerted action since there is a question about whether each Teacher Defendant pursued a common plan to commit their actions against Plaintiff and whether Teacher Defendants cooperated with one another, gave aid, encouraged, ratified and adopted the acts of each other for their own benefit in their common goal to oust Plaintiff Catania from her position as Acting Principal. See Rodriguez v. City of New York, supra; Bichler v. Eli Lilly & Co., supra; Rustelli v. Goodyear Tire & Rubber Company, supra.

Conspiracy (15th Cause of Action):

For the purposes of a motion to dismiss on insufficiency as a pleading pursuant to CPLR 3211(a)(7), the Court of Appeals ruled in Grid Realty Corp. v. Winokur, 43 NY2d 956 (1978) that the independent tort of conspiracy does state a cause of action.. See also FIA Leveraged Fund Ltd. V. Grant Thornton LLP, 150 AD3d 492 (1st Dept., 2017); 936 Coogan's Bluff, Inc., v. 936-938 Clifferest Hous. Dev. Fund Corp.,

162 AD3d 482 (1st Dept., 2018);Errant Gene Therapeutics, LLC v. Sloan Kettering Inst. For Cancer Research, 174 AD3d 473 (1st Dept., 2019); Keviczky v. Lorber, 290 NY 297 (1943).

The First Department determined in Errant Gene Therapeutics LLC v. Sloan-Kettering Institute for Cancer Research et al, 106 NYS3d 302 (1st Dept., 2019) that the civil conspiracy cause of action was dismissed because civil conspiracy is not recognized as an independent tort. However, the allegations in the complaint charging conspiracy are deemed part of the remaining causes of action to which they are relevant. Allegations of conspiracy serve to enable a plaintiff to connect a defendant with the acts of his co-conspirators where without it he could not be implicated. In any event, the liability of a defendant as a conspirator for co-conspirators' wrongful acts does not necessarily depend upon his active participation in the particular overt acts. Once a conspiracy is established, all defendants are liable for each other's acts in furtherance of the conspiracy. The measure of plaintiff's damages was not speculative as a matter of law.

As the First Department found in Coogan's Bluff, Inc. v. 936-938 Cliffcrest Housing Development Fund Corporation et al, 74 NYS3d 854 (1st Dept., 2018), the allegations must be sufficiently detailed to state causes of action for conspiracy to commit an individual tort.

The Appellate Division ruled in Ferrandino & Son, Inc., v. Wheaton Builders, Inc., LLC, supra that while New York does not recognize civil conspiracy to commit a tort as an independent cause of action, the claim stands or falls with the underlying tort. Since the civil conspiracy claim is clearly derivative of the tort of tortious interference, its viability is dependent upon that tort.

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact as a conspiracy because she has made detailed allegations about each of the Teacher Defendants' actions regarding their campaign of harassment against her which involves other individual torts. See Errant Gene Therapeutics LLC v. Sloan-Kettering Institute for Cancer Research et al, supra; Coogan's Bluff, Inc. v. 936-938 Cliffcrest Housing Development Fund Corporation et al, supra; Ferrandino & Son, Inc. v. Wheaton Builders, Inc., LLC, supra.

Willful Misconduct Against All Defendants and Willful Misconduct As Against UFT – Failure to Act (16th Cause of Action):

In order to prove a willful or malicious misconduct, the Appellate Division ruled in Gardner v. Owasco Riv. Ry., 142 AD2d 61 (3rd Dept., 1988) that a plaintiff must show an intentional act of unreasonable character performed in disregard of a known or obvious risk so great as to make it highly probable that harm would result. A plaintiff must show malice by defendant. The conduct or lack of affirmative action by defendant must rise to the level of willful and malicious misconduct.

