SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

---------------------------------------------------------------------------x

Dr. Mark Crispin Miller,

                                                Plaintiff,                                        INDEX NO. 160329/2020

vs.

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.

-------------------------------------------------------------------------x

 **PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

 **PRELIMINARY STATEMENT**

 Plaintiff filed a Verified Complaint [VC] which plausibly alleges that a group of politically correct colleagues wrote a vicious and false diatribe mischaracterizing him and his teaching. They did so, he alleges, in support of one student’s misguided effort to have him terminated for daring to challenge orthodox views regarding the efficacy of mask-wearing.

Defendants now move to discuss his action on these grounds: [1] the VC fails to allege actual malice; [2] they are protected by the common enterprise or interest doctrine; and [3] under the heightened burden of pleading required by CPLR 3211(g) in a defamation case characterized as a SLAPP lawsuit and in light of defendants’ Affidavits exhibits, the allegedly defamatory communication is “substantially true,” and plaintiff cannot demonstrate that his case raises a substantial issue of law.

Each of these arguments is unavailing, the motion should be denied, and a discovery established to facilitate discovery.

 **STATEMENT OF FACTS**

On October 21, 2020, the twenty defendants emailed a letter to five administrators associated with New York University [hereinafter “NYU”]. *See*, Exhibit 1 to VC. They wrote as professors and the first paragraph of their letter “affirms that our role in the classroom is above all to foster student engagement, analysis and inquiry…” In fact, their diatribe was an effort to stifle analysis and inquiry in the name of orthodoxies further propounded in their letter. In their Affidavits, defendants all claim that their letter was intended only for the eyes of the administrators they emailed it to, that they did not want to cause any harm to plaintiff or to publicize their letter.

 In the second paragraph of their letter, defendants claim to be responding to a petition “accusing our department of violating his academic freedom and conducting an email campaign against the department.” They provide no support for either proposition. In fact, plaintiff’s petition does not mention or refer to his department and defendants attach no emails substantiating their baseless claim that he had been conducting any email campaign against his department. *See* Exhibit 1 to the Crispin Reply Affidavit for the Petition.

 Rather than supporting their claim that plaintiff attacked their department or providing any evidence about the content of his classes, defendants next attack the alleged content of Dr. Miller’s “highly visible website,” as if their representation of its content could provide support for their concerns about his teaching. The email sent to the administrators does not attach any posts from plaintiff’s web sites or any quotations from it.

 The VC alleges that defendants’ knowingly malicious attributions to him are false, intended to vilify him and justify the adverse administrative action they support. While none of these defendants had ever contemporaneously commented about, or challenged, any post on plaintiff’s web site, *see* Miller Reply Affidavit, para. 2, that did not stop them from falsely claiming that he engaged in “direct mockery of transgender individuals” or denied the Sandy Hook elementary school shooting.

Despite their baseless and unsupported opinion that plaintiff had damaged the reputation of the Department of Media, Culture and Communication [“the department”] by espousing these positions, defendants acknowledge that “Professor Miller has the right to his opinions;” indeed, they begrudgingly concede that “[a]cademic freedom and freedom of speech are rights that we must uphold.”

Having made the concession that plaintiff was entitled both to formulate and express even ideas they found heretical, defendants next fabricate a fact devoid analysis of plaintiff’s behavior they claim constitutes “discrimination, attacks against students and others in our community, or advocacy for an unsafe learning environment.”

A careful reading of the letter demonstrates that its numerous authors never attempt to support any of these defamatory claims. There is not a single instance of “discrimination” cited in the diatribe. There is mention made of one student, but no showing that plaintiff “attacked” her or any other student. Nor is there any evidence presented that plaintiff advocated for an unsafe learning environment.

Instead, after making these strong claims, defendants assert that students “have complained regularly about Professor Miller’s conduct in the classroom and the way in which he engages discussion around controversial views and non-evidence-based arguments.” Again, the challenged email does not cite to any objectionable conduct in which plaintiff engaged nor provide any detail of the “way” in which he engaged in classroom discussion.

As plaintiff explains, not one allegedly concerned defendant colleague ever spoke with him about either subject or raised any question about his “conduct in the classroom” or how he engages in discussions with students. *See* Miller Reply Affidavit, para. 3. Moreover, the outpouring of support for plaintiff, as manifest by Exhibit 2 to the Miller Reply Affidavit, strongly suggests the fact devoid nature of defendants’ otherwise nebulous claims.

Defendants next suggest that a large number of students had filed complaints about plaintiff, that “in all cases,” NYU leadership directed these students [and now faculty] to file “a bias complaint.” The email then claims that, despite the filing of “many” bias complaints against plaintiff to “NYU’s bias review boards, the Office of Equal Opportunity and to school leaders,” there has been no change or improvement in the situation. These statements are false; the university policies require that plaintiff be provided notice of any such complaint and he has never received notice of any but one bias complaint, as is discussed below. *See* Miller Reply Affidavit, para. 4. Nor have defendants produced any such “bias” complaints nor explained how they would have access to any. The email is an attempt to vilify plaintiff and its signatories have invented a history which does not exist as a sword against Dr. Miller.

Defendants next refer to the proximate controversy, making the following allegedly factual claims, each of which is either true or false:

A) Plaintiff attacked a student on his public blog and social media platforms.

B) Plaintiff launched this attack after the student publicly objected to his criticism of mask usage in an in-classroom setting.

C) Miller “used his position of authority to intimidate students who chose to wear masks.”

D) Miller repeatedly named and provided contact information for the student who publicly objected to his criticism of mask usage in the classroom, enabling cyberbullying and threatening communication against her.

After making these claims, the signatories declare their own allegiance to a set of unequivocally progressive ideals, including their condemnation of “white supremacy, anti-trans/non-binary bias, and any hate speech,” and conclude by requesting that NYU undertake an “expedited review … of Professor Miller’s intimidation tactics, abuses of authority, aggressions and micro-aggressions, and explicit hate speech, none of which are excused by academic freedom and First Amendment protections.” *See* Exhibit 1 to Amended Verified Complaint

In other words, the signatories have concluded and pronounced plaintiff guilty of each of these heinous behaviors and attribute each to plaintiff before the conduct of any review, expedited or not.

As relief, these distinguished professors request a public condemnation of plaintiff’s actions and “further disciplinary measures … deemed appropriate.” Finally, the signatories make the claim that the “ongoing harm to our students” compelled their email and that the university needs stronger protocols to protect student, staff and untenured faculty members from intimidation and harm like that plaintiff inflicted.

Alleging that each of the facts they included in their email is substantially true, defendants move to dismiss the VC. Their motion should be denied because they have failed to prove the underlying truth of their factual claims.

We next review the Affirmation each defendant has supplied in support of his/her/their motion to dismiss and any cited exhibits, highlighting the alleged evidence to which s/he/they cites in support of the claims made in the email each signed and submitted to university administrators. We do so without prejudice to plaintiff’s legal position that, in reviewing a motion to dismiss, such Affidavits may not be considered and merely raises factual issues which must be explored through discovery and cannot be taken as true because asserted or affirmed.

1. **Arjun Appadurai** always had a positive relationship with plaintiff though they had “very few” interactions. Appadurai claims that, in 2019, he was at a faculty meeting “where concerns were expressed about Professor Miller’s actions.” Plaintiff’s troubling actions were “transphobic comments” which plaintiff made on his social accounts and website. Dr. Appadurai does not aver that he actually read any of these comments himself either before or after the faculty meeting or before signing the challenged email. He did find his unidentified colleague’s account of these speech acts “troubling,” but describes no action which he or anyone else at the meeting took.

Appadurai next describes his September 2020 receipt of an email from Professor Marita Sturken, who circulated an article from *The Gothamist* which included an account by a single student claiming that plaintiff was “espousing anti-mask rhetoric during his class.” Without any further investigation or discussion with plaintiff, Dr. Sturken advised that “senior faculty planned to draft a statement of principles in response to this incident.”

Dr. Appadurai disclaims personal knowledge of “many of the allegations about Professor Miller in the letter.” He signed the email because he trusted his colleagues.

2. **Deborah Borisoff** also claims to have had a long and collegial relationship with plaintiff. For the last 25 years, she has had “frequent interactions” with plaintiff and reports that all have been “very cordial.”

While the letter she signed in October 2020 asserts that, “for several years,” students have complained regularly about plaintiff, Borisoff claims she first heard about any issue relating to him in 2019 during the department’s search for a “Queer and/or Transgender Studies scholar.” Borisoff does not claim to have ever heard plaintiff say anything related to the search let alone make any deprecatory comments about any queer or transgender person. Nor did she review his website or social media to determine what he had written or posted on the subject. And, of course, this issue had nothing to do with a complaint by any student.

