SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FERDOUS KHANDKER,

Plaintiff,

-against-

[redacted]
and [redacted]

Defendants.

Index No. 708671/20

MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION
AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION

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INTRODUCTION

In the summer of 2020, the Bengali community in Queens had its own #MeToo moment. Dozens of women and girls came forward to publicly declare that they had been sexually assaulted by Dr. Ferdous Khandker, a self-styled celebrity doctor of great prominence in the community. In the face of these widespread accusations, Khandker's choice was to file suit against one of his victims, and two other women who had relayed the experiences of their loved ones, for defamation. Now faced with counterclaims for the assault, and under investigation by the Office of Professional Misconduct, Khandker seeks reprieve from the litigation he himself commenced – by refusing to comply with discovery, and asserting the fifth amendment privilege.

New York's new anti-SLAPP legislation was contemplated with precisely this type of suit in mind. Khandker's lawsuit has no merit whatsoever, and he no longer claims it does. Khandker's claims must be dismissed for either of two reasons: (1) his action is squarely defined as a SLAPP suit; and (2) he is precluded by his own actions from offering any testimony in support of his claims, and cannot establish his claims.

FACTUAL BACKGROUND

I. Khandker Sexually Assaulted Defendant

Defendant is a 23-year old woman who attends Berkeley College and lives in Queens (Affidavit of [hereafter " Aff."] ¶ 2). On February 5, 2020, went with her mother to see Khandker for a medical appointment (*id.*. ¶ 3; Affidavit of [hereafter " Aff."] ¶ 3). At the checkup, mother went into a different exam room, leaving alone until her appointment with Khandker (Aff. ¶ 5; Aff. ¶ 4). When saw Khandker and asked him for a routine blood test, he smiled at her in a creepy way, immediately agreeing to perform the exam (Aff. ¶ 6). Once Khandker

and [redacted] arrived in the exam room, Khandker looked [redacted] up and down in a sexual manner, telling her that before the blood test, he'd do a "regular checkup" (*id.* ¶ 8).

[redacted] was surprised when Khandker took out his stethoscope and forcibly removed her shirt, exposing her breasts, for reasons unrelated to the exam. [redacted] deeply uncomfortable, tried to pull her t-shirt back down, but Khandker overpowered her (*id.* ¶ 10). Thereafter, Khandker placed the stethoscope on her left breast, underneath her bra and remarked to her, "You're wearing such a tight bra. Why are you wearing this?" and asking [redacted] "Is your bra padded? Why do you want to make your boobs look bigger?" (*Id.* ¶ 11-12). She remained frozen in a state of fear and shock as Khandker stared at her breasts for approximately 20 seconds, as if in a trance (*Id.* ¶ 14).

When [redacted] attempted to push Khandker away, he then proceeded to grope her breasts and grab her nipples, for no medical purpose whatsoever, causing [redacted] great pain and distress (*id.* ¶ 15). He then summarily concluded the exam (*id.* ¶ 15-16). Extremely distressed and shaking, [redacted] retrieved her mother from the other room, as she couldn't be there for a second longer (*id.* ¶ 18). Once [redacted] was safely outside of the medical practice with her mother, she told her mother that Khandker had touched her inappropriately (*id.* ¶ 17-20; [redacted] Aff. ¶ 9). [redacted] mother was livid; she initially suggested immediately going back to confront Khandker, but as [redacted] was too anxious to go back, she instead called and demanded to speak to Khandker. ([redacted] Aff. ¶ 21; [redacted] Aff. ¶ 10).

[redacted] stated to Khandker, "Do you know what you did? You're going to get in trouble for this" ([redacted] Aff. ¶ 22; [redacted] Aff. ¶ 11). Khandker replied, "I'll call you back" (*id.*) He then called [redacted] back from his personal cellphone and responded meekly, "Please don't be mad, I didn't do anything, she misunderstood what was happening" ([redacted] Aff. ¶ 23; [redacted] Aff. ¶ 12;

see also telephone records evidencing these calls, attached as Exhibit A). Eventually, [redacted] asked her mother to hang up ([redacted] Aff. ¶ 25; [redacted] Aff. ¶ 14). [redacted] continued to shake uncontrollably until she and her mother were safely at home ([redacted] Aff. ¶ 26; [redacted] Aff. ¶ 15).

Later that same day, [redacted] posted the following to her own Facebook page:

> Education doesn't really educate you or else every highly educated individual would be the most civilized human being ever. Dr. Ferdous Khandaker, some of you who lives in NY and goes to JH might know him. He's a bastard! I repeat he's a bastard!! One of my friends went for a regular checkup this morning and he tried to molest her. She was sooo in shock that she couldn't take actions right away. This is so absurd and unacceptable if your doctor does that to
> you. Where's the women's safety?? She can't sue the doctor for the lack of the evidence but that can't stop us to speak up against inhuman acts. I would suggest DO NOT VISIT THAT DOCTOR ([redacted] Aff. ¶ 27).