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact as willful misconduct by Teacher Defendants during their protest over Black History Month and subsequent interviews with the press, media and social media which impacted her reputation by labeling her a racist. She has sufficiently alleged malice on the part of Teacher Defendants because their statements can be seen by a trier of fact as made with either knowledge of their falsity or with reckless disregard of whether they were false or not. See New York Times co., v. Sullivan, supra; Prozeralik v. Captial Cities Communications, supra. Thus, she has alleged an intentional claim of unreasonable character performed in disregard of a known or obvious risk so great as to make it highly probable that

harm would result when Teacher Defendants made their allegations regarding Black History Month to the print, media and social media. See Gardner v. Owasco Riv, Ry, supra.

Willful Misconduct As Against UFT – Failure to Act (16th Cause of Action):

Not applicable to Teacher Defendants. This cause of action was dismissed against UFT Defendants by Decision/Order, dated November 6, 2020 by the Honorable Julia Rodriguez

Joint Enterprise (17th Cause of Action):

A joint enterprise is an endeavor in which two or more persons unite to achieve a common purpose. Under such circumstances, each has express or implied authority to act for all with respect to control of means or agencies employed to execute the plan. The negligence of one member may be imputed to the others. Essential to a finding of a joint enterprise where the negligence of one member may be imputed to the others is the equal right of each member to direct or control the others in respect to the enterprise. Thus, the characterization placed upon an operation by a participant should not be conclusive. Liability will not be imputed under a joint enterprise theory where the element of control is lacking. See Fairbairn v. State, 107 AD2d 864 (2nd Dept., 1985). The rationale for the joint and several liability is that the wrongdoers are considered part of a joint enterprise and a mutual agency such that the act of one is the act of all. Liability for all that is done is visited upon each one. See Achieve It Solutions LLC v. Lewis, 186 AD3d 49 (2nd Dept., 2020). Joint and several liability which is primarily a tort-law concept imposes on each wrongdoer responsibility for entire damages awarded even though a particular wrongdoer's conduct may have caused only a portion of loss. See Matter of Seagroatt Floral Co., Inc., 78 NY2d 439 (1991).

Assuming the truth of the facts as pleaded, the acts complained about by Plaintiff can be seen by a trier of fact to amount to joint enterprise since there is a question about whether each Teacher Defendant had express or implied authority to act for all with respect to control of means to execute the plan of harassment. Each Teacher Defendant spoke with a reporter regarding all Teacher Defendants' accusations of racism by Plaintiff Catania during Black History Month. Those statements were published in print, media and social media. See Fairbairn v. State, supra; Achieve It Solutions LLC v. Lewis, supra; Matter of Seagroatt Floral Co., supra.

Anti-SLAPP Lawsuit Claim:

The New York State Legislature in 1992 enacted Civil Rights Law Sections 70-a and 76-a to provide heightened protections for defendants in actions which involve public petition or participation often referred to as SLAPP suits. See Hariri v. Amper, 854 NYS2d 126 (1st Dept., 2008).

Civil Rights Law Section 76-a(1)(a) defines an action involving public petition and participation as an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee. It is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission. A "public applicant or permittee" is defined as any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlements for use or permission to act from any government body or any person with an interest, connection or affiliation with such person that is materially related to such application or permission. See Civil Rights Law Section 76-a(1)(b). See Hariri v. Amper, supra.

Civil Rights Law Section 70-a provides that a defendant in a SLAPP suit may recover costs and attorneys' fees as well as compensatory and punitive damages if certain delineated showings are made. See Civil Rights Law Section 70-a(1)(a), (b), (c). See Hariri v. Amper, supra.

The United States Court of Appeals for the Second Circuit clarified in Chandok v. Klessig, 632 F3d 803 (2011) that for a claim under the ani-SLAPP statute to be viable: 1) there must be a public application or petition; 2) the public applicant or permittee of that application must file a lawsuit against a person who is "materially" related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission; and 3) the lawsuit must be at minimum substantially without merit. The U.S. Court of Appeals ruled that the anti-SLAPP counterclaim should be dismissed because plaintiff was not a public applicant or permittee because government permission was not a prerequisite to her work. Uniformly, the New York courts have found that the persons properly alleged to be public applicants within the meaning of the anti-SLAPP statute were persons whose proposed actions required government permission. See Novosiadlyi v. James, 70 AD3d 793 (2nd Dept., 2010); Singh v. Sukram, 866 NYS2d 267 (2nd Dept., 2008). The U.S. Court of Appeals highlighted that it was unaware of any case which held the New York anti-SLAPP statute applicable to a person who is entitled to engage in her proposed course of conduct without government permission or to a person who merely sought government funding for a project which would be financed privately.

Moreover, as the First Department found in Hariri v. Amper, supra, the mere advocation of one's agenda at public meetings or initiation of legal action does not bring an individual within the ambit of an applicant or permittee defined in Civil Rights Law Section 76-a(1)(b).

The First Department also noted in Guerrero v. Carva, 10 AD3d 105 (1st Dept., 2004) that a plaintiff's defamation claims were not "materially related" to defendants' efforts to comment on or oppose any particular application or permit within the meaning of the statute. Instead defendants' intent was to cause embarrassment or injury to plaintiff's reputation by a public airing of the allegations against plaintiff. Thus, the defamation suit brought by plaintiff was not a SLAPP suit pursuant to Civil Rights Law Section 76-a(1)(a) in the absence of evidence that defendants were an agency regarding an application or permission of plaintiffs. Because a plaintiff's action did not affect defendants' rights of public petition and participation before public agencies, it did not offend Civil Rights Law Sections 70-a and 76-a.

As the Appellate Division ruled in Singh v. Skhram, 866 NYS2d 267 (2nd Dept., 2008), defendants were not entitled to dismissal of the complaint regarding the defamation claims in a Civil Rights Law Section 76-a action because plaintiff alleged malice and the alleged facts indicated that defendants knew that portions of the statements were false or made the statements with reckless disregard to whether the statements were true or false.

As the Court of Appeal found in Matter of Minister, Elders & Deacons of Refm. Prot. Dutch, 76 NY2d 411 (1990), a motion is "frivolous" within the meaning of rule 130-1.1(a) of the Uniform Rules for Trial Court if it is completely without merit in law or fact and cannot be supported by any reasonable argument for an extension, modification or reversal of existing law. See NYCRR 130-1.1 (c)(1). A motion is also frivolous if it was undertaken primarily to delay or prolong the resolution of litigation. See McKinneys 1990 New York Rules of Court (22 NYCRR) Section 130-1.1 (c)(ii). See also Matter of L&M Bus Corp., v. New York City Dept. of Educ., 83 AD3d 432 (1st Dept., 2011).

The First Department maintained in Ansonia Associates Limited Partnership v. Ansonia Tenants' Coalition, Inc. et al, 677 NYS2d 575 (1st Dept., 1998) that plaintiff's action was not a SLAPP suit pursuant to Civil Rights Law Section 76-a(1)(a) because it was not frivolous and the documentary evidence did not definitively dispose of the matter. See Bell v. Little, 250 AD2d 485; CPLR 8303-a; Matter of Entertainment Partners Group v. Davis, 198 AD2d 63; Fischbach & Moore v. Howell Co., 240 AD2d 157.

When a court considers sanctions against a party or an attorney pursuant to 22 NYCRR 130-1.1(c), the First Department ruled in Yenom Corp. v. 155 Wooser St. Inc., 33 AD3d 67 (1st Dept., 2006) that it must consider whether the alleged frivolous conduct was continued when its lack of merit was or should have been apparent to the party or attorney.

Because the instant action was brought to vindicate Plaintiff Catania's rights, it can be said that the action is not retaliatory or frivolous in nature. As discussed, Plaintiff has presented a substantial basis in law in support of her complaint. See Allan & Allan Arts v. Rosenblum, 201 AD2d 136 (2nd Dept., 1994); Guerrero v. Carva, supra; Matter of Minister, Elders & Deacons of Refm. Prot. Dutch, supra.

Moreover, Teacher Defendants have failed to prove that Plaintiff Catania's lawsuit is a SLAPP suit pursuant to Civil Rights Law Section 76-a(1)(a) since no application or permit was before an agency. Her action does not affect Teacher Defendants' rights of public petition and participation before public agencies. Her defamation claims are not materially related to Teacher Defendants' ability to comment on or oppose any particular application or permit within the meaning of the statutes. Plaintiff Catania has alleged malice in her defamation claims and alleged facts indicating that there is a question about whether Teacher Defendants knew that portions of their statements were false or made with reckless disregard to whether the statements were true or false. See Hariri v. Amper, supra; Guerrero v. Carva, supra; Chandok v. Klessig, supra. Thus, this Court finds that her lawsuit is not frivolous. See Bell v. Little, supra; Ansonia Associates Limited Partnership v. Ansonia Tenants' Coalition, Inc. et al, supra; Matter of Entertainment Partners Group v. Davis, supra; Fischbach & Moore v. Howell Co., supra.

Consequently, in the absence of evidence that Teacher Defendants were petitioning an agency regarding an application or permission of Plaintiff, Plaintiff Catania's action did not affect Teacher Defendants' rights of public petition and participation before public agencies and accordingly did not offend Civil Rights Law Sections 70-a and 76-a. See Bell v. Little, 250 AD2d 485 (1998); Guerrero v. Carva, supra. Thus, Teacher Defendants' conduct was not within the purview of the statute. See Guerrero v. Carva, supra.

This Court also finds that Plaintiff is not a Permittee because she has not applied for a permit, zoning change, lease, license or other permission from any government body. Plaintiff Catania was acting in her official capacity as Assistant Principal regarding the lesson plans during Black History Month. See Civil Rights Law Section 76-a(1)(b); Hariri v. Amper, 51 AD3d 146 (1st Dept., 2008); Guerrero v. Carva, 10 AD3d 105 (1st Dept., 2004); Yeshiva Chofetz Chaim Radin, Inc., v. Village of New Hempstead, 98 F.Supp2d 347 (U.S. District Court, S.D.N.Y. 2000); City of Buffalo v. Hawks, 226 AD 480 (4th Dept., 1929); 600 W. 115th St. Corp. v. Von Gutfeld, 80 NY2d 130 (1992), cert. denied 508 US 910 (1993).

Therefore, Teacher Defendants are not entitled to sanctions because they are not warranted pursuant to 22 NYCRR 130-1.1 (c). Plaintiff Catania's action is not completely without merit in the law. It is not used to harass another. See Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of NY v. 198 Broadway, 76 NY2d 411 (1990); Bell v. State of New York, 96 NY2d 811 (2001); Matter

of L&M Bus Corp. v. New York City Dept. of Educ., 83 AD3d 432 (1st Dept., 2011); Gordon Group Inv, LLC v. Kugler, 127 AD3d 592 (1st Dept., 2015); Yenom Corp. v. 155 Wooster St., Inc., 33 AD3d 67 (1st Dept., 2006); Sansum v. Fioratti, 128 AD3d 420 (1st Dept., 2015).

Teacher Defendants CPLR Section 3211(a)(1) Argument:

The Court of Appeals reasoned in Heaney v. Purdy, 29 NY2d 157 (1971) that the applicable standard for resolving a motion under CPLR Section 3211(a)(1) is that the documentary evidence submitted must conclusively establish a defense to the asserted claims as a matter of law. See also Leon v. Martinez, 84 NY2d 83 (1994); Kolchins v. Evolution Markets, Inc., 31 NY3d 100 (2018); Alden Global Value Recovery Master Fund, LP v. KeyBank NA, 159 AD3d 618 (1st Dept., 2018).

The First Department ruled in Fortis Financial Services, LLC v. Fimat Futures USA Inc., 290 AD2d 383, 737 NYS2d 40 (1st Dept., 2002) that on a motion to dismiss pursuant to CPLR 3211(a)(1) the defendant has the burden of showing that the relied upon documentary evidence resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. See Scadera v. Robillard, 256 AD2d 567 (2nd Dept., 1998).

This Court finds that Teacher Defendants failed to conclusively establish a defense to the asserted claims as a matter of law which would warrant disposal of Plaintiff Catania's claims. See CPLR Section 3211(a)(1); Leon v. Martinez, supra; Kolchins v. Evolution Markets, Inc., supra; Alden Global Value Recovery Master Fund, LP v. KeyBank NA, supra; Fortis Financial Services, LLC v. Fimat Futures USA Inc., supra; Scadera v. Robillard, supra.

Teacher Defendants CPLR Section 3211(a)(5) Argument:

Although Teacher Defendants labeled their Notice of Motion as also requesting CPLR Section 3211(a)(5) relief, this Court notes that they failed to present any arguments regarding arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of any party, payment, release, res judicata, statute of frauds or statute of limitations. Thus, this Court finds that they did not conclusively establish a defense to the asserted claims as a matter of law which would warrant disposal of Plaintiff Catania's claims.

Personal Jurisdiction Over Teacher Defendant Jacinth Scott Pursuant to CPLR 3211(a)(8):

The Appellate Division determined in Purzak v. Long Island Housing Services, Inc., 53 NYS3d 112, 149 AD3d 989 (2nd Dept., 2017) that a process server's affidavit stating that personal service was effected by delivering a copy of the summons with notice to an authorized agent, and providing a description of that person, constitutes prima facie evidence of proper service. See CPLR 311(a)(1). When there is a sworn denial of service by the defendant, the affidavit of service is rebutted and the plaintiff must establish by a preponderance of evidence at a hearing.

The Appellate Division found in Deb v. Hayut, 97 NYS3d 662, 171 AD3d 862 (2nd Dept., 2019) that the burden of proving that personal jurisdiction was acquired over a defendant rests with the plaintiff. The failure to file an affidavit of service with the Court pursuant to CPLR Section 308(4) is generally a procedural irregularity which may be cured. The Supreme Court denied a defendant's motion to dismiss pursuant to CPLR 3211(a)(8) with leave to renew upon the submission of affidavits from the defendants addressing when they were served with the summons and complaint. Since the plaintiff did not cure the

defect and in the absence of evidence that the defendant was properly served, the defendant's motion pursuant to CPLR 3211(a)(8) to dismiss should have been granted.

Teacher Defendant Scott averred in her Affidavit that she did not receive service of the "Summons and Notice" at any time pursuant to CPLR 3211(a)(8). While Teacher Defendant Scott instructed her attorney to enter an appearance on her behalf, she averred that she did not waive or accept service by her attorney's appearance pursuant to CPLR 3211(a)(8).

Since Plaintiff improperly requested in her opposition that her time to serve Teacher Defendant Scott be extended without making a motion for leave to serve, she has in essence acknowledged that service was not made.

Because there was no Affidavit of Service provided by Plaintiff in her opposition papers regarding service on Teacher Defendant Scott, that part of Teacher Defendants' motion to dismiss the Complaint against Teacher Defendant Scott is granted solely against her pursuant to CPLR 3211(a)(8). See Purzak v. Long Island Housing Services, Inc., supra; Deb v. Hayut, supra.

Accordingly, it is hereby ORDERED that:

Plaintiff Catania's motion for a stay of the hearing and determination as well as a request to file a Supplemental Memorandum of Law pursuant to CPLR Section 2201 is DENIED (Sequence 11).

Teacher Defendants Liriano, Scott and Dickson's motion to dismiss Plaintiff's Complaint pursuant to CPLR 3016(a), CPLR 3211(a)(1). (a)(5), (a)(7) as well as Sections 70-a and 76-a of the Civil Rights Law and CPLR 3211(g) for dismissal of Plaintiff's lawsuit as an anti-SLAPP proceeding and for sanctions pursuant to NYCRR 130 is DENIED (Sequence 9).

That part of Teacher Defendants' motion to dismiss the Complaint against Teacher Defendant Jacinth Scott pursuant to CPLR 3211(a)(8) is GRANTED (Sequence 9), and the Complaint is DISMISSED only against Teacher Defendant Scott (Sequence 9).

This constitutes the Decision and Order of the Court.

Dated: April 15, 2021
Bronx, New York

E N T E R,

Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court