

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STACY BLAIN, PH.D.

Plaintiff,

v.

STATE UNIVERSITY OF NEW YORK
DOWNSSTATE MEDICAL CENTER,
VITALY CITOVSKY, RICHARD
GRONOSTAJSKI, FRANK MIDDLETON,
AND DAVID CHRISTINI

Defendants.

No. 1:22-cv-03022

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW
CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY
INJUNCTION**

May 23, 2022

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Plaintiff Dr. Stacy Blain, by her undersigned counsel, submits this Memorandum of Law in support of her application for an *ex parte* temporary restraining order and preliminary injunction ordering Defendants State University of New York, Downstate Medical Center (“SUNY Downstate”), Dr. Vitaly Citovsky, Dr. Richard Gronostajski, Dr. Frank Middleton, and Dr. David Christini (collectively, “Defendants”) to (1) refrain from initiating disciplinary proceedings or taking adverse employment actions against Dr. Blain, (2) refrain from discussing Dr. Blain’s alleged research misconduct with third parties, (3) refrain from contacting publications to remove Dr. Blain’s research based on the alleged misconduct, (4) to the extent any Defendants have contacted any publication seeking such removal, contact the publication(s) to halt such removal, (5) refrain from otherwise retracting or disparaging Dr. Blain and her work, and (6) restore Dr. Blain as the principal investigator (“PI”) on Grant 1R01CA249667 and Grant 1R21CA252585-01 (the “Adverse Conduct”) until this Court has made a final decision regarding the merits of Dr. Blain’s employment discrimination action.

PRELIMINARY STATEMENT

This case involves Defendants’ discriminatory and retaliatory actions, including the investigation of allegations of research misconduct, against Dr. Stacy Blain, a highly accomplished molecular cell biologist. Without this Court’s immediate assistance, Dr. Blain will be irreparably harmed by Defendant SUNY Downstate’s ongoing and threatened conduct, the result of which will be the permanent destruction of Dr. Blain’s reputation, future opportunities, and career focused on life-saving breast cancer treatments.

For years now, Defendant SUNY Downstate has chronically underpaid Dr. Blain and discriminated against her on the basis of her sex. In the face of this adversity, Dr. Blain nevertheless built a sterling career and made significant breast cancer research breakthroughs.

Eventually, Dr. Blain reached a point where she could not quietly accept Defendant SUNY Downstate's discrimination, and she raised the longstanding discriminatory conduct with the school.

As retaliation, Defendant SUNY Downstate began waging -- and recently accelerated -- a scathing campaign of retaliation against Dr. Blain. Defendant SUNY Downstate's main tool in this war has been an incessant and pretextual investigation into (unfounded) allegations of research misconduct even though multiple SUNY Downstate investigations completed *before* Dr. Blain complained of discrimination found no misconduct related to the research at issue. Defendant SUNY Downstate also has paid no attention to the fact that the federal authority responsible for investigating research misconduct, the Office of Research Integrity ("ORI"), an office within the U.S. Department of Health & Human Services, has issued no findings related to the alleged research misconduct. Instead, using its own retaliatory investigation as an excuse, Defendant SUNY Downstate has taken further steps to destroy Dr. Blain's reputation and ensure that she loses everything that she has earned throughout her impressive career.

At this time, Defendant SUNY Downstate is threatening to take disciplinary actions against Dr. Blain with the goal of ultimately revoking her tenure and terminating her employment, contacting journals requesting retractions of research papers on which she was co-author, and disparaging Dr. Blain's reputation to her colleagues and peers. These threats are imminent. On or about May 12, 2022, Defendant SUNY Downstate notified Dr. Blain of their intent to initiate formal disciplinary proceedings against her. Moreover, the journal *Molecular and Cellular Biology* has demanded a response from Dr. Blain to Defendant SUNY Downstate's accusations by May 26, 2022. Defendant SUNY Downstate's behavior is unwarranted, unfounded, and unfair and should not continue during the pendency of Dr. Blain's employment discrimination action.

We request that the Court put a stop to Defendant SUNY Downstate's campaign against Dr. Blain before she and her reputation are irreparably damaged.

STATEMENT OF FACTS

The facts are more fully described in the Complaint, which we incorporate by reference herein. They are supported by the Affidavits of Dr. Blain and Lisa Marie Casey, filed together with this Memorandum of Law. Briefly, the pertinent facts are as follows.