[redacted] posted about a "friend" because she felt very ashamed that she had been subjected to such assault and she simultaneously wanted to protect her identity (*id.* ¶ 28). [redacted] contacted a friend that same day to tell him what had happened to her. She told her friend, "I'm shaking." She said Khandker"touched my boobs and I was like wtf" and later incredulously repeated, "he touched my boobs wtf" (*id.* ¶ 37; see also Exhibit B.) She told her friend how "sad" and "disgusted" she was after plaintiff "touched [her] boobs" (*Id.*). Since that day, [redacted] has suffered from frequent nightmares and panic attacks. (*Id.* ¶ 35).

On June 9, 2020, during the height of plaintiff's popularity in the Bangladeshi community, [redacted] February 5th Facebook post went viral. (*Id.* ¶ 31). Some Facebook users expressed support for [redacted] "friend," while others harassed her and questioned the veracity of her claims (*id.*). As such, [redacted] posted another Facebook status defending her previous post and asking that anyone who wanted to share her words remove her name and photo from the post so that she would ostensibly be protected (*id.* ¶ 32). On June 25, 2020, [redacted] wrote another

Facebook post sharing a change.org petition about Khandker's abuse because she believed it was a matter of public interest and concern. (*id.* ¶ 33). She did not author the change.org petition (*id.*). On June 26, 2020, [redacted] reposted on Facebook, several accounts of other anonymous individuals who reached out to her about their horrific experiences with Khandker (*id.* ¶ 34). She wanted the other victims to know what they were not alone and believed that this was a matter of great public interest (*id.*). That same day, plaintiff filed a Summons with Notice against [redacted] (Affirmation of Julia Elmaleh-Sachs [hereafter "Affirm"], ¶ 4; Exhibit F.) [redacted] was shocked and devastated and expressed her anger and disbelief to her relative via Whatsapp message, stating, "I can not believe he has the audacity to sue me after molesting me" ([redacted] Aff. ¶ 38; Ex. C) and explained that she was "numb" (*id.*)

II. Khandker Sexually Assaulted Defendant [redacted] Sister

Roughly twenty years ago, defendant [redacted] sister [redacted] – who was approximately 19 years old at the time – went to see Khandker for laryngitis treatment, as she seemed to be losing her voice (Affidavit of [redacted] [hereafter "[redacted] Aff."] ¶ 6; Affidavit of [redacted] [hereafter "[redacted] Aff."] ¶ 7). Khandker did in fact diagnose her with laryngitis, but then proceeded to bizarrely ask her whether she had received her yearly breast exam ([redacted] Aff. ¶ 9; [redacted] Aff. ¶ 10). She stated no, but could not understand how this was relevant to her laryngitis diagnosis (*id.*). Khandker then requested that she take off her shirt and proceeded to give her a breast exam with his hands ([redacted] Aff. ¶ 10; [redacted] Aff. ¶ 11). No one else was in the room (*id.*). [redacted] felt uncomfortable, but as a young woman who had always been taught to respect and trust medical professionals, she felt she had no choice but to comply ([redacted] Aff. ¶ 11; [redacted] Aff. ¶ 12).

Understandably, [redacted] left the appointment disgusted and extremely distraught. She questioned what had happened to her, felt alone and ashamed, and endeavored to put the incident behind her ([redacted] Aff. ¶¶ 11-12; [redacted] A.. ¶¶ 13-14). However, when she noticed Khandker's rising stardom, she felt compelled to speak out ([redacted] Aff. ¶ 2; [redacted] Aff. ¶ 3). His social media presence became widespread and [redacted] grew troubled by his apparent popularity ([redacted] Aff. ¶ 12; [redacted] Aff. ¶ 7).

In early June 2020, [redacted] disclosed what Khandker had done to her to [redacted] ([redacted] Aff. ¶¶ 5-6; [redacted] Aff. ¶¶ 6-7). [redacted] was very upset and angry when she heard about what Khandker had done to [redacted] ([redacted] Aff. ¶ 8). She sought to advocate for her sister and to spread awareness so that plaintiff would be prevented from assaulting other young women ([redacted] Aff. ¶¶ 14-17). [redacted] was very angry and also concerned about the other women who might be victimized by Khandker, especially in light of his status as an increasingly public figure (*id.*). She felt it was a matter of public interest (*id.*). As such, she posted the following truthful review on his Facebook page on June 25, 2020: "Dr. Ferdous sexually assaults all of his female patients. As a general physician why does he personally give breast exams to all of his female patients even if they come in just for a cough? He is disgusting and should have all of his licenses and certifications revoked. IF YOU ARE A WOMAN DO NOT SEE THIS DOCTOR." (*Id.* ¶ 15).

[redacted] also added the following comment to the change.org petition: "[h]e told my sister he needed to give her a breast exam when she went in for laryngitis. This happened 20 years ago so imagine how many victims he's taken advantage since then. He molested her and many underaged women and older. Not only is he a sexual predator but a pedophile as well" (*id.* ¶ 17).

