SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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DR. MARK CRISPIN MILLER,

Plaintiff,

- v -

ARJUN APPADURAI, DEBORAH BORISOFF, STEPHEN DUNCOMBE, ALLEN FELDMAN, LISA GITELMAN, RADHA S. HEGDE, NICHOLAS MIRZOEFF, SUSAN MURRAY, ARVIND RAJAGOPAL, MARITA STURKEN, AURORA WALLACE, JAMIE SKYE BIANCO, PAULA CHAKRAVARTTY, BRETT GARY, TED MAGDER, MARA MILLS, JUAN PINON, NATASHA SCHULL, NICOLE STAROSIELSKI, ALEXANDER GALLOWAY,

Defendants.

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INDEX NO. 160329/2020

MOTION DATE 03/02/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 166, 167, 168, 169, 170, 172

were read on this motion to/for DISMISS.

In this defamation action, defendants Arjun Appadurai (Appadurai), Deborah Borisoff (Borisoff), Stephen Duncombe (Duncombe), Allen Feldman (Feldman), Lisa Gitelman (Gitelman), Radha S. Hegde (Hegde), Nicholas Mirzoeff (Mirzoeff), Susan Murray (Murray), Arvind Rajagopal (Rajagopal), Marita Sturken (Sturken), Aurora Wallace (Wallace), Jamie Skye Bianco (Bianco), Paula Chakravartty (Chakravartty), Brett Gary (Gary), Ted Magder (Magder), Mara Mills (Mills), Juan Piñon (Piñon), Natasha Schüll (Schüll), Nicole Starosielski (Starosielski), and Alexander Galloway (Galloway) (collectively, defendants) move, pursuant to CPLR 3211 (a) (1) and (a) (7), CPLR 3211 (g) and Civil Rights Law §§ 70-a and 76-a, to dismiss the complaint

brought by plaintiff Dr. Mark Crispin Miller with prejudice, and to recover their costs, attorney's fees and compensatory and punitive damages.

BACKGROUND

The following facts are drawn primarily from the complaint unless otherwise indicated and are assumed to be true for purposes of this motion (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]). Plaintiff is a tenured professor in the Department of Media, Culture and Communication (the Department or MCC) at New York University (NYU) (NY St Cts Elec Filing [NYSCEF] Doc No. 110, Jeremy A. Chase [Chase] affirmation, exhibit 2, ¶ 9). Defendants are all current or former professors in the Department (*id.*, ¶ 10).

On October 21, 2020, defendants signed a letter (the Letter) addressed to nonparties Dean Jack Knott (Knott) and Provost Katherine Fleming at NYU purporting to advance certain facts about plaintiff. The Letter begins with the statement that the "undersigned faculty … affirm the values of academic freedom," and continues with,

> "[plaintiff] is currently circulating a petition accusing our department of violating his academic freedom and conducting an email campaign against the department. Over the years, many of us have been distressed and concerned over the positions that Professor Miller has espoused on his highly visible website, where he prominently displays his title as a full tenured professor in our department. These positions include characterization of transgender surgery as a eugenic form of sterilization, direct mockery ridicule of trans individuals, and denial of the Sandy Hook elementary school shooting"

(NYSCEF Doc No. 110 at 14). Defendants referred to student complaints about plaintiff's classroom conduct and "the way in which he engages discussion around controversial views and non-evidenced based arguments" (*id.*). They wrote that he has "attacked a student who publicly objected to his criticism of mask usage in an in-classroom setting, and used his position of authority to intimidate students who choose to wear masks and abide by NYU policy, New York State law,

and CDC guidelines," and that his act of naming and publishing the student's contact information had led to cyberbullying (*id.*). Defendants expressed, "[w]e do not condone nor will we tolerate intimidation of students, staff, and colleagues" (*id.*). The Letter concludes:

> "We call on Steinhardt and University leadership to publicly support the NYU community and undertake an expedited review, as per the Faculty Handbook and Title IV, of Professor Miller's intimidation tactics, abuses of authority, aggressions and microaggressions, and explicit hate speech, none of which are excused by academic freedom and First Amendment protections. If your review substantiates our claims, we ask that you publicly condemn his actions and take whatever further disciplinary measures are deemed appropriate. It is unacceptable to remain silent in the face of ongoing harm to our students. Further, we call upon the administration to establish stronger protocols and policies to protect students, staff, and nontenured faculty members from intimidation and harm"

(*id.* at 15).