In September 2020, Borisoff received from defendant Brett Gray an email with a link to *The Gothamist* article which claimed that, during an NYU class, “Professor Miller had advocated that mask wearing was ineffective as a method to stop the spread of the COVID-19 virus.” Without any further investigation, Borisoff found Miller’s claimed comments “upsetting.”

The professors in her department scheduled two meetings/conversations: during these, Professors Schull and Murray “mentioned that numerous complaints had been raised about Professor Miller’s comments in the classroom and online.” Borisoff never received any such complaints herself and her Affidavit does not identify the nature, timing, or content of any such complaints. Without any further inquiry, she, too, accepted her colleagues’ statements and, “in solidarity,” signed the letter.

3. **Stephen Duncombe** has long known plaintiff and “respected his work.” He and plaintiff “always had a cordial relationship” and he recommended Professor Miller’s Propaganda course to his students.

However, Duncombe relates, “over the past few years students…verbally complained to me that Professor Miller had crossed the line from merely teaching about propaganda to spreading it.” In his sworn Affidavit, this defendant does not indicate how many students complained to him or what they claimed Miller had said. He also does not affirm that he ever as much as discussed or mentioned any of this to plaintiff, his long-time professional colleague. [[1]](#footnote-1)

Duncombe also claims, again vaguely, that “Professor Miller was promulgating conspiracy theories, including that the Sandy Hook school shooting was a hoax.” Again, defendant Duncombe does not identify who said this to him, their basis for so claiming and whether he took any step to verify the statements. Indeed, he claims that, because he believes in academic freedom, he never investigated to ascertain whether these statements about plaintiff’s alleged promulgation of conspiracy theories were, or was not, true.

Defendant Duncombe compounds his reliance on utter unverifiable hearsay, next claiming that he had learned from “my colleagues” [again unidentified] that Professor Miller has been creating a “hostile work and learning environment” by posting mocking online comments about transgender individuals. Again, Dr. Duncombe did not speak with plaintiff about this or take any action in 2019 when he heard about the issue.

While claiming that Professor Miller had created a hostile “learning environment,” he identifies no student who made any such claim to him.

Later in his Affidavit, Duncombe references learning in August 2019 of his obligation to report to a supervisor even hearsay statements concerning the creation of a hostile work environment. This, he claims, justifies his signing the October 2020 email, though the professor does not explain why he waited more than a year to report what he claims to have regarded as plaintiff’s creation of a hostile work environment against transgender people the prior year.

Professor Duncombe next claims that, in October 2020, Professor Marita Sturken informed him that colleagues were planning to write “a statement of principles” in response to plaintiff’s reported comment in class that “wearing masks does not prevent the spread of COVID-19” and plaintiff’s reposting of the student’s tweet critical of his comment.

Professor Duncombe offered no other factual basis for any statement in the email he signed; he, too, trusted his colleagues, did not mean for his email to be publicized, did not view the letter he signed as calling for plaintiff’s termination and denies personal animus against Dr. Miller.

4. **Dr. Alan Feldman** makes no claim that he has ever spoken with plaintiff about any matter raised in the challenged email. He claims that he first became aware of any issue concerning plaintiff in 2019, when he grew concerned because, while NYU was “searching for a Queer and/or Transgender Media Studies scholar,” plaintiff was promulgating “eugenic theories of sexual reassignment behavior as being biologically determined by corporate environmental pollution rather than by personal choice.”

Having heard about this from unnamed colleagues, Feldman did not review any of plaintiff’s writings himself, discuss his concerns with plaintiff or take any other action.

Dr. Feldman next learned from another professor, Marita Sturken, about an article in *The Gothamist* which reported that during class, Dr. Miller “told his students that wearing masks does not prevent the spread of COVID-19.” Feldman Aff. at para. 3. The article also reported that Dr. Miller provided his students links to websites that supported this point of view.

Dr. Feldman’s Affidavit makes perfectly clear that he knew Dr. Miller was teaching a class on Propaganda and did not personally endorse one or another view on mask-wearing during class. But, for him, even raising questions about mask-wearing during a pandemic was a dangerous activity and form of speech.

Dr. Feldman’s Affidavit deftly shifts from whatever happened in an NYU class [and he never investigated the content of that class] to an October 6, 2020 post on plaintiff’s website [which is not part of his classroom teaching or an assigned reading] and references a report about the COVID-19 crisis published by the Association of French Reserve Army Officers. DX-42. Plaintiff’s post plainly states that “I’ve just had time to scan it,” but Dr. Feldman writes that his “promulgation and endorsement of these theories was highly troubling and created a real risk for students’ health and safety.” In other words, we are at a university, but we are to carefully censor what we post on our own websites.

Of course, Feldman provides no basis for his claim that Dr. Miller ever directed any students to this study or the web page which Dr. Feldman references; it was published two weeks after the class in which mask-wearing was discussed.

Dr. Feldman makes no claim that he has any information supporting anything else in the challenged mail. He trusted his colleagues and, therefore, signed onto a document someone else wrote.

5. **Lisa Gitelman** served as Chair of plaintiff’s department between 2013 and 2016, had many interactions with him and described all of them as ‘cordial.’ She makes no claim that she heard that plaintiff was discriminating, abusing, or intimidating his students.

Without any citation, she repeats unsupported claims that “he gave voice to the theory that the Sandy Hook shooting was a hoax.” She also claims she heard “complaints from students and colleagues that Professor Miller has been espousing conspiracy theories.” Allegedly substantiating this, she cites DX-8, which is not a “complaint,” but an inquiry from an unidentified graduate journalism student querying whether there was any “pushback within the department regarding [plaintiff’s] belief in 911 conspiracy theories.” Gitelman responded that colleagues at NYU “do not even read their colleagues’ work unless the colleague is in their own subfield.” She then forwarded the graduate student’s inquiry to Department Chair Rodney Benson with these words, “There is a potential scandal here if it’s as bad as I think it is[.]” and refers to a comment a student made to her about Professor Miller’s alleged claim that there was a silence of conspiracy around the fact that carrying your cel [sic] phone in your pocket will damage your health.” Again, there is no evidence that the student who reported the latter made any form of “complaint” to anyone.

 Dr. Gitelman claims no knowledge of any bias complaints made against plaintiff to anyone at NYU, let alone any formal complaints, as is alleged in the letter of principles which she signed.

Indeed, Dr. Gitelman makes no claim about any involvement she had with plaintiff between October 2016 and late September 2020 when she received “numerous simultaneous complaints about Professor Miller.” She identifies two of these numerous complaints. Unidentified colleagues told her that a student complained on Twitter that Miller had stated that wearing masks was an ineffective way to stop COVID-19 and another unidentified person sent her an article with the student’s tweets and Miller’s comment that the student’s tweets were “venomous.” Dr. Gitelman asserts that, by so reacting, Miller subjected this student to attack by his thousands of followers.

When the student published her own views about Miller’s alleged mask statement on Twitter [a public venue], she did not have a large social media presence. But, in re-circulating her comments to his much larger twitter following, Gitelman reasons, Professor Miller opened the student to attack, something far beyond the bounds of academic freedom.

Dr. Gitelman acknowledged no first-hand knowledge of plaintiff’s views concerning transgender people but cites to Exhibits 19 and 21 from January and February 2020 [8 and 9 months earlier] where Miller assailed biologically male athletes competing against female athletes. Gitelman claims that these posts “misidentified the gender of transgender individuals” and offers double hearsay to the effect that unidentified new hires in the department felt insulted by Miller’s posts. No affidavit by any such insulted person is presented and, indeed, in the twenty affidavits, no such person is even identified.

Gitelman felt a duty to report these instances under NYU’s policy enforcing Title IX and relates no personal animosity toward plaintiff.

6. **Radha Hegde** has a long history with NYU and, specifically, in the department. In 2016-19, she directed Graduate Studies. Before that, for an unspecified time period, Dr. Hegde was Director of Undergraduate Studies. She boasts of a “collegial relationship” with the plaintiff who she, too, has known for many years.

Contrary to the letter she signed, Dr. Hegde claims that she first heard a complaint about plaintiff in November 2019. Dr. Hegde does not identify who complained or what s/he stated. The issue related to plaintiff’s expressed concern that biologically male high school athletes were being permitted to compete against and trouncing biologically female athletes in track and field events. Dr. Miller viewed this as a form of misogyny. DX-15. Dr. Miller also took issue with surgical “sex change” operations, comparing them to eugenics and sterilization methods used to control population. DX-16.

 Hegde claims that two members of a search committee seeking a Queer and/or Transgender Media Studies Professor told her about these posts on social media. She found them problematic. The Chair of the Departmental search committee sought to exclude Dr. Miller from the vote on who would fill the faculty position, but the affiant ends her account there, not explaining what occurred.