III. Khandker Could Have Killed Defendant [redacted] Parents

On June 26, 2020, defendant [redacted] posted an article written in Bengali on her Facebook page, about the many sexual assault allegations against Khandker she had read about, along with the comment (in Bengali), "I'm not sure about it." (Affirmation of [redacted] ["[redacted] Aff."] ¶ 5). [redacted] wrote on Facebook about her family's experience with plaintiff because she thought it was a matter of public interest and she wanted her community to know about Khandker's negligence. (*Id.* ¶¶ 5-6). She was upset that Khandker was being venerated in the press because in 2018, she had taken her father to see him for a medical appointment and plaintiff ignored and dismissed [redacted] father's concerns (Affidavit of [redacted] ¶ 3-4; [redacted] Aff. ¶ 3).

Khandker repeatedly told [redacted] over the course of many appointments, that there was nothing wrong with her father until he ultimately succumbed to a heart attack ([redacted] Aff. ¶ 5; [redacted] Aff. ¶ 8). As a result, [redacted] father ended up in a coma. ([redacted] Aff. ¶ 5; [redacted] Aff. ¶ 8). This was a very painful experience for [redacted] and her family ([redacted] Aff. ¶ 5). Khandker also sent [redacted] mother into surgery with the wrong file. ([redacted] Aff. ¶ 6; [redacted] Aff. ¶ 9). Khandker and his wife both apologized to [redacted] family for these incidents. ([redacted] Aff. ¶ 7; [redacted] Aff. 10).

IV. Khandker Victimized Many, But They Chose To Speak Out

When the global pandemic hit, Khandker began to enjoy an increased level of celebrity, as he marketed his services and expertise to the community. He capitalized on his fame by participating extensively in social media and the press. Khandker has created a YouTube channel, where he regularly posts content advertising his services and expertise; he has over 871,000 followers, and his videos have been viewed over 48 million times (Affirm. ¶ 2; Exhibit

D.) He also maintains an Instagram account, where he markets himself as a public figure, and where he has 18,600 followers *(id.*). On April 17, 2020, ABC7 published a human-interest story starring Khandker, and describing him as "tireless" and a "lone wolf… who works 14 to 16 hours a day" (Affirm. ¶ 3; Exhibit E). The story was posted on Facebook, where he continued to garner accolades from commenters who described him as "Best dr [sic] in town…" and "Amazing hero" (*id.*).

Concerned by his growing fame, in early June 2020, over a dozen women, previously scared into silence, publicly accused Khandker of sexually molesting them or their loved ones during routine medical appointments at his office (Aff. ¶ 29-34). In late June 2020, an Instagram user posted about a friend who had been subjected to one of plaintiff's appalling breast-groping episodes (Ex. L, ¶ 40; Aff. ¶ 17). In response, she received an outpouring of support from women within the community, who shared horrifyingly similar stories of assault (Aff. ¶ 30). Soon after, an online petition was initiated, on the popular "change.org" platform, by some of the survivors of plaintiff's abuse (Aff. ¶ 33). The explicit aim of the petition was to show support and spread awareness, in the hopes that this would lead to plaintiff's medical license being revoked (Ex. L, ¶ 109).

PROCEDURAL HISTORY

On June 26, 2020, plaintiff filed a Summons with Notice against defendants in this action, claiming they had defamed him by way of their Facebook posts (Affirm ¶ 4; Exhibit F). Upon securing counsel, defendants sent notification to plaintiff's attorneys detailing why the case was frivolous and misguided, and warning that sanctions would be pursued should they prosecute the matter. Counsel continued:

> For the reasons discussed herein, this litigation is patently frivolous, retaliatory and offensive. I am enclosing a stipulation of discontinuance with prejudice as against Ms.

> [redacted] and Ms. [redacted] that I request you execute promptly. Otherwise, we will move for an order dismissing plaintiff's claims with prejudice, which I am confident will be issued. In such a case, we will thereafter move for an order of attorney's fees pursuant to 22 NYCRR § 130-1.1, which governs frivolous conduct in civil litigation.
>
> 22 NYCRR § 130-1.1(c) provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider ... whether or not the conduct ... was brought to the attention of counsel or the party." This letter is to provide you the "safe harbor" contemplated by the court rule.

(Affirm. ¶ 5; Exhibit G). Undeterred, plaintiff proceeded to file a complaint on August 19, 2020, alleging defamation, tortious interference with contractual relations and prima facie tort (Ex. F ¶¶ 147-169).

On September 18, 2020, defendants filed a verified answer, and [redacted] interposed counterclaims relating to the assault (Ex. L). The counterclaims by [redacted] include claims of sexual assault and battery, violations of the NYC Gender-Motivated Violence Protection Act (NYC Admin Code § 8-903), false imprisonment, negligent infliction of emotional distress, intentional infliction of emotional distress, medical malpractice, lack of informed consent, gender discrimination in violation of the New York State Human Rights Law (NY Exec Law § 296[1]) and gender discrimination in violation of the New York City Human Rights Law (NYC Admin Code § 8-107[1][a]) (*id.).* That same day, defendants served a Notice of Deposition on Khandker, pursuant to CPLR § 3107, for November 5, 2020. (Affirm ¶ 7; Ex. I). On October 2, 2020, defendants served their First Request for the Production of Documents (the "Requests") on plaintiff. (Affirm ¶ 13; Ex. M). Pursuant to CPLR §§ 3101, 3111 and 3120, Plaintiff was to respond by October 22, 2020. On October 8, 2020, Plaintiff filed an Amended Complaint with allegations related to a "John Doe" whom the undersigned does not represent. (*See* Ex. J).

I. Dilatory Tactics Began Almost Immediately

On October 21, 2020, one day before responses to the Requests were due, plaintiff's then-attorney called defendants' counsel to notify defendants that they were withdrawing as counsel, and that new counsel would be substituting in shortly (Affirm. ¶ 9). Plaintiff requested a 30-day extension to respond to the Requests. Defendants replied that we would agree to refrain from filing any motion to compel discovery that week, to give new counsel a chance to appear (*id.*).

On October 26, 2020, plaintiff appeared by new counsel, Aaron M. Rubin (Dkt. No. 11). On October 28, 2020, Mr. Rubin spoke with defendants' attorney Julia Elmaleh-Sachs by telephone, and requested a 30-day extension. Ms. Elmaleh-Sachs relayed that defendants would consent to the request provided that plaintiff agreed to schedule Khandker's deposition for a date certain, as it had previously been scheduled for November 5, 2020. Plaintiff never agreed to same (Affirm. ¶¶ 10, 12; Exhibit K). That same day, defendants filed a Verified Amended Answer and Counterclaims in response to Plaintiff's Amended Complaint, although defendants' counterclaims were identical to those filed in the initial Verified Answer and Counterclaims on September 18, 2020 (Ex. L).

Having no confirmation from plaintiff's new counsel regarding the rescheduling of plaintiff's deposition or the production of documents, on November 12, 2020, defendants filed a Motion to Compel and a Request for Judicial Intervention (Affirm ¶ 14; Exhibit N).

On November 24, 2020 defendants requested a preliminary conference (Dkt. Nos. 23-24). On November 25, 2020, plaintiff filed an utterly bare-bones, completely unsupported motion to dismiss defendants' counterclaims – with a return date *seven weeks later* (Dkt 026). The motion was completely lacking in merit, and there was no discernable reason for the extraordinarily

lengthy return date other than to needlessly prolong the proceedings and to delay discovery. On February 1, 2021, the court issued a reasoned and thorough decision denying plaintiff's motion (Affirm ¶ 15; Exhibit M). The same day, the court also denied defendant's motion to compel, on the basis that a compliance conference had not yet been scheduled at the time the motion was filed (Dkt No. 33).

On February 10, 2021, plaintiff moved to reargue the court's decision regarding dismissal of the counterclaims, yet again filing barebones, woefully unsupported papers, and yet again choosing a return date of one month later (Dkt. No. 34-35). That motion remains *sub judice*.

II. Plaintiff Then Reversed Course and Pled the Fifth Amendment

In the meantime, counsel for the parties held a telephonic conference on February 12, 2021 to discuss outstanding discovery and to schedule deposition dates (Affirm. ¶ 18). The parties agreed to exchange responses to initial discovery requests and initial document productions by March 12, 2021. Defendants complied with this schedule, and sent formal responses as well as an initial document production to plaintiff on March 12, 2021 (Affirm. ¶ 19; Exhibit R). Having failed to receive document responses and/or any document production from plaintiff on March 15, 2021 – the date counsel had specifically discussed and agreed upon – counsel for defendants inquired with plaintiff as to the status of this overdue discovery. (Affirm. ¶ 20; Exhibit S). At 10:37 p.m. on March 15, 2021, counsel for plaintiff indicated for the first time that in fact, they did not intend to adhere to the mutually-agreed deadline, writing, "Julia, we are reviewing circumstances that will affect the schedule. We will be filing a motion shortly" (*id.)*.

Later that evening, plaintiff filed its motion seeking a stay of all proceedings herein, and notifying the court that plaintiff openly refuses to comply with all further discovery:

> "Plaintiff will assert his Fifth Amendment privilege in the instant litigation during the pendency of the OPMC matter. Further, due to the overlapping issues between the OPMC and the instant matter, all responses to discovery will also be met with similar assertions."

(Affirmation of Aaron M. Rubin, ¶ 15.)

ARGUMENT

Plaintiff's efforts to evade obligations in a case he himself filed are mind-boggling. It is evidently clear that this case was filed for no discernable purpose whatsoever but to harass and intimidate the defendants. Plaintiff cannot reasonably expect defendants, nor this court, to take any action but to dismiss his claims. The extreme dilatory tactics by counsel, open refusal to comply with discovery, and assertion of the Fifth Amendment privilege *in a case Khandker himself commenced* are actions so frivolous as to warrant the imposition of sanctions. However, it so happens that the New York Anti-SLAPP suit provides additional bases for dismissal and the recovery of damages.

I. This Case Is A "SLAPP Suit" And Must Be Dismissed

In November 2020, the New York Legislature enacted S52A to "extend the protection of New York's current law regarding Strategic Lawsuits Against Public Participation ('SLAPP suits')." The amendment was enacted with the explicit purpose of "protect[ing] citizens' exercise of the rights of free speech and petition about matters of public interest." 2020 NY Senate-Assembly Bill S52A, A5991A. By broadening the definition of an "action involving public petition and participation," the amendment to Section 76-a purposefully widened the ambit of the

law so as to include all matters of "public interest" including survivors of sexual abuse who speak up about their abuse. *See* New York State Legislature; "Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech," https://nyassembly.gov/Press/files/20200722a.php (July 22, 2020).

The statute applies broadly to, *inter alia,* any communication in public forum in connection with issue of public interest (NY Civil Rights Law ["NYCRL"] § 76-a[1][a]). It defines public interest as any subject other than a "purely private matter" (76-a[1][d]). Where the defamation suit was "without basis", attorney's fees should be awarded to the defendant (70-a[1][a]). Compensatory damages are [redacted] against the plaintiff if the action was "commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights" (70-a[1][b]) and punitive damages are [redacted] if that was its "sole" purpose (70-a[1][c]). Plaintiff must prove, by "clear and convincing evidence," that the statement was knowingly false or that it was made with reckless disregard for the truth/falsity (76-a[2]).

The instant action is precisely the type of action contemplated: lawsuits, like the instant action, that lack legal merit, but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and, perhaps most importantly, 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; *see* L 1992, ch 767; Civil Rights Law §§ 70-a, 76-a).[1]

The legislation creates a new mechanism for summary disposition of these claims (CPLR § 3212[h]), which provides that a motion such as this one "shall be granted unless the party

[1] The original 1992 legislation was specifically aimed at broadening the protection of citizens facing a lawsuit arising from their public petition and participation (*see* L 1992, ch 767, § 1; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d at 137 n 1; *Mable Assets v. Rachmanov*, 2021 NY Slip Op 01759, ¶ 1 (App. Div. 2nd Dept.)).

responding to the motion demonstrates that the [action] has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law."

The Facebook posts at issue in this litigation are, by definition, "communications in a public forum" (NYCRL § 76-a[1][a]). It is equally clear that a public, ongoing discussion about a serial sexual predator, in which survivors share first-hand stories of their own assaults, constitute a "matter of public interest" (NYCRL 76-a[1][d]). After Khandker sexually assaulted [redacted] on February 5, 2020, she immediately took to Facebook to alert her friends not to visit him ([redacted] Aff. ¶ 27). Because she was ashamed and scared of any backlash, she spoke about her experience as though it had happened to a friend ([redacted] Aff. ¶ 28). Similarly, [redacted] and [redacted] spoke out about their family members' horrible experiences with plaintiff on Facebook ([redacted] Aff. ¶ 14-17; [redacted] Aff. ¶ 5). [redacted] did so specifically to spread awareness so that plaintiff would be prevented from assaulting other young women, especially in light of his status as an increasingly public figure and because she felt this was a matter of public interest ([redacted] Aff. ¶ 14.)

It is similarly apparent that the sole purpose of this action was "harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights" (NYCHRL 70-a). Plaintiff is not even disputing the truth of the allegations, nor has he even alleged damages, even in the complaint itself. Now, plaintiff continues to prosecute this case, while simultaneously refusing to participate. It is the very definition of frivolous conduct, and the very definition of a SLAPP suit.

II. Plaintiff's Claims Warrant Summary Dismissal

Even if this action were not a SLAPP case, defendants would still entitled to summary judgment on plaintiff's claims. Plaintiff has not established the requisite elements for a

defamation claim, and cannot do so, especially in light of his discovery noncompliance. Pursuant to CPLR § 3212, summary judgment is appropriate in cases where there are no material and triable issues of fact presented *(Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). To obtain summary judgment, the moving party must make a prima facie showing to the court that, as a matter of law, it is entitled to judgement in its favor *(Friends of Animals v. Associated Fur Mfrs*., 46 NY2d 1065 [1997]). Summary judgment should only be denied if the opposing party presents facts sufficient to require a trial (*Zuckerman v. City of New York*, 49 NY2d 557, 560 [1980]).

False factual statements are the *sine qua non* of a libel claim (*Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 537 [1st Dept 2013]). To satisfy the falsity element of a defamation claim, a plaintiff must allege that the statements in issue are "substantially false" (*Franklin v Daily Holdings, Inc.*, 21 NYS3d 6, 12 [1st Dept 2015]). Indeed, "substantial truth" is all that is necessary to defeat a charge of libel (*Fairley v Peekskill Star Corp.*, 83 AD2d 294, 297 [2d Dept 1981]). If an allegedly defamatory statement is "substantially true," a claim of libel is "legally insufficient and ... should [be] dismissed" (*Guccione v. Hustler Magazine, Inc.,* 800 F.2d 298, 301 [2d Cir.1986]). New York courts have held that a statement is substantially true if the statement would not "have a different effect on the mind of the reader from that which the pleaded truth would have produced" (*Fleckenstein v. Friedman,* 266 NY 19 [1934]). Thus, "it is not necessary to demonstrate complete accuracy to defeat a charge of libel. It is only necessary that the gist or substance of the challenged statements be true" (*Biro v Conde Nast*, 883 F Supp 2d 441, 458 [SDNY 2012], quoting *Printers II, Inc. v. Professionals Publishing, Inc.,* 784 F2d 141, 146 [2d Cir.1986]).

Based on the attached affidavits, exhibits and the procedural and factual history outlined *supra,* it is evident that defendants' Facebook comments and posts are true and entirely based on their personal experiences with Khandker. Defendants had no motive in posting these remarks about Khandker other than to share their personal stories and protect other women and/or patients who may be considering consulting Khandker. Moreover, defendants statements are only a small handful out of dozens and dozens of similar statements and comments.

To state a claim for defamation in New York, the purported false statement "must either cause special harm or constitute defamation per se" (*Plautz v. Eidlin-Quere,* 2011 NY Slip Op 33714([U] [Sup Ct NY County], *citing Dillon v. City of New York,* 261 AD2d 34, 38 [1st Dep't 1999]). Special damages contemplate "the loss of something having economic or pecuniary value" (*Id.,* citing *Liberman v. Gelstein,* 80 NY2d 429, 434-35 [192]), which are not stated herein. And to sustain the only possible claim here for defamation per se, i.e., an allegation that "the person or entity is "'ignorant, incompetent, [or] incapable in his calling' . . . and thereby tend to injury him in that capacity," *Amelkin v Commercial Trading Co.*, 23 AD2d 830, 831 [1st Dept 1965] *affd,* 17 NY2d 500 [1966](citations omitted), it is similarly required that "there must be something that addresses the element of injury to reputation" (*Sandals Resorts Intern. Ltd. v Google Inc,* 86 AD3d 32, 39 [1st Dept 2011]) ("a cause of action for libel per se requires the plaintiff to establish that the publication injured its business reputation or its credit standing") (citations omitted).

Plaintiff has never even *alleged* that he suffered any damages as a result of defendants' statements.

III. Plaintiff Must Be Precluded From Offering Any Evidence

If any party refuses to obey an order for disclosure or willfully fails to disclose information, the court may issue an order "prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony . . . or from using certain witnesses; or . . . striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party" (CPLR § 3126.)

The NY Court of Appeals has established that compliance with court orders and discovery obligations under the CPLR require "a timely response and one that evinces a good-faith effort to address the requests meaningfully" (*CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014], quoting *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Indeed, trial courts have broad "discretion to strike pleadings under CPLR 3126 when a party's repeated noncompliance is dilatory, evasive, obstructive and ultimately contumacious" (*Cohen*, 23 NY3d at 318) (internal citations and quotations omitted). The First Department has also been clear that such dilatory tactics during the course of the discovery process are unacceptable and subject to consequences. (*See Figdor v City of NY*, 33 AD3d 560, 561 [1st Dept 2006]) ("While discovery has trickled in with the passage of each compliance conference, the cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence"). In addition to the long past due deadlines for compliance set forth in the CPLR, plaintiff has ignored, disregarded, and failed to comply with the Preliminary Conference Order or with the discovery schedule agreed to by the parties initially in October 2020, and then once again on February 12, 2021. Now, plaintiff is openly and brazenly refusing to comply with ongoing discovery.

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 against a party who has refused to obey court orders, or willfully fails to disclose information which should be disclosed, is a matter within the discretion of the court" (*Sowerby v Camarda*, 20 AD3d 411 [2d Dept 2005]). "Although dismissing a complaint pursuant to CPLR 3126 is a drastic remedy, it is warranted when a party's conduct is shown to be willful and contumacious" (*id*). The willful and contumacious character of a party's failure to respond to discovery demands can be inferred from its repeated failures to comply with the court's orders, as well as the absence of any explanation offered to excuse its failures (*id*.; *see also Arpino v FJF & Sons Elec. Co.*, 102 AD3d 201, 210 [2d Dept 2012]["The striking of a party's pleading is a drastic remedy only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious….The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse"]). Where, as here, there is no reasonable excuse proffered by a disobedient party for the repeated failure to disclose information and engage in good faith in its discovery obligations, the court has considered the failure to be willful (*Wolfson v Nassau County Medical Center*, 141 AD2d 815 [2d Dept 1988]).

Plaintiff's conduct with respect to all discovery—that is plaintiff's and plaintiff's counsel's refusal to participate in it—goes beyond the outstanding document demands and demonstrates a pattern of willful default and neglect that cannot be excused (*see Prudence v White*, 39 NYS3d 837, 838 [2d Dept 2016]). Defendants cannot plan or prepare their defenses when after *seven months* of continuous requests for documents and examination, plaintiff has refused to produce even one single document, and is now purporting to plead the fifth amendment in his own case. Plaintiff has been afforded many chances and many months to

engage in good faith in its discovery obligations and has failed to do so. It is prejudicial and unfair for defendants – who did not ask to be sued by plaintiff – to continue a one-sided litigation. The plaintiff has ignored every single discovery deadline demonstrating that plaintiff's non-compliance is willful and contumacious warranting nothing less than dismissal with prejudice.

Defendants are young women who spoke out about sexual abuse to their friends and family and who were then shockingly dragged into court by plaintiff. If plaintiff had veritable claims, plaintiff should have litigated them at this juncture. It is more than time for this shakedown to end so that defendants may move on with their lives.

IV. No Stay Should Be Granted

From the beginning, plaintiff has engaged in every sort of delay tactic imaginable. The instant motion for a stay is only the most recent ploy in a series of bad faith moves by plaintiff to delay the discovery process in the hope that defendants will abandon their counterclaims. Plaintiff has failed to articulate any cognizable basis whatsoever for a stay, whether factually nor legally. *Plaintiff's motion does not even include an affidavit!*

CPLR 2201 provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." The determination to stay an action is discretionary, and may be granted when another action has the same parties, claims, and relief sought (*Simoni v Napoli*, 101 AD3d 487, 487-488, 954 N.Y.S.2d 870 [1st Dept 2012]) (*see also Deutsche Bank AG v Vik*, 2016 NY Slip Op 31329[U], *5 [Sup Ct, NY County 2016]). New York courts generally weigh the prejudice to the parties in considering whether or not to grant a stay. (*See Wells v St. Vincent's Hosp.*, 199 AD2d 27, 27 [1st Dept 1993]) ("The prejudice to the

parties in litigating this claim after such a substantial delay far outweighs any discernible benefit to the State. We vacate the stay as an abuse of discretion as a matter of law") (*see also Matter of Astor*, 62 AD3d 867, 869 [2d Dept 2009]) (affirming the denial of a stay and weighing prejudice to the non-moving part, i.e., the defendant).

Plaintiff does not, and cannot, assert that he will, may, or has, suffer any prejudice whatsoever. Counsel cannot testify as to that. On the other hand, all three defendants will suffer great prejudice in the event of further delays. According to [redacted]

> I understand that Dr. Khandker is asking this court to postpone these cases. That would cause tremendous stress and anxiety for me. Getting sued for defamation has been extremely stressful and having these claims pending against me for any longer than necessary will cause me severe emotional pain. I believe I am entitled to compensation from Dr. Khandker for the harm he has done for me. The longer I have to wait for the possibility of that recovery, the more I will continue to struggle, both financially and emotionally.

([redacted] Aff. ¶ 36; *see also* [redacted] Aff. ¶ 18; [redacted] Aff. ¶ 13).

Plaintiff's contention that he is entitled to a stay, based on his assertion of the fifth amendment, is woefully unavailing. A plaintiff that brings a civil complaint cannot then assert his fifth amendment privilege: "[The] defendant has . . . chosen the tactic of seeking to bar plaintiff's access to the evidence. At least to the extent of pleading the Fifth Amendment, that is his right. But, in a civil case, he cannot have it both ways. By hiding behind the protection of the Fifth Amendment as to his contentions, he gives up the right to prove them" (*SEC v Invest Better 2001*, 2005 US Dist LEXIS 34654, at *4-5 [SDNY Apr. 29, 2005]) (citing *SEC v. Benson*, 657 F.Supp. 1122, 1129 (S.D.N.Y. 1987).

The New York Court of Appeals has continuously upheld the principal that a plaintiff in a civil action cannot assert the Fifth Amendment privilege and also seek affirmative relief at the same time. In *Steinbrecher v. Wapnick*, 24 NY2d 354 [1969], the Court of Appeals stated:

"There is one important exception to the general rule that a witness is free to rely on the [Fifth Amendment] privilege unless he has waived it by voluntarily testifying to incriminating facts. Since the sole purpose of the privilege is to shield a witness against the incriminating effects of his testimony, the courts will not permit its use as a weapon to unfairly prejudice an adversary." (*See Crocker C. v Anne R.*, 58 Misc 3d 1221[A], 2018 NY Slip Op 50182[U], *20 [Sup Ct, Kings County 2018]) (citing *Levine v. Bornstein*, 6 NY2d 892 [1959]).

Similarly, the trial court in *Levine* found that "[t]he plaintiff therefore obviously had the right to claim the privilege, but *he cannot eat his cake and have it too*. The defendant also has certain rights, one of which is to defend this lawsuit and to develop an affirmative defense which may well destroy the plaintiff's right to maintain his action" (*Levine v Bornstein*, 13 Misc 2d 161, 165 [Sup Ct, Kings County 1958]) (emphasis added).[2]

Indeed, if plaintiff in the instant matter was genuinely concerned about the implications of the OPMC proceedings, plaintiff could simply withdraw his lawsuit against defendants.

Caselaw cited by plaintiff in his moving brief is not only unavailing but actually directly undermines plaintiff's motion. In *Matter of Astor*, 62 AD3d 867, 870 [2d Dept 2009], the Appellate Division affirmed the Surrogate Court's denial of a plaintiff's motion to stay discovery pending resolution of a related criminal proceeding against him and affirming that the proper procedure is that the party seeking to protect documents from disclosure establish a factual predicate by compiling a privilege log in order to aid the court in its assessment of a privilege claim) (internal citations omitted). Similarly, *De Siervi v Liverzani*, 136 AD2d 527 [2d Dept 1988]) – a case from over thirty years ago – is distinguishable from the instant matter because in that case, plaintiff filed a civil suit against plaintiff's former attorney, i.e., the defendant, alleging

[2] The decision and order of the trial court dismissing the action in *Levine* was affirmed by the Appellate Division, Second Department (7 AD2d 995 [2 Dept 1959]) and by the Court of Appeals (6 NY2d 892 [1959]).

that the defendant caused a forged assignment of a mortgage to be recorded which assigned plaintiff's interest in certain property to defendant's wife and accountant. The defendant was then indicted on charges relating to the forgery. In that case, the Second Department affirmed the lower court's order granting the defendant's motion to stay the civil proceeding pending the resolution of a criminal prosecution against him. Obviously, *De Siervi* is distinguishable from the matter at hand, where the *plaintiff* and not the defendants is the party seeking the stay of discovery.

Plaintiff cites to another case for the proposition that "[i]n determining whether to stay a civil action pending the resolution of a related criminal matter the courts will examine several factors including avoiding the risk of inconsistent adjudications, duplication of proof and potential waste of judicial resources. *See Mook v. Homesafe America, Inc.,* 144 AD3d 1116 (2d Dep't 2016)." Again, in *Mook* the party seeking the stay of the action was the defendant, not the plaintiff (144 AD3d 1116, 1117 [2d Dept 2016]). Thus, *Mook* too is inapposite.

Plaintiff's next argument in favor of a stay is that "even though the OPMC proceeding is not technically a criminal one, it has criminal implications because it can be referred for criminal prosecution. Certainly, the OPMC proceedings threaten plaintiff's medical license and his freedom due to a potential criminal charge." Dkt. No. 38 at ¶ 20. Plaintiff then goes on to cite two cases (*Heifetz v Metropolitan Jewish Geriatric Center*, 135 AD2d 498 [NY App Div 2d Dept 1987]) and *Rodriguez v South Bronx Dev. Organization*, 179 AD2d 545 [NY App Div 1st Dept 1992]) where, once more, the stay of the action was sought by the defendant and not the plaintiff. *Id.* at ¶¶ 21-22. The third case plaintiff cites in this section concerns divorce proceedings between a husband and wife. *Id.* at ¶ 23. Hence, all of these cases are also inapplicable to the instant matter.

Simply put, not only does no legal precedent exist for granting a plaintiff a stay of discovery in a civil action to recover damages, but it would be completely illogical and counterproductive to do so.

V. This Court Should Sanction Plaintiff

It is respectfully submitted that given the aforementioned pattern and practice of baseless litigation and dilatory tactics, it would be appropriate for this court to award sanctions against the plaintiff.

Pursuant to 22 NYCRR § 130-1.1, costs may be awarded to reimburse actual expenses reasonably incurred and reasonable attorney fees. Sanctions may also be imposed against an attorney or party or both, as a result of the attorney and/or party's "frivolous conduct" *Nix v Major League Baseball*, 2018 NY Slip Op 33373(U), ¶ 3 [Sup Ct]). "[F]rivolous conduct can be defined in any of three manners: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false (22 NYCRR 130-1.1 [c]) . . . Sanctions are retributive, in that they punish past conduct" (*Levy v Carol Mgmt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]).

As is evident from a review of the factual history, procedural background and attached affidavits, sanctions against plaintiff are merited here as a result of the ongoing frivolous conduct and delay tactics that plaintiff has engaged in throughout the entire course of this action. The instant motion for a stay is simply more of the same: a prolonging and groundless tactic meant to frustrate and delay these proceedings.

CONCLUSION

Defendants' cross-motion should be granted in its entirety. Plaintiff's claims should be dismissed, and summary judgment should be granted in favor of defendant [redacted] on her counterclaims.