Plaintiff commenced this action on November 30, 2020. The complaint dated December 4, 2020 pleads a single cause of action for defamation predicated upon alleged misstatements of fact in the Letter (NYSCEF Doc No. 110, ¶¶ 5 and 11), a copy of which is attached to the complaint. According to the complaint, the purported facts as opposed to "opinion" are:

> "a) Plaintiff is circulating a petition accusing the department of violating his academic freedom;
> b) Plaintiff is conducting an 'email campaign against the department';
> c) Plaintiff has a highly visible web site;
> d) Plaintiff prominently displays on his web site his title as a full tenured professor;
> e) Plaintiff has taken certain controversial positions on the web site;
> f) Specifically, plaintiff has characterized transgender surgery as a eugenic form of sterilization;
> g) Plaintiff has engaged in direct mockery and ridicule of trans individuals on his web site;
> h) On his web site, plaintiff took the position that the Sandy Hook shooting did not occur;
> i) Students have regularly complained about plaintiff's conduct in the classroom;

> j) Students have complained about 'the way in which' plaintiff engages in discussions and controversial subjects;
> k) Students have complained that plaintiff advances 'non-evidence' based arguments;
> l) Despite these complaints, plaintiff has not improved his behavior;
> m) Plaintiff recently attacked a student who publicly objected to his classroom criticism of those who choose to wear masks;
> n) Plaintiff uses his authority to intimidate students who choose to wear masks;
> o) Plaintiff repeatedly and publicly identified the student who publicly objected to his classroom criticism of those who choose to wear masks;
> p) Due to his publication of this student's name and contact information, she has been repeatedly cyber-bullied and threatened;
> q) Plaintiff has repeatedly used intimidation tactics;
> r) Plaintiff has repeatedly committed abuses of authority;
> s) Plaintiff has repeatedly engaged in aggressions and microaggressions, including 'hate speech'"

(*id.*, ¶ 12). The complaint alleges that statements 12(f) to (h) cause those reading the Letter to believe that plaintiff is "mentally unstable and unworthy of belief"[1] (*id.*, ¶ 15). Statements 12(i) to (l) allegedly "mis-portray plaintiff as someone who poorly discharged his responsibilities as a university professor and sought to intimidate students and limit discourse" (*id.*, ¶ 16). Statements 12(m) to (p) are alleged by plaintiff to be false because plaintiff did not attack a student for wearing a mask or for supporting those who choose to wear masks, and because plaintiff did not disseminate any information about the subject student or cause the student to suffer abuse on social media (*id.*, ¶ 19). Statements 12(q) to (s) allegedly denigrate plaintiff in his profession (*id.*, ¶ 20). NYU's investigation is ongoing (*id.*, ¶ 14). Plaintiff maintains that these 19 factual claims have caused him "embarrassment, humiliation, a loss of professional standing, emotional distress and exacerbated the symptoms of a serious physical illness he suffers" (*id.*, ¶ 26).

In lieu of serving an answer, defendants move for dismissal on the ground that this action is a strategic lawsuit against public participation (SLAPP) brought by plaintiff in retaliation against

[1] The challenged statements are referred to using the paragraph/letter assigned to them in the complaint.

them for exercising their free speech rights on issues of public interest. They posit that the defamation claim lacks a substantial basis in law and should be dismissed under New York's anti-SLAPP law and CPLR 3211 (a) (1) and (a) (7). The motion is supported by defendants' affidavits and excerpts from plaintiff's website and social media accounts, among other exhibits.

Plaintiff, in opposition, tenders his affidavit, a copy of the petition he had filed on change.org and numerous unsworn statements from students.[2]

DISCUSSION

A. Civil Rights Law §§ 70-a and 76-a

Defendants argue that the present lawsuit meets the definition of a SLAPP suit because they were engaged in lawful conduct in furtherance of their constitutional right of free speech on matters of public interest, namely inappropriate classroom behavior; public health protocols on mask wearing during the ongoing COVID-19 pandemic; a public attack on an undergraduate student (Student A) by a professor at that university; anti-transgender sentiments; and the Sandy Hook elementary school shooting. Plaintiff, in response, argues that this action concerns a private dispute between him, defendants and NYU involving defendants' request for an expedited review into his conduct by NYU. He questions the timeliness of the Letter which was written one month after he allegedly attacked Student A. In addition, plaintiff claims that any concerns defendants may have had regarding his alleged anti-transgender sentiments and Sandy Hook denial would not