 Dr. Hegde provides no information about any student complaints she received as a departmental administrator nor any occasion she ever discussed any such student complaints with Dr. Miller. This never happened. *See* Miller Reply Affidavit, para. 5.

 In September 2020, Dr. Sturken called a meeting of unidentified senior faculty and advised that an undergraduate posted a thread on twitter which accused Miller of telling his students that wearing a mask does not prevent the spread of COVID-19. While Hegde claims that the senior faculty attending this meeting learned that Miller’s social media “followers” were allegedly threatening and abusing the reporting student, she does not relate that the group [many of whom now claim under oath to have had cordial relationships with plaintiff for years] elected to speak with plaintiff or otherwise express their concerns to him. No faculty member did discuss these issues with plaintiff. *See* Miller Reply Affidavit, para. 6.

 Next, Dr. Hegde cites to a September 21, 2020 post in which plaintiff notes that the tweets from the student calling for his termination were “venomous.” Dr. Miller notes that the thread had “made quite a splash,” causing colleagues to contact him and question his status at NYU. DX-32.

 Dr. Hegde next conflates plaintiff’s web site with the content of his class, citing an October 13, 2020 post in which Miller cites new research challenging the efficacy and health effects of mask wearing and another on October 15, 2020 in which plaintiff provides a link to additional scientific study on the issue. Dr. Hegde explicitly justifies signing the letter against Miller by reference to her disagreement with the views Miller supported in these posts and her belief that plaintiff’s expressed views endangered NYU students and staff. She provides no other factual information in support of her signing of the letter and, while vaguely claiming that others brought unspecified first-hand knowledge of student complaints to the enterprise, she makes no claim to any such first-hand knowledge or any investigation or questioning about these claims.

 7. **Nicholas Mirzoeff**, another long-time tenured department member, claims a positive relationship with Miller. Aff., para. 3. He recounts that unidentified students “have been deeply offended by Professor Miller’s espousal and support of conspiracy theories in the classroom.” He does not recount any discussion with Dr. Miller about these students’ views. Nor does he suggest that any of these students filed any form of complaint against Miller or that he has any knowledge of the university’s disposition of any such complaint. Nor does the affiant claim that any of these complaints deal with discrimination, bullying or intimidation, the actual averments he advanced.

 Mirzoeff does provide one stale example, from more than eight years old, in support of his claim that Dr. Miller has developed an “increasingly paranoid view of the world.” In 2012, when an audience member questioned the racial/gender diversity of a panel Dr. Miller had organized, plaintiff responded that identity politics “was designed to prevent the left from pursuing class or economic analysis.” Mirzoeff claims this was an insulting response but does not recount any comment he made in response or any discussion he claims to have ever had with plaintiff about this perspective.

 Next, without any citation, Dr. Mizroeff makes the baseless claim that Professor Miller “has used his [social media] platform to castigate and mock individuals who identify as queer or transgender.”

The Mizroeff Affidavit presents no evidence showing any statement by plaintiff about a queer person or queer people as a group. Instead, Dr. Mizroeff cites plaintiff’s repeated concern that allowing transgender men compete in scholastic athletic competition against high school aged females is a form of misogyny which inevitably undervalues the latters’ athletic abilities and rewards the larger and stronger biologically-male athletes. DXs-19 & 21. Dr. Mizroeff also cites to DX-22, a March 8, 2020, in which plaintiff attaches a series of links to transgender activists disrupting scheduled presentations by noted European feminists.

 Dr. Mizroeff relates that he learned that an undergraduate had tweeted that, during an NYU class, Professor Miller “suggested that masks were ineffective in helping to stop the spread of the COVUID-19 pandemic.” He then claims to have read a lengthy document plaintiff published on September 5, 2020 in which he assessed the scientific literature dealing with the effects of mask wearing, the radically different messages on mask wearing from Dr. Fauci and other well-regarded medical luminaries between late March 2020 and June 2020, the response by the media to the mask-wearing controversy and the oppression visited on persons who do not wear masks in countries with less regard for human rights/civil liberties than ours.

Citing Dr. Miller’s conclusion that the scientific evidence supporting mask-wearing was itself thin, Dr. Mizroeff concluded that plaintiff’s public expression of his opinion posed a threat to NYU’s collective health.

With no known or articulated basis, this Affiant also became concerned that plaintiff might reduce the grade to a student who did not follow his views on masking.

This affiant presents no further facts supportive of the claims asserted in the letter he signed.

 8. **Susan Murray** is another long-time member of the department and claims to have known plaintiff since 2001 and has a “cordial personal relationship.” Aff. at 4.

In September 2018, Dr. Murray became Director of Graduate Studies for the department. She claims to have received numerous complaints about Dr. Miller both before and after she assumed this role. These complaints allegedly related to plaintiff’s own use of “racial slurs” in his class and his condonation [through silence] of guest lecturers’ use of sexist terms, including one’s reference in 2018 to Jane Fonda as a “hairy cunt.”

Rather shockingly, Dr. Murray makes no claim that she discussed any of this with plaintiff, reported it to anyone else, filed a complaint herself because she allegedly knew about these events and was concerned that plaintiff was creating an educationally hostile environment, advised students to file complaints, learned of any such student complaints or of NYU’s response thereto or did anything else about these “numerous” complaints. Nor does she claim to have ever discussed any of these issues with plaintiff. *See* Miller Reply Affidavit, para. 7.

 Likewise, even in her position as Graduate student coordinator and possessed of an email like DX-24, she did nothing. DX-24 is an email dated May 21, 2020 to her and Dean Benson complaining about an undergraduate course in Propaganda which this graduate student had completed four months earlier. Dr. Murray never shared or discussed this email with plaintiff. *See* Miller Reply Affidavit, para. 8. [[2]](#footnote-2)

Likewise, Dr. Murray never discussed with plaintiff his re-post of Paul Craig Roberts’ reporting about Sandy Hook or raised any issue or concern with plaintiff about the same. Of course, this post was on a social media platform which had nothing to do with any course plaintiff was teaching at NYU and Murray does nothing to relate the post to any course plaintiff taught or any comment he made in an NYU classroom. *See* Miller Reply Affidavit, para. 9.

In short, despite whatever her position or her concerns, Dr. Murray did nothing about any of her concerns through the 2019-20 school year: nothing, including a discussion with plaintiff.

 Dr. Murray next discusses in a dismissive manner plaintiff’s concerns that female athletes will be overshadowed and over-powered by transgender biologically male athletes competing against them in inter-scholastic athletics. Rather than recognize the validity of plaintiff’s point of view or express and argue for an alternative viewpoint, Murray simply claims that a person supporting this concern was one of plaintiff’s “bigoted followers.”

As with other affiants, Dr. Murray’s sworn statement presents incomplete half-narratives which establish nothing. She explains her concern that Dr. Miller posted on his web site concerns about biologically male athletes competing against female athletes. She explains her concern that Dr. Miller expressed the belief that some of the surgeries transgender people chose were reminiscent of eugenics and forced sterilization techniques used to control population. What she does not do is relate these views to anything occurring at NYU, in Dr. Miller’s classes, or to anything plaintiff did or said while the department employed a search committee to identify and hire a Professor to teach Queer/Transgender Studies.

Her “fear” that plaintiff’s web posts might hinder the department caused her to email the chair of the search committee. And, what happened from there? Did she speak with Professor Miller? Did the search committee chair do so? Is there anything hateful about expressing the concerns on social media that Dr. Miller expressed? Does the First Amendment allow him to utter his concerns? Dr. Murray does not address these issues. [[3]](#footnote-3)

She next converts a statement made by an undergraduate student on Twitter – that plaintiff had expressed the view that masks-wearing was not an effective means of preventing the spread of CPVID 19 – into plaintiff’s “espousing anti-mask rhetoric during his lectures.” This was never reported on Twitter or elsewhere and is a fiction of Dr. Murray’s imagination.

Dr. Murray next repeats utter hearsay, claiming that some unidentified member of the NYU faculty had reported “it” to school security due to “the threats the student has been receiving from individuals on the Internet.” Where are these threats?

In paragraph 12 of her Affidavit [a sworn statement], Dr. Murray claims to paraphrase a September 21, 2020 post by plaintiff on his web site: contrary though to Dr. Murray’s characterization, plaintiff’s post explicitly states that he did NOT tell his students to ignore NYU policy. He did tell them to think for themselves and study the evidence for any mandate instead of merely bowing to authority. “It’s own thing to expect the students to obey their institution’s rules, but quite another thing to urge them not to think about it.” DX-31. In short, plaintiff expected the students to obey the institution rules while considering their virtue.