Dr. Blain has been employed by Defendant SUNY Downstate since 2002 and has been a tenured professor since about January 2017. Dr. Blain, a graduate of Princeton University (B.S.) and Columbia University (Ph.D.), has made significant discoveries, and caused extraordinary progress, in the field of breast cancer treatment. She has published approximately 28 papers in peer-reviewed journals, has received funding from, among other sources, the American Cancer Society, the Susan G. Komen Foundation, and the National Institutes of Health ("NIH"), and has devoted most of her career to finding a cure for breast cancer. Dr. Blain is the co-founder of Concarlo Therapeutics, LLC ("Concarlo"), a biotechnology company dedicated to the development of breast cancer treatments.

During Dr. Blain's entire tenure at Defendant SUNY Downstate -- whose faculty is predominantly male -- it has had a discriminatory workplace environment operated by an "old boys' network," which has been hostile to women and has thwarted opportunities for female professors throughout Dr. Blain's two decades at SUNY Downstate. This was evident to Dr. Blain since her earliest years, causing her to accept her male supervisors' sexist comments and actions toward her and hide her family life from them. In one instance, when one male supervisor learned she was pregnant, he started calling her the "soccer mom" in front of her male colleagues and sent her unwanted memes of "soccer moms." After she politely asked him to stop, he criticized every miniscule action Dr. Blain took from which he could find fault, such as by summoning her to his

office after a student left a microscope on overnight and reprimanding her for proudly hanging her students' presentations on the hallway walls, because such practice was "bragging." Dr. Blain's male colleagues were not reprimanded for participating in this common practice.

On or about October 23, 2019, Dr. Blain's counsel submitted a letter to Defendant SUNY Downstate to complain of the long history of sex-based discrimination that Dr. Blain has suffered, including Defendant SUNY Downstate's decision to re-open an investigation into allegations of research misconduct that it had reviewed several times and closed in 2016 without any finding of research misconduct. Since that time, Defendant SUNY Downstate has retaliated against Dr. Blain for raising the complaint.

Defendant SUNY Downstate's current campaign of retaliation stems from 2016, when Dr. Blain learned that a member of her team ("John Doe 1") may have either mislabeled or mishandled data for an as-yet unpublished article. Dr. Blain asked a colleague, herself an Associate Professor of Cell Biology, to investigate the allegedly mislabeled or mishandled data and related data that had been published in the journal *Molecular and Cellular Biology* in 2015 (the "Subject Data"). Dr. Blain's colleague did so and found no research misconduct. Defendant SUNY Downstate then conducted its own investigation, led by two other SUNY Downstate professors. These professors investigated the Subject Data and submitted their findings to Dr. Mark Stewart, the dean of SUNY Downstate's School of Graduate Studies. Dr. Stewart found no misconduct on the part of either John Doe 1 or Dr. Blain, and issued a letter in December 2016 so stating. Dr. Stewart also determined that no disciplinary actions were warranted. Moreover, in preparation for John Doe 1's upcoming graduation in 2017, his thesis committee reviewed his work, including the allegations concerning the Subject Data. Not surprisingly -- and for a third time -- a reviewing

committee found no evidence of research misconduct and cleared John Doe 1 to graduate, which he did.

Throughout this time, Defendant SUNY Downstate made no real effort to hide its animus towards Dr. Blain. For example, in or about July 2019, Concarlo's then-Chief Operating Officer Lisa Marie Casey submitted a report to Defendant SUNY Downstate, in part seeking to extend the 3-year timeframe of the "Licensed Materials" in a licensing agreement between Concarlo and The Research Foundation for SUNY ("SUNY RF"). On or about July 19, 2019, Ms. Casey met with Defendant SUNY Downstate's Director of the Office of Technology Commercialization, David Schoenhaut, who told Casey words to the effect of: "people here don't like Stacy; we are never going to extend the 3-year timeframe of the Licensed Materials definition and I need you to change the wording around 'collaboration' between Concarlo and SUNY RF." Ms. Casey asked for more information about people's dislike of Dr. Blain, but Mr. Schoenhaut declined to provide more information. Mr. Schoenhaut requested that Ms. Casey rewrite the cover letter of the report so that it did not discuss the "collaboration" between Concarlo and SUNY RF, which she did.