[2] Plaintiff is reminded of Uniform Rule for Trial Courts (22 NYCRR) § 202.8-b (a) (i) and (c), which provide that "affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7,000 words each" and that each "memorandum, affirmation, and affidavit shall include … a certification by counsel … who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit." Uniform Rule 14 (b) (1) of the Rules of the Justices, New York County, Supreme Court, Civil Branch also provides, in part, that "memoranda of law shall not exceed 30 pages each." Plaintiff's 62-page memorandum of law and 28-page affidavit lack the requisite word count certification and exceed the allotted page limits.

likely "assist with the alleged public interests claimed" given that their remarks were made in a "private presentation" (NYSCEF Doc No. 166, plaintiff mem of law at 55-56).

CPLR 3211 (g) governs motions to dismiss SLAPP suits. If the defendant on a motion brought under CPLR 3211 (a) (7) shows that the action involves public petition or participation, then the plaintiff must demonstrate that "the cause of action has a substantial basis in law" (CPLR 3211 [g] [1]). The court must consider the pleadings and supporting and opposing affidavits in making this determination (CPLR 3211 [g] [2]). If the plaintiff fails to satisfy this burden, then, in addition to dismissal, the court shall award the defendant their costs and attorney's fees (*see* Civil Rights Law § 70-a [1] [a]).

SLAPP suits "are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future" (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137 n 1 [1992], *rearg denied* 81 NY2d 759 [1992], *cert denied* 508 US 910 [1993]). As a result, New York's anti-SLAPP statute is "specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation" (*id.*). The anti-SLAPP law must be strictly construed (*see 315 W. 103 Enters. LLC v Robbins*, 171 AD3d 466, 467 [1st Dept 2019], *lv dismissed* 34 NY3d 1151 [2020]). In 2020, the anti-SLAPP law was amended to expand the definition of an "action involving public petition and participation" (*see* Civil Rights Law § 76-a, as amended by L 2020, ch 250, § 2). Civil Rights Law § 76-a (1) (a) now reads, in part:

> "An 'action involving public petition and participation' is a claim based upon:
> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."

Civil Rights Law § 76-a (1) (d) directs that the term "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter." A plaintiff in an action involving public petition and participation may recover damages only if:

> "in addition to all other necessary elements, [the plaintiff] shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue"

(Civil Rights Law § 76-a [2]).

Here, defendants have failed to demonstrate that Civil Rights Law § 76-a (1) (a) (2) applies to this action. "A matter of public concern is generally 'any matter of political, social or other concern to the community'" (*Cioffi v Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F 3d 158, 164 [2d Cir 2006], *cert denied* 549 US 953 [2006]), and involves "'a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants'" (*Fairley v Peekskill Star Corp.*, 83 AD2d 294, 298 [2d Dept 1981], quoting *Waldbaum v Fairchild Publications*, 627 F 2d 1287, 1296 [DC Cir 1982], *cert denied* 449 US 898 [1982]). To be sure, the issue of public health is a matter of public concern (*see Bridgeford v Armstead*, 2021 WL 1390641, *6, 2021 US Dist LEXIS 72047, *17 [D Md, April 13, 2021, No. PJM-20-1261] [stating that "[p]ublic health is a matter of public concern and limiting the spread of COVID-19 is a matter of public interest"]). The Letter touches upon other topical issues of the time, as well. However, "publications directed only to a limited, private audience are 'matters of purely private concern'" (*Huggins v Moore*, 94 NY2d 296, 302 [1999], quoting *Dun & Bradstreet v Greenmoss Bldrs.*, 472 US 749, 759 [1985]). In this case, defendants published the Letter by email to a limited audience – the dean for MCC and the provost for NYU. That the Letter was transmitted to only two people implies that the communication involves a matter of purely private concern.