 Dr. Murray then recounts Dr. Miller’s effort to fight back against what he regarded as baseless attacks against his exercise of academic freedom: in a class about propaganda, he and his students were exploring the changing rhetoric around “mask-wearing” and the progressive devaluation during 2020 of scientists who challenged the growing orthodoxy that masks were an efficacious means of keeping safe during the pandemic. *See* Miller Reply Affidavit, para. 10.

On September 23, 2020, plaintiff disseminated news articles which covered his own case in a more even-handed manner than the original article in *The Gothamist*. DX-33.

According to Dr. Murray, before signing the letter, she had reviewed DX-38, a post dated October 6, 2020 in which plaintiff explained the class the offended student enrolled in – “the aim is to teach students to identify [propaganda] drives for what they are, think carefully about their claims, seek out whatever data and/or arguments have been blacked out or misreported to protect those claims from contradiction, and look into the interests financing and managing he propaganda, so as to figure out its purpose.”

In the same post, plaintiff explained what occurred during the September 20 class: he “had brought up the randomized, controlled tests – all of those so far conducted on the subject – finding that masks and ventilators are ineffective at preventing such transmission, because the COVID-19 virions are too small for such expedients to block them. Prof. Miller urged the students to read those studies, as well as others that purport to show the opposite, with due attention to the scientific reviews thereof, and possible financial links between the researchers conducting them and such interests as Big Pharma and the Gates Foundation. Prof. Miller followed up by providing the links to the former studies [not easily found on Google, though they have all appeared in reputable medical journals) and other materials, including a video of a debate on the subject.” DX-38.

In the same post, Professor Miller further reported that the undergraduate student had sought to file a complaint with the NYU bias hotline, which repelled her. She then continued to advocate for plaintiff’s termination on twitter. Plaintiff’s Department Chair advised the complaining student that the department had made this matter a priority and were discussing next steps. Likewise, the Dean of NYU’s Steinhart School [in which plaintiff teaches] wrote to each student in plaintiff’s class, directing them to what they regarded as authoritative sources on mask-wearing, including the CDC which, plaintiff noted, had until April 2020 publicly adhered to an alternative view of the efficacy of such masks.
 The same post repeated numerous emails from students who had taken plaintiff’s propaganda class in 2019-20, each of the 32 lauding his teaching. Dr. Miller also reported in this post that departmental leadership had suggested he not offer Propaganda next year, but instead teach two sections of Cinema. As this was highly unusual, plaintiff regarded it as a retaliatory intrusion on his academic freedom. See Miller Reply Affidavit, para. 11.

Murray also cites to DX-39, the Petition plaintiff circulated advocating his academic freedom, and to DX-40, tweets by which plaintiff insured that his followers were aware of the details of the claims made against him and his response.

Murray claims that, before signing on to the October 21, 2020 letter, she saw posts gathered in DX-41 which allegedly represent Professor Miller’s supporters threatening and insulting the complaining student. However, two of these tweets are from December 28, 2020 and January 4, 2021, way after the challenged letter, calling into question Murray’s credibility [and that of other affiants who claimed to have the same posts before they signed the letter].

Dr. Murray also claims to have seen DX-37, emails between Department Chair Benson and plaintiff. However, again, she distorts their content: on September 21, 2020, having read the complaining student’s tweet, plaintiff noted they were clearly defamatory and that, after the student called for his termination, the department had publicly stated it would make the matter a priority. Dr. Miller viewed the student as a disruptive presence in his class and asked his Chair how “we go about inviting her to drop the course.” DX-37. The Chair promptly responded that the student had already dropped the course. Dr. Miller replied that she was still listed on the Classes site and the chair requested Rebecca Brown to confirm. Ms. Brown then responded that she was going to report [as an instance of prohibited retaliation] to the university’s bias hotline Dr. Miller’s desire to have this student invited to leave the class. Chair Benson disagreed, noting that Miller had not taken any retaliatory action and had merely raised the issue to him. The dean wrote further, “In terms of this particular incident, now that the University has reached out to the students to stress its position on COVID-19 safety and the evidence on masks, the Provost considers the issue closed unless there is further escalation. I will nevertheless be holding further discussion with the Dean on the other issues that have been raised.”

Dr. Murray somehow received the email from Dr. Benson to Ms. Brown and responded: “…Mark also engaged in public harassment of his student and, in doing so, set an army of trolls upon her. This is something worthy of the OEO offices attention, I believe. James emailed Natasha and me yesterday [9/22/20] to tell us that he has a student who is also in the class and very upset. I don’t think this issue is going away, it’s escalating.” Dean Benson responded that he was getting attacked on-line also and Dr. Murray replied that Dr. Miller had “attacked” the student and his ‘cult-like followers’ were now doing the same. On September 23, 2020, Dr. Murray further replied, accusing Dr. Miller of “abusing” his power. DX-37. Benson agreed and sent that message to defendants Murray and Natasha Schull.

Dr. Murray offers no other factual information supporting her preparation and signing the challenged letter. She does cite to DX-49, written a month after her publication by a group of unidentified graduate students, none of whom even pretends to have taken any course with plaintiff. Plaintiff does not typically teach doctoral students and was never shown a copy of their combative after-the-fact letter. *See* Miller Reply Affidavit, para. 12.

9. **Arvind Rajagopal** considered plaintiff a “good colleague” and they had a cordial relationship for more than twenty years. He admits to no personal knowledge of any of the “facts” contained in the letter. He had learned the month before he signed it that an undergraduate had posted on Twitter that Professor Miller was suggested that masks were ineffective in helping to stop spread of the COVID-19 pandemic and that Professor Miller responded by posting on his website and Twitter account critiquing the student and the University for not immediately defending his academic freedom. Rajagopal disliked the “bullying tone of [plaintiff’s] response and the campaigning nature of his public statements.” He felt plaintiff was attempting to curry favor with the public for himself and against the student. He related no other pertinent support for the claims advanced in the document he signed.

10. **Marita Sturken** has worked at NYU since 2005, served as Department Chair between 2009-13, lives in the same building as plaintiff and “always had pleasant interactions with Professor Miller and his wife.” Aff. at paras. 3 & 4. During her years as Department Chair, Sturken relates no conversation with plaintiff about student complaints and makes no claim that she received any.

Sturken next related concerns she heard from unidentified colleagues that plaintiff “had begun to espouse and propagate troubling conspiracy theories.” She does not affirm that she ever spoke with plaintiff about any of this or any concerns these comments caused her.

In September 2020, Sturken claims that an unidentified colleague emailed her a thread containing a claim that an unidentified tenured professor spent “an entire class telling students that wearing masks doesn’t prevent the spread of COID-19 and that hydroxychloroquine trials were made to fail so that more people would be given the vaccine and have their DNA changed.” DX-27. This thread further claimed that the same professor sent links to students supporting these positions. Someone reported in the same thread that s/he forwarded the emails to the NYU bias hotline.

Sturken claims that ‘these viewpoints directly contradicted NYU’s guidance concerning mask use for students and faculty.” However, she does not cite to any such contradiction and the referenced policy statement does not bar campus speech which questions the efficacy of mask-wearing nor disallow students or faculty from questioning its medical or scientific basis.

Nor, once apprised of the threads accusing Dr. Miller of blasphemous speech, did Dr. Sturken confront or contact him to determine what he had stated or why. Rather, she found a newspaper article in *The Gothamist* which revealed that plaintiff had posted on his personal website tweets showing an NYU student publicly attacking him.

While it alarmed Sturken that a professor would make “such a public statement about an undergraduate student,” this experienced professor makes no claim that doing so violated any university policy any more than she claimed that the student’s public tweets critical of the professor violated any university edict.

Dr. Sturken had many concerns: the involved student might be bullied on- line. She shares no evidence that this occurred or that anything plaintiff did encouraged this. Students might believe the sources Dr. Miller provided and stop wearing masks in contravention of NYU policy. Dr. Sturken shares no evidence that this happened or that plaintiff ever encouraged this.

Concerned that Dr. Miller was endangering the student and the whole school, Dr. Sturken served as the facilitator of the challenged letter, putting together an initial draft, which she has not supplied, and circulating other drafts, which, likewise, she has not supplied. Dr. Sturken reveals that senior faculty did not approve her letter; it was not direct enough.

Unnamed colleagues then took the lead in reviewing the letter. She thinks these colleagues, certainly not she, were privy to plaintiff’s behavior “inside and outside of class.” Again, Sturken does not identify these colleagues or provide the basis for her conclusory statement that they knew more about Dr. Miller’s teaching and classroom behavior than she did. Nor does she provide any details of what they claimed to have known or the bases for any such alleged knowledge.