Defendant SUNY Downstate's opportunity to act on their discriminatory animus came on July 17, 2019, when ORI informed SUNY Downstate that it received allegations of Dr. Blain's research misconduct regarding the same Subject Data that Defendant SUNY Downstate had already extensively reviewed and cleared. In the letter, ORI instructed that "[i]f your institution has already conducted an inquiry or review of this matter," to "please send us a copy of the findings." In contravention of ORI's instructions, Defendant SUNY Downstate did not send ORI a copy of the letter or otherwise notify ORI that it had conducted multiple reviews of the Subject Data even though it understood that the allegations were the same as those lodged against John Doe 1 in 2016.

Thus, despite the various investigations of John Doe 1's work and the issuance of Dr. Stewart's letter concluding the matter without any findings of research misconduct, in 2019, as part of its campaign of discrimination against Dr. Blain, Defendants SUNY Downstate reopened the investigation without any new or additional evidence. Defendant SUNY Downstate began by convening a three-member panel to conduct an inquiry (the "Inquiry Committee"), consisting of Defendants Dr. Vitaly Citovsky, Dr. Richard Gronostajski, and Dr. Frank Middleton. Later, Defendant SUNY Downstate convened a five-member panel consisting of the Inquiry Committee and two other individuals to conduct an investigation (the "Investigation Committee") to review the allegations. This was SUNY Downstate's *fourth* review of the issues with John Doe 1 and the Subject Data.

Although the Inquiry Committee initially seemed to approach the inquiry fairly, things took a drastic turn for the worse after Dr. Blain complained to Defendant SUNY Downstate regarding their "old boys' network" and the hostile workplace they engendered. On or about October 15, 2019, over a week before Dr. Blain made her complaint of discrimination on October 23, 2019, the Inquiry Committee met with two SUNY Downstate professors who reviewed John Doe 1's data in 2016. At these meetings, they did not engage in the sorts of retaliatory and defamatory steps that, as described below, they took after Dr. Blain's voiced her complaints about Defendant SUNY Downstate's discriminatory environment.

Following Dr. Blain's complaint of Defendant SUNY Downstate's discriminatory behavior, however, Defendant SUNY Downstate commenced a retaliatory campaign. Defendants Dr. Vitaly Citovsky, Dr. Richard Gronostajski, and Dr. Frank Middleton, under the guise of conducting an inquiry, began by tarnishing Dr. Blain's reputation by making false statements to Dr. Blain's colleagues about her purported "guilt" with respect to research misconduct. On or

about October 28, 2019, less than a week after Dr. Blain made her complaint, they met with Dr. Blain and three other witnesses. During the transcribed interview with one witness, for example, the members of the committee told the witness that Dr. Stewart's letter, of which the witness did not have personal knowledge, had concluded that one of the papers at issue relied on "falsified data" and implied that there was "clearly falsification of data." That was a blatant lie, as Dr. Stewart's letter made no such conclusions. The committee members also falsely told the witness that "the Research Integrity Office showed that . . . bands . . . were manipulated to look differently" and that the manipulation was "done with premeditation." This was also a lie, as the ORI letter made no statements regarding "premeditation," let alone a determination about data manipulation. Instead, the letter merely asked SUNY Downstate to conduct an inquiry. Moreover, during their interview of Dr. Blain, the committee members disregarded her explanations and used a belittling tone meant to diminish Dr. Blain's hard work and successes.

Defendants' vindictive and retaliatory conduct continued for years throughout the investigation process. Following the conclusion of the initial inquiry, SUNY Downstate empaneled an Investigation Committee consisting of the Inquiry Committee and two additional members. That committee, too, conducted the investigation in an unusually haphazard and retaliatory manner by misinterpreting Dr. Blain's explanations of data without bothering to ask her for clarification when necessary and failing to interview key witnesses, including the two researchers who were primarily responsible for generating the data at issue. In the end, the Investigation Committee found no new evidence against her.

Yet, on or about December 2, 2021, the Investigation Committee released a report (the "Investigation Report") that concluded that Dr. Blain had committed research misconduct because three of the peer-reviewed papers of which she was a co-author have instances of either mislabeled

data or “beautified” data presentations, of which she was unaware. Repeatedly, the Investigation Report claimed she “should have” been aware, so the report is essentially a finding of negligence. The Investigation Committee nowhere explained why or how the material could have made it through the exhaustive and exacting peer-review process with no one noticing the few examples at issue. Nowhere did it explain why Defendant SUNY Downstate, which had the work reviewed, was not itself negligent. They simply placed blame solely on Dr. Blain.

On or about December 14, 2021, the SUNY Downstate official with final authority over the investigation accepted, and thus finalized, the Investigation Report. Defendant SUNY Downstate then submitted the Investigation Report to ORI in or about January 2022.

Using this “witch hunt” as a cover, Defendant SUNY Downstate escalated its retaliatory conduct in recent months. Relying on its Investigation Report, Defendant SUNY Downstate has now embarked on a pernicious campaign to disparage Dr. Blain and ruin her career for no reason other than to retaliate against Dr. Blain for filing a complaint of discrimination. On or about February 28, 2022, without any concern for the devastating impact on Dr. Blain’s cancer research, Concarlo, or Dr. Blain, SUNY RF notified Concarlo that it had moved to withdraw the application for, and expressly abandon, a patent for which Dr. Blain was the inventor and SUNY RF was the assignee. In or about March 2022, Defendant SUNY Downstate removed Dr. Blain from one of her grants without first discussing it with her and ignored Dr. Blain’s suggestion for the most suitable replacement. On or about May 12, 2022, Dr. Blain learned that Defendant SUNY Downstate removed her from another NIH grant.

Defendant SUNY Downstate’s further harm to Dr. Blain is imminent. In or about April 2022, Defendant SUNY Downstate contacted *Molecular and Cellular Biology* and *Journal of Pediatric Gastroenterology* requesting retractions of research papers on which she was a co-

author, and *Molecular and Cellular Biology* has demanded a response from Dr. Blain to Defendant SUNY Downstate's accusations by May 26, 2022. On or about May 12, 2022, Defendant SUNY Downstate notified Dr. Blain of its intent to initiate formal disciplinary proceedings which could result in the revocation of her tenure and ultimate termination. As further discussed, these actions will cause Dr. Blain irreparable injury by destroying her reputation and relationships with colleagues, peers, and other third parties and preventing her from continuing her research. Putting aside the devastating consequences to Dr. Blain, Defendant SUNY Downstate's actions (a) threaten to ruin a hope for breast cancer patients, (b) have obstructed the issuance of a critical patent (two business days before it was set to be issued), (c) have left Dr. Blain's excellent team of trainees bereft of their mentor and leader, and (d) have created existential threat to Concarlo, its vital work, and its investors. Defendant SUNY Downstate all does this because, among other things, Dr. Blain did what was not acceptable in the toxic "old boys" club at Defendant SUNY Downstate: complain after discrimination and disparate treatment.

Defendant SUNY Downstate is taking these drastic steps even though ORI's review of the investigation report and exculpatory evidence that Dr. Blain provided is ongoing and despite the fact that, in light of the unsubstantiated conclusions of Defendant SUNY Downstate's investigations, Dr. Blain will likely be exonerated. The actions that Defendant SUNY Downstate has taken -- and will continue to take if not stopped -- ensure destruction of Dr. Blain's reputation beyond repair. The Court should put an end to Defendant SUNY Downstate's harmful actions until it makes a determination on the merits of Dr. Blain's employment discrimination action.

ARGUMENT

AN EX PARTE TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION SHOULD BE GRANTED

A temporary restraining order and a preliminary injunction should be granted where the movant establishes “(1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking the injunctive relief.” *Mullins v. City of New York*, 626 F.3d 47, 52-53 (2d Cir. 2010); *see also Wright v. City of New York*, No. 09-CV-2452, 2010 WL 167951, at *1 (E.D.N.Y. Jan. 6, 2010) (citing *Local 1814, Int’l Longshoremen’s Ass’n, AFL-CIO v. N.Y. Shipping Ass’n, Inc.*, 965 F.2d 1224, 1228 (2d Cir. 1992)) (“[T]he standard for a temporary restraining order is the same as for a preliminary injunction.”).

A. Dr. Blain Will Suffer Irreparable Injury Absent a Preliminary Injunction

If this Court does not restrain Defendant SUNY Downstate’s retaliatory conduct, Dr. Blain’s career, reputation, and the revolutionary research she has published for the benefit of the scientific community will be irreparably harmed. Moreover, a lack of injunctive relief would illustrate to other employees at Defendant SUNY Downstate that anti-retaliation law does not sufficiently safeguard protected classes of people from discriminatory conduct, thus deterring them from reporting such conduct. *See Mullins*, 626 F.3d at 55 (emphasizing that, in some circumstances, “[u]nchecked retaliation subverts the purpose of [anti-retaliation statutes] and the resulting weakened enforcement of federal law can *itself* be irreparable harm in the context of a preliminary injunction application” (emphasis in original) (quotation marks omitted)); *see also Holt v. Cont’l Grp., Inc.*, 708 F.2d 87 (2d Cir. 1983) (“A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act,” which “may be found to constitute irreparable injury.”).

Irreparable harm is shown where “there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation.” *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (quotation marks omitted). Prior to Defendant SUNY Downstate’s Adverse Conduct, Dr. Blain was an employed, well-connected, and highly respected molecular cell biologist published in at least 28 peer-reviewed journals. If Defendant SUNY Downstate’s retaliatory conduct continues, by the time the employment discrimination lawsuit is decided, Dr. Blain will likely be unemployed, stripped of her credentials and publications, and lacking the connections and respect she has dedicated her career to earn. Thus, to maintain Dr. Blain’s position and prevent the irreparable harm that would otherwise ensue during the pendency of the discrimination lawsuit, injunctive relief is essential. *See Brenntag Int’l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999) (An “accurate description of the circumstances that constitute irreparable harm is that where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.”).

As a published scientist, professor, and researcher for molecular cell biology, Dr. Blain’s success and career are directly tied to her stature in her industry and the good standing of her publications. Thus, if her reputation is even temporarily tarnished, or her research removed from any of the journals which have carefully selected and published her research, irreparable harm, such as damaged relationships with publications, peers, and potential employees, would follow. Indeed, Dr. Blain’s position in the industry, requiring her displayed success in research and publishing to secure grants and funding to continue her laboratory work, is akin to a business’s position in their industry, which requires customer satisfaction, trust, and good will. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming finding of irreparable

injury where, absent injunctive relief, the defendant's actions would cause plaintiff irreparable harm "through loss of reputation, good will, and business opportunities"); *see also Rex Med. L.P. v. Angiotech Pharma (U.S.), Inc.*, 754 F. Supp. 2d 616, 623 (S.D.N.Y. 2010) ("During [the company's] absence from the market, its customers will resort to competing products to fill their needs, and, even after [the company's] return, customers may nonetheless refuse to return to [the company], because of [the company's] lack of dependability[.]").

SUNY Downstate's harm to Dr. Blain cannot be assigned a dollar value. Each day that Defendant SUNY Downstate continues to discuss Dr. Blain's unproven misconduct with colleagues, scientists, and the journals with which Dr. Blain has fostered relationships over decades allows SUNY Downstate to further damage the trust and respect that Dr. Blain has earned in her industry throughout her career in a way that no amount of money could repair. *See Ecolab Inc. v. Paolo*, 753 F. Supp. 1100, 1110 (E.D.N.Y. 1991) ("Loss of good will constitutes irreparable harm which cannot be compensated by money damages."); *Unisource Worldwide, Inc. v. Valenti*, 196 F. Supp. 2d 269, 280 (E.D.N.Y. 2002) (same). Moreover, each day that Dr. Blain remains removed from her position as PI of the two grants -- which she earned -- is another day that Dr. Blain is without employees and funding and therefore unable to continue her important work. Without an injunction, Dr. Blain will continue to be stuck in a position where she cannot contribute her work to the breast cancer treatment community and Defendant SUNY Downstate will continue requesting that journals retract her peer-reviewed papers, spreading lies about Dr. Blain's investigation with her peers, and humiliating Dr. Blain throughout disciplinary proceedings. Even once Dr. Blain's name is cleared following the conclusion of the research misconduct hearings, journals will approach consideration of publishing Dr. Blain's future research with hesitancy, top medical students will be less inclined to work in her laboratory, and her colleagues will pause

before approaching her for advice or mentorship. These injuries are not “calculable nor compensable in dollars and cents.” See *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438, 444-45 (2d Cir. 1977). As with harm to a company’s goodwill, a stain on Dr. Blain’s established position in the world of cancer research and molecular biology will permanently impair her career. See *Ecolab*, 753 F. Supp. at 1110.

The harms from Defendant SUNY Downstate’s actions are imminent. On May 12, Defendant SUNY Downstate stated its intention to start proceedings leading to Dr. Blain’s termination. And *Molecular and Cellular Biology* has demanded a response from Dr. Blain to Defendant SUNY Downstate’s accusations by May 26, 2022.

Lastly, and importantly, unchecked retaliation carries with it “the distinct risk that other employees may be deterred from protecting their rights under the [law].” *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 511-12 (2d Cir. 2005). Indeed, Dr. Blain has young, vulnerable employees who are terrified about their job security, future education, and career opportunities given Defendants’ unreasonable and targeted treatment of Dr. Blain following her complaint of discrimination. Because Defendant SUNY Downstate has a demonstrated history of facing discrimination allegations from its employees,¹ it is crucial that this Court grant injunctive relief to avoid the irreparable harm of deterring Dr. Blain’s colleagues and employees from coming

¹ SUNY Downstate has been accused of gender discrimination and retaliation several times in the past. See, e.g., *McCalla v. SUNY Downstate Med. Ctr.*, No. 1:03-cv-02633 (E.D.N.Y.) (alleging employment discrimination and retaliation against SUNY Downstate under Title VII and New York State and City Human Rights laws); *Poston v. SUNY Downstate Med. Ctr.*, No. 513533 (N.Y. Sup. Ct. July 29, 2020) (alleging violations of New York Labor Law and retaliation against SUNY Downstate); *Harrison v. SUNY Downstate Med. Ctr.*, No. 1:16-cv-01101 (E.D.N.Y.) (alleging gender and disability discrimination in violation of Title VII, the New York State and City Human Rights Laws, and the Rehabilitation Act against SUNY Downstate); *Novotney v. State Univ. of N.Y.*, No. 1:17-cv-01180 (E.D.N.Y.) (alleging violations of procedural and substantive due process, First Amendment, retaliation, and defamation against SUNY Downstate).

forward in the face of discrimination in the future. *See Mullins*, 626 F.3d at 55; *Holt*, 708 F.2d at 90-91.

B. Dr. Blain Is Highly Likely to Succeed on the Merits of Her Claims and the Balance of Hardships Weigh Strongly in Her Favor

After establishing irreparable harm, a movant for a preliminary injunction or temporary restraining order need only show either that she has a likelihood of success on the merits of her claims or that a balance of hardships tips toward injunctive relief. *Mullins*, 626 F.3d at 52-53. Though not necessary, Dr. Blain can establish both.

1. Dr. Blain Will Likely Succeed on the Merits of Her Retaliation Claims

To establish a likelihood of success on the merits, Dr. Blain “need not show that success is in absolute certainty,” but only “that the probability of [her] prevailing is better than fifty percent.” *Ecolab*, 753 F. Supp. at 1109-10. Indeed, “[t]here may remain considerable room for doubt.” *Id.* Here, the probability that Dr. Blain will succeed in establishing that Defendant SUNY Downstate’s Adverse Conduct is in unlawful retaliation of her complaint of employment discrimination is well above fifty percent.

Dr. Blain claims that Defendant SUNY Downstate’s retaliatory conduct violated, and continues to violate, the Equal Pay Act and the New York analogue, as well as the New York State and City Human Rights Laws. *See* 29 U.S.C. § 206(d)(1); N.Y. Lab. L. § 194; N.Y. Exec. L. §§ 290 *et seq.*; N.Y.C. Admin. Code §§ 8-101, *et seq.* To establish retaliation in these contexts, a plaintiff must show “(1) that she participated in a protected activity, (2) that she suffered an adverse employment action, and (3) that there was a causal connection between her engaging in the protected activity and the adverse employment action.” *Mauze v. CBS Corp.*, 340 F. Supp. 3d 186, 210 (E.D.N.Y. 2018) (addressing retaliation under New York State and City Human Rights Laws); *Jones v. Pawar Bros. Corp.*, 434 F. Supp. 3d 14, 27-28 (E.D.N.Y. 2020) (addressing retaliation

under the Equal Pay Act and New York Labor Law, which it acknowledged are “nearly identical provisions”).

Dr. Blain is likely to succeed in establishing a retaliation claim on the merits. First, Dr. Blain participated in a protected activity when she, through her counsel, informed Defendant SUNY Downstate that their administration had taken several discriminatory actions against her. *Soloviev v. Goldstein*, 104 F. Supp. 3d 232, 251 (E.D.N.Y. 2015) (“[T]he term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination,” and such action can be informal, as “an employee does not need to lodge a formal complaint of discrimination”); *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 116 (2d Cir. 2015) (concluding that, to fall under the anti-retaliation provision applicable to the Equal Pay Act, a complaint is adequate if it is “sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection”).

Second, Dr. Blain suffered several adverse employment actions. An employee can establish an action was sufficiently adverse by showing that the action disadvantaged the employee such that it would “dissuade[] a reasonable worker from making or supporting [similar] charge[s].” *Mullins*, 626 F.3d at 47. Defendant SUNY Downstate’s actions against Dr. Blain would certainly dissuade her colleagues from similarly coming forward. To start, Defendant SUNY Downstate embarked on a painstaking and predetermined investigation into Dr. Blain’s alleged misconduct for multiple years. Despite the fact that Defendant SUNY Downstate investigated and cleared the alleged research misconduct *three times* before ORI contacted SUNY Downstate informing them of research misconduct allegations, they ignored ORI’s instructions to provide ORI with those findings. Defendant SUNY Downstate then reviewed the Subject Data for a fourth time for approximately two years, disparaging and ignoring Dr. Blain along the way. This long-winded

and frustrating process would certainly dissuade a reasonable employer in Dr. Blain's shoes from complaining to Defendant SUNY Downstate's administration. *See id.* Indeed, such investigation is extremely adverse to an employee whose work and reputation is built on the integrity and good-standing of research and writing. *See Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (acknowledging that determination of adverse employment actions should consider the context of the employment, because "an act that would be immaterial in some situations is material in others").

Defendant SUNY Downstate did not stop at one adverse action. Since making their predetermined conclusion that Dr. Blain committed research misconduct, Defendant SUNY Downstate has continued its efforts to destroy Dr. Blain's success and end her career, including by causing SUNY RF to abandon a patent of which Dr. Blain was the inventor, contacting journals requesting they retract research papers on which she was co-author, removing her as the principal investigator on an NIH grant, which effectively removed her employees and funds and thus the opportunity to do her work, and notifying her of their intent to initiate formal disciplinary proceedings against her. These actions not only would dissuade other employees from reporting discrimination to Defendant SUNY Downstate, *see Mullins*, 626 F.3d at 47, but also have damaged her reputation and will undoubtedly impact her employment, connections, and professional stature in the future. *Cf. D'Amato v. Five Star Reporting, Inc.*, 80 F. Supp. 3d 395, 420 (E.D.N.Y. 2015) (dismissing retaliation claims where the plaintiff failed to show that the defendant's actions "had some impact on the plaintiff's employment or prospective employment").

Third, it is apparent from the timing and treatment of Dr. Blain that Defendant SUNY Downstate's adverse actions were triggered by Dr. Blain's October 2019 complaint of employment discrimination and unequal pay. A plaintiff can establish proof of causation either "directly,

through evidence of retaliatory animus directed against the plaintiff by the defendant,” or “indirectly, by showing that the protected activity was followed closely by discriminatory treatment.” *Fraser v. MTA Long Island R.R.*, 307 F. Supp. 3d 105, 115 (E.D.N.Y. 2018). Here, causation can be established both directly from Defendant SUNY Downstate’s explicit animus toward her and indirectly from the timeline of the activities against Dr. Blain following her complaint. First, Dr. Blain can establish causation through Defendant SUNY Downstate’s discriminatory intent and retaliatory animus following her complaint. During the investigation process, the members of the Inquiry Committee and Investigation Committees made false statements regarding Dr. Blain’s purported “guilt” to witnesses in the investigation, disregarded Dr. Blain’s explanations and exculpatory evidence, and one member unbelievably admitted that he did not even read the paper in which the data at issue was published. Moreover, a director of Defendant SUNY Downstate’s, Schoenhaut, told Concarlo’s then-Chief Operating Officer that people at SUNY Downstate “don’t like Stacy,” and went as far as to tell Dr. Blain that Defendant SUNY Downstate “owned her brain.” Defendant SUNY Downstate has further exhibited its animus in recent months by withdrawing its patent application from issuance without the courtesy to notify Concarlo or Dr. Blain, contacting journals requesting that they retract research papers on which she was a co-author, removing her as the principal investigator on two grants, and threatening to initiate formal disciplinary proceedings against her.

Second, causation can be established by the fact that Defendant SUNY Downstate’s investigation intensified almost immediately following Dr. Blain’s complaint regarding their discrimination. *See Mullins*, 626 F.3d at 54 (“[T]he sequence, timing and nature of events only reinforces the connection” between protected activity and adverse employment actions). The inquiry committee began meeting witnesses on or about October 15, 2019, when they met with the

two Defendant SUNY Downstate professors who reviewed John Doe 1's data in 2016. They did not falsely assert that Dr. Blain committed research misconduct at this point. However, less than a week after Dr. Blain complained of discrimination on October 23, 2019, the inquiry committee stepped up their attacks on Dr. Blain's reputation. Only five days later, on October 28, 2019, when they met with Dr. Blain and three other witnesses, it was apparent to Dr. Blain that their demeanor and approach had shifted and intensified. They adopted a belittling tone during their interview of Dr. Blain and refused to acknowledge her explanations -- both signaling their disinterest in neutral fact-finding. Moreover, they told a witness that Dr. Stewart's letter concluded that the papers at issue relied on "falsified data" and that ORI told the committee that Dr. Blain engaged in data manipulation. Both statements were false, as Dr. Stewart in fact concluded that there was no research misconduct, and ORI has not made any such determinations. Thus, given the temporal proximity between Dr. Blain's complaint and Defendant SUNY Downstate's adverse actions, as well as the many examples of their discriminatory animus against Dr. Blain, Dr. Blain is likely to establish a causal connection between her act of complaining and Defendant SUNY Downstate's adverse employment actions.

Defendant SUNY Downstate may argue that their findings of Dr. Blain's research misconduct provide a legitimate, non-discriminatory reason for their actions against Dr. Blain. *See Mauze*, 340 F. Supp. at 211; *Jones*, 434 F. Supp. 3d at 28. They may argue that they took the adverse actions against Dr. Blain -- such as contacting journals requesting that they remove Dr. Blain's papers, causing SUNY RF to withdraw from the patent, and threatening to initiate disciplinary proceedings against Dr. Blain -- because Dr. Blain committed research misconduct and such steps are taken when research misconduct is found. But the finding of research misconduct was illegitimate and discriminatory, as demonstrated by the pretextual, predetermined

investigation. The investigation was clouded by an inequitable process from start to finish. Accordingly, Defendant SUNY Downstate will be unsuccessful in arguing that their actions were justified by a non-discriminatory reason.

2. The Balance of Equities Weigh Strongly in Dr. Blain's Favor

If the Court determines it is necessary to examine the balance of the hardships, it is clear that the balance tips decidedly in Dr. Blain's favor. First, if Defendant SUNY Downstate provides Dr. Blain with her requested relief, it will undergo minimal, if any, hardship. Indeed, a preliminary injunction and temporary restraining order for the relief sought will require little affirmative actions on behalf of Defendant SUNY Downstate. It would require only that, to the extent Defendant SUNY Downstate has contacted journals regarding Dr. Blain's purported research misconduct and the removal of her authored articles, they contact the journals and ask that her research be reinstated and preserved in their publications. This would require the same efforts that Defendant SUNY Downstate was willing to take to tarnish Dr. Blain's reputation and remove her work from public discourse. Such efforts -- which Defendant SUNY Downstate has willingly undertaken in the past -- is not a hardship.

On the other hand, absent injunctive relief, Dr. Blain will suffer much hardship. As discussed, if Defendant SUNY Downstate continues to speak about Dr. Blain's alleged misconduct to her colleagues and to journals in which Dr. Blain is published, her reputation will be severely tarnished and, even when her name is cleared from the allegations of misconduct, she will forever be associated with wrongdoing by scientists and scholars in her field. In Dr. Blain's industry, her reputation, connections, and credentials are everything, and any further negative attention will result in lack of trust and respect from publications, peers, and students. Not to mention, the world of breast cancer prevention development will be hindered if Dr. Blain's past and future research

and articles are removed from and prevented from entering public discourse. Unquestionably, the balance of hardships tips strongly in favor of granting the requested injunctive relief.

CONCLUSION

For the reasons set forth above, this Court should grant the relief sought in the accompanying Order to Show Cause, and grant Defendant such other and further relief as this Court deems just and proper.

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May 23, 2022

Respectfully submitted,

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