Defendants' attempt to transform a purely private matter into one involving a matter of public interest fails. The 2020 amendments to Civil Rights Law § 76-a were meant to reinforce the original objective of the statute, which was "to provide the utmost protection for the free exercise or speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." (*Palin v New York Times Co.*, 510 F Supp 3d 21, 27 [SD NY 2020] [internal quotation marks and citation omitted]). It can hardly be said that the Letter, transmitted by email to two people, qualifies as a communication made in a public forum (*see e.g. Center for Med. Progress v Planned Parenthood Fedn. of Am.*, 2021 WL 3173804, *9, 2021 US Dist LEXIS 140055, *26 [SD NY, July 27, 2021, No. 20 Civ. 7670 (CM)] [reasoning that Civil Rights Law § 76-a (1) applied to statements published on Twitter and *Rewire News*, which were both open the public]). Notably, while the Letter references plaintiff's petition, defendants did not submit the Letter to the website where the petition had been posted. Moreover, defendants each aver that it was never their intention to make the Letter public, and that it was plaintiff's decision to publicize its contents on his website (NYSCEF Doc No. 87, Galloway aff, ¶ 10; NYSCEF Doc No. 88, Feldman aff, ¶¶ 12 and 14; NYSCEF Doc No. 89, Appadurai aff, ¶¶ 8 and 11; NYSCEF Doc No. 90, Rajagopal aff, ¶ 8; NYSCEF Doc No. 91, Wallace aff, ¶ 8; NYSCEF Doc No. 92, Gary aff, ¶ 14; NYSCEF Doc No. 93, Borisoff aff, ¶ 11; NYSCEF Doc No. 94, Bianco aff, ¶ 15; NYSCEF Doc No. 95, Piñon aff, ¶ 11; NYSCEF Doc No. 96, Gitelman aff, ¶ 10; NYSCEF Doc No. 97, Mills aff, ¶ 13; NYSCEF Doc No. 98, Sturken aff, ¶¶ 20 and 22; NYSCEF Doc No. 99, Schüll aff, ¶¶ 19-21; NYSCEF Doc No. 100, Mirzoeff aff, ¶ 11; NYSCEF Doc No. 101, Starosielski aff, ¶ 21; NYSCEF Doc No. 102, Chakravartty aff, ¶¶ 13 and 17; NYSCEF Doc No. 103, Hedge aff, ¶¶ 12-13; NYSCEF Doc No. 104, Duncombe aff, ¶¶ 12 and 14; NYSCEF Doc

No. 105, Murray aff, ¶ 19; NYSCEF Doc No. 106, Magder aff, ¶¶ 11 and 13). Thus, defendants have failed to establish that this action falls under New York's anti-SLAPP statute.

B. Dismissal under CPLR 3211 (a) (1) and (a) (7)

Dismissal under CPLR 3211 (a) (1) is warranted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]). Emails constitute documentary evidence for purposes of CPLR 3211 (a) (1) (*see Calpo-Rivera v Siroka*, 144 AD3d 568, 568 [1st Dept 2016]; *accord Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015], *affd* 31 NY3d 100 [2018]).

"In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff 'the benefit of every possible favorable inference'" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]). "'[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail'" (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013] [citation omitted]). However, "bare legal conclusions" will not suffice (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]). When the defendant submits documentary evidence, "'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations

omitted]). Whether a plaintiff can ultimately prevail is not part of the court's calculus (*see J.P. Morgan Sec. Inc.*, 21 NY3d at 334]).

As a preliminary matter, plaintiff's objection to the submission of defendants' affidavits as more appropriate for a summary judgment motion is not supported. "An affidavit is an appropriate vehicle for authenticating and submitting relevant documentary evidence" (*Muhlhan v Goldman*, 93 AD3d 418, 418 [1st Dept 2012]). An affidavit also "may provide 'connecting link[s]' between the documentary evidence and the challenged statements" in a defamation action (*id.* at 418-419 [citation omitted]), and documentary evidence may be used to establish the truth of the challenged statements (*see Greenberg v Spitzer*, 155 AD3d 27, 45 [2d Dept 2017]). Here, several defendants aver that they personally reviewed plaintiff's website or social media accounts and submit the pages they read (NYSCEF Doc No. 87, ¶ 7; NYSCEF Doc No. 88, ¶¶ 7 and 10; NYSCEF Doc No. 90, ¶ 7; NYSCEF Doc No. 94, ¶ 5; NYSCEF Doc No. 96, ¶¶ 5 and 7; NYSCEF Doc No. 97, ¶¶ 5 and 11; NYSCEF Doc No. 100, ¶¶ 6-7; NYSCEF Doc No. 101, ¶ 14; NYSCEF Doc No. 102, ¶ 5; NYSCEF Doc No. 103, ¶ 6; NYSCEF Doc No 105, ¶ 12; NYSCEF Doc No. 106, ¶ 9). Other defendants viewed "screenshots" of posts that had been saved from plaintiff's social media accounts or links to certain posts that had been circulated by others (NYSCEF Doc No. 87, ¶ 5; NYSCEF Doc No. 98, ¶¶ 6 and 17; NYSCEF Doc No. 99, ¶¶ 10-11).