Dr. Sturken provides no further facts supporting any claim advanced in the letter and, rather incredibly, claims that she and her colleagues used as a model a letter from Indiana University to a colleague who had engaged in racist speech.

11. **Aurora Wallace** has worked at NYU for more than twenty years, including as Director of Undergraduate Studies between 2008-18. Since 2018, she has worked in Paris. She always had a “cordial professional relationship” with plaintiff. Aff., para. 3.

Wallace claims that, at some unidentified times between 2008-18, students verbally complained to her that Professor Miller used his class to promulgate contrarian conspiracy theories. She does not indicate how many times this occurred or identify any such student. She certainly does not claim she ever contemporaneously discussed any such complaints with plaintiff. She certainly does not claim that the complaints related to racism, misogyny, transphobic or anti- Queer expression. She also does not claim that any student stated that plaintiff bullied or intimidated her/him. Indeed, she relates that she told the students that they need not adopt any of plaintiff’s positions to succeed in his class and she certainly does not report any student disagreeing with her.

Wallace does state she told the unidentified department chair[s] about these complaints but, unsurprisingly, is “not sure” what, if any, action anyone took. Plaintiff denies that Ms. Wallace ever spoke with him about any such complaints. *See* Miller Reply Affidavit, para. 13.

In her Affidavit, Ms. Wallace relates no other facts corroborating anything in the letter she signed and claims she signed because she trusted the unidentified colleagues who put the letter together.

12. **Jamie Sky Bianco** has worked for NYU for seven years. She claims that unidentified students have made “countless complaints” about plaintiff’s behavior in class. These included allegations of “racial slurs.”

Despite NYU’s policy that anyone is to report his/her knowledge of the creation of such a racially hostile environment, Bianco does not claim to have reported any of these countless complaints. Nor does Bianco aver that she advised students to complain or how to complain. Nor does she claim any knowledge of a single student who filed any formal complaint against plaintiff and the university’s response thereto. Nor does she claim to have ever shared these countless complaints with any other member of the faculty.

Likewise, Bianco followed plaintiff’s web site and expresses great concern about Dr. Miller’s views on transgender surgical procedures. In 2019, a year before she signed the defamatory letter, Bianco grew deeply upset because she claims to have concluded that Professor Miller used language regarding such procedures which “created an abusive and hostile learning environment for students.” Again, Bianco took no action and did not report these web posts to anyone at NYU who had the authority to intervene. In her Affidavit, Bianco does not reconcile her stated concerns with this inaction.

Similarly, apparently concerned that plaintiff’s posts seemed like a direct message that he did not support departmental efforts to hire someone who identified as transgender or non-binary, Bianco relates no action she took about the matter. In fact, Miller did participate as a voting departmental member, supporting the successful candidate. *See* Miller Reply Affidavit, para. 19

Dr. Bianco next explains that she was not surprised that plaintiff would express views contrary to NYU policy on mask-wearing and feared students would feel the need to take their masks off to succeed in Miller’s class, endangering the campus. Of course, Bianco offers no facts to support this fear: for instance, she makes no claim that, during the prior six years, any student had complained that s/he had been grade-penalized because of a disagreement with plaintiff during his course.

Bianco next expressed great concern for the undergraduate who tweeted repeatedly concerning her belief that NYU should terminate plaintiff. Yet, she expressed no fear that she was bringing “doxxing” upon herself by tweeting her issues, only a concern that by re-posting her tweets and fairly representing her views, plaintiff would bring harm to her.

Bianco offered no other “facts” to support the letter and relied on unidentified trusted colleagues and their unspecified comments.

13. **Pauline Chakravartty** has been affiliated with NYU since 2013 and claims to have views on social justice which overlap with plaintiff’s. They are both members of Faculty Democracy and always had a collegial professional relationship.

In 2018, an unidentified graduate student working for plaintiff complained to Chakravartty because a guest Miller invited “denied the existence of the HIV/AIDs epidemic and made misogynistic and homophobic comments.” This student was allegedly upset with Miller although Chakravartty does not explain why she or the student blamed Miller for his guest’s statements. In any event, the affiant does not know whether the student filed a complaint about Miller with the Office of Equal Opportunity, whether anyone raised any issue with Miller about this incident [she does not recount doing so] or any resolution.

In 2019, Chakravartty became concerned that plaintiff’s posts on transgender surgery might dissuade prospective Queer or transgender candidates from accepting employment and diversifying the department. Fortunately, this did not occur.

Concerned about this and with admittedly overlapping interests in social justice issues with him, Chakravartty relates no contemporaneous conversation which she initiated with plaintiff about the issues or the potentially detrimental effects of his web site posts on the department job search. She did not do so. See Miller Reply Affidavit, para. 14.

In the summer 2020, NYU professors engaged in an email dialogue about the merits of the school’s decision to-reopen in person and its associated mask-wearing policy. DX-25. Plaintiff contributed his research to the discussion, explaining other countries’ experience with masks and advancing his considered view that masks were ineffectual in preventing the spread of COVID-19. No professor disputed his claims. One expressed support for vaccinations and plaintiff responded with ambivalence about their efficacy and admonitions as to their dangers, sharing that his grandnephew had been killed by a barrage of vaccinations at two months old. Others writing on the thread expressed concerns about NYU’s policies as well, resenting being asked to turn in those who did not wear masks. None of those on the dialogue, including this affiant, chastised plaintiff for his views or challenged the facts he supplied.

Chakravartty next explains that, in September 2020, the undergraduate student who complained by tweet about plaintiff’s position on mask-wearing contacted her and asked if she could join one of her courses. She engaged with the student and shares their email exchange. DX-30. The student recounts that the class was a debate between plaintiff and one student about mask-wearing and that she did not participate in the discussion. Id.

In an email exchange dated September 21, Chakravartty sought to ascertain if other students in the class were upset [the complaining student did not know] and how NYU had responded [in a day] to her complaint [the student recounted that Steinhart, MCC and Benson had already replied].

Chakravartty provides no other relevant facts known to her at the time she signed the letter.

14. **Brett Gary** has known plaintiff for many years, works on related issues and supported plaintiff for a teaching award. He refers to a 2017 *Observer* article in which plaintiff explains his teaching philosophy and his hope to expose students to ideas they will not encounter in mainstream media. Whatever his concerns and relationship with plaintiff, Gary makes no mention of any discussion with Miller during which he expressed concerns or raised issues of any sort.

Gary next claims that, in the summer 2020, he learned that plaintiff did not support mask-wearing. This outraged him and an unidentified scientist who had reliable information and felt that masking was the one thing epidemiologists agreed could help stop COVID-19 spread.

On some unspecified date, Gary claims to have brought plaintiff’s anti-masking views to the department chair [Benson’s] attention, though he did not attach to his Affidavit either his email or Benson’s response.

Gary next relates that a student sent him *The Gothamist* article which revealed that plaintiff had allegedly raised questions about mask-wearing in a class and that university administrators had responded by directly reiterating university protocol to students in that class. Gary was furious because Miller called “venomous” the tweets by an undergraduate student who had called upon NYU to terminate his employment.

Gary’s Affirmation provides no additional factual information which corroborates any statement in the challenged letter.

15. **Ted Magder** served as Vice Dean for Academic Affairs for the Steinhart School of Culture, Education and Human Development between 2014-2019 and before that had administrative positions in the department. Despite being well positioned to report any, Magder provides no information about any prior complaints by anyone against plaintiff.

In October 2020, Sturken contacted him and advised him that a student had reported that plaintiff had stated in class that wearing masks does not prevent COVID 19. He also learned that Miller had publicly responded to the student’s tweets and believed this very problematic. He cites to no university policy or precedent dealing with this issue.

Magder claimed that plaintiff was contradicting and encouraging his students to distrust carefully crafted university policies.

Magder has no other factual information which corroborates any claim made in the letter. Like others, he simply believed what others who drafted the letter wrote.

16. **Maura Mills** is a tenured Associate Professor who focuses on disability and the media. She has had very few interactions with plaintiff, and these were always cordial.

In 2019, Mills was a member of the search committee for a Queer and/or Transgender Media Studies scholar. Concurrent with the search, Dr. Miller made two postings, DX-15 & 16, which Mills felt mocked transgender people. Late in 2019, after the search concluded, Dr. Miller continued to use his web site to oppose “breast removal,” DX-17, which he deplored as not progressive and instead consistent with a far-right agenda. He also opposed other interventions grouped under the term “transgender medicine,” expressing concern for their impact. DX-18.

Mills claimed she was offended by these posts, though she did not express any contemporaneous concern to Dr. Miller nor take any issue with his point of view. *See* Miller Reply Affidavit, para. 15. Mills claims to have provided the unidentified letter drafters her input, which was focused on, and limited to, Miller’s alleged transphobic comments. She did not provide any further information in her Affidavit which confirmed any claim made in the letter she signed.

17. **Juan Pinon** has worked in the Department since 2007 and received tenure in 2014. He focuses on Latino and Latin-American media. He has had few personal interactions with plaintiff, and these have been collegial.

Pinon joined the department’s diversity committee in September 2020. He learned that Dr. Miller allegedly told students in one of his classes that masks were ineffective. He also saw an email by the university to students in that class which refuted this. The diversity committee met and decided that mask-wearing was a priority for communities of color and that not wearing masks could create particular harm for minority group students and staff members.

Pinon relates no personal knowledge of any comments or behavior by plaintiff. He signed the final version of the letter because he wanted to express his belief that NYU needed to investigate Miller’s conduct.

18. **Natasha Schull** is a tenured faculty member who focuses on the anthropology of technology and digital media and has been at NYU since 2015.

Since September 2018, Dr. Schull has served as the Department’s Director of Undergraduate Studies. As such, she provided one complaint from a student she received through another university employee in October 2018. This complaint was never investigated because the student chose not to pursue it. Schull cites to no other complaint from any student she received in either 2018-19 or 2019-20. She does cite to a letter sent on February 20, 2018, written months before she was appointed to her current position, by unidentified students in a class plaintiff taught. The letter relates the crass behavior of a guest speaker plaintiff invited and what the writer regarded as plaintiff’s failure to protect students from that crassness. No one from NYU ever discussed the matter with plaintiff, *see* Miller Reply Affidavit, para. 15. Affiant Schull provides no insight as to how she received the letter and does not claim that she or any administrator ever discussed it with the plaintiff. Nor does she claim that she shared the letter with anyone else.

Schull next claims that she became aware of plaintiff’s alleged ‘transphobic” views, asserting that plaintiff had espoused such rhetoric in his classroom. She provides no substantiation for this allegation nor any source for it. She certainly never was in plaintiff’s classes and Miller has not made any such comments in his class nor ever been spoken with about doing so. *See* Miller Reply Affidavit, para. 16. Nor does Schull affirm when she saw the posts identified as DX 16 and 17, who shared them with her or when.

The Schull affidavit provides no other factual information allegedly known to her which corroborates or supports any aspect of letter she signed.

19. **Nicole Starosielski** has been a professor at NYU since 2012 and was tenured in 2017. She recalls no substantive interaction with plaintiff. She claims that many students complained to her about racist and transphobic behavior on the part of the plaintiff. She lists no specifics, does not aver that she reported these verbal complaints to anyone and has no idea whether the students followed her suggestion that they file complaints. [[4]](#footnote-4)

Starosielski does not discuss or acknowledge university policy requiring her to report instances of behavior likely to create a hostile environment for students nor explain why she failed to do so or what happened if she did do so.

Starosielski next claims that she learned of transphobic views on the part of Miller during the search for a scholar in Queer/Transgender studies. She reviewed several web posts plaintiff made concerning transfer surgery and transgender scholastic athletes. The search committee asked the department to remove Dr. Miller from any supervisory role with anyone who identified as trans, non-binary and/or queer, but this Affiant does not relate what action, if any, the department has taken regarding this request. [[5]](#footnote-5)

Despite her alarm with the impacts his posts might cause, that is, discouraging a qualified candidate from accepting appointment an NYU, Starosielski made no effort to discuss any of this with plaintiff and recounts no such discussion by anyone with him.

In September 2020, Starosielski became aware that plaintiff expressed disagreement with masking as a means of preventing the spread of COVID, considered tweets written by an undergraduate calling for his termination as “venomous” and alerted his followers to the controversy surrounding his class assignments and the call for his termination.

Starosielski’s Affidavit provides no other factual information relevant to the matter.

20. **Alexander Galloway** makes no claim that he ever discussed any of his alleged concerns with plaintiff or ever attended any of plaintiff’s classes or has ever discussed any pertinent issue with plaintiff.

Galloway refers to Exhibit 12 to the Chase Affidavit, an August 5, 2019 post which related to a ruling made by a Wisconsin judge concerning a death certificate for one of those killed during the Sandy Hook shootings. Plaintiff’s post does not express the opinion that the Sandy Hook shootings did not occur or support the claim that plaintiff denied that event.

Galloway next cites an article in *The Gothamist* which includes a claim that Professor Miller “espoused anti-mask rhetoric during one of his classes.” Galloway never discussed this matter with plaintiff and did no investigation of what actually occurred during the class.

Rather, reading this article caused Galloway to meet with unnamed “senior faculty” who drafted a “statement of principles in response to Professor Miller’s conduct.” Galloway has not provided this statement of principles. As the challenged letter was drafted, Galloway claims to have seen two undated “screenshots” which confirm that Dr. Miller has expressed concerns about [i] transgender males competing against women in scholastic athletic events and [ii] the uses of certain surgical techniques which are part of “transgender medicine” and resemble sterilization programs themselves part of prior eugenics movements. In Exhibit 16, plaintiff plainly distinguished his concern about the broad acceptance of such medical procedures from his support for transgender individuals.

Without knowing anything about plaintiff’s position on the hiring of transgender faculty members, Galloway claims that he viewed Miller’s concerns, as referred to above, as “a direct castigation of these faculty members.” He further claims that Miller made his [here undated] posts as a form of hazing of junior faculty. He had no additional factual information in support of the truth of the assertions made in the letter he signed.

Dr. Miller has submitted a Reply Affidavit which directly addresses the effable claims defendants have actually advanced. In it, he demonstrates that their defamatory statements are false and baseless. NYU has a process for resolving bias complaints and none has ever been resolved in a manner verifying any of these defendants’ claims. The only known complaint of this sort, filed by one of the defendants, was dismissed as unfounded early in 2020.

**LEGAL ARGUMENT**

A. **THE COURT SHOULD REJECT DEFENDANTS’ PROOFS ON A MOTION TO DISMISS**

 In reviewing a motion to dismiss for failure to state a cause of action, the court’s “well-settled task is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.” *See* *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995). The complaint must be liberally construed, see CPLR § 3026, and the plaintiff must be afforded every favorable inference, see Dunn v. Gelardi, 59 A.D.3d 385, 386 (2d Dep’t. 2009). Thus, “a complaint is deemed to allege whatever can be imputed from its statements by fair and reasonable intendment.” *Condon v. Associated Hospital Service of New York,* 287 N.Y. 411, 414 (1942) (quotations & citations omitted); *See also*, *Bovino v. Village of Wappingers Falls*, 215 A.D.2d 619, 620 (2d Dep’t. 1995) (quotations & citations omitted) (“[I]f from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion will fail regardless of whether the plaintiff will ultimately prevail on the merits.”).

If the plaintiff is “entitled to relief on any reasonable view of the facts stated . . . [the court] must declare the complaint legally sufficient” and deny the motion to dismiss. *Campaign for Fiscal Equity,* 86 N.Y.2d at 318.

Here, defendants improperly invite the Court to exceed its review authority under § 3211(a)(7) and, in effect, by considering this evidentiary submission, to grant them summary judgment. But defendants have not yet joined issue by answering the Verified Complaint, and it is well settled that the “Court is without power to grant summary judgment before joinder of issue on plaintiff’s complaint.” *Myung Chun v. N. Am. Mortg. Co*., 285 A.D.2d 42, 45 (1st Dep’t. 2001). To be sure, the Court has discretion to convert a § 3211(a) motion into one for summary judgment. See N.Y. C.P.L.R. § 3211(c). But it must first give adequate notice to the parties of its intent to do and, in so notifying them, “fairly advise as to the issues it deems dispositive of the action.” *Four Seasons Hotels v. Vinnik*, 127 A.D.2d 310, 320 (1st Dep’t. 1987); *See also* N.Y. C.P.L.R. § 3211(c). The Court has not so converted Defendants’ motion here and, even if Defendants expressly requested conversion, which they did not, such request alone would be insufficient to convert the motion because a moving party cannot unilaterally convert its motion and, instead, notice must come directly from the Court. See Id.[[6]](#footnote-6) Nor should the Court convert the motion – defendants have not yet answered the VC, their Affidavits leave many questions unanswered and plaintiff has not yet had the benefit of discovery. It is simply premature to do so as plaintiff is not ready to “lay bare [her] proof and make a record.” Id. at 319.

Having established that Defendants’ § 3211(a)(7) motion has not, and should not, be converted to a summary judgment motion, the parties “should be able to rest assured that, no matter the quantity or quality of the nondocumentary evidentiary material submitted by the other party, there will be no fact finding or framing of the factual issues for trial on a CPLR 3211(a)(7) motion.” Id. Indeed, “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.” *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 635 (1976). Rather, such “affidavits may be received for a ***limited purpose only***, serving normally to remedy defects in the complaint . . . [and] affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits ***establish* *conclusively*** that plaintiff has no cause of action.” Id. at 636 (emphasis added*); See also Nonnon v. City of New York,* 9 N.Y.3d 825, 827 (2007) (affidavits submitted on unconverted § 3211(a)(7) motion “are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims.”).

 B. **THE VC ALLEGES THE ELEMENTS OF “ACTUAL MALICE”**

In assessing whether a publication is libelous, “the publication must be considered as a whole, that its meaning depends, not upon isolated and detached statements, but upon 'the whole scope and apparent object of the writer'" (Julian v. Am. Bus. Consultants, Inc., 2 NY2d 1, 22-23 [1956] quoting More v. Bennett, 48 NY 472, 476). Just as "[t]here can be only one cause of action for one publication of a libel no matter how many separate and distinct defamatory charges the plaintiff may claim it contains" (*Hoffman v. Landers*, supra at 747 [2d Dept 1989] citing *Kern v. News Syndicate Co*., 6 AD2d 404), a publication need only contain one statement reasonably susceptible of a defamatory meaning in order to be properly considered within the context of the claim. Therefore, the Court will not isolate individual sentences from the March 22 publication or from any other publication herein under consideration in order to render piecemeal determinations of their individual viability.” *Levy v. Smith*, 2013 NY Slip Op. 52300(U) (12/3/13 Putnam Cty. Sup. Ct.) (Lubell, J.).

Much the same analysis applies in determining whether the VC makes out actual malice. Defendants raise one alleged pleading defect – they claim plaintiff has not alleged actual malice and that, as a public figure, this allegation is required. Of course, this represents a patent misreading of the Verified Complaint taken in its entirety.

The VC alleges that the defendants’ challenged communication was “maliciously intended to portray plaintiff in a negative light” [para. 5], that before signing the letter, none of the defendants conducted a good faith investigation into the matters set forth in the letter or otherwise had a good faith basis for the alleged statements of fact set forth in the communication [para. 6]. The VC further avers that defendants did not discuss any of the alleged facts they asserted with plaintiff, a member of their department, and, instead, inspired by their version of political correctness and orthodoxy, vilified plaintiff with the intent of running him out of the university. Plaintiff’s VC also specifies the false statements defendants made and relates his effort to have defendants retract their defamatory writing and their failure to do so.

In response, apart from citing their Affidavits, which have not been challenged through the normal process of cross examination, defendants claim that the VC does not explicitly state that defendants knew their statements were false and that such actual knowledge must be pled. Failure to investigate is not probative, defendants submit, of actual malice. Reckless disregard for the truth is only established where the author is highly aware that what he/she/they utter is probably false.

However, the VC does make clear that defendants knew the statements with which they libeled plaintiff were false and “intended to mis-portray plaintiff as someone who poorly discharged his responsibilities as a university professor.” VC at para. 17. Likewise, paragraph 28 of the VC accuses each defendant of defaming plaintiff in a “knowing” manner, that is, with knowledge that his/her/their comments were false.

Taken as a whole, the VC plainly claims that defendants knew their depiction of the plaintiff was false and engaged in their joint enterprise as an exercise in political correctness. As is shown below, the publication contains at least one statement alleged in the complaint to be false, which is reasonably susceptible of a defamatory meaning, and which is either an explicit assertion of fact or, although couched in the language of hypothesis, would be understood by a reasonable reader as an assertion of fact pertaining to the plaintiff (*see*[*Gross v New York Times Co.,* 82 NY2d 146, 154 [1993]](https://scholar.google.com/scholar_case?case=14353156180267261775&hl=en&as_sdt=6,33&as_vis=1); [*Kotowski v Hadley,* 38 AD3d 499, 500 [2007]](https://scholar.google.com/scholar_case?case=15292223071720796367&hl=en&as_sdt=6,33&as_vis=1)). *Levy v. Smith*, 132 A.D.2d 961, 962 (2d Dep’t. 2015). Therefore, this

basis for dismissal should be denied.

C. **HAVING PLED “ACTUAL MALICE,” THE COMMON** **ENTERPRISE DOCTRINE IS UNAVAILABLE TO DEFENDANT**

It is equally plain that defendants cannot hide behind the common interests doctrine which does not apply where actual malice is demonstrated. *Liberman v. Gelstein*, 80 N.Y.2d 429, 437-38 (1992). There, on a summary judgment record, the Court of Appeals explained that conditional privileges like the common interest doctrine cannot survive actual malice, either common law or constitutional. Here, in light of the allegations of the VC, which make clear the knowing, intentional and malicious nature of the alleged defamation, defendants cannot deploy the “common interest” doctrine on a motion to dismiss.

D. **THE ANTI-SLAPP LAW DOES NOT APPLY** and IF IT DOES IT **DOES NOT ASSIST THESE DEFENDANTS**

Defendants cite the new anti-SLAPP law but do not explain how it governs claims made involving private parties. It does not.

The amended law reads as follows:

**§ 76-a. Actions involving public petition and participation; when actual malice to be proven**

**1.**For purposes of this section:

**(a)** 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.

**(b)** “Claim” includes any lawsuit, cause of action, crossclaim, counterclaim, or other judicial

pleading or filing requesting relief.

**(c)** “Communication” shall mean any statement, claim, allegation in a proceeding, decision,

protest, writing, argument, contention, or other expression.

**(d)** “Public interest” shall be construed broadly, and shall mean any subject other than a purely

private matter.

**2.**In an action involving public petition and participation, damages may only be recovered if the

plaintiff, in addition to all other necessary elements, 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.

**3.**Nothing in this section shall be construed to limit any constitutional, statutory or common law protections of defendants to actions involving public petition and participation.

 Under CPLR 3211(g), if defendants’ speech comes within the contours of the new law, plaintiff must make a showing that his Verified Complaint has a substantial basis in law or reasonably seeks an extension of prevailing law. The VC in this case provides sufficient facts to meet that standard. If defendants acted as plaintiff says they did, they plainly committed defamation. But defendants have submitted Affidavits which contravene the claims plaintiff makes. Plaintiff has responded. Defendants’ Affidavits fall woefully short of allowing the court to conclude that this action does not have a substantial basis in law.

 (i) *The new law does not control*

In their own Affidavits, defendants repeatedly claim that they wrote a letter to administrators, did not make, or intend to make public their statement and cannot, therefore, be protected by a law involving “public petition and participation.”

The constitutional rights to free speech and petition are terms of art related to communications citizens make to their government, not communications between third parties about private matters. That such communications reference “matters of public concern” does not convert them into constitutionally protected expressions. *Ezekwo v. NYC HHS*, 940 F.2d 775 (2d Cir. 1991). [[7]](#footnote-7)

Defendants made their writing is in the context of a private dispute between three private parties: plaintiff, the twenty defendants and NYU. Their letter is, at bottom, a request that NYU expedite its internal disciplinary proceedings against plaintiff for reasons, allegedly false and defamatory reasons, defendants assert in their email. The timing of defendants’ letter - a month after they all learned of plaintiff’s comments in class – suggests strongly that defendants were not motivated by any urgent concern for public health, as they now claim. Likewise, their claim that concerns about plaintiff’s “public attack” on an undergraduate student, his “anti-transgender sentiments” and his 2017 “Sandy Hook” denial are matters of public concern are nigh frivolous. If any of those concerns motivated this email, its presentation was highly untimely and the method of its private presentation not likely to assist with the alleged public interests claimed. In short, defendants have not demonstrated that they were not engaging in petitioning government for redress of grievances and their letter was a defamatory excess, intended to demonstrate their own political correctness to each other and their super-ordinates at NYU.

(ii) *Plaintiff’s defamation claims have a substantial legal basis*

Were the court to apply CPLR 3211(g) based on a view that the anti-SLAPP amendments do apply, the outcome would be no different: plaintiff’s VC and Affidavit plainly demonstrate that defendants made a number of blatantly false statements about him, very few of which are supported by the twenty affidavits defendants have submitted or their exhibits. Plaintiff can meet the standard of actual malice by clear and convincing evidence. *See* *Palin v. NY Times, Co.*, 20 U.S. Dist. LEXIS 243594 (Dec. 30, 2020 S.D.N.Y.) (Rakoff, J.).

First, defendant did not engage in the mockery and ridicule of transgender individuals. He made fair public comment about two subjects: the deleterious impact of surgeries being used by some transgender persons and the unfairness of allowing biologically male high school athletes to compete against biologically female athletes. He did not mock or ridicule anyone and the claim is palpably false. Indeed, it takes disagreement about a matter of public importance and subjects those engaging in such disagreement to standards of political orthodoxy and conformity inimical to a democratic society.

Second, despite fifty exhibits and twenty affidavits, defendants have produced no evidence that plaintiff ever denied the Sandy Hook shootings. No student ever made any such clam or complaint and none of plaintiff’s manifold writings states this. The statement is false and intended to rile those to whom defendants addressed their email.

Third, defendants have presented no evidence that plaintiff engaged in any form of “discrimination” which, in every form, is prohibited by university regulation. Defendants have produced no student complaint alleging that plaintiff discriminated against him/her/they based on any protected classification let alone any finding by any university tribunal to this effect. Instead, one defendant, Nicole Starosielski, did not share with this Court the fact that she filed a complaint that plaintiff was transphobic in early 2020, months before signing this diatribe, and the university investigated and found baseless her claim. There was no basis for such a claim. Likewise, while now stating in their Affidavits that each had a collegial or cordial relationship with the plaintiff, defendants claimed in their letter that he had “attacked’ students and others in the NYU community. There is absolutely no fact elicited in 20 Affidavits supporting the false assertion that plaintiff attacked anyone. On the contrary, the evidence presented by plaintiff in support of his claim [on a CPLR 3211-g showing] is overwhelmingly to the contrary – that plaintiff’s students loved him and his methodology. Defendants present almost no contrary evidence; submitting three letters of complaint from students in plaintiff’s classes over a more than 20-year period does not establish the truth of broad claims of attacks against students, discrimination, bullying or intimidation.

Nor have defendants established that plaintiff advocated for an “unsafe learning environment.” There is no evidence that plaintiff ever told his students not to wear masks or engage in social distancing. There is evidence that he shared with both the faculty and students who were in his Propaganda class scientific and medical research, conducted by others, which called into question whether mask wearing was an efficacious way to fight the COVID-19 virus. In a university, the conduct of such research and its dissemination cannot be viewed as “advocacy for an unsafe learning environment.” To the contrary, if this research is correct, NYU will have misled its community in an exercise which was ineffective. To claim that discussion of this issue undermines public health is to embrace an orthodoxy antithetical to that of the academy.

Defendants have also utterly failed to support the further claims that [a] students have regularly complained about Millers’ conduct in the classroom and [b] the ways in which he engages in discussion around controversial views and non-evidence-based arguments.” Again, the issue is whether defendants had any factual basis to make these assertions. The answer is plainly that they did not. They have failed to identify more than one or two stray student complaints regarding these subjects, which would hardly be surprising in a course as controversial as plaintiff’s. Miller has affirmed that his classes were highly popular, well attended and the student commentary in Exhibit 2 to his Affidavit demonstrates that defendants’ statements were false. Defendants, who include past department chair and coordinators, make no reference to student evaluations of the plaintiff, something to which they would have had access, and their highly positive content makes highly knowing and defamatory the contents of the email. Indeed, to the extent defendants made claims, as they did, about student response to Dr. Miller, the best evidence would be the student reviews and narratives which he has provided and to which they do not avert.

Defendants also make the claim that students have regularly complained to NYU leadership about Miller, another baseless assertion which finds no support in the twenty affidavits. NYU leadership, these defendants baselessly assert, told students and faculty to file bias complaints and “many have been”. There is no factual basis for this assertion which falsely undermines plaintiff’s professional standing.

The letter proceeds with more utter falsehoods, claiming that plaintiff attacked a student. This is false. Plaintiff stated that a student’s call for his termination was “venomous,” but did not attack the student who had previously publicly attacked him and called for his removal.

Defendants next falsely claim that plaintiff “used his position of authority to intimidate students who choose to wear masks and abide by NYU policy…” Again, through 20 affidavits and 50 exhibits, defendants cannot point to a scintilla of evidence that plaintiff ever sought to or did intimidate anyone. Likewise, he never criticized a student for wearing a mask or complying with policy and his web site expressed the expectation that students would obey NYU policy.

The balance of the defendants’ email is a suggestion that, contrary to them, plaintiff holds views inimical to every progressive group in America. This was false and known to be false by those who signed the letter. Indeed, one signer explained that she and Miller shared membership in a progressive organization and she knew Miller shared progressive values and principles. In other words, mingling a condemnation of Miller with *their recommitment to principles of social justice* would lead any reasonable reader to believe that this re-assertion was written to disassociate themselves from the hated ideology forwarded by plaintiff.

Finally, without any factual basis, in the last paragraph of their writing, these defendants accuse plaintiff of using “intimidation tactics, abuses of authority, aggressions and micro-aggressions, explicit hate speech.” Again, despite 20 affidavits and fifty exhibits, defendants cannot point to examples of any such statements or speech by this plaintiff. And, unable to do so, their counsel now claims that such statements about plaintiff’s alleged conduct should be viewed as statements of non-actionable opinion. But, in a university setting, such accusations subject the target to profound derision, isolation and humiliation. Either a person has so engaged, or s/he/they have not and, here, Miller did not.

In short, reviewing the Affidavits submitted by defendants, it is clear that plaintiff has established a cause of action as a matter of law against each of them. The court cannot resolve the disputed issues of fact but can plainly discern that these defendants made many arguably baseless statements which they cannot now defend except through further hyperbole, exaggeration, and misstatements of fact. Dr. Miller’s Reply Affidavit makes clear his record and it is one entirely antithetical to the attributions these defendants have shamelessly made and maintained.

**CONCLUSION**

The defendants’ motion should be denied, and discovery permitted to proceed on a schedule approved by the court.

Dated: February 16, 2021

 Respectfully submitted,

 MICHAEL H. SUSSMAN

Sussman & Associates

PO Box 1005

Goshen, Ny 10924

(845)-294-3991

Counsel for Plaintiff Dr. Mark Crispin Miller

1. In their briefs, but none of their Affidavits, defendants poke fun at the notion that if any of them had an issue with plaintiff, s/he/they might reasonably have been expected to raise their issue with plaintiff in a collegial manner. This is a telling indictment of the mentality of this group of defendants. [↑](#footnote-ref-1)
2. In his Reply Affidavit, plaintiff explains that, in June 2020, Department Chair Benson advised him that four students had complained about his Propaganda class and asked him to modify the syllabus for the class. Plaintiff reviewed the student comments he had received for that class, found them highly positive and so advised the Chair who dropped the matter. Plaintiff has recently seen DX-24, written by a single female student known to plaintiff. While he never saw that document before, he recounts that Chair Benson edited that document, attributing parts of it to four different students when, in fact, it is now clear that only one student complained about him. See, Miller Reply Affidavit, para. [↑](#footnote-ref-2)
3. As plaintiff relates in his Affidavit, no one from the Department spoke with him about these issues and he participated in the hiring process for the new professor. [↑](#footnote-ref-3)
4. This affiant is the only defendant who actually did make a complaint to the university, alleging that plaintiff’s posts were transphobic. As explained in plaintiff’s Reply Affidavit, the University investigated this complaint and found it without basis and so advised plaintiff. [↑](#footnote-ref-4)
5. It is reasonable to assume that given this affiant’s concern for the matter, she was well aware when she swore out her Affidavit that plaintiff was permitted to participate and did participate in the hiring of a candidate to fill this position. Plaintiff explains this in his Reply Affidavit. [↑](#footnote-ref-5)
6. There are only three exceptions to this rule – (1) “[i]f the action involves no issues of fact, but only issues of law fully appreciated and argued by both sides”; (2) “when a request for CPLR 3211(c) treatment is specifically made by both sides”; and (3) “when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course.” *Four Seasons Hotels*, 127 A.D.2d at 320. None of these exceptions obtain here – (1) whether these defendants defamed plaintiff is a highly fact-intensive inquiry and the action generally does not involve only issues of law; (2) though they have submitted evidentiary materials, defendants have not specifically requested conversion and plaintiff is expressly asking the court ***not*** to convert the motion; and (3) notwithstanding the parties’ evidentiary submissions, the parties are not unequivocally charting a summary judgment course. Indeed, plaintiff makes his evidentiary submissions herewith simply as a precaution, expressly disclaims summary judgment treatment and vehemently asserts the need to conduct further discovery on this issue. Indeed, plaintiff denies nearly every alleged “fact’ asserted in support of defendants’ motion, making summary judgment improvident and improper. [↑](#footnote-ref-6)
7. It is also noteworthy that as a matter of First Amendment law, the email sent by these professors would not be deemed constitutionally protected under Garcetti. First, of course, NYU is a private university. Second, in light of NYU’s requirement that defendants report any instance of harassment or bullying, their speech would be viewed as part of their job function and unprotected under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). [↑](#footnote-ref-7)