"Defamation is the making of a false statement about a person that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society'" (*Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014], quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *cert denied* 434 US 969 [1977]). "Whether particular words are defamatory presents a legal question to be resolved by the court in the first

instance" (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985]). "The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable" (*id.* at 594). Since "only facts' are capable of being proven false, … only statements alleging facts can properly be the subject of a defamation action" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks and citation omitted]), as "[a]n expression of pure opinion is not actionable" (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]). "A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based" (*id.*). A mixed statement of fact and opinion is actionable as implies that the statement is based on facts not known to the audience (*id.* at 289-290).

A statement, although defamatory, may be protected by a qualified privilege. "A good-faith communication upon any subject matter in which the speaker has an interest, or in reference to which he has a duty, is qualifiedly privileged if made to a person having a corresponding interest or duty" (*Present v Avon Prods.*, 253 AD2d 183, 187 [1st Dept 1999], *lv dismissed* 93 NY2d 1032 [1999]). A statement that is subject to a qualified privilege cannot form the basis for a defamation claim (*see Stega v New York Downtown Hosp.*, 31 NY3d 661, 669 [2018]; *Toker v Pollak*, 44 NY2d 211, 218 [1978]). It is the defendant who bears the burden of demonstrating that a qualified privilege applies (*see Moore v Dormin*, 252 AD2d 421, 428 [1st Dept 1998], *lv denied* 92 NY2d 816 [1998]). Thus, "[t]o prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]).

Here, whether the challenged statements are defamatory or not, defendants have demonstrated that the statements are protected under a qualified privilege. Generally, "statements by employees to management about another employee's job-related misconduct" are protected under the common interest privilege (*Present*, 253 AD2d at 187). Here, plaintiff and defendants are members in the same group with a shared common interest (*see Keeling v Salvo*, 188 AD3d 463, 463 [1st Dept 2020]). Plaintiff and defendants are educators at MCC, which is a department at NYU, and defendants addressed the Letter to NYU officials.[3]

NYU maintains a policy titled "Non-Discrimination and Anti-Harassment Policy and Complaint Procedures for Students" (NYSCEF Doc No. 99, ¶ 18; NYSCEF Doc No. 101, ¶ 5; NYSCEF Doc No. 113, Chase affirmation, exhibit 5 at 1). The policy dated August 19, 2019 provides, in pertinent part, that "[NYU] is committed to equal treatment and opportunity for its students; to maintaining an environment that is free of bias, prejudice, discrimination, harassment, and retaliation" and that the "policy applies regardless of whether the alleged wrongdoer is a student" (NYSCEF Doc No. 113 at 1). NYU's Faculty Handbook also contains a section on academic freedom (NYSCEF Doc No. 101, ¶ 19). That section reads, in part, that "[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should not introduce into their teaching controversial matter that has no relation to their subject" (NYSCEF Doc No. 114, Chase affirmation, exhibit 6 at 1). The handbook further states that teachers "should remember that the public may judge their profession and their institution by their utterances. Hence they at all times should be accurate, should exercise appropriate restraint, should show respect for the opinions of others and for the established policy of their institution" (*id.*). In addition, Title IV in the Faculty Handbook discusses general disciplinary regulations applicable to tenured faculty

[3] Plaintiff does not dispute defendants' assertion that that they did not publish the Letter to anyone outside of NYU (*see Matter of Bondalapati v Columbia Univ.*, 170 AD3d 489, 490 [1st Dept 2019]).

(NYSCEF Doc No. 106, ¶ 8; NYSCEF Doc No. 115, Chase affirmation, exhibit 7 at 1). This section provides, in part, that "all faculty members have an obligation to comply with the rules and regulations of the University and its schools, colleges and departments" and warns that disciplinary action may be taken "when the faculty member engages in other conduct unbecoming a member of the faculty" (NYSCEF Doc No. 115 at 1).

In accordance with these stated policies, the purpose of the Letter was to apprise NYU leadership of conduct on plaintiff's part that falls outside the boundaries of academic freedom and conduct that "constitutes discrimination, attacks against students and others in our community, or advocacy for an unsafe learning environment" (NYSCEF Doc No. 110 at 14). Defendants requested an expedited review of plaintiff's conduct (*id.*). Thus, the Letter reporting on plaintiff's job-related conduct to NYU officials falls squarely within the common interest privilege (*see Ashby v ALM Media, LLC*, 110 AD3d 459, 459 [1st Dept 2013] [concluding that the common interest privilege protected employees working on the same system redesign]; *O'Neill v New York Univ.*, 97 AD3d 199, 213 [1st Dept 2012] [same]; *Present*, 253 AD2d at 189). Plaintiff does not challenge defendants' contention that they share a common interest (NYSCEF Doc No. 166 at 53).

A qualified privilege, though, is a conditional privilege since it does not absolutely shield the speaker from liability (*see Stega*, 31 NY3d at 669-670]). A "qualified privilege creates 'a rebuttable presumption of good faith that may constitute a complete defense'" (*Meloff v New York Life Ins. Co.*, 240 F 3d 138, 146 [2d Cir 2001] [citation omitted]). To rebut this presumption, the plaintiff must prove that the statement was false and that the defendant acted with common-law malice or actual or constitutional malice (*see Weldy v Piedmont Airlines, Inc.*, 985 F 2d 57, 62 [2d Cir 1993] [applying New York law]; *Benscosme v Rodriguez*, 2013 NY Slip Op 31786[U], *9 [Sup Ct, NY County 2013]). Common-law malice means "spite or ill will [which] refers not to

defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements" (*Liberman v Gelstein*, 80 NY2d 429, 439 [1992]). Constitutional malice means "'knowledge that [the statement] was false or … reckless disregard of whether it was false or not'" (*id.* at 438, quoting *New York Times Co.*, 376 US at 279-280), and focuses on "the defendant's attitude toward the truth" (*Chandok v Klessig*, 632 F 3d 803, 815 [2d Cir 2011] [internal quotation marks and citation omitted]). To prove constitutional malice, the defendant must have been "highly aware" that the statement "is probably false" (*id.*, quoting *Liberman*, 80 NY2d at 438; *Kipper v NYP Holdings Co.*, 12 NY3d 348, 354 [2009] [stating that the publisher must have entertained serious doubts about a statement's truth]). Although the plaintiff need not "show evidentiary facts to support … allegations of malice" in opposition to a motion to dismiss, the "allegations of malice may not rest on mere surmise and conjecture" (*Pezhman v City of New York*, 29 AD3d 164, 169 [1st Dept 2006]). Malice "may be inferred from a defendant's use of expressions beyond those necessary for the purpose of the privileged communication or from a statement that is 'so extravagant in its denunciations or so vituperative in its character'" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 259-260 [1st Dept 1995] [internal quotation marks and citations omitted]).

Applying these precepts, the complaint is deficient in pleading malice. First, the complaint does not contain any factual allegations to plausibly infer malice (*see Metrosearch Recoveries, LLC v City of New York*, 169 AD3d 512, 512 [1st Dept 2019], *lv denied* 33 NY3d 910 [2019]; *Hame v Lawson*, 70 AD3d 640, 641 [2d Dept 2010] [collecting cases]). The complaint alleges that all 19 statements are false, but "an allegation of falsity is insufficient to create an inference of malice" (*Smith v Montefiore Med. Ctr.*, 116 AD3d 573, 573 [1st Dept 2014]). The complaint also alleges that the Letter was "maliciously intended to portray plaintiff in a negative light" (NYSCEF

Doc No. 110, ¶ 5) and "represents a malicious and intentional campaign of distortion meant to run plaintiff out of his university professorship and disgrace and humiliate him under the guise of phony and uninformed political and cultural correctness and orthodoxy" (*id.*, ¶ 8). These conclusory allegations, though, are insufficient (*see L.Y.E. Diamonds, Ltd. v Gemological Inst. of Am., Inc.*, 169 AD3d 589, 591 [1st Dept 2019]; *Matter of Bondalapanti*, 170 AD3d at 490 [dismissing a defamation claim where the "allegations of malice amount to little more than 'mere surmise and conjecture'"]; *Green v Combined Life Ins. Co. of N.Y.*, 69 AD3d 531, 531 [1st Dept 2010] [finding that conclusory allegations of malice cannot defeat a qualified privilege]). Notably, the Letter does not call for plaintiff's termination.

Specifically, as to common-law malice, the complaint fails to allege that malice was defendants' "sole motivation" for drafting the Letter (*Matter of Soames v 2LS Consulting Eng'g, D.P.C.*, 187 AD3d 490, 492 [1st Dept 2020]; *Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438-438 [1st Dept 2017] [finding that the allegation that defendants had conspired to remove the plaintiff as a competitor demonstrates that malice was not the sole motive]; *Chao v Mount Sinai Hosp.*, 476 Fed Appx 892, 895 [2d Cir 2012], *cert denied* 568 US 981 [2012] [determining that the complaint failed to plead facts showing spite or ill will when the statements were made by defendants in fulfilling their professional obligations]). In his affidavit, plaintiff challenges the veracity of the statements in the Letter and charges defendants with conflating his online writings with his classroom teachings (NYSCEF Doc No. 167, plaintiff aff, ¶ 20). Plaintiff, though, does not put forth any additional facts from which it may be inferred that malice was defendants' *sole* motivation.

As to constitutional malice, the complaint is similarly deficient as it contains only conclusory allegations (*see Rohrlich v Consolidated Bus Tr., Inc.*, 15 AD3d 561, 562 [2d Dept

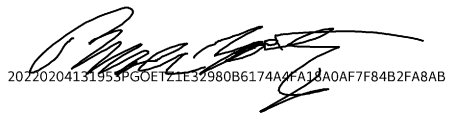
2005] [collecting cases]). The complaint does not allege that defendants "published the statements at issue with actual malice, that is, with either knowledge that they were false, or reckless disregard for the truth" (*Winklevoss v Steinberg*, 170 AD3d 618, 619 [1st Dept 2019], *appeal dismissed* 33 NY3d 1043 [2019]). The complaint, as amplified by plaintiff's affidavit, alleges only that defendants failed to conduct a good faith investigation, did not have a good faith basis for their statements and failed to discuss their concerns with him before signing the Letter (NYSCEF Doc No. 110, ¶¶ 6-7; NYSCEF Doc No. 167, ¶¶ 3, 5-9, 13-14, and 27). But as is the case here, "the failure to investigate … [the] truth [of a statement], standing alone, is not enough to prove actual malice even if a prudent person would have investigated before publishing the statement" (*Sweeney v Prisoners' Legal Servs. of N.Y.*, 84 NY2d 786, 793 [1995]). Plaintiff's affidavit fails to offer any additional facts suggesting that defendants harbored serious doubts as to the truth of the statements or that they acted with a high degree of awareness of their falsity (*Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014], *lv denied* 25 NY3d 915 [2015]). As such, the complaint fails to plead any facts sufficient to infer that defendants entertained any doubts about the accuracy of the statements (*see Rivera v Time Warner, Inc.*, 56 AD3d 298, 298 [1st Dept 2008] [dismissing a defamation claim where the "[p]laintiff did not plead actual malice either explicitly or through facts from which actual malice can be inferred"]). Accordingly, because "the moving papers conclusively establish that no cause of action exists," the complaint will be dismissed with prejudice (*Ming v Hoi*, 163 AD2d 268, 269 [1st Dept 1990] [modifying trial court order dismissing defamation claim on qualified privilege grounds without prejudice to dismissal with prejudice]).

Finally, as to defendants' request for attorney's fees "New York follows the general rule that attorney's fees are incidents of litigation and a prevailing party may not collect them from the

loser unless an award is authorized by agreement between the parties, statute or court rule" (*Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 361 [2020]). Defendants argue that they are entitled to attorney's pursuant to the anti-SLAPP statute. However, the as shown above the the anti-SLAPP statute is inapplicable and defendants provide no other basis for awarding them attorneys. Accordingly, that branch of defendants' motion seeking attorney's fees will be denied.

Accordingly, it is

ORDERED that the motion brought by defendants Arjun Appadurai, Deborah Borisoff, Stephen Duncombe, Allen Feldman, Lisa Gitelman, Radha S. Hegde, Nicholas Mirzoeff, Susan Murray, Arvind Rajagopal, Marita Sturken, Aurora Wallace, Jamie Skye Bianco, Paula Chakravartty, Brett Gary, Ted Magder, Mara Mills, Juan Piñon, Natasha Schüll, Nicole Starosielski, and Alexander Galloway to dismiss the complaint with prejudice and for their attorneys' fees, costs and damages is granted to the extent of dismissing the complaint, and the complaint is dismissed in its entirety as against said defendants with prejudice, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and the balance of the motion is otherwise denied.



2/4/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE