

In the Wisconsin Court of Appeals
DISTRICT 1

MARY MACCUDDEN,
PLAINTIFF-RESPONDENT,

v.

KATY SCARLETT JOHNSON,
DEFENDANT-APPELLANT.

**APPENDIX TO THE OPENING BRIEF OF
DEFENDANT-APPELLANT KATY SCARLETT JOHNSON**

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Electronically signed by Kristy Yang
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 47

MILWAUKEE COUNTY

MARY MACCUDDEN,
Plaintiffs,

v.

Case No.: 22-CV-6894

KATY SCARLETT JOHNSON,
Defendants.

DECISION AND ORDER

Defendant Scarlett Johnson (“Johnson”) brings this motion for summary judgment against Plaintiff Mary MacCudden (“MacCudden”). The motion involves the following documents: Dkt. 57 (Johnson’s brief in support of motion for summary judgment), Dkt. 64 (MacCudden’s brief in opposition to motion for summary judgment), Dkt. 65 (Johnson’s reply brief in support of summary judgment), Dkt. 67 (MacCudden’s supplemental brief), and Dkt. 68 (Johnson’s supplemental brief). For the following reasons, the Court **GRANTS** in part and **DENIES** in part Johnson’s motion for summary judgment.

BACKGROUND

On or about October 6, 2022, Johnson sent a tweet on Twitter and created a post on Facebook that used the image and likeness of MacCudden. Dkt. 23, Am. Compl. ¶ 8. Immediately above MacCudden’s picture, Johnson allegedly made derogatory and defamatory statements regarding MacCudden. *Id.* ¶ 9. The statements made by Johnson in her social media posts included the following:

- a. Johnson circled in red that part of MacCudden's LinkedIn profile which stated that MacCudden worked as a "social Justice Coordinator" at Homestead high School. Johnson then wrote, "Why the hell am I paying for a 'Social Justice Coordinator' in my school district?"
- b. Johnson wrote MacCudden was "just what @mtschools needs; more woke, white women w/ a god complex."
- c. Johnson wrote "Thank you, white savior" in addressing MacCudden."

Id. ¶ 10. At issue are the words "woke white women," "god complex," and "white savior." *Id.* ¶ 11. At the time of Johnson's October 6, 2022 Facebook post and tweet, MacCudden did not work as a "Social Justice Coordinator" at Homestead High School and was not employed by the Mequon-Thiensville School District. *Id.* ¶ 17.

On October 11, 2022, Johnson acknowledged that MacCudden was not employed at Homestead High School or paid by the Mequon-Thiensville School District when she responded to a comment saying, "I'm relieved she is no longer employed in my district." *Id.* ¶ 19. The parties dispute the timing of Johnson's retweet of her own tweet. According to MacCudden, Johnson retweeted her original tweet on Twitter and reposted her original post on Facebook after she knew the truth about MacCudden's employment status. *Id.* ¶ 20. According to Johnson, she did not retweet her Tweet any later than October 7, 2022. Dkt. 57, ¶ 25.

On October 15, 2022, Johnson tweeted in reply to @S_OReilly_USA, that if MacCudden "really wants to promote equity, perhaps she should forfeit her job to a person of color?" Dkt. 23, ¶ 21. On October 16, 2022, Johnson tweeted in reply to @metal_gear88, "Parents know these woke lunatics are bullies. They are bullying you into silence and compliance." *Id.* ¶ 26.

Johnson's statements were broadcast to all third parties who accessed Johnson's Facebook and Twitter pages. *Id.* ¶¶ 29, 30. By October 13, 2022, Johnson's Facebook post had been shared 15 times and had received between 19 and 30 comments. *Id.* ¶ 29. By October 13, 2022, Johnson's Tweet had been retweeted 258 times, liked 867 times, and received 110 comments. *Id.* ¶ 30. Johnson's tweets of October 11, 15, and 16 were also retweeted, liked, and shared with third parties. *Id.* ¶ 31.

In the Amended Complaint, MacCudden states that when she held the position, it was not directly funded through the Mequon-Thiensville School district. Dkt. 23, ¶18. However, at deposition, she testified she believed funds came from the Homestead High School budget,

which is money allocated through the district and disbursed to the separate schools. Dkt. 60, 67: 2-10.

At the time of Johnson's October 6, 2022 Facebook post and tweet, MacCudden identified as a Hispanic woman. *Id.* ¶ 16. In addition to her Puerto Rican heritage on her mother's side, she has Polish and German heritage from her mother and Irish, Italian, Polish, Welsh, and German from her father. Dkt. 57, ¶ 27.

In a letter dated October 10, 2022 to Johnson, MacCudden's counsel stated that Johnson had singled MacCudden out in her posts and that the posts had caused MacCudden harm and affected her ability to be employed as a schoolteacher in the future. Dkt. 58, Ex. SJ-D, 15. On October 13, 2022, Johnson deleted her tweet and made her Facebook post private. Dkt. 57, ¶¶ 35-36. MacCudden was the only individual that Johnson made a direct personal attack towards. Dkt. 64, 1. She was the only person that Johnson labelled as a "white savior" with a "god-complex." *Id.* at 1-2.

On November 7, 2022, at 6:25 p.m., MacCudden's original Summons and Complaint were served on Johnson's husband. Dkt. 23, ¶ 33. On November 7, 2022, at 6:58 p.m., Johnson posted/tweeted MacCudden's picture and a copy of MacCudden's LinkedIn work experience and stated, "No more politics in education. We need more reading specialists NOT woke social justice coordinators who are 'skilled in Equity Promotion.' 81% of Americans agree. Public Schools are too political. Teach kids actual math. Hint: 2+2 doesn't equal transgender." *Id.* ¶ 34, Ex. E.

LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Summary judgment "is designed to eliminate unnecessary trials" because "there is no triable issue of fact" to present to a jury. *Maynard v. Port Publ'ns., Inc.*, 98 Wis.2d 555, 562-63, 297 N.W.2d 500 (1980). Courts apply a two-step test to determine whether summary judgment is appropriate. *In re Garza*, 2017 WI 35, ¶ 21, 374 Wis.2d 555, 566, 893 N.W.2d 1 (citing *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 314-15, 401 N.W.2d 816 (1987)). First, the court looks at the pleadings to determine if the plaintiff has stated a claim for relief. *Id.* "If proof of the well-pleaded facts in a complaint would satisfy each element of a cause

of action, then the complaint has stated a claim upon which relief may be granted.” *Cattau v. Nat’l Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶ 6, 386 Wis.2d 515, 926 N.W.2d 756. Then, if there is a claim for relief, the court looks at the evidence to decide whether any factual issues exist and applies the summary judgment statute. *Id.* Once the moving party has satisfied the initial burden, the nonmoving party “must set forth specific facts showing that there is a genuine issue for trial.” Wis. Stat. § 802.08(3).

A party who opposes summary judgment cannot just rest on its mere denials or pleadings. *Dawson v. Goldammer*, 2006 WI App 158, ¶ 31, 295 Wis.2d 728, 746, 722 N.W.2d 106. This is because the “the allegations of the pleadings may not be considered as evidence or other proof on a disposition of the motion.” *Kavon Enterprises, Inc. v. Am. Universal Ins. Co.*, 74 Wis.2d 53, 56-57, 245 N.W.2d 695, 697 (1976). Instead an opposing party “must affirmatively counter with evidentiary materials demonstrating there is a dispute.” *Dawson*, 2006 WI App 158, ¶ 31. (citations omitted).

The court takes “evidentiary facts in the record as true if not contradicted by opposing proof.” *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis.2d 804, 623 N.W.2d 751. However, “inferences to be drawn from the underlying facts,” “should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party.” *Id.* The moving party has the burden of showing the absence of genuine issues of material fact. *Cent. Corp. v. Research Prods. Corp.*, 2004 WI 76, ¶ 19, 272 Wis.2d 561, 681 N.W.2d 178. “A ‘material fact’ is one that is of consequence to the merits of the litigation.” *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis.2d 538, 742 N.W.2d 294. A factual issue is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Baxter v. Wis. Dep’t of Natural Res.*, 165 Wis.2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991). If the court is satisfied that there is no genuine issue of material fact, the court shall enter judgment as a matter of law. Wis. Stat. § 802.08(2); *Jackson v. Benson*, 218 Wis.2d 835, ¶ 18, 578 N.W.2d 602 (1998).

DISCUSSION

- I. **Johnson’s screenshot of MacCudden’s LinkedIn profile, her statement of “Why the hell am I paying for a ‘Social Justice Coordinator’ in my district?” and labeling MacCudden as a white woman are at least substantially true.**
 - a. **Elements of Defamation in Wisconsin**

The instant case involves two private individuals with no privilege or confidential privilege. Thus, the applicable elements of defamation are: (1) a false statement, (2) communicated by speech, conduct, or in writing to a third person, and (3) the communication is unprivileged and tends to harm the reputation of another as to lower the person in the estimation of the community or deter others from associating or dealing with the person. *Ladd v. Uecker*, 2010 WI App 28, ¶ 8, 323 Wis.2d 798, 780 N.W.2d 216; *see* Wis. JI-Civil 2500.

At the March 14, 2024 hearing, Johnson confirmed her admission to elements two and three. As to element three, it is admitted to by Johnson for the purpose of summary judgment that Johnson's statements are unprivileged and would be harmful to character. Thus, the issue surrounds the first element.

b. Truth or Substantial Truth is a Defense.

Since, “[b]y definition, a defamatory statement must be false[, truth] is an absolute defense to a defamation claim.” *Anderson v. Herbert*, 2011 WI App 56, ¶ 14, 332 Wis.2d 432, 798 N.W.2d 275. A statement does not need to be “true in every particular,” but only “substantially true.” *Id.* It is unnecessary “to prove the literal truth of the precise statement made” because “[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance.” *Lathan v. J. Co.*, 30 Wis.2d 146, 158, 140 N.W.2d 417 (1966). When the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true. *Laughland v. Beckett*, 365 Wis.2d 148, ¶¶23, 26 (Ct. App. 2015); *see* Wis. JI-Civil 2501. While the defense of substantial truth is normally a question for the jury, “whether a reasonable jury could find substantial truth has not been established” is a question of law addressed by the court. *Parker v. House O'Lite Corp.*, 756 N.E.2d 286, 296 (App. Ct. Ill., First Dist. 2001).

c. Portions of Johnson's statements are substantially true.

The Amended Complaint alleges that paragraphs 10, 21, and 26 contain the defamatory statements made by Johnson. Dkt. 23, ¶¶ 38-41. Paragraph 10 contains the following statements:

- a. Johnson circled in red that part of MacCudden's LinkedIn profile which stated that MacCudden worked as a “Social Justice Coordinator” at Homestead High

School Johnson then wrote, “Why the hell am I paying for a ‘Social Justice Coordinator’ in my district?”

- b. Johnson wrote MacCudden was “just what @mtschools needs; more woke white women w/ a god complex.”
- c. Johnson wrote “Thank you, white savior” in addressing MacCudden.

Id. ¶ 10. In a reply tweet to @S_OReilly_USA, Johnson made the statement that if MacCudden “really wants to promote equity, perhaps she should forfeit her job to a person of color?” *Id.* ¶ 21. Finally, in a reply tweet to @metal_gear88, Johnson made the statement that “[p]arents know these woke lunatics are bullies. They are bullying you into silence and compliance.” *Id.* ¶ 26.

i. The image of MacCudden’s LinkedIn profile containing the statement that MacCudden worked as a Social Justice Coordinator at Homestead High School is substantially true.

Before tweeting the screenshot of MacCudden’s LinkedIn profile that contained a picture of MacCudden, Johnson searched for MacCudden’s profile and confirmed that the screenshot matched MacCudden’s current profile. Dkt. 57, 2; Johnson Dep. Dkt. 60, 24: 5-6. At deposition, MacCudden confirmed that the LinkedIn profile was accurate and she did not update the profile for many months after leaving her position at Homestead High School. MacCudden Dep. Dkt. 60, 17:23-18: 2, 103:24-104:5. Regardless of when MacCudden stopped working at Homestead High School and when Johnson learned of that information, the fact remains that both parties agree the LinkedIn profile was accurate. As Johnson states in her brief, Johnson did not claim that MacCudden was currently a Social Justice Coordinator in the Mequon-Thiensville School District. Dkt. 57, 11. Given that MacCudden did work for Homestead High School as an English teacher and Social Justice Coordinator, when Johnson learned of MacCudden’s departure from the school district does not negate the underlying fact that MacCudden did at one time work for the school district. Thus, Johnson sharing the LinkedIn profile with MacCudden’s likeness and job description as an English teacher and a Social Justice Coordinator is a substantially true statement and not defamatory.

ii. Johnson’s statement of “Why the hell am I paying for a ‘Social Justice Coordinator’ in my district?” is substantially true.

The Mequon-Thiensville School District funded the Social Justice Coordinator position at Homestead. MacCudden Dep. Dkt. 60, 67: 3-10. MacCudden was paid \$2,000 each year for three years, plus benefits, to be the Social Justice Coordinator and those funds came from the

Homestead High School budget. *Id.* at 16:6-16, 66:11-21, 67:3-5. MacCudden affirms that “how a position that MacCudden did not occupy in October and November 2022 was funded is not material to the claim of defamation.” Dkt. 64, 11. However MacCudden posits that Johnson’s use of the present tense in her statement “Why the hell am I paying” is incorrect because MacCudden no longer worked as a Social Justice Coordinator at the time. *Id.* Johnson is correct to state the slight inaccuracies in the statement are immaterial as long as the statement is substantially true. Dkt. 65, 4; *Lathan*, 30 Wis.2d at 158. Johnson argues she paid property taxes to the district and the district paid for that position. Dkt. 65, 4. Despite MacCudden’s response that Johnson has not been employed outside the home, in 2022 Johnson did not own the home she lived in, and repeatedly married rich men, both parties can agree that the Mequon-Thiensville School District was paying for the Social Justice Coordinator position. Dkt. 67, 4; Dkt. 68, 5-6.

iii. Johnson’s description of MacCudden as a “white wom[a]n” is substantially true but labeling MacCudden as a “white savior” and saying that she should “forfeit her job to a person of color” are opinions that cannot be proven as substantially true.

Mary MacCudden testified that her ethnicity is Hispanic because her mother is of Puerto Rican descent, and her mother’s ethnicity also includes German and Polish heritage. MacCudden Dep. Dkt. 60, 50:3-8. Additionally, her ethnicity on her father’s side includes German, Polish, Italian, and Irish. *Id.* at 50:9-12. MacCudden agrees that her racial heritage is at least partly white. *Id.* at 50:13-15. MacCudden also identifies as a woman. *Id.* at 88:1-2. By MacCudden’s own admission, the label that she is a “white wom[a]n” is at least substantially true. However, the statements “white savior” and that if MacCudden “really wants to promote equity, perhaps she should forfeit her job to a person of color?” are opinions and not statements of fact that can be proven. Dkt. 57, 18.

II. Considering the remaining statements made by Johnson in a light most favorable to MacCudden, a genuine issue of material fact exists as to whether the statements constitute mixed opinions.

Johnson argues that the remaining statements are opinions based on the disclosed fact that MacCudden was a Social Justice Coordinator at Homestead High School in the Mequon-Thiensville School District. Dkt. 57, 14.

a. Opinion Law

Generally, defamatory communication must be a statement of fact, and an expression of opinion generally cannot be the basis of a defamation action. *Laughland v. Beckett*, 2015 WI App 70, ¶ 27, 365 Wis.2d 148, 870 N.W.2d 466; Wis. JI-Civil 2500. However, communications are not automatically considered nondefamatory simply because they are phrased as opinions, suspicions, or beliefs. *Converters Equip. Corp. v. Condes Corp.*, 80 Wis.2d 257, 263-64, 258 N.W.2d 712 (1977). Exposure to liability remains “[w]here the defamer departs from expressing ‘pure opinion’ and communicates . . . ‘mixed opinion’[.]” *Id.*, see also Wis. JI-Civil 2500. Thus, an actionable opinion is “[a] defamatory communication . . . of a statement in the form of an opinion, . . . [that] implies the allegation of undisclosed defamatory facts as the basis for the opinion.” *Terry v. J. Broad. Corp.*, 2013 WI App 130, ¶ 14, 351 Wis.2d 479, 840 N.W.2d 255 (quoting Restatement Second, Torts § 566).

In *Laughland*, Beckett created a fake Facebook profile to defame his girlfriend’s ex-boyfriend, Laughland, while the former couple was involved in a custody dispute. 2015 WI App 70, ¶¶ 2-8. The Facebook account had a picture of Laughland and many negative comments purporting to be made by Laughland about himself. *Id.* ¶ 4. The comments included statements about “manipulation, control, and deceit” over people, banks, and credit card companies. *Id.* ¶ 5. Another comment stated “[i]t is nice being a loser and taking advantage of banks and credit card companies. I am not sure why more people have not caught onto the fact that I am a low life manipulative person.” *Id.* ¶ 6. Multiple of Laughland’s friends saw the comments and posts, and brought it to Laughland’s attention. *Id.* ¶¶ 5-7. In his defense, Beckett argued that the statements were true or simply his opinions, and were the result of his search of public records. *Id.* ¶ 10.

The Court’s analysis began with the first inquiry of “whether the communication is capable of a defamatory meaning, [or stated differently,] whether the words complained of are ‘reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one.” *Id.* ¶ 21 (internal citations omitted). The Court determined that the statements were defamatory and unsupported by the public records Beckett relied upon in making his statements. *Id.* ¶ 26. The Court also concluded that the statements were not protected opinions because they all were variations of the underlying factual assertion that Laughland engaged in fraudulent financial activity. *Id.* ¶ 28. While “low life loser” may have been an opinion, “accusing Laughland of defrauding banks, ‘manipulating

banks and credit card companies’ and engaging in ‘underhanded business practices’ were specific allegations. *Id.* Notably, the Court held that merely phrasing communications as opinions does not mean they cannot be defamatory. *Id.* ¶ 27.

In contrast, the court in *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) found that an author who called an engineer a “crank” for his mathematical abilities in an article was not defamatory because a “crank” was a colorful way to disagree with someone’s ideas. The plaintiff had the burden of proving actual malice because the defendant was a public figure. *Id.* at 309. The court noted that expressions can be figurative rather than literal depending on the context but literal expressions are considered assertions that can be defamatory. *Id.* The court used the example of calling a person a “lunatic” as a word that can be defamatory if taken in its literal sense. *Id.* The court also explained that professors could maintain defamation suits if accused of plagiarism, sexual harassment, selling high grades, or other serious misconduct. *Id.* at 310.

b. A genuine issue of material fact exists as to whether the remaining statements—“woke,” “god complex,” “white savior,” “perhaps she should forfeit her job to a person of color,” and “[p]arents know these woke lunatics are bullies. They are bullying you into silence and compliance”—constitute mixed opinions.

The remaining statements include “woke,” “god complex,” “white savior,” “perhaps she should forfeit her job to a person of color,” and “[p]arents know these woke lunatics are bullies. They are bullying you into silence and compliance.” Dkt. 57, ¶¶ 10, 21, 26. These remaining statements could potentially constitute mixed opinions. Even if the statements were in the form of opinions, if the opinions imply the allegation of undisclosed defamatory facts, they become actionable. *Terry*, 2013 WI App 130, ¶ 14. Additionally, the terms taken in their literal expression can be defamatory. A reasonable jury could find that Johnson departed from expressing a pure opinion on a disclosed fact and instead expressed an opinion that implies the allegation of undisclosed defamatory facts. *Id.*

Taking all inferences in the light most favorable to MacCudden, the nonmoving party, a reasonable jury could potentially return a verdict for the nonmoving party based on the facts that both parties presented. Like in *Laughland*, negative posts on social media are at issue. While Johnson claims that her statements—woke, god complex, white savior, bully, lunatic—are based on the disclosed fact that Homestead High School once employed a Social Justice Coordinator,

these terms are directed towards an individual and not a school district. In the context of MacCudden's career in education, these terms could hurt her reputation because employers may take "god complex, white savior, bully, and lunatic" as an indication that MacCudden abuses her position of power over students.

While unlike *Laughland* where the specific allegations suggested that the plaintiff committed fraud, it is reasonable to infer that Johnson's statements are harmful assertions that hurt MacCudden's reputation. Johnson often commented on the Mequon school district, but she singled out MacCudden with specific statements and continued to make these statements even after finding out that she was no longer employed in the district¹. Like the court in *Dilworth* explained, a jury could find that these words were used in a literal sense and consider the words defamatory. The terms taken in their literal sense could impute an unfitness to teach. The terms taken in Johnson's political commentary as criticism of the school district is even more convincing that the statements were not mere criticisms but rather of the fitness of one person to do her job. Dkt 57, 18. Moreover, a jury could also potentially find that Johnson acted with express malice by continuing to make harmful statements even after she found out that MacCudden no longer held the position that Johnson was critiquing.

Furthermore, the Court in *Laughland* considered the fact that the statements were shared with six friends that Beckett believed were connected with Laughland and some of these friends reached out to *Laughland* to express their concern regarding the fake page. Here too, the tweet and post were shared with people on both Facebook and Twitter. Johnson's statements were broadcast to all third parties who accessed her Facebook and Twitter pages. By October 13, 2022, Johnson's Facebook post had been shared 15 times and had received between 19 and 30 comments. By October 13, 2022, Johnson's Tweet had been retweeted 258 times, liked 867 times, and received 110 comments. Additionally, three of MacCudden's friends brought to her attention Johnson's posts, meaning that people in MacCudden's community were seeing these

¹ It remains in dispute whether Johnson retweeted her original Tweet after learning that MacCudden no longer worked for the Mequon-Thiensville School District. Dkt. 23, ¶ 20; Dkt. 57, 10. At the March 14, 2024 hearing, it was reported to the Court that while there are screengrabs of the purported retweet, the metadata is not available to confirm when the screengrabs were taken. Thus, this remains a factual dispute that may need to be resolved later on or decided by a jury as it calls into question the credibility of the parties.

negative statements about her. Dkt. 59, 4. Subsequent to these posts, MacCudden had twelve sessions with a therapist to discuss the impact of Johnson's social media posts. *Id.* at 6.

Johnson also incorrectly relies on *Dilworth* and *Terry* to argue that the terms she used were just expressions of hostility. Dkt. 65, 5. In both of those cases, the plaintiff was a private individual bringing suit against a public or media figure. Johnson states that "[t]o prevail, MacCudden must establish that these statements are factual (and false), not opinions." *Id.* However, when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true. Wis. JI-Civil 2501. The jury could potentially find that the terms Johnson used were not just opinions or expressions of hostility but mixed opinions that imply allegation of undisclosed defamatory facts that would hurt her ability to get hired or be respected as a teacher.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that Johnson's motion for summary judgment is **GRANTED** in part and **DENIED** in part.

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL

2022 WL 4243953

Only the Westlaw citation is currently available.

United States Court of Appeals, Third Circuit.

Steve BARTNICKI, Appellant

v.

SCRANTON SCHOOL DISTRICT; Alexis Kirijan

No. 21-2360

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Submitted Under Third Circuit L.A.R. 34.1(a) September 9, 2022

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(Filed: September 15, 2022)

On Appeal from the United States District Court for the Middle District of Pennsylvania, District Court No. 3:18-cv-01725,
District Judge: Honorable [Malachy E. Mannion](#)

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Before: [JORDAN](#), [HARDIMAN](#), and [SMITH](#), Circuit Judges

OPINION *

[SMITH](#), Circuit Judge.

*1 Steve Bartnicki, a public school teacher employed by Scranton School District at West Scranton High School, brought claims under [42 U.S.C. § 1983](#) and Pennsylvania law against the School District and its then-superintendent, Alexis Kirijan. He claimed that Kirijan violated the First Amendment and state tort law by retaliating against him—in the classroom, on the soccer field, and even at his church—for his public criticism of her “handling of school district matters.” A61.

At the pleadings stage, the District Court concluded that Bartnicki failed to state federal or state law claims with respect to Kirijan's alleged intervention at Bartnicki's church. And on Defendants' motion for summary judgment, the District Court determined that Bartnicki's remaining theories—alleging that Kirijan prevented his assignment to an honors class and his hiring as the assistant soccer coach—failed to raise triable questions of material fact.

Bartnicki now appeals. Because the District Court did not err in entering either order, we will affirm.¹

I

First, we agree with the District Court that Bartnicki did not state a First Amendment retaliation claim insofar as the claim was based on Kirijan's comments to Bartnicki's priest. First Amendment claims require “state action,” so Bartnicki could not have maintained a claim premised on official action unless Kirijan, in speaking with Bartnicki's priest, can “ ‘fairly be said’ ” to have

“act[ed] in h[er] official capacity or while exercising h[er] responsibilities pursuant to state law.” *West v. Atkins*, 487 U.S. 42, 49–50 (1988) (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)). Failing that, Bartnicki could not have proceeded on his claim unless he plausibly alleged that Kirijan “used authority derived from the state in causing the alleged harm.” *Harvey v. Plains Twp. Police Dept.*, 421 F.3d 185, 189 (3d Cir. 2005).

At best, even after “accept[ing] as true all factual matters” in Bartnicki’s complaint, *Beasley v. Howard*, 14 F.4th 226, 231 (3d Cir. 2021), Bartnicki alleged no more than Kirijan’s “mere presence” as a private citizen at Bartnicki’s church, *Harvey*, 421 F.3d at 190. Bartnicki did not explain why Kirijan’s position as superintendent was a “but-for cause” of her ability to speak with his priest. *Id.* at 191. Accordingly, we conclude as the District Court did that Kirijan, unlike a police officer accused of abusing his appearance of “public authority” to improperly access private property, *id.*, was not taking action “made possible only because [she was] clothed with the authority of state law,” *West*, 487 U.S. at 49 (citation and quotation marks omitted).

II

*2 Second, we agree with the District Court’s dismissal of Bartnicki’s state law defamation and false light claims, which were also based on Kirijan’s conversation with Bartnicki’s priest.² Kirijan’s alleged statements to the priest—that Bartnicki was “offensive” and implied that he was a “bully,” A65–66—were nothing more than her opinion. And an opinion, “without more,” is not actionable as defamation under Pennsylvania law. *Baker v. Lafayette College*, 532 A.2d 399, 402 (Pa. 1987). Because Bartnicki’s defamation claim relied only on this alleged statement and implication, his defamation claim was legally insufficient.³

Bartnicki also failed to state a false light claim. He did not allege that Kirijan called him offensive or a bully to anyone other than his priest. And Kirijan cannot be held liable under the tort of false light unless her allegedly offensive statement was communicated “‘to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.’” *Curran v. Children’s Serv. Ctr. of Wyo. Cnty., Inc.*, 578 A.2d 8, 12 (Pa. Super. Ct. 1990) (quoting Restatement (Second) of Torts § 652D cmt. A (Am. Law Inst. 1977)). Thus, Bartnicki’s false light claim was deficient for failure to plead widespread public dissemination or its equivalent.

III

Third, and finally, we agree with the District Court’s entry of summary judgment in favor of Defendants with respect to Bartnicki’s remaining First Amendment retaliation theories. According to Bartnicki, Kirijan violated his First Amendment rights by denying him an assignment to a West Scranton High School honors class and preventing his hire as the school’s assistant soccer coach.

Bartnicki did not claim that anyone other than Kirijan wronged him. Yet Bartnicki proffered no evidence other than his own speculation that could connect Kirijan to the complained-of employment actions. The record is devoid of evidence that Kirijan participated in selection for the assistant soccer coach position.

No one other than Bartnicki testified that Kirijan was involved in the honors class assignment or soccer coach hiring decisions. Bartnicki’s testimony, in turn, was based on his speculation that the Scranton School District superintendent “holds final say over all appointments.” A767. But Bartnicki himself observed that, under the Scranton School District Policy Manual, “[t]he Superintendent or designee shall provide a *system* of assignment or reassignment for district employees.” *E.g.*, A765–66 (emphasis added). So Bartnicki’s reference to the Policy Manual, on its own, is not evidence capable of implicating Kirijan in the complained-of employment actions. See *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 227 (3d Cir. 2000) (“Such speculation is insufficient to raise a fact issue precluding summary judgment.”).

*3 Bartnicki suggested before the District Court that his principal at West Scranton High School confirmed Kirijan's involvement in the complained-of employment actions, but Bartnicki's principal did not actually say anything to that effect. Instead, according to Bartnicki in his deposition, his principal merely "put his hands up and shrugged" when asked if Bartnicki was not could be assigned to the honors class. A789.

Because the principal's response was "not in words or was in body language," and Bartnicki did not provide contextual evidence capable of suggesting that his principal was referring to Kirijan, "the only reasonable reading of [Bartnicki's] testimony as a whole is that [his principal] remained silent [on Kirijan's involvement], and we assess [Bartnicki's] case on that basis." *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 66 n.5 (1st Cir. 2002) (cleaned up). Accordingly, we conclude that Bartnicki's reference to his principal's body language was not enough to raise a genuine dispute as to whether Kirijan was involved in the honors class assignment or soccer coach hiring decisions.

IV

For the reasons set forth above, we will affirm the District Court's dismissal of some of Bartnicki's claims and its entry of summary judgment in favor of Defendants with respect to Bartnicki's remaining claims.

All Citations

Not Reported in Fed. Rptr., 2022 WL 4243953

Footnotes

- * This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.
- 1 The District Court had federal question jurisdiction over Bartnicki's First Amendment retaliation claim under 28 U.S.C. § 1331 and supplemental jurisdiction over his state law claims pursuant to 28 U.S.C. § 1367(a). We have appellate jurisdiction under 28 U.S.C. § 1291.
- We apply *de novo* review to both the District Court's dismissal order, *Beasley v. Howard*, 14 F.4th 226, 231 (3d Cir. 2021), and its entry of summary judgment, *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 872 (3d Cir. 2022).
- 2 "In an action for defamation, it is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit." *MacElree v. Phila. Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996).
- 3 There is no merit to Bartnicki's contention that the District Court should have abstained from reaching Bartnicki's state law defamation claim. The supplemental jurisdiction statute makes declination of jurisdiction over a state law claim "permissive, not mandatory." *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1508 (3d Cir. 1996) (discussing 28 U.S.C. § 1367). We will not second guess the District Court's exercise of its discretion.

2020 WL 882335

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Patricia CUMMINGS, Plaintiff,

v.

The CITY OF NEW YORK; New York City Department of Education; City of New York Office of Special Investigations; NYC Mayor Bill de Blasio; Giulia Cox; Courtney Ware; Ben Chapman; New York Daily News; Dr. Andre Perry; the Hechinger Report a/k/a Hechinger Institute on Education and the Media; Lenard Larry McKelvey a/k/a Charlamagne Tha God; WWPR-FM (105.1 MHz); iHeartMedia; Clear Channel Communications, Inc.; New York State Senator Kevin S. Parker; Councilman, Jumaane D. Williams; Councilman, Daniel Dromm; Coalition of Educational Justice; Angel Martinez; Natasha Capers; and “John Doe and Jane Doe #1-100” said names being fictitious, it being the intent of Plaintiff to designate any and all individuals, officers, members, agents, servants, and/or employees of the aforementioned agencies owing a duty of care to Plaintiff, individually and jointly and severally, Defendants.

No. 19-cv-7723 (CM)(OTW)

I

Signed 02/24/2020

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Dorothy O. Nese, Office of the New York State Attorney General, Mineola, NY, John Michael Schwartz, Office of the New York State Attorney General, New York, NY, for Defendant Kevin S. Parker.

MEMORANDUM DECISION AND ORDER DISMISSING COMPLAINT

McMahon, C.J.:

*1 At all relevant times, Plaintiff Patricia Cummings (“Plaintiff”) was a probationary social studies teacher employed by the New York City Department of Education (“DOE”). She taught at the William W. Niles School – Middle School 118 (“X118”)

in the Bronx. In January 2018, she taught her seventh grade social studies classes a lesson on the Middle Passage¹ that featured a clip from the movie *Freedom* and an impromptu demonstration that included a simulation of the conditions on a slave ship. Multiple students in the classroom reported that she physically moved students closer together, asking them “how it felt” to be a slave.

A student and parent, upset by Plaintiff's lesson, filed a complaint with the school's principal, Giulia Cox. The complaint included the allegation that Plaintiff pushed her knee into the student's back to demonstrate “how the slaves were on the boat.” Fearing that what occurred might have qualified as “corporal punishment,” Cox elevated the complaint to the DOE, which opened an investigation into Plaintiff shortly thereafter.

Months later, after interviewing various students and staff members, the Department concluded that, while Plaintiff's Middle Passage lesson did not rise to the level of “corporal punishment,” it reflected “poor judgment” and “significantly diverged from best practices.” Plaintiff was terminated from her probationary employment at the school in October 2018. (Dkt. No. 13, Compl. ¶ 80.)

The *New York Daily News*, in a series of articles written by Defendant Ben Chapman and others, reported on the allegations against Plaintiff and the DOE's investigation into the matter as the situation developed (the “*Daily News* Articles”). The reportage was picked up by other media outlets and sparked significant public controversy.

Now, claiming that the DOE's investigation “exonerated” her, Plaintiff brings this suit against myriad defendants, including the City of New York, the Department of Education, local lawmakers, the Mayor of New York, media organizations, and journalists. Plaintiff asserts federal claims pursuant to, *inter alia*, 42 U.S.C. § 1983 for violation of her civil rights, right to due process, and right to equal protection, and state law claims including fraud, breach of contract, negligence, defamation, libel, and slander.

Defendants the *Daily News*, Ben Chapman, the City of New York, the New York City Department of Education, Mayor Bill de Blasio, Councilmember Daniel Dromm, Public Advocate Jumaane Williams, DOE employees Giulia Cox, and Courtney Ware, Dr. Andre Perry, the Hechinger Institute, and Lenard Larry McKelvey (a.k.a. Charlamagne the God) move to dismiss the Complaint for failure to state a claim upon which relief can be granted. (Dkt. Nos. 27, 28, 29, 31.)

Defendant State Senator Kevin Parker moves for judgment on the pleadings. (Dkt. No. 88.)

For the reasons discussed below, all Defendants' motions are GRANTED.

BACKGROUND

I. The Defendants

A. The *Daily News* Defendants

*2 Defendant *Daily News*, L.P. (the “*Daily News*”) publishes a New York daily newspaper in print and online with a daily circulation of hundreds of thousands of readers. (Compl. ¶¶ 25–27.)

Defendant Ben Chapman (“Chapman”) is an award-winning reporter employed by the *Daily News*. (*Id.* ¶ 23, Exh. B.) Chapman covers education in New York City and has written more than 2,000 articles about New York City schools for the *Daily News* since joining the newspaper in 2009. (*Id.*) His reportage about the DOE investigation into Plaintiff's Middle Passage Lesson was “picked up by the media worldwide and transmitted to various news outlets and appeared online and in media all over the world,” including in “several prominent newspapers and televised news programs, as well as on YouTube.” (*Id.* ¶¶ 60–61.)

B. The Media Defendants

Defendant Dr. Andre Perry is an individual education leader and author whose work focuses on race and structural inequality, education, and economic inclusion. Since 2013, Dr. Perry's column on educational equity has appeared in the Hechinger Report. (*Id.* ¶ 28.)

Defendant the Hechinger Institute, part of Teachers College, Columbia University, provides in-depth writings that focus “on inequality and innovation in education.” (*Id.* ¶ 32.)

Defendant Lenard Larry McKelvey, is an individual American radio presenter, television personality, and author; known professionally as Charlamagne tha God; co-host of the nationally syndicated radio program *The Breakfast Club* with Angela Yee and DJ Envy. (*Id.* ¶ 33.)

C. The Municipal Defendants

Defendant City of New York is a domestic municipal corporation located in and established pursuant to the laws of the State of New York. (*Id.* ¶ 17.)

Defendant New York City Department of Education (“DOE”) is a public corporation created pursuant to the laws of the State of New York. (*Id.* ¶ 18.)

Defendant City of New York Office of Special Investigations (“OSI”) is an entity within the New York City Department of Education that investigates reports of incidents of inappropriate behavior within New York City Department of Education schools. (*Id.* ¶ 19.)

At all times relevant, Defendant Giulia Cox was an individual employed by the City of New York DOE as a Principal at the William W. Niles School – Middle School 118, Community School District 10, located in Bronx County, New York. (*Id.* ¶ 21.)

At all times relevant, Defendant Courtney Ware was an individual employed by the City of New York DOE as an Assistant Principal at the William W. Niles School – Middle School 118, Community School District 10, located in Bronx County, New York. (*Id.* ¶ 22.)

D. The Political Defendants

Defendant Mayor Bill de Blasio is New York City's 109th Mayor. (*Id.* ¶ 20.)

Defendant Jumaane Williams, is an individual who, at all times relevant to the Complaint, served as a member of the New York City Council from the 45th District. He is the New York City Public Advocate. (*Id.* ¶ 40.)

Defendant Councilman, Daniel Dromm, is an individual councilmember for the 25th District of the New York City Council. (*Id.* ¶ 41.)

Defendant Kevin S. Parker is and was at all times relevant to the Complaint, an individual member of the New York State Senate. (*Id.* ¶ 39.)

II. Plaintiff's Lesson on Slavery and the Middle Passage

*3 On January 9, 2018, Plaintiff taught two of her seventh grade social studies classes a lesson on slavery and the Middle Passage in ways that deviated from the class's pre-approved curriculum. *See* (Dkt. No. 29, Balog Decl. Exh. A, Redacted OSI Investigative Report, dated July 24, 2018 (“OSI report”), at 10.)² As part of the lesson, Plaintiff showed clips from the movie

Freedom, which “depict[ed] the horrible conditions and atrocities slaves were subjected to on the Middle Passage.” (Compl. ¶ 53.)

According to Plaintiff, students “were mocking ... the deplorable conditions” of the slave ships. (*Id.* ¶ 53.) Hoping to take advantage of the “teachable moment,” Plaintiff enlisted four students in a “demonstration to exhibit the cramped conditions on the ship.” (*Id.*) Seeking to replicate the conditions on the boats along the Middle Passage, Plaintiff had these four students sit close to each other on the floor with their knees against their chests. (OSI Report at 10.) Plaintiff “denies making any physical contact with any student during the demonstration,” (Compl. ¶ 54), but multiple students later reported that Plaintiff, using either her hands or feet, moved students closer together to mimic the conditions on the boat. (OSI Report at 2, 3, 4.)

III. The Department of Education's Subsequent Investigation

On January 11, 2018, Plaintiff learned that X118 Assistant Principal Andre Ware was taking students’ statements about her Middle Passage lesson. (Compl. ¶ 166.) On January 16, 2018, Plaintiff received a letter from X118 Principal Giulia Cox, stating that she was the subject of a disciplinary meeting to take place on January 18, 2018. (*Id.* ¶¶ 55, 166.) The letter made no mention of an allegation of corporal punishment. (*Id.* ¶ 166.) There is no allegation in the Complaint or the OSI Report that Defendant Ware had knowledge of the corporal punishment allegations before January 16.

The day before the meeting, on January 17, 2018, a parent of one of the students in Plaintiff’s class filed a written complaint about the lesson. (*Id.* ¶ 52; OSI Report at 6.) The parent stated that Plaintiff instructed her child to “get on the floor” and to “assume the position of a slave.” (OSI Report at 8.) According to the parent, Plaintiff then “ ‘put her knee into [the student’s] back’ and pushed down asking if [the student] felt pain.” (*Id.*) She said her child felt “ashamed and embarrassed.” (*Id.*) The student similarly reported that Plaintiff said, “I can show you how it is to be squashed on a boat,” lined the students “in front of each other with [their] knees up,” and “pushed [the students’] back[s] with her knees.” (*Id.* at 8–9.)

*4 On January 18, 2018, Plaintiff met with defendant Cox and was told about the January 17 parent complaint. (Compl. ¶ 56.) According to Plaintiff, Cox did not raise the issue of the corporal punishment allegation at that meeting. (Compl. ¶ 166.)

That same day, Cox reported the parent complaint to the Department of Education's Office of Special Investigations (“OSI”), which promptly began an investigation into Plaintiff’s conduct. (OSI Report at 1, 6, 12.)

Plaintiff was removed from teaching one of her social studies classes for three days – from January 23 through January 25, 2018. (Compl. ¶¶ 57, 166.)

At 5:59 PM on February 1, 2018, defendant Cox left Plaintiff a voicemail advising her that she was being removed altogether from the classroom and reassigned to 100 Gold Street, and that she was the subject of an OSI investigation. (Compl. ¶¶ 66, 170.) Three minutes later, Plaintiff received an email informing her of her reassignment. (*Id.* ¶ 66.) Plaintiff alleges that others have referred to 100 Gold Street as “teacher jail.” (*Id.*)

At some point, Plaintiff was reassigned to the Queens South Reassignment center, which she describes as “a small, uncomfortable room with bars on the windows and 15+ teachers crammed together....” (*Id.* ¶ 170.)

While Plaintiff was on reassignment, OSI interviewed various students and staff members who were familiar with the events of January 9. The student’s parent who reported the allegation of corporal punishment refused to permit her child to be interviewed as part of the OSI investigation. (*Id.* ¶ 174.) Plaintiff asserts that the failure of the parent to permit her child to be interviewed by the OSI investigator is “a form of blatant racism” and speculates, without evidence, that “Defendants may have offered the Plaintiff, parents, and students a lie detector examination....” (*Id.*)

The OSI investigation report issued on July 24, 2019. OSI concluded that Plaintiff’s actions during the January 9, 2018 lesson did not qualify as “corporal punishment,” (OSI Report at 11), but also concluded that Plaintiff had acted with “poor judgment”

in administering the lesson, and that her actions “significantly diverged from best-practices.” (*Id.*) Plaintiff alleges that the OSI Report “demonstrated that she had not engaged in acts of racism and otherwise engaged in racist misconduct,” (Compl. ¶ 97), but OSI explained that the Department of Education “does not ever include or encourage reenactments of historical events where students take on roles of victimized people.” (OSI Report at 11.) The Report recommended that Plaintiff be provided “with appropriate training to ensure her lesson plans are developed in a manner that takes into account potential social and cultural sensitivities.” (OSI Report at 12.) OSI referred its report back to Principal Cox to take “appropriate disciplinary action.” (*Id.*)

IV. DOE'S Termination of Plaintiff's Employment

On August 22, 2018, Principal Cox e-mailed Plaintiff and informed her that she was scheduled to return to X118 in September. (Compl. ¶ 74.)

Plaintiff returned to X118 on September 4, 2018. (*Id.* ¶ 77.) Early in the day, she met with Cox and received her program schedule and a 48-hour notice to review the OSI Report. (*Id.*) At another meeting shortly thereafter, Cox's secretary approached Plaintiff and informed her that Cox needed Plaintiff to sign a reassignment notice pending employee discipline. (*Id.* ¶ 78.) Plaintiff signed the reassignment notice and left the building. (*Id.* ¶¶ 78–79.)

*5 By letter dated September 17, 2018, Plaintiff was informed that, on October 18, 2018, the District 10 Superintendent would be reviewing and considering whether Plaintiff's employment should be terminated. (*Id.* ¶ 179.) Referral to the Superintendent is the process by which the DOE determines whether to discontinue probationary employment. (*Id.*) As a probationary employee, Plaintiff's employment could have been terminated without a hearing and without cause unless the termination was in bad faith, for a constitutionally impermissible purpose, or in violation of statutory or decisional law. See *Johnson v. County of Orange*, 29 N.Y.S.3d 502, 503 (2d Dep't 2016).

On September 28, 2018, the *Daily News* reported that a DOE spokesperson told it that the DOE had “begun the process of firing Ms. Cummings based upon an investigation of this unacceptable behavior and her performance as an educator.” (Compl. ¶ 179.)

On October 18, 2018, the DOE terminated Plaintiff's probationary employment. (*Id.* ¶¶ 80, 175.) Plaintiff claims that this violated her “due process and civil rights.” (*Id.* ¶ 179.)

V. The *Daily News* Report on the Department of Education's Investigation

On February 1, 2018, before the completion of the OSI investigation, two students reported to Plaintiff that a “white man” had been walking around the school campus asking questions about Plaintiff, including whether Plaintiff had ever walked on their backs. (*Id.* ¶¶ 68, 167.) At the end of that school day, Ben Chapman, a reporter for the *Daily News*, approached Plaintiff on school property to question her about her Middle Passage lesson. (*Id.* ¶¶ 65, 167.) Plaintiff claims that, “Defendants did nothing to prevent Mr. Chapman from being present on school property,” although the Complaint does not contain any allegations that Principal Cox, Assistant Principal Ware, or any of the Municipal Defendants knew or should have known that Mr. Chapman was on school grounds. (*Id.* ¶ 167.)

After being approached, Plaintiff immediately went to speak with an Assistant Principal. (*Id.* ¶ 65.) That Assistant Principal called Cox, who then told Plaintiff that she had spoken with the DOE division that handles media issues and had been told that the *Daily News* would be running an article the following day. (*Id.*)

The next morning, Cox sent an email to the entire school staff informing them that the Superintendent had advised the school to expect a large media presence. (*Id.* ¶ 67.) She also sent a letter to parents “expressing the school's concern over the reported accusation; informing them that it is being investigated; and reassuring the parents that [Plaintiff had] ... ‘been assigned away from students.’ ” (*Id.* ¶¶ 70, 171.) Defendant Cox also advised the parents that she was “working with staff to review the Department's Non-Discrimination Policy to further diversity and sensitivity in the workplace.” (*Id.* ¶ 70.)

On February 2, 2018, the *Daily News* published its first in a series of articles written by Chapman and others that reported on OSI's investigation into Plaintiff's conduct. The front page of the paper previewed the article and expressly referenced the ongoing investigation. It featured the caption: "Bronx middle school teacher Patricia Cummings (above) has been removed from classroom while officials look into shocking slave lesson." (Dkt. No. 31, Rosenfeld Decl. Exh. A.) The article explained that, according to students in Plaintiff's class and a staff member at the school, Plaintiff told her history students to "lie on the floor" and then "stepped on their backs to show them what slavery felt like." (Rosenfeld Decl. Exh. B at 2.) It cited one student, who stated that Plaintiff "picked three of the black kids," instructed them to get on the floor, and said "You see how it was to be a slave?" (*Id.* at 1, 3.) When one student made a joke, the source reported that Plaintiff "put her foot on [the student's] back and said, 'How does it feel?'" (*Id.* at 3.) The article then quoted another student who stated that Plaintiff "had students lie on the floor" and that she "was measuring the length and width to show how little space slaves had in the ship." (*Id.* at 4.) The article explained that OSI was investigating the allegations against Plaintiff and included a quote from a Department of Education spokesperson: "While the investigation has not been completed, these are deeply disturbing allegations, and the alleged behavior has no place in our schools or in society." (*Id.*)

*6 As the investigation progressed, so too did the *Daily News*'s coverage. For example, on July 9, 2018, the *Daily News* published another article titled, "Bronx educators accused of racism still under investigation, still on payroll." (Compl. Exh. E. at 1.) This article explained that OSI had not yet concluded its investigation into Plaintiff and cited DOE officials who stated that the investigation could take months to complete. (*Id.* at 2.) On August 11, 2018, the *Daily News* reported that the investigation had been completed but that the results had not yet been made public. (Compl. Exh. F. at 1.) And on October 4, 2018, October 28, 2018, and March 9, 2019, the *Daily News* published reports of the completed investigation, noting that OSI found that Plaintiff had used "poor judgment" but that OSI "did not substantiate the allegations that she engaged in corporal punishment." (Compl. Exhs. H, I, J.)

VI. Public Reaction to the *Daily News* Report and Investigation

In her Complaint, Plaintiff identifies various individuals who she alleges defamed her by commenting on the reports of Plaintiff's controversial January 9 lesson on the Middle Passage. Each will be considered in turn.

A. The Statements of Mayor de Blasio

On February 6, 2018, four days after the *Daily News* published the article about Plaintiff and the allegations made by a student and parent, Mayor de Blasio held a press conference along with the Police Commissioner regarding crime statistics. (Compl. ¶ 102; *see also* Balog Decl. Exh. B, Transcript of February 6, 2018 Press Conference ("Feb. 6, 2018 Tr.")). At the end of the conference, a reporter asked the Mayor about the *Daily News* article and for his "reaction to the fact that this happened and also there's some parents who will be protesting today and seeking some cultural sensitivity training in schools...." (Feb. 6, 2018 Tr. at 14.) Plaintiff alleges that Mayor de Blasio made the following statement:

"It is not acceptable. It's not even close," de Blasio said when asked about the allegations. "I don't know any teacher in their right mind who would do something like that ... we're doing a full investigation of that. That makes no sense. It is unfair to the kids. It's insensitive."

"But I will say, this has not been a widespread problem in terms of any type of incident like that, thank God, but we will keep deepening our implicit type training, and ways of helping our teachers to think about these issues better."

(Compl. ¶ 102; *see also* Balog Decl. Exh. B, Feb. 6, 2018 Tr. at 14 (setting forth the complete statement by Mayor de Blasio).) Although on February 6, 2018, OSI had not yet completed the investigation and Plaintiff had not yet been interviewed by OSI, Plaintiff alleges that Mayor de Blasio "knew or should have known" when he answered the question at the conference that "what was reported in the *Daily News* was false based on the investigation...." (Compl. ¶ 103.)

On April 26, 2018, Mayor de Blasio set aside \$23 million for “anti-bias training and the creation of the Office of Culturally Responsive Education.” (*Id.* ¶ 104.) Plaintiff further alleges that Mayor de Blasio “defamed” her when on an unspecified date he “accepted” petitions from the Coalition of Educational Justice. (*Id.* ¶ 105.)

B. Statements of Councilmembers Dromm and Williams

On February 9, 2018, the *New York Amsterdam News* published an article about a protest in front of New York City Hall organized by an education advocacy group in response to the reports about Plaintiff’s lesson. (*Id.* ¶¶ 114–115.) The article purportedly attributed the following statement to Councilmember Dromm:

“Educators teaching in a city as diverse as ours should be given cultural competency training,” said Daniel Dromm, NYC Council Finance Committee chair. “This is the only way to avoid similar traumatic experiences like what happened in the Bronx.”

The article also attributed the following statement to former-Councilmember Williams:

*7 “There is a clear need for the administration to be more proactive in mandating Culturally Responsive Education in our schools,” said Councilmember Jumaane Williams. “We should not have to wait for grotesque events of cultural insensitivity to mar our classrooms in order to spur action, and I sincerely hope we don’t have to wait for the next one.”

Plaintiff alleges that both Councilmembers Dromm and Williams “exhibited flagrant disregard as to whether the accusations against the Plaintiff were actually true....” When they spoke. (*Id.* ¶¶ 114–115.)

C. Statement of State Senator Kevin Parker

In the article featuring comments by Councilmember Dromm and Public Advocate Williams, the *New York Amsterdam News* also quoted New York State Senator Kevin Parker. (*Id.* ¶¶ 108.) The quote reads:

“Like many others, I am completely outraged [] by the actions of Bronx Middle School 118 teacher, Patricia Cummings,” said State Sen. Kevin Parker. “I call for her swift removal from the New York City Department of Education, and the revocation of all New York State licensures and credentials that would allow her to teach in our State.”

Parker continued, “Although I hear some calling for a second chance for Ms. Cummings via culturally competent training and the like, as an African studies professor at the City University of New York for over 20 years now, I know there is no level of training that can make a person more sensitive to the struggles of another. Those feelings cannot be prepared in one’s mind, but rather must be intrinsic to one’s character. This is not the case for Ms. Cummings and it is my hope we can learn for this deplorable act to inform future decisions and best practices when deciding who will be afforded the honor of teaching our children.”

Plaintiff alleges that Senator Parker “exhibited flagrant disregard as to whether the accusations against the Plaintiff were actually true ...” when he spoke. (*Id.*)

D. Dr. Andre Perry’s Column on Race in Education

On February 6, 2018, four days after the *Daily News* ran their first story on the incident, Dr. Andre Perry published a column in the Hechinger Report titled “Teachers, how does it feel to be oppressors?” (*Id.* ¶ 117.) In his column, Dr. Perry explicitly references the contemporaneous *Daily News* story and provides a link to it. Perry uses the incident as a launch point for offering his views on race in education more generally. (Dkt. No. 27, Rochford Decl., Exh. A.)

In the Complaint, Plaintiff identifies a series of sentences and passages in Dr. Perry’s column that, to Plaintiff, constitute defamation:

- A subheadline that reads: “A teacher literally stepped on children to ‘teach’ them about slavery.”
- “Cummings’ slavery lesson wasn’t only cruel; it was redundant.”
- “Black students know too well what it’s like to be humiliated, held in captivity and to suffer from inhumane conditions created by educators. Many compliant students who sit quietly accepting demeaning lessons like the ones administered by Cummings and others like her are viewed as obedient and law-abiding. Their counterparts who resist are deemed disorderly and subjected to harsh disciplinary policies, often ending up in jail by way of the school-to-prison pipeline. Whether you are obedient or ‘woke’ – conscious of your oppression – you are being oppressed in schools. Yep, black students already know what it’s like to be stepped on.”
- *8 • “There are white teachers like Cummings who have not reckoned with what it means to oppress.”
- “While most teachers probably won’t see themselves in either Black or Cummings, most should recognize that they associate with white norms, which makes it possible to act in racist ways,”

Only one of the fifteen paragraphs in the article – the very first – refers specifically to the facts alleged to have occurred in Cummings’s classroom. In this paragraph, Dr. Perry conspicuously identified the *Daily News* as the source for the allegations and provided a link to the article: “The New York Daily News reported on February 1 – the start of Black History Month – that a teacher in a majority-minority school in the Bronx, NY, instructed three black children in her seventh-grade class to lie on the floor during a lesson slavery.” (Compl. ¶ 117 n. 9.)

E. Lenard Larry McKelvey’s, a/k/a Charlamagne tha God’s, Challenged Broadcast

On February 7, 2018, during a “Donkey of the Day” segment of *The Breakfast Club* that incorporated a CBS news report on Plaintiff’s Middle Passage lesson (Dkt. No. 28, Exh. 1, p. 7, 11. 10-23; p. 8, 11. 2-4), Charlamagne described Plaintiff as a “racist,” a “bigot,” a “cracker,” and a “white devil.” (Compl. ¶¶ 63, 106-107 and Exh. 1.)

VII. The Instant Litigation

On September 25, 2018, Plaintiff’s counsel served a Notice of Claim on Defendants the City of New York, New York City Department of Education, and the City of New York Office of Special Investigations. (Dkt. No. 31, Rosenfeld Decl. Exh. D.) In the Notice, Plaintiff alleged that the City and its Departments engaged in “ ‘reverse discrimination’ at its worst” because – according to Plaintiff’s unidentified colleague – “a black teacher could have taught the very same lesson, and there would not have been a single complaint from any student’s parent.” (*Id.* at 7, 11.) The Notice also threatened that the “irresponsible media” would be held accountable for “promulgating and promoting ‘fake news’ stories” about Plaintiff. (*Id.* at 7.) Plaintiff claimed that, as a result of this “reverse discrimination,” she was damaged “in the amount of \$120 Million....” (*Id.* at 13.)

The *Daily News* Defendants reported on this Notice of Claim in a September 28, 2018 article titled “White social studies teacher ousted over slavery lesson plans to sue over reverse racism.” (Compl. Exh. G at 1.)

On January 10, 2019, Plaintiff served the *Daily News* Defendants and other parties, including New York City, the Department of Education, the Mayor of New York, Councilmember Daniel Dromm, former Councilmember Jumaane Williams, State Senator Kevin Parker, various media organizations, and journalists, with a Summons with Notice seeking damages for “defamation, reverse discrimination, denial of due process, severe emotional, psychological, and physical distress, loss of reputation, loss of income, and expenses” totaling \$120 million. (Dkt. No. 1, Exh. 1 at 5.) The action was commenced in the Supreme Court of New York, County of Suffolk, by the filing of a Summons with Notice. (Compl. ¶ 8.)

On March 4, 2019, the Municipal Defendants moved in state court to change venue to the Supreme Court of New York, New York County.

*9 Before any judicial action was taken on that motion, defendants *New York Daily News* and Ben Chapman on March 22, 2019, removed the case to the Eastern District of New York based on the allegations of federal civil rights claims under 42 U.S.C. §§ 1983 and 1988.

The Municipal Defendants timely moved pursuant to 28 U.S.C. § 1404 to transfer venue to the Southern District.

On May 17, 2019, Plaintiff filed her Complaint. (Dkt. No. 13.)

On June 27, 2019, Senator Parker filed his Answer to the Complaint. (Dkt. No. 18.)

On July 22, 2019, all other Defendants that have appeared filed motions to dismiss the Complaint. (Dkt. Nos. 27, 28, 29, 31.)

On November 6, 2019, Defendant Senator Kevin Parker moved for judgment on the pleadings. (Dkt. No. 81.)

VIII. Disciplinary Letter Arbitration

On February 7, 2019 and May 21, 2019, Plaintiff, represented by her union, participated in arbitration with the DOE on the issue of whether “the Department of Education violate[d] Article 21(C)(3) of the Collective Bargaining Agreement (“CBA”) by issuing a letter to file to [Plaintiff] dated September 12, 2018.” (Dkt. No. 54, Exh. C at 2.)

Article 21(C)(3) of the CBA lays out the procedure for placing disciplinary letters in a DOE employee's personnel file. (*Id.*) Through arbitration, Plaintiff challenged whether those procedures were properly followed when Principal Giulia Cox placed a September 2018 disciplinary letter related to the Middle Passage lesson in Plaintiff's personnel file.

While noting that the “decision has no bearing on the propriety of any disciplinary action taken against [Plaintiff],” the arbitrator found that those procedures were not followed and ordered that the September 12, 2018 letter be removed from Plaintiff's file. (*Id.* at 15–16.)

DISCUSSION

I. Standard of Review

To survive a motion to dismiss made pursuant to either Federal Rule 12(b)(6) or 12(c),³ “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* When evaluating whether the Complaint meets this standard, the Court must accept all factual allegations as true and draw all reasonable inferences in Plaintiff's favor. *ATSI Comms., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). The Court is not, however, obligated to accept as true legal conclusions couched as factual allegations. *Rolon v. Hennenman*, 517 F.3d 140, 148–49 (2d Cir. 2008); see also *Iqbal*, 556 U.S. at 678. Unless a plaintiff's well-pleaded allegations have “nudged [its] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed.” *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 680.

II. Plaintiff's Constitutional Law Claims Are Dismissed

*10 Plaintiff claims that the Municipal Defendants violated her rights under the Fourteenth, First, Second, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments to the Constitution in the course of investigating her Middle Passage lesson and terminating her probationary employment. (Compl. ¶¶ 1, 165–187.)

These claims are without merit.

A. Plaintiff's Due Process Claims Fail

To state a claim for deprivation of procedural due process, “a plaintiff must show that a government entity deprived her of a right secured by law.” *Finley v. Giacobbe*, 79 F.3d 1285, 1296 (2d Cir. 1996). To do so, plaintiffs must demonstrate that they “have a legitimate claim of entitlement to [a benefit] under state or federal law.” *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)) (internal quotations omitted). Therefore, when analyzing procedural due process claims, the threshold issue is whether the plaintiff possessed a valid property or liberty interest. *Oneida Indian Nation of N.Y. v. Madison Cnty*, 665 F.3d 408, 427–28 (2d Cir. 2011).

To the extent that Plaintiff claims that she was deprived of a property interest by the Municipal Defendants when they ended her probationary employment, that claim fails because as a probationary teacher, she did not possess a property interest in her position and Plaintiff has not pled that she had a legitimate claim of entitlement to her job.

To the extent that Plaintiff claims that she was deprived of a liberty interest, that claim fails because she has not pleaded facts that would suggest a stigma-plus claim.

1. Plaintiff had no property interest in her job.

Plaintiff had no property interest in her continued employment as she was a probationary teacher. It is well-settled that under New York law, a probationary employee has no property interest in her job. *Finley*, 79 F.3d at 1297–98 (collecting cases).

Plaintiff also had no property interest in remaining at X118 – the Middle School where she taught – rather than being transferred, with full salary, to a reassignment center. Courts have held that “being placed in a reassignment center with full salary does not implicate a property interest.” *Norgrove v. N.Y.C. Dep’t of Educ.*, No. 08 Civ. 2202 (FB)(MDG), 2011 WL 441678, at *4 (E.D.N.Y. Feb. 4, 2011); see *O’Connor v. Pierson*, 426 F.3d 187, 199 (2d Cir. 2005) (observing that “no court has held that an employee on fully paid leave has been deprived of a property right merely by virtue of being relieved of his job duties.”).

Finally, Plaintiff argues that she has been deprived of a property interest because the DOE did not comply with certain Chancellors Regulations and the contract between the United Federation of Teachers and the DOE in investigating the allegations. But again, Plaintiff had no property interest in having the allegations against her investigated in any particular way or the DOE using any specific procedures. In *Perez v. Metro Transp. Auth.*, No. 11 Civ. 8655 (RWS), 2012 WL 1943943 (S.D.N.Y. May 29, 2012), the plaintiff claimed that “she was deprived” of “the expectation that she would be treated in accordance with the applicable agency policy and procedures.” *Id.* at *8. The court dismissed the plaintiff’s due process claim because “Plaintiff cannot claim a property interest in the MTA’s policy and procedures.” *Id.* For the same reason, Plaintiff’s claim fails because DOE investigatory procedures do not create an independent cognizable property interest. See also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (“ ‘Property’ cannot be defined by the procedures provided for its deprivation any more than can life or liberty.”).

2. Plaintiff has not established a deprivation of a liberty interest.

*11 Where Plaintiff claims deprivation of a liberty interest in her reputation, she must establish the elements of a “stigma-plus” claim. To prevail, Plaintiff must show that (1) defendants made false and stigmatizing statements about her—statements that call into question her good name, reputation, honor or integrity; (2) a tangible and material state-imposed burden in addition to the stigmatizing statement, and (3) the false and stigmatizing statements were made public, concurrently with, or in close proximity to the tangible and material state-imposed burden. *Segal v. City of New York*, 459 F.3d 207, 212 (2d Cir. 2006). Crucially, “a

stigma-plus claim enforces a limited but important right: the right to be heard ‘at a meaningful time and in a meaningful manner.’” *Segal*, 459 F.3d at 213. Indeed, “the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate [her] employment is solely to provide the person an opportunity to clear [her] name.” *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam).

Statements that “denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her profession” satisfy the stigma requirement. *Segal*, 459 F.3d at 212 (citation omitted). However, “Statement[s] that an employee poorly performed her duties or acted in an improper manner, or that describe behavior or actions that are within the employee's power to correct, do not generally qualify as stigma for constitutional purposes.” *Adams v. New York State Educ. Dep't*, 732 F. Supp. 2d 420, 449 (S.D.N.Y. 2010) (quotations and citations omitted).

In the instant case, Plaintiff fails to plead any facts alleging the publication by the Municipal Defendants of an arguably false statement injurious to her reputation made in close temporal proximity of her termination. The only statement that Plaintiff alleges was made by the DOE to the public and in close temporal proximity to her termination is that on September 28, 2018, when a DOE spokesperson stated to the *Daily News* that the DOE had “begun the process of firing Ms. Cummings based upon an investigation of this unacceptable behavior and her performance as an educator.” (Compl. ¶ 179.) That statement is not alleged to be false and it is not false. As alleged in the Complaint, the DOE began the process of ending Plaintiff's probationary employment on September 17 by sending Plaintiff her 30-day notice. (*Id.* ¶ 180.)

Plaintiff does not dispute that the stated reasons by the DOE for its determination to begin the termination process – the allegedly “unacceptable behavior” uncovered by the OSI investigation and its assessment of her “performance as an educator” – was not the basis for the proceedings. Accordingly, Plaintiff can establish neither the first nor third elements of a stigma-plus claim.

Even if Plaintiff were to establish those elements, dismissal of Plaintiff's stigma-plus due process claim is also warranted because an adequate state remedy was available to her in the form of an Article 78 proceeding. *See Segal*, 549 F.3d at 213 (dismissing a stigma-plus claim and noting that “the availability of adequate process defeats a stigma-plus claim.”). In a case “involving an at-will government employee, the availability of an adequate, reasonably prompt post termination name-clearing hearing is sufficient to defeat a stigma-plus claim...” *Id.* at 214. Courts in the Second Circuit have held repeatedly that a proceeding under Article 78 of the CPLR affords such a remedy. *Id.*; *Anemone v. Metro. Trans. Auth.*, 629 F.3d 97, 121 (2d Cir. 2011). That Plaintiff chose not to pursue an Article 78 proceeding does not render that remedy inadequate.

Accordingly, Plaintiff's claim that she was deprived of a liberty interest without due process is dismissed.

B. Plaintiff's Equal Protection Claim Is Dismissed

*12 The Equal Protection Clause of the Fourteenth Amendment provides that, “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. To state a claim under the clause, “a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination.” *Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005).

Plaintiff asserts a claim under the Equal Protection Clause against the Municipal Defendants. Though neither the Complaint nor Plaintiff's briefing is the model of clarity, taken in its best light, Plaintiff asserts that her firing “was the result of ‘having a white teacher; teach events of black history to black students.’” (Compl. ¶ 182 (emphasis in original).) Plaintiff also points to various statements by a “colleague” and an unidentified individual to the effect that “A black teacher could have taught the very same lesson, and there would not have been a single complaint from any student's parent.” (*Id.*) Nowhere does Plaintiff allege that a black teacher did in fact teach “the very same lesson” without consequence but, to Plaintiff, these statements, “evidence the reverse discrimination employed by the Defendants in the way that the Plaintiff was treated, as a Caucasian teacher, teaching in a school that has a significant minority population.” (*Id.*)

Plaintiff's equal protection claim fails because she pleads nothing more than conclusory allegations that do not give rise to a plausible inference that she was treated differently than a black teacher who did the same thing. To be sure, the Complaint is replete with the words "discrimination" and "racism." (Compl. ¶¶ 85, 97, 169, 174, 181, 182.) And Plaintiff summarily alleges that "there was an intention to harm Plaintiff because she is Caucasian...." (Compl. ¶ 150.) But the fact that an unidentified colleague of Plaintiff opined that Plaintiff's whiteness was the reason why a student's parent complained about her Middle Passage lesson does "not nudge [Plaintiff's] claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570 and certainly does not give rise to a plausible inference that Defendants intentionally or purposefully discriminated against her because of her race.

Equally fatal to her claim is that nowhere in the Complaint has Plaintiff set forth any allegations, as she must, from which one could adduce that there were non-Caucasian employees who were treated better than her, let alone that they were "similarly situated." *Id.*

C. Plaintiff Has Not Adequately Alleged Monell Liability

In ¶181, Plaintiff cites to *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and states that the Municipal Defendants have a "pattern of discrimination against Caucasian teachers." When the defendant in a § 1983 discrimination claim is a municipality – or an individual sued in her official capacity, see *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (claim against a municipal employee in his official capacity deemed brought against the municipality itself) – the plaintiff must establish that the challenged acts were performed pursuant to a municipal policy or custom. *Monell*, 436 U.S. at 692–94.

In service of her *Monell* claim, Plaintiff cites to three comments of an unidentified colleague that, to Plaintiff, "evidence the reverse discrimination employed by the Defendants." (Compl. ¶182.) To wit:

*13 [1] that what occurred was the result of 'having a white teacher, teach events of black history to black students.' ... [2] that 'only black teachers should be allowed to teach about events of black history to black students.' [3] 'A black teacher could have taught the very same lesson, and there would not have been a single complaint from any student's parents.' "

(*Id.*) None of these musings, however, identifies any municipal policy, much less raises an inference that the Municipal defendants maintain a policy responsible for a constitutional violation. The second statement – that "only black teachers should be allowed to teach about events of black history to black students" – might amount to this unidentified individual's pedagogical preference. However, Plaintiff does not allege that the Municipal Defendants have a policy of prohibiting teachers other than black teachers from teaching black history. The third statement – an observation couched as a hypothetical – is directed at the reaction of parents to Plaintiff's lesson, and in no way refers to a municipal policy. The entirely unsubstantiated musings of Plaintiff's unidentified colleague are not enough to raise a plausible inference that the Municipal Defendants maintain a policy that led to a constitutional violation.

Because Plaintiff has neither adequately alleged an underlying constitutional violation nor a pattern or practice of discrimination attributable to the Municipal Defendants, Plaintiff has failed to plead a *Monell* claim against the City.

D. Plaintiff's Miscellaneous Constitutional Claims Fail

In the very first paragraph of the Complaint, Plaintiff mentions the First, Second, Fourth, Fifth, Sixth, Seventh and Eighth Amendments to the Constitution. The Fifth Amendment is, of course made applicable to the Municipal Defendants by the Fourteenth Amendment. The First and Fifth Amendment claims asserted by Plaintiff are comprehended in her Fourteenth Amendment claims discussed above.

As for the rest of these amendments, neither they nor any facts relevant to them, are mentioned anywhere else in the Complaint. To the extent that Plaintiff intended to assert claims pursuant to these Amendments, the Complaint fails to provide sufficient facts to proceed on any of these theories.

The Second Amendment concerns the right to bear arms. There are no allegations in the Complaint that Defendants infringed upon Plaintiff's right to bear arms.

The Fourth Amendment protects the privacy and security of individuals against unreasonable searches and seizures by government officials. There are no allegations in the Complaint that the government carried out an illegal search on Plaintiff's effects or illegally seized her person.

The Sixth Amendment right to counsel is inapplicable in this civil action, or in any proceeding conducted by the DOE.

Any claims that the Municipal Defendants denied Plaintiff a Seventh Amendment-guaranteed jury trial or punished her in violation of the Eighth Amendment's prohibition against cruel and unusual punishments, are absurd on their face.

III. Plaintiff's Fraud Claim Is Dismissed

To the extent that Plaintiff intended to assert a fraud claim against the Municipal Defendants, (*see* Compl. p. 46), that claim is dismissed for failure to plead a fraud claim.

To state a claim for common law fraud in New York, a plaintiff must plead that “(1) defendant made a representation as to a material fact; (2) such representation was false; (3) defendant[] intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss[.]” *Stephenson v. PricewaterhouseCoopers, Ltd. Liab. P'ship*, 482 F. App'x 618, 622 (2d Cir. 2012) (citation omitted).

*14 Additionally, a claim for common law fraud must meet the particularity pleading requirements of [Federal Rule of Civil Procedure 9\(b\)](#), “which requires that the plaintiff (1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent.” *Financial Guar. Ins. Co. Putnam Advisory Co., LLC*, 783 F.3d 395 (2d Cir. 2015) (citation omitted).

Plaintiff has done none of the above. The Complaint does not plead the elements of a fraud claim and comes nowhere close to the level of particularity demanded by [Rule 9\(b\)](#). Plaintiff has not identified a single false statement that was made to her on which she relied. Instead, she complains that defendant Cox made a false statement to OSI investigators. (Dkt. No. 58, Pl. Mem. at 32.) That allegation does not give rise to a fraud against Plaintiff.

IV. Plaintiff's Breach of Contract Claim Is Dismissed

Plaintiff, a probationary teacher, asserts a breach of contract claim against the Municipal Defendants. As noted above, Plaintiff had no contractual right to continued employment, so her dismissal did not break her contract of employment. It appears that Plaintiff is alleging that the City breached the contract between the DOE and the United Federation of Teachers (“UFT”) and the Chancellor's Regulations when they investigated her Middle Passage Lesson and subsequently ended her probationary employment. (*See, e.g.*, Compl. ¶¶ 166, 176.) Plaintiff further argues that, because an arbitrator sustained the grievance brought by Plaintiff's union concerning the September 12, 2018 disciplinary letter that was placed in Plaintiff's employment file, she has a meritorious claim for breach of contract. (Dkt. No. 55, Opp. p. 34.)

Plaintiff lacks standing to assert a breach of the contract between DOE and the Union. By becoming a union member, an individual employee “has no individual rights under a collective bargaining agreement which he can enforce against his employer except through the union.” *Berlyn v. Board of Ed. of E. Meadow Union Free Sch. Dist.*, 435 N.Y.S.2d 793, 794 (2d Dep't 1981), *aff'd* 433 N.E.2d 1278 (N.Y. 1982).⁴

Moreover, the outcome of the arbitration is irrelevant. The proceedings had nothing to do whatever with the propriety of either the investigation into the Middle Passage lesson or the subsequent decision to terminate Plaintiff's probationary employment. It concerned only whether proper procedures were followed before a disciplinary letter was placed in Plaintiff's personnel file. (Dkt. No. 54, Exh. C at 2.) Indeed, the arbitrator took care to note that the arbitration decision "has no bearing on the propriety of any disciplinary action taken against [Plaintiff]." (*Id.* at 15.)

Plaintiff's breach of contract claim is dismissed.

V. Claims Against Other Defendants

All claims against all other Defendants arise under state law. However, the Court will elect to exercise supplemental jurisdiction over them, as they are dismissible on their face.

A. Defendants' Motion to Dismiss Plaintiff's Cause of Action for Defamation Is Granted as to the Daily News Defendants

*15 Defamation is the injury to one's reputation either by written expression, which is libel, or by oral expression, which is slander. See *Morrison v. Nat'l Broad. Co.*, 227 N.E.2d 572, 574 (N.Y. 1967). The law of defamation serves to protect an individual's right to one's reputation. See *Gertz v. Welch*, 418 U.S. 323, 343–45 (1974). However, courts have held that, "Because a defamation suit may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, courts should, where possible, resolve defamation actions at the pleading stage." *Adelson v. Harris*, 973 F. Supp.2d 467, 481 (S.D.N.Y. 2013), (internal quotations and citations omitted), *aff'd*, 876 F.3d 413 (2d Cir. 2017).

Under New York law, to establish a claim for defamation, a plaintiff must plead "(1) a defamatory statement of fact; (2) that is false; (3) published to a third party; (4) 'of and concerning' the plaintiff; (5) made with the applicable level of fault on the part of the speaker; (6) either causing special harm or constituting slander per se; and (7) not protected by privilege." *Frascatore v. Blake*, 344 F. Supp.3d 481, 493 (S.D.N.Y. 2018) (quoting *FTA Mkt. Inc. v. Vevi, Inc.*, No. 11 Civ. 4789 (VB), 2012 WL 383945, at *6 (S.D.N.Y. Feb. 1, 2012)).

Falsity is a necessary element of a defamation cause of action and because "only 'facts' are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action." *Rosner v. Amazon.com*, 18 N.Y.S.3d 155, 157 (2d Dep't 2015) (internal quotations and citations omitted).

Plaintiff avers that Defendants Ben Chapman and the *New York Daily News* "exhibited flagrant disregard as to whether the accusations made against the Plaintiff were actually true" in publishing a series of articles related to Plaintiff's Middle Passage lesson and the ensuing DOE investigation. (Compl. ¶ 100.)

However, because the *Daily News* Articles are substantially accurate reports of official proceedings, they are absolutely privileged under *New York Civil Rights Law* § 74.

The Complaint is therefore dismissed as to the *Daily News* Defendants.

1. The Daily News Articles Are Absolutely Privileged Under *New York Civil Rights Law* Section 74

A plaintiff cannot prevail on a defamation claim where the statements complained of are privileged under state law. *Zappin v. NYP Holdings, Inc.*, No. 16 Civ. 8838 (KPF), 2018 WL 1474414, at *5 (S.D.N.Y. Mar. 26, 2018), *aff'd*, 769 F. App'x 5 (2d Cir. 2019). One such privilege is codified at § 74 of the *New York Civil Rights Law*. It provides:

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

N.Y. Civ. Rights Law § 74. The New York legislature enacted this statute in order to avoid stifling “an active, thriving, and untrammelled press” and to ensure that the press receive “broad protection.” *Idema v. Wagner*, 120 F. Supp. 2d 361, 365 (S.D.N.Y. 2000) (citation omitted), *aff’d*, 29 F. App’x 676 (2d Cir. 2002).

Under § 74, a report of an official proceeding that is “fair and true” is protected by an “absolute privilege,” and this privilege is “not defeated by the presence of malice or bad faith.” *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 477 (S.D.N.Y. 2012) (internal quotation marks and citations omitted). Courts look to the context of the statements in order to determine whether a reasonable observer would find that they constitute reports of a proceeding. See *Gonzalez v. Gray*, 69 F. Supp. 2d 561, 570 (S.D.N.Y. 1999).

*16 The privilege requires that the “substance of the article be substantially accurate.” *Holy Spirit Ass’n*, 399 N.E.2d 1185, 1187 (N.Y. 1979). The language used in an article “should not be dissected and analyzed with a lexicographer’s precision.” *Id.* Rather, the “test is whether the published account of the proceeding would have a different effect on the reader’s mind than the actual truth, if published.” *Procter & Gamble*, 974 F. Supp. 190, 196 (E.D.N.Y. 1997) (quoting *Daniel Goldreyer, Ltd. v. Van de Wetering*, 630 N.Y.S.2d 18, 22 (1st Dep’t 1995)).

Crucially, § 74 protects reporting on charges and allegations made in proceedings regardless of whether the underlying allegations are in fact true. See *Mulder v. Donaldson, Lufkin & Jenrette*, 611 N.Y.S.2d 1019, 1024–25 (Sup. Ct. N.Y. Cty. 1994) (“The question is not whether or not the statement is ‘true.’ The question is whether it is a substantially accurate description of the claims made in the ... proceeding.”), *aff’d*, 623 N.Y.S.2d 560 (1st Dep’t 1995).

Applying the above principles here, it is abundantly clear both that (1) the *Daily News* articles reported on “official proceeding[s],” and (2) the Articles were “fair and true report[s]” of those proceedings. § 74 therefore bars Plaintiff’s claims against the *Daily News* and Chapman.

i. The Department of Education’s investigation and Plaintiff’s
filings in this litigation are “Proceedings” covered by Section 74.

The fair report statute applies to reports of “any judicial proceeding, legislative proceeding or other official proceeding,” which courts have construed to include official investigations. See *Fine v. ESPN, Inc.*, 11 F. Supp. 3d 209, 214 (N.D.N.Y. 2014); *Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 588 (S.D.N.Y. 2009).

Here, both (1) the Department of Education’s investigation into Plaintiff; and (2) Plaintiff’s own Notice of Claim and Summons, which initiated this judicial action, qualify as “proceedings” for purposes of Section 74.

a. The Department of Education investigation into Plaintiff,
including the allegations leading thereto, comprised a “proceeding.”

New York courts have consistently held that “even the announcement of an investigation by a public agency, made before the formal investigation has begun, is protected as a report of an official proceeding within the contemplation of the statute, as the report is of an ongoing investigation.” *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of N.Y.*, 475 N.Y.S.2d

383, 388 (1st Dep't 1984) (internal citations omitted). Similarly, “reports on allegations that lead to a government investigation are fully protected.” *SentosaCare LLC v. Lehman*, No. 2016-504407, 2018 WL 692568, at *7 (Sup. Ct. Kings Cty. Jan 25, 2018), *appeal docketed*, No. 2018-03473 (N.Y. App. Div. 2d Dep't Nov. 20, 2018); *cf. El Greco Leather Prods. Co. v. Shoe World, Inc.*, 623 F. Supp. 1038, 1043 (E.D.N.Y. 1985) (holding that allegations included in an article but not contained in court papers “constitute[] background information ... and thus do not remove the article from the protection of Section 74”), *aff'd*, 806 F.2d 392 (2d Cir. 1986).

Here, each of the *Daily News* Articles identified in the Complaint reports on OSI's investigation into Plaintiff, including the allegations from parents and students that triggered the investigation.

On February 2, 2018, the day the first article appeared in the *Daily News*, the front page of the paper states: “Bronx middle school teacher Patricia Cummings (above) has been removed from the classroom while officials look into shocking slave lesson.” (Dkt. No. 31, Rosenfeld Decl. Exh. A.) The article proceeds to report on the allegations that led to the investigation, contains quotations from students and staff members from the school, and includes a quotation from a Department of Education employee, that, “While the investigation has not been completed, these are deeply disturbing allegations, and the alleged behavior has no place in our schools or in society.” (Dkt. No. 31, Rosenfeld Decl. Exh. B at 4.)

*17 In a July 9, 2018 article, the *Daily News* reports that “City Department of Education officials have failed to conclude investigations of two Bronx educators accused of racist acts roughly five months after launching their probes.” (Dkt. No. 13, Compl. Exh. E at 1) It then recounts the allegations against Plaintiff being investigated by OSI. (*Id.*)

In an August 11, 2018 article titled “City completes probe of teacher in ‘slavery’ controversy,” the *Daily News* states, “City Education Department officials have finished their probe of a teacher who grabbed headlines and sparked protests after she was accused of stepping on a student during a lesson on slavery in January.” (Dkt. No. 13, Compl. Exh. F at 1.) The article explains that the report had not yet been released and cites to a DOE spokesperson who stated that the Department would provide an update when the matter was resolved. (*Id.*)

In articles written on October 4, 2018, October 20, 2018, and March 9, 2019, the *Daily News* reports on – and quotes – the results of the OSI's investigation. For example, the October 4 article quotes portions of the investigatory report stating that Plaintiff's actions “significantly diverged from best practices” and “the DOE does not ever include or encourage re-enactments of historical events where students take on roles of victimized people.” (Dkt. No. 13, Compl. Exh. H.) The October 20 article states that the investigation found that Plaintiff used “poor judgment” but that the allegation that she engaged in corporal punishment was unsubstantiated. (Dkt. No. 13, Compl. Exh. I at 2.) And the March 9 article similarly reports on the allegations that underlay the investigation, and then explains that the Department of Education, “did not substantiate allegations by one student that [Plaintiff] pushed her knee into students’ backs.” (Dkt. No. 13, Compl. Exh. J.)

Any reasonable reader would know that the *Daily News* Articles were reports on the DOE's investigation into allegations made against Plaintiff.

b. The notice of claim, summons, and other papers served or filed in this litigation constitute “judicial proceedings.”

Reports of judicial proceedings – including the documents that initiate them – lay at the heart of the § 74 privilege. *Gristede's Foods, Inc. v. Poospatuck (Unkechaug) Nation*, No. 06 Civ. 1260 (KAM), 2009 WL 4547792, at *16 (E.D.N.Y. Dec. 1, 2009) (“Allegedly libelous statements fall within the privilege conferred by § 74 where it appears that all of the statements published by the defendants are of and concerning the complaint in the underlying federal litigation and constitute substantially accurate descriptions or characterizations of such complaint.”) (citations and internal quotation marks omitted); *Riel v. Morgan Stanley*, No. 06 Civ. 524 (TPG), 2007 WL 541955, at *10 (S.D.N.Y. Feb. 16, 2007) (“The protections of section 74 extend to pleadings,

transcripts, live proceedings and the release by the parties of background material regarding their positions in the case.”), *aff’d*, 299 F. App’x 91 (2d Cir. 2008).

The same is true of reports on notices of claims.⁵ For example, in *Rickerson v. Porsch*, No. 20180015, 2019 WL 1289734, at *4 (Sup. Ct. Seneca Cty. Feb 5, 2019), the court explained that a notice of claim constitutes both a “judicial proceeding” under § 74 because it is a “jurisdictional pre-requisite to the filing of a plenary action against a municipal corporation” and an “official proceeding” because it is “prescribed by law with its own procedures.” *Id.* The court held that as a result, “any reporting about the notice of claims ... is not actionable under Civil Rights Law § 74.” *Id.*

*18 Here, in addition to reporting on the OSI investigation, certain of the *Daily News* Articles quote from or cite to Plaintiff’s Notice of Claim and summons. For example, the September 27, 2018 article begins by noting that Plaintiff “says she is the victim of reverse-racism” and explains that Plaintiff filed a “Notice of Claim filed in anticipation of a lawsuit against ‘the city, parents, students, and the media.’ ” (Dkt. No. 13, Compl. Exh. G at 2.) The article recounts the allegations that the *Daily News* reports – which Plaintiff claimed were false and which formed the basis of her proposed lawsuit – and explains that Plaintiff “denied that any child laid on the floor at any time during the demonstration and denied making any physical contact with any student.” (*Id.*; see also Compl. Exh. H (reporting that Plaintiff “filed a \$120 million discrimination suit”)); (Compl. Exh. I at 2 (reporting that Plaintiff “announced she planned to sue the city” because “accounts of the [slavery] lesson were all wrong”)); (Compl. Exh. J (reporting that Plaintiff “is suing the Education Department and various individuals and entities including The News in a suit that her attorney said could become a class action worth as much as \$1 billion”).)

In sum, the *Daily News* Articles are clearly reports of official proceedings within the contemplation of § 74.

ii. The Daily News Defendants fairly and accurately reported on these proceedings.

Plaintiff vehemently asserts that she “NEVER” engaged in the conduct reported in the *Daily News* Articles and that the “claims made [of corporal punishment] were **completely inaccurate**.” (Dkt. No. 58, Plaintiff’s Opposition at 19) (all emphasis in original). However, nowhere does Plaintiff allege that the articles present inaccurate accounts of the *allegations* that were made against her.

And indeed, she cannot. Plaintiff argues that because the allegation that Plaintiff “singled out black students and made them act like slaves” and then “stepped on their backs to show them what slavery felt like” is false, that the *Daily News* Articles are not substantially accurate reports. She complains that the allegations were “reported as ‘fact’ by the News Defendants each and every time they reported on this matter.” (*Id.* at 4.)

Plaintiff is incorrect.

One example emblematic of the reporting from the *Daily News* Articles is instructive. It reads:

Middle School 118 teacher Patricia Cummings shocked and traumatized children in her social studies classes when she singled out black students and told them to lie on the floor for a lesson on U.S. slavery – and then stepped on their backs to show them what slavery felt like, *students and a staffer said*.

(Dkt. No. 13, Compl., Exh. B) (emphasis added). The articles do not posit the allegations as fact. To the contrary, the Articles repeatedly uses phrases like “students said” to report on allegations that were at the heart of a public agency investigation.

Plaintiff further argues that the *Daily News* reportage presented “erroneous facts to the public,” because one of the students Chapman interviewed for the first story in the series “was absent on the day of the lesson in question and could not have possibly witnessed the lesson.” (Dkt. No. 58, Opp’n at 19.) To Plaintiff, because, “Absolutely no fact checking was done,” (*id.*), into whether the underlying allegations were true, the Articles lose the § 74 privilege.

But this conclusory statement is unsupported by the law. As the court explained in *Cholowsky v. Civiletti*, 887 N.Y.S.2d 592, 596 (2d Dep’t 2009):

[H]ow a reporter gathers [] information concerning a judicial proceeding is immaterial provided his [or her] story is a fair and substantially accurate portrayal of the events in questions. ... Accordingly, the fact that the defendants derived information about the [] proceedings from secondary sources did not mean that Civil Rights Law § 74 was inapplicable.

(internal citations omitted). Thus, it is immaterial whether the *Daily News* Defendants gathered their information directly from proceedings, from witnesses in Plaintiff’s class, or from third parties who heard about Plaintiff’s actions because their reportage was a substantially accurate portrayal of the allegations against Plaintiff.

*19 Even if the allegations are “erroneous[],” *id.* ¶¶ 53–54, § 74’s privilege is purposely designed to immunize reporting on the allegations made in proceedings regardless of the veracity of those underlying allegations. *Mulder*, 611 N.Y.S.2d at 1023–24 (noting that in applying § 74 privilege, “The question is not whether or not the statement is ‘true.’ The question is whether it is a substantially accurate description of the ... proceeding”); *Freeze Right*, 475 N.Y.S.2d at 389 (“Section 74 ... was designed precisely to protect the publisher of a fair and true report from liability for just such an error and to relieve it of any duty to expose the error through its own investigation.”); *Zappin*, 2018 WL 1474414, at *7 (“To invoke the § 74 privilege properly, Defendants need not prove that the statements made at the ... proceeding were, themselves, accurate; rather, all that matters for the application of § 74 is that the article is a substantially accurate rendering of what was said, even if the testimony given was not true.”), *aff’d*, 769 F. App’x 5 (2d Cir. 2019).

For example, in *Rodriguez v. Daily News, L.P.*, 37 N.Y.S.3d 613 (2d Dep’t 2016), the plaintiff sued the *Daily News* and WPIX for defamation after the paper reported that he was wanted in connection with an attempted crime. *Id.* at 614. The final news report on the attempted crime reported that another individual had been arrested for the crime, but also included a photograph of plaintiff. *Id.* Even though the underlying allegations were untrue, the New York Supreme Court dismissed plaintiff’s defamation claim and the Appellate Division affirmed, finding that the report was a “substantially accurate report[] of the information provided by the NYPD in its press releases.” *Id.* at 615. In other words, the veracity of the underlying allegations against Plaintiff is simply not relevant to a § 74 analysis; the question is whether the articles truly and fairly report those allegations.

They do. Indeed, Plaintiff does not allege that the *descriptions* of the allegations are erroneous. Plaintiff concedes that one parent complained that, “Plaintiff instructed [the student] to get on the floor” and that Plaintiff “put her knee into her back and pushed down.” (Compl. ¶ 53.) That parent and their child said that Plaintiff “put her knee into [the student’s] back and pushed down asking if [the student] felt pain,” and the OSI report shows that numerous other students stated that Plaintiff used her feet or hands to push students together. (Dkt. No. 31, Rosenfeld Decl. Exh. C at 8–9.) The Articles contain variations of these allegations, including that Plaintiff “stepped” on, “pressed,” and “put her foot on” students’ backs. While Plaintiff may rightfully take issue with the substance of the allegations, it is beyond cavil that these statements were made to the DOE.

Finally, Plaintiff takes issue with the following statement made by Chapman on a WNYC radio program: “The seventh grade history teacher at the school by the name of Patricia Cummings had asked black students to lie face down on the floor in the classroom and then stepped on at least one of those students in a lesson on the Middle Passage, which is the infamous slave route used in the U.S. slave trade.” (Compl. ¶ 100.) This statement – like the others at issue – is a privileged fair report of

the allegations at the heart of the OSI investigation. The radio program both mentions the *Daily News*'s reporting and, in a written excerpt on the same web page as the program, hyperlinks to the February 2, 2018 article. As my colleague Judge Oetken explained in *Adelson v. Harris*, 973 F. Supp. 2d 467, 482–86 (S.D.N.Y. 2013), hyperlinking to another article that itself is a fair report of a proceeding signals to the reader that the allegations stem from a proceeding, *aff'd*, 876 F.3d 413 (2d Cir. 2017). As explained, the statement that Plaintiff “stepped on at least one student” is a substantially accurate formulation of one of the allegations that was the subject of the OSI investigation.

2. Statements Describing Plaintiff or Plaintiff's Lesson as “Racist” Are Nonactionable Opinions

*20 Statements describing Plaintiff or Plaintiff's Lesson as “racist” are dismissed because they are nonactionable statements of opinion.

“Since falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false ... a libel action cannot be maintained unless it is premised on published assertions of fact.” *Brian v. Richardson*, 660 N.E.2d 1126, 1129 (N.Y. 1995). Thus, defendants cannot be liable “for simply expressing their opinion ... no matter how unreasonable, extreme or erroneous these opinions might be.” *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1306 (N.Y. 1977); *see also Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) (“[T]he New York Constitution provides for absolute protection of opinions.”).

The question of whether a statement constitutes fact or opinion is a question of law for the court. *Chau v. Lewis*, 771 F.3d 118, 128 (2d Cir. 2014) (“Determining whether a statement is an allegation of fact or mere opinion is a legal question for the court.”). To make this determination, New York courts consider three factors:

- (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion.

Brian, 660 N.E.2d at 1129 (internal alterations omitted).

In applying these factors, courts have adopted a “holistic approach.” *Davis v. Boehm*, 22 N.E.3d 999, 1005 (N.Y. 2014). “Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.” *Brian*, 660 N.E.2d at 1129 (internal citations and quotation marks omitted); *see also Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1167 (N.Y. 1993) (“The dispositive inquiry ... is whether a reasonable [reader] could have concluded that [the articles were] conveying facts about the plaintiff.”) (citation and internal quotation marks omitted). Further, where the facts supporting the opinion are fully set forth, the characterization accompanying those facts is a nonactionable opinion. *Gross*, 613 N.E.2d at 1167–1168.

Courts in New York have consistently held that terms like “racist” constitute nonactionable opinion. In *Silverman v. Daily News, L.P.*, 11 N.Y.S.3d 674 (2d Dep't 2015), the plaintiff was fired from his position as the principal of a school after defendant published articles referring to materials authored by the plaintiff as “racist writing.” The court held that “the context of the complained-of statements was such that a reasonable reader would have concluded that he or she was reading opinions, not facts, about the plaintiff.” *Id.* at 676. Further, “defendants made the statements with express references to the written materials authored by the plaintiff.” *Id.* The court therefore concluded that the statements were nonactionable because “there was full

disclosure of the facts supporting the opinions.” *Id.*; see also *Russell v. Davis*, 948 N.Y.S.2d 394, 395–396 (2d Dep’t 2012) (statements by reports and local politicians interpreting an essay by an electoral candidate as racist and anti-Semitic were opinions based on disclosed facts); *Goetz v. Kuntsler*, 625 N.Y.S.2d 447, 452 (Sup. Ct. N.Y. Cty. 1995) (statement that plaintiff had “venomous feelings against black people” and “developed hatred toward all blacks” was protected opinion); *Covino v. Hagemann*, 627 N.Y.S.2d 894 (Sup. Ct. Rich. Cty. 1995) (statement that plaintiff’s actions were “racially insensitive” were nonactionable opinions because “racially insensitive and disrespectful racial insensitivity have no meaning which is readily understood,” *id.* at 897 (internal quotation marks omitted)).

*21 Here too, the terms “racist” and “racism” that appear in the *Daily News* Defendants’ articles are pure statements of opinion based on disclosed facts. For example, in the *Daily News* Defendants’ February 2, 2018 article, the opening line states, “Kids and parents say this Bronx teacher needs a lesson – in racism.” (Dkt. No. 13, Exh. B at 2.) In this context, references to Plaintiff as racist do not have the precise meaning capable of sustaining a defamation action. The line merely expresses the views of Plaintiff’s students and their parents, quotation from whose interviews feature prominently in the Articles. Similarly, in the *Daily News* Defendants’ July 9, 2018 article, the *Daily News* Defendants note that City Department of Education officials had not yet concluded investigations of “educators accused of racist acts.” (Compl. Exh. E. at 1.) This, too, indicates that Plaintiff’s accusers viewed her actions as racist – an opinion about her conduct, rather than a factual assertion.

In addition, as in *Silverman*, the *Daily News* Defendants disclosed the facts on which the opinions are based—i.e., that they were allegations from parents, students, and staff about the Plaintiff’s Middle Passage lesson. While Plaintiff denies that she ever had students lie on the floor and denies any physical contact with students, (Compl. ¶ 54), she admits (1) that she had students sit in the front of the room to demonstrate the conditions on slave ships, and (2) that a parent reported that she “pushed her knee” into students’ backs and asked if the students felt pain. (*Id.* ¶ 53.)

Thus, because the facts reported by the *Daily News* Defendants underlying the opinions were based on substantially true disclosed facts, the opinions are not actionable under a defamation theory. See *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 281 (S.D.N.Y. 2016) (holding that opinion based on disclosed facts is only actionable when the “disparity between the stated facts and the truth would cause a reader to question the opinion’s validity”). The fact that Plaintiff may disagree with the sources’ characterizations of her or wish that the articles painted her in a different light, does not alter this conclusion.

To the extent Plaintiff’s claims arise from the inclusion of “racism” and “racist” in the headlines over the articles, they are also dismissed. See (Compl. Exh. C (“Thousands sign parents’ petition demanding action from de Blasio on racist school incidents”)); (Exh. E (“Bronx educator accused of racism still under investigation, still on payroll”)). Plaintiff takes issue with reference to her as “Slave Teach” or “Slave Teacher” in the headlines of certain articles. (Dkt. No. 58, Opp’n at 18.) A headline is not actionable so long as it is a “fair index of the article with which it appears.” *Mondello v. Newsday, Inc.*, 774 N.Y.S.2d 794 (2d Dep’t 2004). “A newspaper need not choose the most delicate word available in constructing its headline; it is permitted some drama in grabbing its reader’s attention.” *Test Masters Educ. Servs. V. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 589 (S.D.N.Y. 2009). Here, the headlines fairly depict the contents of the articles—that students and parents alleged that Plaintiff’s lesson on slavery was racist and that OSI was investigating these allegations. As a result, these headlines cannot form the basis of Plaintiff’s Complaint.

B. Defendants’ Motion to Dismiss Plaintiff’s Cause of Action for Defamation Is Granted as to the Media Defendants

As to the Media Defendants, the Complaint disputes comments made by Defendant Charlamagne tha God on a radio program, and Defendant Perry and the Hechinger Report on an internet blog post.

Defendants argue that their statements are also nonactionable opinions.

When understood in their respective contexts, statements made by Defendants Charlamagne and Perry could only be understood by listeners and readers as impassioned criticism of the conduct reported in media coverage, and as their personal ruminations

concerning the educational impropriety and racial insensitivity of that conduct. The statements therefore do not give rise to a cause of action for defamation.

*22 Each Defendant's statement will be considered in turn.

1. Charlamagne's Challenged Comments Are Expressions of Opinion and Are Therefore Nonactionable

In her Complaint, Plaintiff objects to what she characterizes as Charlamagne's "racist and defamatory rant" (Compl. ¶ 107) on a February 7, 2018 episode of *The Breakfast Club* morning show. As will be shown below, Plaintiff cannot as a matter of law base a defamation claim on these remarks, because they offer expressions of opinion so subjective as to be insufficient to state a claim for defamation.

Descriptions of Plaintiff as a "bigot," "white devil" and "cracker-ass-cracker" are not actionable. To constitute actionable defamation, a challenged statement must be provably false. *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir. 1976). Based on this principle, the Complaint's allegations arising from the broadcast descriptions of Plaintiff as a "white devil" and a "bigot cracker-ass cracker" fail to state a viable cause of action. See *Rubinstein v. Transp. Workers' Union, Local 100*, No. 02 Civ. 994 (GBD)(KNF), 2005 U.S. Dist. LEXIS 19969, at *17 (S.D.N.Y. Sept 6, 2005) (statement that defamation counter-claimant "endorsed and rewarded a confessed bigot" not actionable as a matter of law). The on-air characterizations of Plaintiff as a "white devil [with] her hoof in my back" are "the sort of loose, figurative, [and] hyperbolic language" that courts routinely hold to be nonactionable. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

Similarly, the observations that, with respect to the students involved in the Middle Passage demonstration, Plaintiff "wanted to break their spirits" and "give them an inferiority complex" reflect inherently subjective evaluations of intent and state of mind, which are matters not readily verifiable and intrinsically unsuitable as a foundation for defamation. Imputing a motive or state of mind to a person based on that person's publicly reported conduct is not actionable in defamation. See, e.g., *Zerman v. Sullivan & Cromwell*, 677 F. Supp. 1316, 1320 (S.D.N.Y. 1988) (statement that plaintiff aimed to "set up" brokerage houses "is nothing more than speculation about ... motivations" and, as such, is a "clear statement of opinion" which "does not support a claim for libel"); *Rappaport v. VV Publ'g Corp.*, 618 N.Y.S.2d 746, 751 (Sup. Ct. N.Y. Cty. 1984), *aff'd*, 637 N.Y.S.2d 109 (1st Dep't 1986) ("Because statements concerning state of mind, such as hypotheses as to motivation, are not readily verifiable as true or false, courts of this State have consistently found them to be protected."). A person's internal thoughts are hardly capable of being proven false, and anyone is entitled to speculate about a person's motives from known facts of his behavior.

Neither can Plaintiff argue that these statements implied facts unknown to the listener. Charlamagne's rant was classic "pure" opinion under the law. As a matter of law, "pure" opinions are absolutely privileged and will not support an action for defamation. *Torain v. Liu*, 279 Fed. App'x 46, 47 (2d Cir. 2008) ("Under New York and federal law, expression of pure opinion, ... are not actionable, receiving full constitutional protection."). A pure expression of opinion occurs when the parties to the communication know the facts or assume their existence and the statement is obviously based on those facts as justification for the opinion. *Chau*, 771 F.3d at 129. Such statements are "not actionable because ... a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture." *Gross*, 623 N.E.2d at 1168.

*23 The factual predicate for Charlamagne's commentary was contained in a CBS news broadcast that was expressly incorporated as part of the "Donkey of the Day" segment. (Dkt. No. 29, Exh. 1, p. 7, 11. 10-23; p. 8, 11. 2-4.) The essential facts animating Charlamagne's opinion were "transmitted to various news outlets and appeared online and in media all over the world." (Compl. ¶ 60) According to the Complaint's allegations, they were known to the public. "Thus, the statements of opinion are nonactionable on the additional basis that there was full disclosure of the facts supporting the opinions." *Silverman*, 11 N.Y.S.3d at 676. Charlamagne's words can only plausibly be construed as presenting his personal point of view, "an exercise in fleshing out the implications of the facts previously disclosed" on the broadcast. *Ratajack v. Brewster Fire Dep't*, 178 F.Supp.3d 118, 166 (S.D.N.Y. 2016).

Indeed, given the immediate context of the contentious debate over the “lesson taught by the Plaintiff in her social studies class 408, on the Middle Passage” (Compl. ¶ 52) as reported by the global media (*id.* ¶¶ 60–61) – as well as the fact that Charlamagne’s comments were made in the setting of a freewheeling morning radio show dedicated to animated discussion of public controversies – “the conclusion easily follows that defendant[’s] statements in this case were hyperbolic.” *600 West 115th Street Corp. v. Von Gutfeld*, 603 N.E.2d 930, 935 (N.Y. 1992). Indeed, Charlamagne’s memorable description of the Middle Passage lesson as “heavy” on the Hellman’s and covered with “extra mayonnaise” – i.e., drenched in whiteness – can only be understood as figurative criticism. Accordingly, “it would be plain to the reasonable [listener] of [Power 105.1] that [Charlamagne] was voicing no more than a highly partisan point of view” immunized from a defamation claim. *Immuno AG. V. Moor-Jankowski*, 567 N.E.2d 1270, 1281 (N.Y. 1991).

2. Dr. Andre Perry’s Challenged Comments Are Expressions of Opinion and Are Therefore Nonactionable

The Complaint asserts that five statements in Dr. Perry’s column are defamatory:

- (1) A subheadline that reads: “A teacher literally stepped on children to ‘teach’ them about slavery.”
- (2) “Cummings’ slavery lesson wasn’t only cruel; it was redundant.”
- (3) “Black students know too well what it’s like to be humiliated, held in captivity and to suffer from inhumane conditions created by educators. Many compliant students who sit quietly accepting demeaning lessons like the ones administered by Cummings and others like her are viewed as obedient and law-abiding. Their counterparts who resist are deemed disorderly and subjected to harsh disciplinary policies, often ending up in jail by way of the school-to-prison pipeline. Whether you are obedient or ‘woke’ – conscious of your oppression – you are being oppressed in schools. Yep, black students already know what it’s like to be stepped on.”
- (4) “There are white teachers like Cummings who have not reckoned with what it means to oppress.”
- (5) “While most teachers probably won’t see themselves in ... Cummings, most should recognize that they associate with white norms, which makes it possible to act in racist ways....”

When considering the full context of the communication – an opinion column about race and academia – the thrust of the challenged statements are Perry’s ruminations on education and race, rather than a factual statement about Cummings. Except for the piece’s subheadline, the specific statements addressed in the Complaint are not provably true or false, but instead are Dr. Perry’s views on education and race, based on his personal experience and expertise.

Nor is the subheadline actionable when read in context of the blog post. *Cf. Sandals Resorts Intern. Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 414 (1st Dep’t 2011) (“even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate ... or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole.”). For one thing, the headline – standing alone – is not independently actionable because it does not mention Plaintiff by name. *See Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 698 (S.D.N.Y. 1995), *aff’d* 119 F.3d 1018 (2d Cir. 1997), *cert. denied* 522 U.S. 1149 (1998). Any defamatory implication would occur “if at all, after reading the entire article,” *id.*, and the subheadline can only be construed in conjunction with the article. *See Mann*, 885 N.E.2d at 886 (“courts must consider the content of the communication as a whole, as well as its tone and apparent purpose”) (citations omitted).

*24 Dr. Perry’s column begins “The *New York Daily News* reported on February 1” —with a hyperlink to the article containing the allegations. (Compl. ¶ 119, n. 9.) With that hyperlink, Perry disclosed that the facts he relied on are the allegations – subject to a government investigation – contained in *The Daily News* article. Further, Perry uses the word “allegedly” in his description

of the allegations contained in the article. See *Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1103 (N.D. Cal. 1999) (holding that an online post accusing the plaintiff of embezzlement was nondefamatory opinion where the facts upon which the post relied were in articles to which the posting hyperlinked). Perry's column does not purport to offer any facts outside of what was reported therein.

When considered in their full context – an academic blog post offering personal observations on race, pedagogy, and education – and where the author has disclosed that his reference to Cummings is based on the allegations contained in the *Daily News* article hyperlinked and referred to explicitly in a piece reporting on a government investigation, these statements are nonactionable. “Fairly read ... these statements constitute [Dr. Perry's] commentary on the allegations” at the heart of the OSI investigation. See *Catalanello v. Kramer*, 18 F. Supp. 3d 504, 518 (S.D.N.Y. 2014) (“Read in context, these statements are properly viewed as statements of opinion – an academic's ruminations – and therefore are not actionable as defamation.”).

In Plaintiff's own words, the essential facts animating Dr. Perry's blog post were “transmitted to various news outlets and appeared online and in media all over the world” (Compl. ¶ 60.) Given that those facts were explicitly integrated into the post, Plaintiff fails to plausibly allege that the post was based on undisclosed facts.

C. Defendants' Motion to Dismiss Plaintiff's Cause of Action for Defamation Is Granted as to the Political Defendants
Finally, Plaintiff asserts defamation claims against the City, Mayor de Blasio, New York State Senator Kevin Parker, and Councilmembers Williams and Dromm—who allegedly “exhibited flagrant disregard as to whether the accusations made against the Plaintiff were actually true....” (Compl. ¶¶ 102, 114, 115.)

The claim against Mayor de Blasio fails because, as the Mayor was speaking in his official capacity about an ongoing governmental investigation, his comments are protected by an absolute privilege.

The claims against the Councilmembers and State Senator Parker fail because, *inter alia*, their statements were nonactionable opinions.

Each will be considered in turn.

1. The Statements Made by Mayor de Blasio Are Protected by an Absolute Privilege

Plaintiff alleges that Mayor de Blasio's response to a question at a February 6 press conference about the OSI investigation was defamatory. (Compl. ¶ 102.) The statement reads:

“It's not acceptable. It's not even close,” de Blasio said when asked about the allegations. “I don't know any teacher in their right mind who would do something like that ... we're doing a full investigation of that. That makes no sense. It is unfair to the kids. It's insensitive.” “But I will say, this has not been a widespread problem in terms of any type of incident like that, thank God, but we will keep deepening our implicit type training, and ways of helping our teachers to think about these issues better.”

(*Id.*; see also Dkt. No. 29, Balog Decl. Exh. B, Feb. 6, 2018 Tr. at 14 (setting forth the complete statement by Mayor de Blasio).) Although OSI had not yet completed its investigation on February 6, 2018, Plaintiff alleges that Mayor de Blasio “knew or should have known” when he answered the question that what was reported in the *Daily News* was false “based on the investigation....” (Compl. ¶ 103.) Plaintiff further alleges that Mayor de Blasio “defamed” her when on some unspecified date he “accepted” petitions from the Coalition of Educational Justice. (*Id.* ¶ 105.)

*25 The statements made by Mayor de Blasio – and Mayor de Blasio's “accepting” petitions (the precise meaning of which remains unclear) – are protected by an absolute privilege. “The absolute privilege defense affords complete immunity from

liability for defamation to ‘an official who is a principal executive of State or local government’ ... with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties.” *Spring v. Cnty of Monroe*, 92 N.Y.S.3d 509, 511 (4th Dep’t 2019) (citation omitted). “[A]n absolute privilege, a veritable immunity, is impervious to proof, and therefore to a charge, of malice.” *Stukuls v. State of N.Y.*, 366 N.E.2d 829, 831 (N.Y. 1977).

Over 40 years ago, the New York Court of Appeals addressed an analogous situation to the one before this Court. In *Lombardo v. Stoke*, 222 N.E.2d 721 (N.Y. 1966), the President of Queens College, in conjunction with the Board of Higher Education, made a public statement about charges by some former faculty members that the appointment and promotional process at Queens College was tainted with religious bias—a matter that had been widely reported on by the press. *Id.* at 722. In the statement, he expressed the belief that these former faculty members had advanced the charges of religious discrimination to explain their lack of academic success and to obtain promotion. *Id.* The Court ruled that this statement, alleged to be defamatory, was protected by absolute privilege. It reasoned that “the members of the defendant Board of Higher Education ... should be free to report to the public on appropriate occasions ‘without fear or reprisal by civil suit for damages.’ ” *Id.* at 724.

Here, Mayor de Blasio responded to a question about the DOE investigation into Plaintiff’s Middle Passage lesson at a Mayoral press availability. Such statements are absolutely privileged. See *Spring v. County of Monroe*, 92 N.Y.S.3d 509, 511 (4th Dep’t 2019) (holding that statements made to the press by county executive about plaintiff’s termination were absolutely privileged “because the investigation and the underlying actions of plaintiff became a matter of public attention and controversy....”); *Cosme v. Town of Islip*, 476 N.Y.S.2d 857, 858 (1st Dep’t 1984) (executive officer of the Town of Islip’s responses to questions at a town meeting were protected by absolute privilege). The Mayor must be allowed to inform the public about the administration of the school system.

For the same reason, the Mayor’s “accepting” petitions relating to the incident is absolutely privileged. New York City school parents, as members of the public, have a First Amendment right “to petition the Government for a redress of grievances.” *U.S. Const. amend. I*. Nothing about the Mayor’s accepting petitions from constituents implies anything about Plaintiff, or about the truth of the allegations made against her.

Plaintiff’s defamation claim against Mayor de Blasio is dismissed.

2. The Statements Made by the Council Members Are Nonactionable Opinions

On February 9, 2018, the *New York Amsterdam News* published an article about a protest in front of New York City Hall organized by an education advocacy group in response to the reports about Plaintiff’s lesson. The article purportedly attributed the following statement to Councilmember Dromm:

“Educators teaching in a city as diverse as ours should be given cultural competency training,” said Daniel Dromm, NYC Council Finance Committee chair. “This is the only way to avoid similar traumatic experiences like what happened in the Bronx.”

The article also purportedly attributed the following statement to then-Councilmember Williams:

*26 “There is clear need for the administration to be more proactive in mandating Culturally Responsive Education in our schools,” said Councilmember Jumaane Williams. “We should not have to wait for grotesque events of cultural insensitivity to mar our classrooms in order to spur action, and I sincerely hope we don’t have to wait for the next one.”

Plaintiff alleges that both Dromm and Williams “exhibited flagrant disregard as to whether the accusations made against Plaintiff were actually true ...” when they made the statements. (Compl. ¶¶ 114–115.)

Neither statement is defamatory, in part because neither refers directly to Plaintiff. Councilmember Dromm's statement is directed at “educators” teaching in a diverse city. Under New York law, “a plaintiff cannot sustain a libel claim if the allegedly defamatory statement is not ‘of and concerning plaintiff’ but rather only speaks about a group of which the plaintiff is a member.” *Chau*, 771 F.3d at 129 (quoting *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006)). And then-Councilmember Williams's statement is not directed at Plaintiff at all, but rather at the Mayor.

Even if the statements did identify Plaintiff with specificity, the officials’ characterization of “what happened in the Bronx” as “traumatic” and “grotesque” are clearly expressions of opinion incapable of being provably true or false. The Councilmembers use of these words indicate that the statements are the kind of “fiery rhetoric” typical of debates on public issues. In this context, “a reasonable listener would have believed that they were opinion.” *Melius v. Glacken*, 94 N.Y.S.2d 134, 136 (2d Dep’t 2012).

3. The Statements Made by New York State Senator Kevin Parker Are Nonactionable Opinions

The same February 9, 2018 *New York Amsterdam News* article that quoted the Councilmembers also provides a quote from State Senator Kevin Parker, which Plaintiff alleges “exhibited flagrant disregard as to whether the accusations made against the Plaintiff were actually true.” (Compl. ¶ 108.) The quote reads:

“Like many others, I am completely outraged [] by the actions of Bronx Middle School 118 teacher, Patricia Cummings,” said State Sen. Kevin Parker. “I call for her swift removal from the New York City Department of Education, and the revocation of all New York State licensures and credentials that would allow her to teach in our State.”

Parker continued, “Although I hear some calling for a second chance for Ms. Cummings via culturally competent training and the like, as an African studies professor at the City University of New York for over 20 years now, I know there is no level of training that can make a person more sensitive to the struggles of another. Those feelings cannot be prepared in one's mind, but rather must be intrinsic to one's character. This is not the case for Ms. Cummings and it is my hope we can learn for this deplorable act to inform future decisions and best practices when deciding who will be afforded the honor of teaching our children.”

(*Id.*)

Senator Parker moves for judgment on the pleadings, (Dkt. No. 81), on the basis that these statements are protected opinion. *See Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006) (“The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim.”) This statement was clearly an expression of opinion. It was quoted in the same article as, and was a reaction to, the “reported” and “alleged” facts concerning Plaintiff’s lesson about the Middle Passage. (*See* Dkt. No. 82, Schwartz Decl. Exh. A.) It consisted of three core ideas: (1) that Senator Parker was “outraged” by Plaintiff’s actions (quite clearly referring to the “allegations” at the heart of the investigation), (2) that Plaintiff should be removed from the DOE, and (3) that “culturally competent training and the like” would not be effective, based on his personal experience as an African Studies Professor at the City University of New York and his understanding that sensitivity to the struggles of another must be intrinsic to a person’s character, which appeared not to be the case for Plaintiff. *Id.*

*27 The only statement arguably capable of defamatory construction is the statement that culturally sensitive training would not be effective for Ms. Cummings. However, that is plainly not something provable and so qualifies as opinion. Moreover, the facts about Plaintiff on which Senator Parker based this statement are set out in the article, and there is no suggestion therein, or anywhere else in the Complaint, that Defendant Parker was referring to any undisclosed facts about Plaintiff. To the contrary, Parker explained in the preceding sentence that the basis of this statement was his personal experience as an African studies professor. Those receiving the statement would be free to credit or discount the bearing that experience had on the debate at hand. Indeed, the full context in which the statement appears would signal to a reader that they were reading or hearing impassioned

rhetoric typical of debates on public issues. Senator Parker's quoted comment is “protected as a statement of opinion and thus not a false statement of fact.” *Frascatore v. Blake*, 344 F. Supp.3d 481, 494 (S.D.N.Y. 2018).

D. Plaintiff's Claims for Negligence, Negligent Infliction of Emotional Distress, and Intentional Infliction of Emotional Distress Are Dismissed as to all Defendants as Duplicative

Plaintiff asserts claims for negligence (Compl. ¶¶ 188–194), negligent infliction of emotional distress (“NIED”), and intentional infliction of emotional distress (“IIED”) (Compl. ¶¶ 195–209) against all defendants.

Plaintiff supports these claims with the same facts that underlie her defamation claims. But her attempt to recast a defamation claim as various other torts is impermissible under New York law. Each of Plaintiff's claims for negligence and emotional distress must be dismissed.

It is well-settled that tort claims “aimed at controlling the same speech that is the basis of a libel claim” should not be entertained “under less stringent standards.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988). Under New York law, a tort claim “based on the same conduct underlying [a] defamation claim fails as a matter of law, because “New York cases have held that a separate cause of action for what are essentially defamation claims should not be entertained.” *Anyanwu v. Columbia Broadcasting System, Inc.*, 887 F. Supp. 690, 693 (S.D.N.Y. 1995) (collecting cases). On this basis, courts applying New York law have dismissed negligence claims paired with defamation claims, *see, e.g., Butler v. Delaware Otsego Corp.*, 610 N.Y.S.2d 664 (3d Dep't. 1994), intentional infliction of emotional distress claims paired with defamation claims, *see, e.g., Matthaus v. Hadjedj*, 49 N.Y.S.3d 393 (1st Dep't 2017), and negligent infliction of emotional distress claims paired with defamation claims, *see, e.g., Napoli v. New York Post*, 107 N.Y.S.3d 279 (1st Dep't 2019).

This Court does the same.

CONCLUSION

Defendants' motion to dismiss Plaintiff's Complaint is granted. Plaintiff's claim is dismissed with leave to replead. The amended complaint is due within 21 days. The Clerk of the Court is directed to remove the motions at Dkt. Nos. 27, 28, 29, 31, and 81 from the Court's list of pending motions.

All Citations

Not Reported in Fed. Supp., 2020 WL 882335

Footnotes

- 1 The Middle Passage refers to the forced voyage of enslaved Africans between West Africa and the Americas during the transatlantic slave trade.
- 2 “In reviewing a motion to dismiss, a court may consider, *inter alia*, (1) documents that are incorporated by reference into the complaint, and (2) documents that, even if not incorporated by reference, the defendant has notice of and that are ‘integral’ to the complaint” without converting the motion to dismiss to a motion for summary judgment. *BankUnited, N.A. v. Merrit Envtl. Consulting Corp.*, 360 F. Supp. 3d 172, 183 (S.D.N.Y. 2018) (citing *Weiss v. Inc. Vill. Of Sag Harbor*, 762 F. Supp. 2d 560, 567 (E.D.N.Y. 2011)); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1992). Plaintiff annexes the *Daily News* Articles to the Complaint, the Complaint references the Notice of Claim,

see ¶ 6, and the Complaint extensively quotes from and refers to the Office of Special Investigations Report, *see, e.g.*, ¶ 53, making it proper to consider those documents in determining the motion.

3 The Second Circuit has stated that “The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim.” *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006) (internal quotations and citations omitted).

4 And indeed, Plaintiff's union filed a grievance on her behalf, which resulted in the disciplinary letter's being removed from Plaintiff's personnel file. (Dkt. No. 54, Ex. C at 17.)

5 Pursuant to New York statute, notices of claims must be filed 90 days prior to suing a municipal entity. *N.Y. Gen. Mun. Law* § 50-e.

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Only the Westlaw citation is currently available.

United States District Court, D. South Carolina, Greenville Division.

Deborah D. DAVIS, Plaintiff,

v.

NEW PENN FINANCIAL, LLC, d/b/a [Shellpoint Mortgage Servicing](#), Defendant.

Civil Action No. 6:18-cv-3342-TMC

|

Signed 07/22/2021

Attorneys and Law Firms

[Shannon Polvi, J. Lewis Cromer](#) and Associates, Columbia, SC, for Plaintiff.

[Mark W. Bakker, Sarah Sloan Batson](#), Nexsen Pruet, Greenville, SC, for Defendant.

ORDER

[Timothy M. Cain](#), United States District Judge

*1 Plaintiff Deborah D. Davis (“Plaintiff”) originally brought this action in South Carolina state court against her former employer, Defendant New Penn Financial, LLC, d/b/a Shellpoint Mortgage Servicing (“Defendant”), asserting causes of action under the Americans with Disabilities Act (“ADA”), [42 U.S.C. §§ 12101–12213](#), and South Carolina defamation law. (ECF No. 1-1).¹ On December 11, 2018, Defendant removed the action to this court based on federal question jurisdiction. (ECF No. 1). In accordance with [28 U.S.C. § 636\(b\)\(1\)\(B\)](#) and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), this matter was referred to a magistrate judge for pretrial handling.

On October 30, 2020, Defendant filed a motion for summary judgment. (ECF No. 52). Plaintiff was given additional time to respond and filed her opposition to Defendant's motion on December 18, 2020, (ECF No. 59), and Defendant replied (ECF No. 63). The magistrate judge granted the parties leave to file sur-replies as well. (ECF Nos. 71; 72; 77). Now before the court is the magistrate judge's Report and Recommendation (“Report”), entered May 25, 2021, recommending that the court grant Defendant's motion for summary judgment. (ECF No. 81). Plaintiff filed objections to the Report, (ECF No. 82), and Defendant replied to Plaintiff's objections (ECF No. 83). Accordingly, this matter is now ripe for review. After carefully reviewing the record and the submissions of the parties, the court concludes a hearing is unnecessary to decide this matter.

I. BACKGROUND

Upon review of the parties’ briefing, the record, and the magistrate judge's Report, the court adopts the procedural history, factual background, and evidence as thoroughly set forth in the Report. *See* (ECF No. 81 at 2–8). Accordingly, the court will only briefly recount this background here. Defendant manages residential mortgage loans. Plaintiff was employed from June 20, 2016, to January 27, 2017, in Defendant's Foreclosure Litigation Department as a Litigation Foreclosure Specialist II. In that capacity, Plaintiff managed the litigation timeline of uncontested foreclosures and served as custodian of business records to testify in foreclosure trials. After she was hired, Plaintiff informed Defendant that she suffered a hearing disability; however, Plaintiff did not report or complain of discrimination on account of her disability while she was employed. During her employment, Plaintiff received some performance-based reprimands. For example, on August 11, 2016, Plaintiff received a written “Performance

Coaching Form” from Kimberly Harmstad (“Harmstad”), her supervisor, touching on her failure to follow instructions and to communicate properly. (ECF No. 52-3 at 9–12). Plaintiff was also found to have violated company policies concerning timekeeping and desk security. *Id.* at 18–23.

*2 On January 16, 2017, Plaintiff notified Harmstad that her last day would be January 27, 2017, as she needed time to study for the South Carolina bar examination in February 2017. Lindsey Wineguard (“Wineguard”), who worked in Defendant’s Human Resources (“HR”) Department, conducted an exit interview with Plaintiff and informed her that she was resigning “in good standing” and that she would be “eligible to be re-hired in a year.” (ECF No. 52-4 at 4). Wineguard also told Plaintiff that “exceptions are made depending on the need in that department.” *Id.* These statements during the exit interview were consistent with Defendant’s written re-hire policy which provides that “[i]f an associate leaves the company in good standing and is eligible for rehire, there is a one year wait period. Any variations to this policy are left to the discretion of executive management of the business line and of Human Resources.” (ECF No. 52-2 at 13). This policy has been in place since at least 2012 and could be accessed by any employee who was logged onto Defendant’s network. (ECF Nos. 52-2 at 1–2; 52-5 at 4, 7).

On March 6, 2017, having completed the South Carolina bar examination, Plaintiff applied to be re-hired by Defendant in several positions, including the Foreclosure Litigation Specialist II position from which she had resigned approximately six weeks earlier. Defendant did not re-hire Plaintiff in any capacity. None of the individuals ultimately hired to fill the positions for which Plaintiff applied had a hearing disability. Plaintiff then filed this action, alleging that Defendant refused to re-hire her because of her hearing disability, in violation of the ADA. (ECF No. 1-1 at 15).

II. REPORT AND OBJECTIONS

The magistrate judge analyzed Plaintiff’s ADA claim under the three-step, burden-shifting framework set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Under this framework, if the plaintiff establishes a *prima facie* case of discrimination under the ADA, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *See id.* at 802. The magistrate judge noted that if the employer meets this burden, the presumption created by the *prima facie* case disappears, leaving plaintiff to “prove by a preponderance of the evidence that the defendant’s articulated reason was a pretext for unlawful discrimination.” (ECF No. 81 at 9).

Applying this framework to the instant facts, the magistrate judge concluded that Plaintiff failed to establish a *prima facie* case under the ADA for failure to rehire.² *Id.* at 10–17. Specifically, the magistrate judge found that Plaintiff could not satisfy the requirement that she be qualified for the positions for which she applied because of Defendant’s policy that former employees must wait one year before they are eligible to be re-hired. *Id.* at 11. The magistrate judge further found that Plaintiff failed to establish that Defendant’s failure to re-hire her occurred under circumstances that give rise to an inference of discrimination, rejecting her contention that she satisfied this prong of her *prima facie* case with evidence that Defendant hired non-disabled people for the positions she was seeking: “the only evidence before the court is that the individuals hired for the positions [Plaintiff] sought were either new hires, an internal transfer, and a former employee who was rehired after a two-year hiatus (and therefore was not subject to the one-year rehire policy).” *Id.* at 14. Likewise, the magistrate judge rejected Plaintiff’s attempt to establish her *prima facie* case via evidence that Harmstad, her supervisor, made comments reflecting a discriminatory animus based on Plaintiff’s disability. *Id.* at 15. The magistrate judge determined that, even if Harmstad made such statements, there was no “competent evidence that Harmstad was involved in the consideration of Plaintiff’s applications [to be re-hired.]” *Id.* at 16. Finally, despite having concluded Plaintiff failed to establish a *prima facie* case, the magistrate judge completed the burden-shifting analysis out of an abundance of caution. *Id.* at 18–19. Noting Defendant’s legitimate, nondiscriminatory reason for not rehiring Plaintiff “is its one-year rehire policy,” the magistrate judge considered whether Plaintiff had carried her burden to rebut Defendant’s explanation with evidence that “discriminatory animus—not the one-year rehire policy—was the true reason for her not being rehired.” *Id.* at 18. The magistrate judge found no merit in Plaintiff’s argument that Defendant “ ‘selectively and discriminatorily applied the policy against Plaintiff but not against other employees,’ ” *id.*, because Plaintiff failed “to provide evidence of similarly situated comparators who were rehired within one year of their post-resignation applications,” *id.* at 13.

*3 With respect to Plaintiff's defamation claim under state law, the magistrate judge also recommended that the court grant summary judgment in favor of Defendants on the basis that some of the alleged defamatory statements constituted mere opinion, *id.* at 24–25; some were barred by the statute of limitations, which precluded Plaintiff from seeking recourse based on any statements made prior to November 5, 2016, *id.* at 25; some lacked the requisite specificity to put Defendant on notice as to which statements it was to defendant against, *id.* at 26–28; and the rest did not constitute actionable defamation or were protected by a qualified privilege, *id.* at 29–36.

Plaintiff raises twelve discrete objections to the Report: (1) the Report erroneously looks in the light most favorable to the moving party as to the disputed reasons for why Defendant did not rehire Plaintiff; (2) the Report overlooks numerous disputes of material facts concerning the Defendant's "one-year rehire policy;" (3) the Report fails to credit the direct evidence of discrimination from Tracy Sirmans' testimony; (4) the Report's scope of comparators is too narrow; (5) the Report overlooks Kathy Davis, the known exception to the one-year provision; (6) the Report erroneously relies on *Furgess v. United Parcel Serv., Inc.*, No. 3:05-cv-1206-CMC, 2006 WL 3192542 (D.S.C. Nov. 1, 2006), *aff'd* by 220 Fed. App'x 186 (4th Cir. 2007); (7) the Report fails to recognize a material and disputed fact regarding Plaintiff's reports of discrimination during her employment; (8) the Report fails to consider key facts concerning the "Performance Coaching Form" that, if considered, will provide important context to the Plaintiff's early reprimands; (9) statute of limitations only bars one alleged statement of defamation, but all other statements are not barred by the statute of limitations; (10) defamatory statements are defamation *per se* because they accuse Plaintiff of incompetence in her profession; (11) the Report's reliance on *Cain v. Providence Hosp., LLC*, No. 3:18-CV-2120-JFA-SVH, 2020 WL 1149724 (D.S.C. Mar. 10, 2020) is misplaced because Harmstad was responsible for initiating Plaintiff's performance-based coaching; and (12) the Report's reliance on *Todd v. S. State Bank*, No. 2:15-cv-0708-RMG, 2015 WL 6408121 (D.S.C. Oct. 22, 2016) creates a jury question regarding Defendant's actionable statements. (ECF No. 82).³

III. STANDARD OF REVIEW

The recommendations set forth in the Report have no presumptive weight, and this court remains responsible for making a final determination in this matter. *Wimmer v. Cook*, 774 F.2d 68, 72 (4th Cir. 1985) (quoting *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976)). The court is charged with making a *de novo* determination of those portions of the Report to which a specific objection is made, and the court may accept, reject, modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1). However, the court need only review for clear error "those portions which are not objected to—including those portions to which only 'general and conclusory' objections have been made[.]" *Dunlap v. TM Trucking of the Carolinas, LLC*, 288 F. Supp. 3d 654, 662 (D.S.C. 2017). "An objection is specific if it 'enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute.'" *Id.* at 662 n.6 (quoting *United States v. One Parcel of Real Prop., With Bldgs., Appurtenances, Improvements, & Contents, Known As: 2121 E. 30th St., Tulsa, Okla.*, 73 F.3d 1057, 1059 (10th Cir. 1996)). On the other hand, objections which merely restate arguments already presented to and ruled on by the magistrate judge or the court do not constitute specific objections. *See, e.g., Howard v. Saul*, 408 F. Supp. 3d 721, 726 (D.S.C. 2019) (noting "[c]ourts will not find specific objections where parties 'merely restate word for word or rehash the same arguments presented in their [earlier] filings'"); *Ashworth v. Cartledge*, Civ. A. No. 6:11-cv-01472-JMC, 2012 WL 931084, at *1 (D.S.C. March 19, 2012) (noting that objections which were "merely almost verbatim restatements of arguments made in his response in opposition to Respondent's Motion for Summary Judgment ... do not alert the court to matters which were erroneously considered by the Magistrate Judge"). Furthermore, in the absence of specific objections to the Report, the court is not required to give any explanation for adopting the magistrate judge's recommendation. *Greenspan v. Brothers Prop. Corp.*, 103 F. Supp. 3d 734, 737 (D.S.C. 2015) (citing *Camby v. Davis*, 718 F.2d 198, 199–200 (4th Cir. 1983)).

*4 Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to

support the fact.” Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment “ ‘against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.’ ” *Phillips v. Nlyte Software Am. Ltd.*, 615 Fed. App’x 151, 152 (4th Cir. 2015) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

“ ‘In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities in favor of the nonmoving party.’ ” *Sellers v. Keller Unlimited LLC*, 388 F. Supp. 3d 646, 649 (D.S.C. 2019) (quoting *HealthSouth Rehab. Hosp. v. Am. Nat’l Red Cross*, 101 F.3d 1005, 1008 (4th Cir. 1996)). However, “ ‘[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.’ ” *McKinney v. G4S Gov’t Sols., Inc.*, 711 Fed. App’x 130, 134 (4th Cir. 2017) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The moving party has the burden of proving that summary judgment is appropriate. *Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Lane & Roderick, Inc.*, 736 Fed. App’x 400, 400 (4th Cir. 2018) (citing *Celotex Corp.*, 477 U.S. at 322–23). Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 540 (4th Cir. 2015).

IV. DISCUSSION

A. Plaintiff’s objections regarding her ADA discrimination claim

Many of Plaintiff’s objections to the Report merely summarize arguments previously presented to and rejected by the magistrate judge. In some instances, Plaintiff presents *verbatim* the same material presented in opposition to summary judgment, which essentially “mak[es] the initial reference to the magistrate useless” and “wastes judicial resources rather than saving them” in contravention to the purpose of the Federal Magistrates Act. *Kevin S. v. Comm’r for Soc. Sec. Admin.*, No. 4:19-cv-20, 2021 WL 1207731, at *4 (W.D. Va. Mar. 30, 2021) (internal quotation marks omitted). It is well-settled in this Circuit that “an objection that merely repeats the arguments made in the briefs before the magistrate judge is a general objection and is treated as a failure to object.” *Jesse S. v. Saul*, No. 7:17-cv-00211, 2019 WL 3824253, at *1 (W.D. Va. Aug. 14, 2019); see also, e.g., *Howard*, 408 F. Supp. 3d at 726 (noting “[c]ourts will not find specific objections where parties ‘merely restate word for word or rehash the same arguments presented in their [earlier] filings’ ”); *Nichols v. Colvin*, No. 2:14-cv-50, 2015 WL 1185894, at *8 (E.D. Va. Mar. 13, 2015) (finding that the rehashing of arguments raised to the magistrate judge does not comply with the requirement to file specific objections). Indeed, a district court “may reject perfunctory or rehashed objections to R&Rs that amount to a second opportunity to present the arguments already considered by the Magistrate Judge.” *Heffner v. Berryhill*, No. 2:16-cv-820, 2017 WL 3887155, at *3 (D.S.C. Sept. 6, 2017) (internal quotation marks omitted). Moreover, objections that state nothing more than Plaintiff’s “disagreement with [the] magistrate’s suggested resolution,” rather than specifically identifying any factual or legal error in the Report, are general objections that have the same effect as no objection at all. *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004). Repetitive objections and general objections as to the magistrate judge’s conclusions or recommended disposition are reviewed only for clear error and the court need not provide any explanation for adopting the magistrate judge’s recommendations. *Camby*, 718 F.2d at 199–200; *Dunlap*, 288 F. Supp. 3d at 662. With these principles in mind, the court turns to consider Plaintiff’s numerous objections.

1. The Report looks in the light most favorable to the moving party as to the disputed reasons for why Defendant did not rehire Plaintiff. (ECF No. 82 at 3–5).

*5 Plaintiff argues, to the extent the court can summarize this objection, that she created a question of fact as to Defendant’s legitimate, nondiscriminatory reason for not rehiring her. She does so by pointing out that the record contained the following evidence: that for each position for which she applied—except the Specialist II position—she received a denial email indicating the only reason she was not rehired was the one-year rehire policy; that Plaintiff met every single qualification and requirement for the Specialist II position and that there is no documentation indicating Plaintiff is not qualified for the other positions; and

that the individuals ultimately hired for the positions did not have a hearing disability. (ECF No. 82 at 3–4). Plaintiff then argues that, rather than recognizing this evidence created a question of fact, the Report “takes on the duties of the jury of weighing the evidence” by “adopting Defendant’s arguments as the factual truth.” *Id.* at 4. Plaintiff takes particular exception to the Report’s reliance on the testimony of Defendant’s HR Director Wilson that Defendant “ ‘made the decision to not consider [Plaintiff’s] applications for these positions, as [Defendant] did not have the business need and Plaintiff did not have the work record or skillset to warrant a departure from [Defendant]’s one-year rehire policy.’ ” *Id.* at 4–5 (quoting ECF No. 81 at 5).

This objection, in large part, repeats verbatim what was previously presented to the magistrate judge in Plaintiff’s opposition to summary judgment. (ECF No. 59 at 5–77, 14). Therefore, the court reviews the portion of the Report in question only for clear error. Having carefully reviewed the Report, the court finds no clear error and overrules this objection. Furthermore, the extent that Plaintiff raises a specific and non-repetitive objection to the Report’s conclusions “as to the disputed reasons ... why Defendant did not rehire Plaintiff,” the court concludes that Plaintiff has failed to create a question of material fact even when the evidence is viewed in a light most favorable to her. HR Director Wilson’s testimony is consistent and not at all contrary to the record evidence including that highlighted by Plaintiff and no reasonable trier of fact could reach a contrary conclusion. Wilson testified that “there is a one-year period that you must wait before you’re eligible to be rehired” and that exceptions have been made “very, very rarely” on a “case by case basis” where there was a “business need” that required the re-hiring of an employee before one year or the employee possessed a “skill set” that was not otherwise available. (ECF No. 52-5 at 3–4). The written policy available on the company network provided that “[i]f an associate leaves the company in good standing and is eligible for rehire, there is a one year wait period. Any variations to this policy are left to the discretion of executive management of the business line and of Human Resources.” (ECF No. 52-2 at 13). According to Director Wilson, Plaintiff was not re-hired because she was subject to the one-year waiting period and Defendant “did not have the business need and Plaintiff did not have the work record or skillset to warrant a departure from [Defendant]’s one-year rehire policy.” *Id.* at 3–4. The fact that the positions for which Plaintiff applied were eventually filled by individuals without hearing disabilities—which Plaintiff highlights in her objection—does not alone create a question of fact as to pretext. As the magistrate judge pointed out, none of the individuals subsequently hired were similarly situated as they were not subject to the one-year policy: “[T]he individuals hired for the positions [Plaintiff] sought were either new hires, an internal transfer, and a former employee who was rehired after a two-year hiatus (and therefore was not subject to the one-year rehire policy.” (ECF No. 81 at 14). Accordingly, the court overrules this objection.

2. The Report overlooks numerous disputes of material facts concerning the Defendant’s “one-year rehire policy.” (ECF No. 82 at 5–7).

First, Plaintiff suggests that the application of the one-year policy was pretext because the Foreclosure Litigation Specialist II position for which she applied “had extremely high turnover rates” and “multiple vacancies.” (ECF No. 82 at 5). As a result, Plaintiff claims, Defendant had a “clear business need” and would have made one of its rare exceptions to the one-year waiting period in Plaintiff’s case except for the fact that she has a hearing disability. *Id.* This objection repeats Plaintiff’s argument to the magistrate judge that Defendant was selectively enforcing its own policies (ECF No. 59 at 17–18) and, therefore, the court reviews the relevant portion of the Report only for clear error. Plaintiff points to no evidence showing that a “high turnover” rate automatically created a “clear business need” such that the one-year policy was disregarded in order to fill the Foreclosure Litigation Specialist II position. Accordingly, the court perceives no clear error in the Report in this regard.⁴

*6 Second, Plaintiff objects to the conclusion of the magistrate judge that Harmstad, the former supervisor who purportedly made discriminatory comments about Plaintiff, was not involved in the decision as to whether an exception to the one-year policy was warranted in Plaintiff’s case. (ECF No. 82 at 5–6). Once again, this argument was presented to (ECF No. 59 at 15–16) and rejected by the magistrate judge:

Plaintiff also attempts to establish her prima facie case based on various comments allegedly made by her former supervisor, Harmstad, which Plaintiff alleges indicate discriminatory animus. Plaintiff submits that, as her former supervisor, Harmstad was a decisionmaker concerning Plaintiff’s applications for a Foreclosure Litigation Specialist II position. Pl. Mem. 15 (citing Wilson Dep. 34-35, 66-67). As an initial matter, the undersigned notes that the cited testimony concerns Wilson’s

responses to general questions regarding whether Harmstad would be consulted regarding the need for an exception of the rehire policy and whether she generally would be consulted as to hires for her team. Wilson did not testify that Harmstad had been involved in determining whether *Plaintiff* should be rehired. In fact, both Wilson and Harmstad state in their declarations that Harmstad did not have the authority to make an exception to the one-year rehire policy and was not consulted or involved with Plaintiff's applications for rehire. Wilson declared, "Ms. Harmstad was not involved in and was not consulted regarding [the decision not to consider Plaintiff for the positions for which she applied]. My team did inform Ms. Harmstad that Ms. Davis had reapplied for a position with SMS, but only after all the positions for which Plaintiff applied had been filled." Wilson Decl. ¶ 12. *See* Harmstad Decl. ¶ 14, ECF No. 52-3 (indicating she was advised of Plaintiff's application after the position had been filled and was not consulted about whether Plaintiff's application warranted a departure from the one-year rehire policy). Disputes of fact are, of course, taken in Plaintiff's favor. In this instance, Wilson's general testimony regarding abstract procedure when someone applies or re-applies for a position is not sufficient to establish a factual issue as to whether Harmstad was involved in the decision not to rehire Plaintiff.

(ECF No. 81 at 15–16 (emphasis in original)). The court finds no clear error in the magistrate judge's analysis and overrules this objection.

3. The Report fails to credit the direct evidence of discrimination from Tracy Sirmans' testimony. (ECF No. 82 at 7–9).

In large part, this objection repeats an argument already presented to (ECF No. 59 at 16) and rejected by (ECF No. 81 at 16–17) the magistrate judge. Accordingly, the court applies a clear error standard of review. The court finds no such error in the magistrate judge's consideration of this testimony. Plaintiff presented testimony from Tracy Sirmans, a former co-worker of Plaintiff's and a former employee of Defendant, who claimed that Harmstad stated "there was no way that I would bring [Plaintiff] back into the department" and that "Plaintiff would use her disability against [Defendant]." (ECF No. 82 at 8 (internal quotation marks omitted)). Plaintiff argues now, as she did in opposition to Defendant's motion for summary judgment, that this evidence reflects Harmstad's discriminatory animus and "bear[s] directly on the Defendant's decision not to rehire." *Id.*; *see also* (ECF No. 59 at 15–16). The magistrate judge specifically rejected this position, concluding that "Sirmans' general recollections and characterizations of what Harmstad said, taken at face value, do not provide competent evidence that Harmstad was involved in the consideration of Plaintiff's applications[.]" and noted that "[i]n her deposition Sirmans specifically testified that she had no knowledge of the actual application process of who was involved in considering Plaintiff's applications." (ECF No. 81 at 16). The court agrees with the magistrate judge's conclusion and, having found no clear error, overrules this objection.

4. The Report's scope of comparators is too narrow. (ECF No. 82 at 9–10).

**7* In rejecting Plaintiff's argument that Defendant selectively applied the one-year policy as a pretext for discrimination based on Plaintiff's hearing disability, the magistrate judge concluded that Plaintiff failed "to provide evidence of similarly situated comparators who were rehired within one year of their post-resignation applications." (ECF No. 81 at 13). The magistrate judge determined that Plaintiff's preferred group of comparators—consisting of the individuals who were hired for the positions sought by Plaintiff—was too broad as none of them were former employees subject to the one-year rehire policy. *Id.* at 14 ("In fact, the only similarity between the identified comparators and Plaintiff was that they applied for the same positions. Plaintiff did not and cannot identify any other similarities.").

Plaintiff recycles this argument in objecting to the Report, again ignoring the crucial issue for comparison in this case—whether the individuals hired by Defendant were subject to the one-year policy. (ECF No. 82 at 9). For the reasons stated in the Report, the court agrees with the magistrate judge that Plaintiff failed to identify any similarly situated comparators. This objection is overruled.

5. The Report overlooks Kathy Davis, the known exception to the one-year provision. (ECF No. 82 at 10).

Plaintiff next claims that the magistrate judge overlooked evidence of pretext showing that Defendant made an exception to the one-year rule for Kathy Davis, an employee who Plaintiff believes was similarly situated except for the hearing disability. (ECF No. 82 at 10). The evidence in question included Plaintiff's own vague testimony that it was her understanding that Kathy Davis "resign[ed] from [Defendant] and was rehired within a year into the bankruptcy department." (ECF No. 59-1 at 73). Plaintiff was unable to testify when Kathy Davis left or when she returned, nor could she provide any other details about Kathy Davis's employment. *Id.* at 71–73. To the extent that Plaintiff cites the testimony of Defendant's HR Director Wilson in support of this objection, Ms. Wilson's testimony is hardly helpful. As the magistrate judge observed, "Wilson testified only that an employee named Kathy Davis had moved from foreclosure to bankruptcy, and back to foreclosure," that "she was unsure of the times of those changes," and that "she was unsure whether Kathy Davis's position changes were related to her need for certain educational-related scheduling." (ECF No. 81 at 13). Furthermore, Wilson classified Kathy Davis as an "internal move" from one position to another within the company, not a "rehire." (ECF No. 52-5 at 3). The one-year policy applied to employees who "leave[] the company" altogether. (ECF No. 52-2 at 13). Accordingly, the court agrees with the magistrate judge's conclusion that, even construed in the light most favorable to Plaintiff, the evidence would not permit a reasonable finder of fact to conclude that "exceptions were made for Kathy Davis (or any non-disabled person) under circumstances similar to [Plaintiff's circumstances]." (ECF No. 81 at 13). The court overrules this objection as well.

6. *Furgess* is distinguishable from the present facts. (ECF No. 82 at 10–11).

Plaintiff next argues that *Furgess*, which the magistrate judge cited in the Report (ECF No. 81 at 10), does not support the magistrate judge's conclusions and recommendations, (ECF No. 82 at No. 10). In discussing whether Plaintiff had established her *prima facie* case, the magistrate judge cited *Furgess* to show that, "in the Title VII failure-to-rehire context," summary judgment was justified where a plaintiff was subject to the "employer's policy against rehiring certain individuals" and, as a result, was unable to satisfy the "qualified-for-position prong" of a *prima facie* case of discrimination. (ECF No. 81 at 10–11).

*8 In her objections, Plaintiff contends that "*Furgess* is distinguishable on the grounds that, unlike *Furgess*, similarly situated individuals were rehired by Defendant notwithstanding the one-year provision." (ECF No. 82 at 10). As set forth above, however, the court has found that the magistrate judge correctly concluded that Plaintiff failed to identify any similarly situated comparators. For those same reasons, the court concludes that this objection is not well-taken and provides no basis for rejecting the recommendation of the magistrate judge. Therefore, the court overrules this objection.

7. The Report fails to recognize a material and disputed fact regarding Plaintiff's reports of discrimination during her employment. (ECF No. 82 at 11–14).

This objection repeats the arguments raised in Plaintiff's second objection. *Compare id.* at 5–7, *with id.* at 11–14. In sum, Plaintiff contends that the magistrate judge ignored evidence that was sufficient for a reasonable jury to conclude that Defendant's discriminatory animus, not its one-year policy, was the real reason she was not rehired. Such evidence, according to Plaintiff, consisted of testimony from former co-workers about statements purportedly made by Harmstad denigrating Plaintiff because of her disability; evidence that Harmstad denied Plaintiff's accommodation request for a headset; and Plaintiff's testimony that Harmstad denied her some opportunities that non-disabled coworkers in her position were given. *Id.* at 11–14. As previously discussed, however, the court finds no clear error in the magistrate judge's conclusion that there was no dispute of fact as to whether Harmstad was involved in the decision to rehire Plaintiff or apply the one-year policy. Plaintiff points to nothing in this objection to undermine that conclusion. Accordingly, the court overrules this objection as well.

8. The Report failed to properly consider the "Performance Coaching Form" as evidence of discriminatory animus. (ECF No. 82 at 14–21).

Finally, like Plaintiff's other objections regarding the magistrate judge's consideration of discriminatory animus evidence, this one fails for the same reasons—Plaintiff has failed to create a question of fact regarding Harmstad's involvement in the decision not to rehire Plaintiff. Accordingly, the court overrules this objection.

Thus, having overruled all Plaintiff's objections and finding no clear error in the magistrate judge's analysis or conclusions as to Plaintiff's ADA discrimination claim, the court agrees with and adopts the Report's recommendation that summary judgment be granted in favor of Defendant as to such claim.

B. Plaintiff's objections relating to her state defamation claim

1. Supplemental Jurisdiction

Before addressing Plaintiff's objections, the court considers Plaintiff's suggestion that if the court grants summary judgment as to her federal claim, it remand the remaining state law claim to state court under [28 U.S.C. § 1367\(c\)](#). (ECF No. 82 at 20). Plaintiff's complaint was originally filed in South Carolina state court, asserting both federal and state law claims, and was removed to this court on the basis of federal question jurisdiction pursuant to [28 U.S.C. § 1441\(a\)](#). *See* (ECF No. 1). The only remaining cause of action arises under South Carolina law and is purely a state-law claim. *See* (ECF No. 1-1 at 17–19). “[U]nder the authority of [28 U.S.C. § 1367\(c\)](#), authorizing a federal court to decline to exercise supplemental jurisdiction, a district court has the inherent power to dismiss [a] case or, in cases removed from State court, to remand, provided the conditions set forth in [§ 1367\(c\)](#) for declining to exercise supplemental jurisdiction have been met.” *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 617 (4th Cir. 2001); *see also Moore v. Sears Roebuck & Co.*, No. 3:06cv255-RV/MD, 2007 WL 1950405, at *10 (N.D. Fla. July 2, 2007) (quoting *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1227 (11th Cir. 2002)) (“‘A court may decline to exercise jurisdiction over state-law claims, where the Court has dismissed all the federal claims over which it has original jurisdiction.’”). A district court “may decline to exercise supplemental jurisdiction over a claim” if the “court has dismissed all claims over which it has original jurisdiction.” [28 U.S.C. § 1367\(c\)\(3\)](#). “[T]rial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when federal claims have been extinguished.” *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). “Among the factors that inform this discretionary determination are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy.” *Id.*

***9** As noted above, Defendant is entitled to summary judgment on Plaintiff's federal cause of action under the ADA and, consequently, the state-law defamation claim necessarily predominates because it is the only remaining cause of action. However, Defendant contends that principles of fairness and judicial economy would make remand unfair as the parties have spent considerable time litigating this matter in federal court, discovery has been completed and dispositive motions filed, and that a remand to state court would extend this litigation well into the future. (ECF No. 85 at 22).

This court has previously exercised its discretion to remand state law claims under [§ 1367\(c\)\(3\)](#) even where discovery had been completed and dispositive were pending, concluding that “[i]t will not inconvenience the parties to litigate the remaining state claims in state court” and that “[t]here is also no reason for this court to retain jurisdiction over state law claims which the state court is more suited to hear.” *Flowers v. South Carolina*, No. 8:15-cv-706-TMC, 2015 WL 6903581, at *2 (D.S.C. Nov. 9, 2015). In this case, however, the court concludes that judicial economy and fairness require the court to continue exercising supplemental jurisdiction over the state law claim. In particular, it is unclear from the record whether, if the pending state law claim was refiled in state court, the action would still be removable to federal court based on diversity jurisdiction. Moreover, the present action has been pending for a substantially longer period of time than the action in *Flowers*. Plaintiff's request for remand is cursory and sets forth no reasons for the court to do so. Accordingly, the court will address Plaintiff's remaining objections as to her defamation cause of action.

2. The statute of limitations only bars one alleged statement of defamation. All other statements are not barred by the statute of limitations. (ECF No. 82 at 15).

The magistrate judge concluded that because Plaintiff filed her complaint on November 5, 2018, South Carolina's two-year statute of limitations for defamation actions, *see S.C. Code Ann. § 15-3-550*, bars Plaintiff from seeking relief based on any defamatory comments alleged to have been made prior to November 5, 2016. (ECF No. 81 at 25). The magistrate judge also concluded that numerous other alleged defamatory remarks identified by Plaintiff in opposition to summary judgment, *see* (ECF No. 59 at 30–31), lacked sufficient specificity for the court to determine when they were made and, therefore, were time-barred.

as well. (ECF No. 81 at 26–29). These time-barred statements included the following: (1) that Harmstad “spoke disparagingly of [Plaintiff] ... so frequently that the dates were too numerous to count”; (2) that Harmstad, “[e]very time Plaintiff went to lunch or was out for the day would openly discuss all of the terrible things Ms. Davis did and said[,] and constantly said Plaintiff was crazy, a lunatic, and off her rocker, and so forth”; (3) that Harmstad “disparaged [Plaintiff] so often when she worked [for Defendant]” that “Sirmans and coworkers just put in earplugs to listen to music because they were tired of Harmstad’s complaining about her staff”; and (4) that Harmstad “was still dragging [Plaintiff’s] name through the mud although Plaintiff had not worked [for Defendant] for months.” *Id.* at 26–27 (internal quotation marks omitted); *see also* (ECF No. 59 at 30–31).

In her objections, Plaintiff concedes that any defamatory statements prior to November 5, 2018 are barred by the statute of limitations. (ECF No. 82 at 15). However, Plaintiff suggests that the only statement made prior to that date was Harmstad’s alleged statement concerning Plaintiff’s use of “the disability card.” *Id.* Plaintiff does not, however, specifically object to the magistrate judge’s conclusion that the statements identified in the Report lacked specificity and, therefore, were barred by the statute of limitations. Accordingly, the court reviews that portion of the Report for clear error. Finding no such error, the court overrules this objection.

3. The defamatory statements found in the Report to lack sufficient detail are still actionable because they constitute defamation *per se*. (ECF No. 82 at 15–16).

*10 Separate and apart from the conclusion that the statute of limitations barred certain statements, the magistrate judge concluded that numerous other alleged defamatory remarks⁵ were so lacking in detail that they did “not permit the court to determine whether the alleged remarks were (a) of a potentially defamatory nature; (b) made after November 5, 2016 (so as to be timely); or (c) were made to persons to permit the court to determine whether nonprivileged publication took place.” (ECF No. 81 at 28). Accordingly, the magistrate judge determined that these alleged defamatory statements did not constitute actionable defamation. *Id.*

Plaintiff objects to this portion of the Report on the basis that these statements constitute defamation *per se* because they suggest Plaintiff is unfit for her profession. (ECF No. 82 at 15). Under South Carolina law, “[s]lander is *actionable per se* when the defendant’s alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) *unfitness in one’s business or profession*.” *McBride v. Sch. Dist. of Greenville Cty.*, 698 S.E.2d 845, 852 (S.C. Ct. App. 2010) (emphasis added) (internal quotation marks omitted). “When the statement is classified as actionable *per se*, the defendant is presumed to have acted with common law malice, and the plaintiff is presumed to have suffered general damages.” *Id.* (internal quotation marks omitted). The effect of classifying a defamatory statement as actionable *per se* is to relieve the plaintiff of the burden of “plead[ing] and prov[ing] both common law malice and special damages.” *Id.* (internal quotation marks omitted). According, as noted by Defendant in its reply, “[t]he actionable *per se* determination is relevant to the damages prong of a defamation claim” and not “whether a statement constitutes actionable defamation” in the first instance. (ECF No. 85 at 15). This objection misses the crux of the magistrate judge’s specificity analysis, and the court finds it to lack merit. This objection is overruled.

4. Plaintiff’s objections with respect to pages 29–36 of the Report regarding statements constituting opinion or hyperbole or protected by qualified privilege

The magistrate judge considered the following alleged defamatory statements that she had not already determined to be time-barred or to lack sufficient specificity:

4. “[Harmstad said] ‘She’s crazy if she thinks she’s going to come back here and work with me.’ ” (numbered statement 4).
5. “It had been in no uncertain terms that she [Harmstad] was saying that what Ms. Davis had done was wrong.” (numbered statement 5).

6. “It was ridicule and disbelief that Ms. Davis could think that she could ever come back and work in that position under her ever again.” **(numbered statement 6).** ...

9. “My concern was built upon the concerns that Kim Harmstad consistently drilled into our team's head, that when we trained with Charlene, Charlene would say the same thing: Anything that Deborah did or instructed you on, do not listen to because it most likely is incorrect. Kim said that if she works on any of your files to make sure you look over everything because most likely it's not done correctly.” **(numbered statement 9).**

12. “[Harmstad said] ‘Guess who passed the bar? Nobody will ever be going to her.’ ” **(numbered statement 12).**

*11 14. “Harmstad got on the phone with our main contact [at outside attorney Kelly Kronenberg's office] ... and said, you know, that everything that Deborah had said or done during her employment with Shellpoint was to be discarded, disregarded, and not taken into consideration from that point forward, that she incorrect, that she was wrong.” **(numbered statement 14).**

17. “[Harmstad said of Plaintiff] that she would have to go into her own practice because nobody would hire her because she is a lunatic[.]” **(numbered statement 17).**

21. “Ms. Harmstad apprised everyone in the Foreclosure Department that Ms. Harmstad had no choice at that point but to keep Ms. Davis now, not only because Ms. Jones said so, but because Ms. Davis was ‘playing up’ the deaf disability.” **(numbered statement 21).**

25. Each time after Ms. Davis applied for her old position on or around March 6, 2017, May 1, 2017, and June 6, 2017, Ms. Harmstad would complain about Ms. Davis again and drag Ms. Davis's name through the mud. Ms. Harmstad referred to Ms. Davis’ disability, and claimed that Ms. Davis would use her disability against Shellpoint. Ms. Harmstad admitted “there was no way that I would bring her back into the department.” It was implied by Ms. Harmstad's conduct that Ms. Harmstad would not re-hire Ms. Davis because of Ms. Davis's disability, especially with the number of times Ms. Harmstad disparaged Ms. Davis because of Ms. Davis's hearing disability. **(numbered statement 25).**

(ECF No. 81 at 29–30 (citing ECF Nos. 59-4 at 35, 46, 50; 59-11 at 44, 129, 142, 204) (internal citations omitted) (emphasis added)).

The magistrate judge first determined that these statements were not “susceptible of having a defamatory meaning.” *Id.* at 31. The magistrate judge concluded that some of Harmstad's alleged statements—for example, that “nobody would hire her because she is a lunatic”—constituted hyperbole “not based on ascertainable facts that could be shown to be true or false,” while others were mere expressions of opinion—for example, that “if [Plaintiff] works on any of your files to make sure you look over everything because most likely it's not done correctly.” *Id.*⁶

The magistrate judge then determined that, to the extent Harmstad's alleged statements related to the plaintiff's work product, they were subject to a qualified privilege and, therefore, were not defamatory as a matter of law. *Id.* at 33–36. The magistrate judge explained that, because “Harmstad was Plaintiff's supervisor and had a business need to analyze and critique her work performance ... to others who worked in the same department or to someone at a law firm who worked with the department,” her alleged statements to Plaintiff's co-workers that her work “had been ‘wrong’ or ‘incorrect’ ” were covered by the qualified privilege. *Id.* at 34–35.

Accordingly, the magistrate judge recommended that Defendant's motion for summary judgment be granted as to the defamation cause of action, having found that “[t]he allegedly defamatory facts are either true, nonspecific, protected opinion/hyperbole, or protected by the non-waived qualified privilege relating to work performance.” *Id.* at 35–36.

a. (Objections 10.1 and 10.2) Objections to the Report's privilege determination. (ECF No. 82 at 16–18).

*12 Plaintiff objects on the basis that Harmstad's alleged defamatory statements were not privileged because they (1) “cannot be said to have been made in good faith based on their frequency, their timing, and their subject matter[,]” and (2) “served no business purpose.” (ECF No. 82 at 17 (citations omitted)). To show a question of fact exists, Plaintiff points to Sirmans’ testimony that “Harmstad would openly discuss all of the terrible things [Plaintiff] did and said[,]” called Plaintiff “‘crazy’, a lunatic, and off her rocker,” and “spoke disparagingly of [Plaintiff] to the point that [it] occurred so frequently in [Plaintiff's] absence that the dates were too numerous to count for me to recall every single time such behavior occurred.” (ECF Nos. 52-12 at 6, 8; 59 at 10). Plaintiff further argues that even if the privilege did apply, Harmstad's statements in front of her co-workers exceeded the scope of the privilege because her co-workers “did not have an interest in a supervisor's characterization of her performance.” (ECF No. 82 at 18).

Plaintiff's objections essentially rehash the arguments made to and rejected by the magistrate judge. (ECF No. 59 at 25). Plaintiff is not permitted a second bite at the apple; accordingly, the court considers these objections under the clear error standard. *See Ray J. v. Saul*, No. 5:20-cv-1835-BHH, 2021 WL 2644318, at *3 (D.S.C. June 28, 2021). After carefully reviewing the magistrate judge's detailed and thorough analysis, the court finds no clear error. The record evidence highlighted by Plaintiff in this objection consists of vague or hyperbolic statements that did not relate to Plaintiff's work performance and were, therefore, not even covered by the magistrate judge's qualified privilege determination. Furthermore, even if the court concluded it could not sustain the qualified privilege analysis set forth in this portion of the Report, the court would nevertheless adopt this section of the Report (ECF No. 81 at 29–36) based on the magistrate judge's conclusion—to which Plaintiff does not object—that the alleged statements at issue are “either too vague or protected hyperbole or opinion,” *id.* at 35. Accordingly, the court rejects this objection.

b. (objections 11 and 12) The Report erroneously cites and relies upon Cain and Todd. (ECF No. 82 at 19–20).

The magistrate judge cited *Cain v. Providence Hosp., LLC*, No. 3:18-cv-2120-JFA-SVH, 2020 WL 1149724, at *8 (D.S.C. Mar. 10, 2020), for the general proposition that “insinuations that plaintiff was not doing her job properly were not actionable defamation when plaintiff was disciplined for not doing her job properly.” (ECF No. 81 at 31). The magistrate judge cited *Cain* in passing to support her conclusion that, to the extent Harmstad stated Plaintiff did a poor job, her comments were not defamatory in light of the reprimands and performance-based coaching Harmstad gave to Plaintiff during her employment. *See id.* The court agrees with the magistrate judge that *Cain* is generally relevant and finds that its inclusion in the Report did not constitute an error.

Plaintiff likewise objects to the magistrate judge's single citation cross-referencing *Todd v. S. State Bank*, No. 2:15-cv-0708-RMG, 2015 WL 6408121, at *3 (D.S.C. Oct. 22, 2016), for the proposition that hyperbolic statements indicating a plaintiff was fired because she was “‘crazy,’ ‘unstable,’ and ‘out of control’ ” did not constitute defamation *per se*. (ECF No. 81 at 31–32). Plaintiff argues that *Todd* still allows that such statements could constitute defamation *per quod*—that is, a jury could infer from circumstances surrounding the statements that there was a defamatory meaning behind the words. (ECF No. 82 at 19–20); *Todd*, 2015 WL 6408121, at *8 (denying motion to dismiss and explaining that “[w]hile the terms ‘crazy, unstable and out of control’ may not, on their face, be considered defamatory ... these terms are alleged here to have been used in the context of being the reason that Plaintiff had to be fired from her job”). Thus, Plaintiff suggests that *Todd* actually supports her position that a question of material fact exists that would preclude summary judgment. Unlike *Todd*, however, this matter is before the court on a motion for summary judgment, rather than a motion to dismiss. As Defendant points out, “Plaintiff has failed to provide any extrinsic facts with regard to the context of these statements and fails to adequately respond to Defendant's contention that these statements lack the required level of specificity.” (ECF No. 85 at 20–21).

V. CONCLUSION

***13** For the reasons set forth above, the court adopts the Report, incorporates its findings and conclusions herein, and accepts the recommendation of the magistrate judge that Defendant's motion for summary judgment be granted. Accordingly, the court **GRANTS** Defendant's motion for summary judgment (ECF No. 52).

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 3088059

Footnotes

- 1 Plaintiff also asserted claims under the Fair Labor Standards Act and the South Carolina Payment of Wages Act. These claims, however, were dismissed pursuant to a stipulation of dismissal. (ECF No. 26).
- 2 The magistrate judge noted that to establish a failure to rehire claim under the ADA, a plaintiff must prove that: “(1) she is within the ADA's protected class; (2) she applied for the position(s) in question; (3) she was qualified for the position(s); and (4) the defendant rejected her application under circumstances that give rise to an inference of discrimination.” *Id.* at 9 (citing *Hinson v. City of Columbia*, No. 3:12-01032-MBS, 2013 WL 5409140, at *5 (D.S.C. Sept. 24, 2013), *aff'd*, 564 F. App'x 11 (4th Cir. 2014)).
- 3 Plaintiff asserts what purports to be a thirteenth “objection”—that if the Court does adopt the Report as it relates to the ADA cause of action, the Court should opt not to exercise supplemental jurisdiction over the state-law defamation claim.
- 4 Plaintiff also asserts that, upon passing the bar exam, she dramatically enhanced her skillset such that a departure from the one-year rehiring bar would be warranted. (ECF No. 82 at 6). Plaintiff, however, fails to explain specifically how passing the bar exam would have equipped her with a relevant and hard-to-find skillset. This argument rests on Plaintiff's unsupported assumptions and, therefore, does not afford a basis for rejecting the magistrate judge's analysis or recommendations.
- 5 These statements are catalogued on pages 27 and 28 of the Report, (ECF No. 81 at 27–28), and identified in Plaintiff's memorandum in opposition to summary judgment on pages 9 and 10, (ECF No. 59 at 9–10).
- 6 Specifically, the magistrate judge identified numbered statements 12, 17, 21, and 25 as statements of opinion, laced with hyperbole and numbered statements 5, 6, 9, 14, 21, and 25 as statements that Harmstad believed to be true based on her opinion. (ECF No. 81 at 31).

2024 WL 4196552

Only the Westlaw citation is currently available.

United States Court of Appeals, Fifth Circuit.

Brett Lorenzo FAVRE, Plaintiff—Appellant,

v.

Shannon SHARPE, Defendant—Appellee.

No. 23-60610

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FILED September 16, 2024

Synopsis

Background: Former professional football player filed defamation action in state court against co-host of sports talk show. Following removal, the United States District Court for the Southern District of Mississippi, [Keith Starrett](#), Senior District Judge, [2023 WL 7132949](#), dismissed complaint, and plaintiff appealed.

The Court of Appeals, [Southwick](#), Circuit Judge, held that co-host's statements about player's alleged receipt of government welfare funds were non-actionable.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

Appeal from the United States District Court for the Southern District of Mississippi, USDC No. 2:23-CV-42, [Keith Starrett](#), U.S. District Judge

Attorneys and Law Firms

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Before [Southwick](#) and [Duncan](#), Circuit Judges, and Kernodle, District Judge. *

Opinion

[Leslie H. Southwick](#), Circuit Judge:

*1 This suit is between two former professional football players. The defendant ex-player was a co-host of a sports talk show during which he said the plaintiff stole funds from a government program meant for those living in poverty. The plaintiff sued for defamation, but the district court categorized the talk-show comments as hyperbole for which there was no liability. The court dismissed the suit on the pleadings. We apply a different doctrine that also protects the comments and AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Brett Favre is a Mississippi native. He was a star football player for the University of Southern Mississippi (“USM”) and then had a lengthy professional career, primarily with the Green Bay Packers of the National Football League. He was named three times as the NFL's Most Valuable Player, had a Super Bowl victory, and was selected for the NFL Hall of Fame. Much more recently, his public image has been somewhat tarnished by his connection to individuals who were convicted for the misuse of government welfare funds and his alleged receipt of some of those funds.

We start with an explanation of the misuse of funds.¹ In October 2021, the Mississippi State Auditor's Office determined more than \$77 million in federal Temporary Assistance for Needy Families (“TANF”) funds intended to help impoverished Mississippians were used for illegal purposes across the state. To date, six individuals have pled guilty to state and federal felony charges related to their involvement in this scandal. Favre has not been criminally charged. Mississippi's Department of Human Services (“MDHS”) filed a civil suit in May 2022 against Favre and numerous persons, seeking to recover TANF funds that were unlawfully diverted between 2016 and 2019.

MDHS initially sought to recover \$1.1 million in TANF funds Favre received from the non-profit Mississippi Community Education Center, Inc. (“MCEC”) in 2017 and 2018 for speaking engagements that he never performed. Favre had repaid the funds prior to MDHS's suit. MDHS amended its complaint to recover \$5 million in TANF funds Favre allegedly arranged to be used to fund the construction of a new USM volleyball facility. According to MDHS, Favre was unable to encourage sufficient donations for the facility's construction, so he turned to the non-profit MCEC to help secure the \$5 million in funding. TANF funds were ultimately used on the project.

*2 Local and national news outlets continued to cover developments in the welfare scandal and Favre's alleged involvement. During that time, two events occurred that gave rise to this lawsuit. The first was a September 13, 2022, article in an online news source called *Mississippi Today*. The article detailed the MDHS's recent filing of a civil suit against Favre. The article included text messages between Favre and one of the six individuals later convicted in the scandal, Nancy New, that discussed the construction funding of USM's volleyball facility and how it was likely the media would not determine the source of the funds.² According to the *Mississippi Today* article, these texts were proof that Favre worked with New to orchestrate MCEC's use of the \$5 million in TANF funds for the volleyball facility. The article stated the separate \$1.1 million was a way to receive more funds for the project. It also acknowledged Favre denied knowing the money received for the project came from the TANF program.

The other event underlying this suit occurred the day after the *Mississippi Today* article appeared online. The defendant, Shannon Sharpe, along with Skip Bayless, hosted a nationally broadcasted sports talk show called *Undisputed*. Sharpe also had an exceptional professional football career. He played 14 seasons in the NFL, was on three Super Bowl winning teams, and was inducted into the NFL Hall of Fame. The relevant segment opened with the moderator briefly summarizing the *Mississippi Today* article and then asking Sharpe for his thoughts about its impact on Favre's legacy. Sharpe and Bayless then engaged in an eleven-minute discussion about Favre, the welfare scandal, and MDHS's civil suit. The hosts provided colorful and derogatory views on the article, calling Favre “a sleazeball,” “shady,” “gross[],” and a “diva,” and accusing Favre of “steal[ing],” “egregious” behavior, and “illegal activity.”

Favre viewed three of Sharpe's statements as defamatory:

1. “The problem that I have with this situation, you've got to be a sorry mofo to steal from the lowest of the low”;
2. “Brett Favre is taking from the underserved” in Mississippi; and
3. Favre “stole money from people that really needed that money.”

Favre sent Sharpe a letter demanding he retract these statements, apologize, and cease and desist from making any “further defamatory falsehoods against Favre.” Sharpe refused. Favre sued for defamation in a Mississippi state court. Favre alleged in his complaint that these three statements injured his reputation, falsely accused him of serious crimes, and were defamatory in nature.

Sharpe removed the case to the United States District Court for the Southern District of Mississippi based on diversity jurisdiction. He then filed a [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) motion to dismiss Favre's complaint for failure to state a claim. Sharpe argued (1) the challenged comments are “a classic example of the kind of rhetorical hyperbole and loose, figurative language” protected by the First Amendment, and (2) Mississippi law protects Sharpe's critical comments because they discuss a matter of public concern and are drawn from official proceedings.

The district court granted Sharpe's [Rule 12\(b\)\(6\)](#) motion because Sharpe's comments were “mere rhetorical hyperbole,” which made the comments “unactionable.” The court concluded that “no reasonable person listening to the Broadcast would think that Favre actually went into the homes of poor people and ... committed the crime of theft/larceny” because “[l]isteners would have recognized Sharpe's statements as rhetorical hyperbole.” Favre timely appealed.

DISCUSSION

We review a [Rule 12\(b\)\(6\)](#) dismissal *de novo*. [Allen v. Hays](#), 65 F.4th 736, 743 (5th Cir. 2023). To survive a [Rule 12\(b\)\(6\)](#) motion, “the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (quotation marks and citations omitted). “A plaintiff need not provide exhaustive detail to avoid dismissal, but the pleaded facts must allow a reasonable inference that the plaintiff should prevail.” [Mandawala v. Ne. Baptist Hosp.](#), 16 F.4th 1144, 1150 (5th Cir. 2021). We take the factual allegations in the complaint as true but disregard conclusory allegations and legal conclusions. *Id.*; [Allen](#), 65 F.4th at 743. We resolve “[a]ll questions of fact ... in the plaintiff's favor.” [Lewis v. Fresno](#), 252 F.3d 352, 357 (5th Cir. 2001).

*3 The district court ruled only on Sharpe's rhetorical-hyperbole argument when it concluded Favre's defamation claim failed as a matter of law. It did not analyze Sharpe's other grounds, which were that his statements were protected under Mississippi law as opinions based on disclosed facts or as reports of official proceedings. This court may affirm a district court's dismissal of a suit for failure to state a claim “on any basis supported by the record.” [Ferrer v. Chevron Corp.](#), 484 F.3d 776, 780–81 (5th Cir. 2007). A different ground raised as a defense provides the clearest ground on which to rule. We therefore do not analyze rhetorical hyperbole and instead analyze whether the statements were protected opinions based on disclosed factual premises.

Our analysis does not turn on the mere labeling of a statement as “fact” or “opinion.” [Roussel v. Robbins](#), 688 So. 2d 714, 723 (Miss. 1996) (discussing [Milkovich v. Lorain J. Co.](#), 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)). “[A] statement, even if phrased as an opinion, will not enjoy constitutional protection if the court concludes that its substance or gist could reasonably be interpreted as declaring or implying an assertion of fact.” [Franklin v. Thompson](#), 722 So. 2d 688, 693 (Miss. 1998) (quotation omitted). Instead, “[t]he relevant inquiry is whether the statement could be reasonably understood as declaring or implying a provable assertion of fact.” *Id.* (quotation omitted); see also [Milkovich](#), 497 U.S. at 21–22, 110 S.Ct. 2695.

Mississippi recognizes that “a defamatory communication may [be] ... in the form of an opinion,” and “[o]pinion statements are actionable only if they clearly and unmistakably imply the allegation of undisclosed false and defamatory facts as the basis for the opinion.” [Ferguson v. Watkins](#), 448 So. 2d 271, 275–76 (Miss. 1984); see [RESTATEMENT \(SECOND\) OF TORTS § 566](#) (AM. L. INST. 1977). Further, “offensive insults and opinion statements” “generally are not actionable in Mississippi” unless they meet the [Ferguson](#) standard. [Trout Point Lodge, Ltd. v. Handshoe](#), 729 F.3d 481, 493 (5th Cir. 2013). This is because “nothing in life or our law guarantees a person immunity from occasional sharp criticism,” and “no person avoids a few linguistic slings and arrows, many demonstrably unfair.” *Id.* (alterations and citation omitted). Thus, “strongly stated [opinions] ... based

on truthful established fact ... are not actionable under the First Amendment.” *Id.* (quoting *Texas Beef Grp. v. Winfrey*, 201 F.3d 680, 688 (5th Cir. 2000)). The Mississippi Supreme Court has described such “[c]austic commentary” based on disclosed facts as “fair comment[s].” *Ferguson*, 448 So. 2d at 276.

Sharpe argues his statements are protected opinions and editorial “fair comments” on a publicly known matter, and “even ‘contemptuous language’ and ‘unfair’ criticism regarding reported facts cannot be defamatory.” He asserts the *Undisputed* broadcast clearly stated its factual basis was Favre’s widely reported involvement in the welfare scandal and that involvement was a matter of public concern. Because Sharpe expressed his views on these “truthful established fact[s],” he argues he was entitled to voice his “sharp criticism” of Favre’s conduct.

Favre disagrees and argues that, even if Sharpe’s statements are considered protected opinions, those statements are still actionable because Sharpe did not provide a correct and complete recitation of “the facts upon which he base[d] his opinion” and the statements “imply a false assertion of fact.” See *Milkovich*, 497 U.S. at 18–19, 110 S.Ct. 2695. According to Favre, “the factual basis for Sharpe’s purported opinions was incorrect and incomplete” because the *Undisputed* broadcast omitted facts from the *Mississippi Today* article about Favre’s contributions to USM and about who initiated the funding process for USM’s volleyball facility.³

*4 Sharpe’s statements — in response to facts widely reported in Mississippi news and specifically in the just-released *Mississippi Today* article — could not have been reasonably understood as declaring or implying a provable assertion of fact. His statements are better viewed as strongly stated opinions about the widely reported welfare scandal. As for the supposed factual inaccuracies with which Favre takes issue, those inaccuracies were corrected during the segment. Bayless correctly stated that “as yet [Favre] has not been criminally charged,” and he amended Sharpe’s one inaccurate statement that Favre had not repaid the additional \$1.1 million in TANF funds by acknowledging that Favre had repaid everything but the interest on \$1.1 million. Sharpe also mentioned Favre’s assertion that he did not know the source of the funds. Because Favre does not allege any remaining statements in the broadcast were false, there were no actual inaccuracies. Instead, the facts were fully disclosed to the listeners and contained no “clear falsity of fact.” *Ferguson*, 448 So. 2d at 273.

It is understandable that Favre considers Sharpe’s statements to be contemptuous. Nonetheless, the *Undisputed* program did not imply that Sharpe was relying on any undisclosed facts. He instead relied only on facts widely reported in Mississippi news and specifically in the just-released *Mississippi Today* article. Though there was no claim by *Mississippi Today* that Favre had committed a crime, there also was no implication from Sharpe’s statements that he was relying on information from other sources when he said Favre “stole money” and took from the “underserved.” At the time Sharpe made the statements, the facts on which he was relying were publicly known, and Sharpe had a right to characterize those publicly known facts caustically and unfairly. Sharpe’s statements were his “strongly stated” opinions “based on truthful established fact[s],” and thus nonactionable. *Trout Point Lodge*, 729 F.3d at 493 (quotation omitted).

AFFIRMED.

All Citations

--- F.4th ----, 2024 WL 4196552

Footnotes

* United States District Judge for the Eastern District of Texas, sitting by designation.

- 1 Both parties submitted documents to the district court that go beyond the four corners of Favre's complaint to provide details on the welfare scandal. Although a “district court generally must not go outside the pleadings,” it “may consider documents attached to a motion to dismiss that are referred to in the plaintiff's complaint and are central to the plaintiff's claim.” *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010) (quotation marks and citations omitted). The district court took judicial notice of documents and facts related to the welfare scandal, finding them “integral to Favre's claim.” See *id.* We will not explore the reach of judicial notice but will set out some of these details because neither party objected to their use by the district court.
- 2 New is the former president and CEO of the MCEC non-profit, which received and illegally disbursed TANF funds. She pled guilty to 13 felony counts related to the scandal.
- 3 After briefing concluded, Favre submitted a 28(j) letter to notify the court of a recent Second Circuit opinion that vacated a Rule 50 judgment and jury verdict. See *Palin v. New York Times Co.*, — F.4th —, No. 22-558, 2024 WL 3957617 (2d Cir. Aug. 28, 2024). There, the Second Circuit considered “whether the evidence at trial was sufficient for Palin to prove that the defendants published the challenged statements with actual malice, as required for public-figure defamation plaintiffs.” *Id.* at —, 2024 WL 3957617, at *7. That is not the issue before this court, and we do not find the opinion relevant to the resolution of this case.

2011 WL 925719

Not Officially Published

(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.
Court of Appeal, Second District, Division 5, California.

John IBARRA, Plaintiff and Appellant,

v.

David C. CARPINELLO et al., Defendants and Respondents.

No. B220934.

|

(Los Angeles County Super. Ct. No. BC415273).

|

March 18, 2011.

|

As Modified March 23, 2011.

APPEAL from orders of the Superior Court of Los Angeles County, [Zaven V. Sinanian](#), Judge. Affirmed, and remanded to determine attorney fees and costs.

Attorneys and Law Firms

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[MOSK, J.](#)

INTRODUCTION

***1** Plaintiff and appellant John Ibarra brought an action, inter alia, for defamation against defendants and appellants David Carpinello and Punch Drunk Gamer, Inc. (PDG), ¹ Hearst Corporation (Hearst) and Houston Chronicle (Chronicle). ² Plaintiff appeals from the trial court's orders granting defendants' special motions to strike (SLAPP motions), which motions were filed pursuant to [Code of Civil Procedure section 425.16](#) (anti-SLAPP statute). ³ We affirm the orders because plaintiff did not show a probability of prevailing on his claims in that he did not submit a prima facie case showing the required malice. We remand the matter to the trial court for a determination of appellate attorney fees and costs to be awarded defendants.

BACKGROUND

A. Factual Background

For more than 28 years, plaintiff had been a trainer and manager of mixed martial arts fighters, and from July 2005 to July 2008, he trained Quinton “Rampage” Jackson. In July 2008, 10 days after Jackson lost a championship fight, he was arrested at gunpoint and booked for evading officers, hit and run driving, and reckless driving arising from Jackson's involvement in a series of vehicle accidents. Jackson was also placed in a psychiatric ward for 72 hours. Also after Jackson lost the championship fight, Jackson fired plaintiff as his trainer. Numerous websites reported that Jackson's decision to fire plaintiff appeared to “involve[] money.”

On September 4, 2008, Carpinello, the PDG founder, publisher, and editor interviewed Tito Ortiz, a mixed martial arts fighter for the PDG website. The interview was published on the PDG website and included the following exchange: “PDG: [W]hat do you think of [Jackson] changing trainers and camps from ... [plaintiff] to Team Wolfslair? [¶] Ortiz: Let me explain this to you because it really pisses me off that [plaintiff] has done what he has done, he is a thief. I have been running training camps for seven years up in Big Bear California and the most that my camp has cost a fighter to attend is \$35,000. [Plaintiff] was charging Jackson \$65,000 to go to Big Bear. I don't understand that!! He was being very disrespectful and taking advantage of [Jackson]. Including travel, training partners, food and lodging, the most ever [that I charged for a training camp] was \$35,000, maybe if you flew in more trainers [I would charge] \$40K. Where did that extra money go that [plaintiff] was charging? [Jackson] is really pissed and he feels betrayed and that he was taken advantage of and I couldn't agree more with him. I don't care if [plaintiff] reads this or hears about it anywhere, he already knows that he is blackballed. I don't care who you are; fighters work very hard for the money they earn and I feel slighted for even knowing [plaintiff].”

On September 8, 2008, Jared Barnes, an author of a weblog⁴ for Chronicle defendants, republished Ortiz's comments and added his own thoughts on Jackson's termination of his relationship with plaintiff, stating, “[Ortiz's comments are] the first time anyone has given any kind of public explanation for what happened between [plaintiff] and [Jackson]. And while [Jackson] has reason to feel betrayed, deceived, hurt etc. it's still extremely difficult to justify his hit-and-run antics and temporary God complex because of it. Everyone is going to get taken sometime over the span of their life and while it's tough to deal with, it has to be dealt with like a grown up, not like a kid with access to a monster truck. [¶] The way to deal with [plaintiff] is to take him to court or to publically state how much of a crook he is which is sure to black ball him from the sport. Let's hope other fighters can learn what not to do in this situation from the now infamous Jackson incident. But, then again rampages through So. Cal. by pro MMA fighters are pretty great fodder for blogging.”

*2 On May 13, 2009, plaintiff's counsel sent a letter to PDG defendants stating that Ortiz's statements during the September 4, 2008, interview that plaintiff “was ‘a thief’ and impl[ying] that ... [plaintiff had] stolen from and taken advantage of” Jackson were false and defamatory and demanded an immediate retraction. In response, PDG defendants advised plaintiff's counsel that they were standing by the story, refused “[a]t this time” to retract it, and invited plaintiff “to offer his side of the events which, following reasonable investigation to confirm accuracy could appear on the front page of PDG.” Plaintiff asserts that on May 20, 2009, plaintiff's counsel sent a letter to Chronicle stating that Ortiz's statements during the September 4, 2008, interview that plaintiff was a thief and conveying that plaintiff stole from and took advantage of Jackson were false and defamatory and demanded an immediate retraction.

B. Procedural Background

On June 5, 2009, plaintiff filed a complaint against 26 parties associated with mixed martial arts websites, including defendants, alleging four causes of action: defamation, invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff bases each of the causes of action on the publication of Ortiz's September 4, 2008, statements, and on any “added defamatory remarks” made in the publications.

Defendants filed special motions to strike the lawsuit under [section 425.16](#). The trial court ruled on the evidentiary objections. The trial court excluded the retraction letter sent to the Chronicle as not authenticated and lacking in evidence it was received. The trial court granted the motions, finding that plaintiff did not show a probability of prevailing on his claims.

DISCUSSION

A. Standard of Review

An order granting a special motion to strike under [section 425.16](#) is directly appealable. (§§ 425.16, subd. (i), 904.1, subd. (a) (13).) We review the trial court's order de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325, 46 Cal.Rptr.3d 606, 139 P.3d 2; *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 79, 55 Cal.Rptr.3d 600.) We do not weigh the evidence; rather, we accept as true evidence favorable to plaintiff, and evaluate evidence favorable to defendant to determine whether it defeats plaintiff's claim as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3, 46 Cal.Rptr.3d 638, 139 P.3d 30; *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279, 55 Cal.Rptr.3d 544.)

Courts have said that they review a trial court's evidentiary rulings in connection with an anti-SLAPP motion for an abuse of discretion. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3, 63 Cal.Rptr.3d 798; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444, 57 Cal.Rptr.3d 885.) They based this on the purported standard of review of evidentiary rulings in summary judgment motions. But in *Reed v. Google, Inc.* (2010) 50 Cal.4th 512, 535, 113 Cal.Rptr.3d 327, 235 P.3d 988 the Supreme Court recently said, “we need not decide generally whether a trial court's rulings on evidentiary objections based on papers along in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo.” We do not have to resolve that issue here.

B. Legal Principles

*3 “ ‘A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted [Code of Civil Procedure section 425.16](#)—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]’ (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056 [39 Cal.Rptr.3d 516, 128 P.3d 713].)” (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 34, 64 Cal.Rptr.3d 348.) “The goal [of [section 425.16](#)] is to eliminate meritless or retaliatory litigation at an early stage of the proceedings.” (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806, 119 Cal.Rptr.2d 108.)

[Section 425.16](#), provides that “[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) In considering the application of the anti-SLAPP statute, courts engage in a two-step process. “ ‘First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.... If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.’ (Citation.)” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712, 54 Cal.Rptr.3d 775, 151 P.3d 1185.) “ ‘ ‘The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]’ [Citation.]” [Citations.]’ (*Rohde v. Wolf, supra*, 154 Cal.App.4th at pp. 34–35, 64 Cal.Rptr.3d 348.) “ ‘Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456, 125 Cal.Rptr.2d 534.)

Plaintiff does not challenge the trial court's ruling that defendants met their initial burden under the anti-SLAPP statute—that the challenged cause of action is one arising from protected activity. The only issue is whether the trial court correctly determined that plaintiff did not establish a probability of prevailing on his claims.

C. Probability of Prevailing on the Merits

1. Plaintiff's prima facie showing of a likelihood of prevailing

“To demonstrate a probability of prevailing on the merits, the plaintiff must show that the complaint is legally sufficient and must present a prima facie showing of facts that, if believed by the trier of fact, would support a judgment in the plaintiff's favor. [Citations.] The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.] The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment. [Citations.]” (*Hall v. Time Warner, Inc.*, *supra*, 153 Cal.App.4th at p. 1346, 63 Cal.Rptr.3d 798; see *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719–720, fn. 5, 34 Cal.Rptr.2d 898, 882 P.2d 894; *1–800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585, 132 Cal.Rptr.2d 789.) Plaintiff contends he demonstrated a likelihood he would prevail on the merits of his claims.

2. Defamation

*4 The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. (Civ.Code, §§ 45, 46; *Taus v. Loftus*, *supra*, 40 Cal.4th at p. 720, 54 Cal.Rptr.3d 775, 151 P.3d 1185.) Plaintiff contends that “Ortiz's assertion that [plaintiff] ‘is a thief’ and his related remarks” were false and defamatory. Plaintiff also contends Chronicle defendants defamed him because Barnes stated that plaintiff was a “crook,” and Barnes's statements generally adopted Ortiz's remark that plaintiff was a thief.

There is no dispute that because plaintiff is a public figure, in order to prevail, he must establish that defendants acted with actual malice. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686; *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 262, 79 Cal.Rptr.2d 178, 965 P.2d 696; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256, 208 Cal.Rptr. 137, 690 P.2d 610.) “[A]ctual malice means that the defamatory statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’” (*New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254, 280 [84 S.Ct. 710, 726].) Reckless disregard, in turn, means that the publisher ‘in fact entertained serious doubts as to the truth of his publication.’ (*St. Amant v. Thompson* [(1968)] 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262.) To prove actual malice, therefore, a plaintiff must ‘demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.’ (*Bose Corp. v. Consumers Union of U.S., Inc.* [(1984)] 466 U.S. 485, 511, 104 S.Ct. 1949, 80 L.Ed.2d 502, fn. 30 [104 S.Ct. 1949, 1965]; see also *McCoy v. Hearst Corp.* [(1986) 42 Cal.3d 835, 860 [231 Cal.Rptr. 518, 727 P.2d 711].) [¶] Actual malice is judged by a subjective standard; otherwise stated, ‘there must be sufficient evidence to permit the conclusion that the defendant ... had a “high degree of awareness of ... probable falsity.”’ (*Harte-Hanks Communications v. Connaughton* [(1989)] 491 U.S. 657, 688 [109 S.Ct. 2678, 2696].) (*Khawar v. Globe International Inc.*, *supra*, 19 Cal.4th at p. 275, 79 Cal.Rptr.2d 178, 965 P.2d 696 .) The common-law standard of malice, which involves hatred or ill will towards the plaintiff, is not an element of the New York Times standard. (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 872, 231 Cal.Rptr. 518, 727 P.2d 711.)

3. Defamatory Statements

In determining malice, one must first determine which statements may be considered defamatory. “The sine qua non of recovery for defamation ... is the existence of falsehood.” (*Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* (1974) 418 U.S. 264, 283, 94 S.Ct. 2770, 41 L.Ed.2d 745.) “To state a defamation claim that survives a First Amendment challenge, ... [the] plaintiff must present evidence of a statement of fact that is ‘provably false.’” [Citations.] “ ‘Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot “ ‘reasonably [be] interpreted as stating actual facts” about an individual.’” [Citations.] Thus, ‘rhetorical hyperbole,’ ‘vigorous epithet[s],’ ‘lusty and imaginative expression[s] of ... contempt,’ and language used ‘in a loose, figurative sense’ have all been accorded constitutional protection. [Citations.]” [Citation.] The dispositive question ... is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion. [Citation.]’ [Citation.] [¶] To ascertain whether the statements in question are provably false factual assertions, courts consider the ‘ “ ‘totality of the circumstances.’ ” ‘ [Citation.]’” (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1048–1049, 72 Cal.Rptr.3d 210.)

*5 In determining whether statements are false factual assertions or protected opinion, the trial court must first look to the language of the statement itself, and second, consider the context in which the statement was made. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260–261, 228 Cal.Rptr. 206, 721 P.2d 87.) “An opinion ... is actionable only ‘if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false.’” (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1471, 37 Cal.Rptr.3d 133; *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 386, 10 Cal.Rptr.3d 429.) Whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. (*Nygaard, Inc. v. Uusi-Kerttula, supra*, 159 Cal.App.4th 1027, 1048–1049, 72 Cal.Rptr.3d 210; *Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 368, 90 Cal.Rptr.3d 882.)

A written statement is defamatory if it “exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” (Civ.Code, § 45.) A statement is defamatory on its face if it “is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact.” (Civ.Code, § 45a.) “Where the statement is defamatory *on its face*, it is said to be libelous per se, and actionable without proof of special damages.” (5 Witkin, *Summary of Cal. Law* (10th ed. 2005) Torts, § 541, p. 794 (Witkin); Civ.Code, §§ 45a, 46, subd. 1.) An allegation the plaintiff is guilty of a crime is libelous on its face. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1145, fn. 7, 12 Cal.Rptr.3d 493; *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1136, 2 Cal.Rptr.3d 385.)

In the context of the defense of truth—“i.e., that the statement is not false—defendants do not have to prove the ‘literal truth’ of the statement at issue. (*Emde v. San Joaquin County Central Labor Council* (1943) 23 Cal.2d 146, 160 [143 P.2d 20].) ‘[S]o long as the imputation is substantially true so as to justify the “gist” or “sting” of the remark’ the truth defense is established. [Citations.]” (*Hughes v. Hughes* (2004) 122 Cal.App.4th 931, 936, 19 Cal.Rptr.3d 247.) “[T]he Restatement Second of Torts states in section 581A, comment c, as follows: ‘If the defamatory statement is a specific allegation of the commission of a particular crime, the statement is true if the plaintiff did commit that crime. If the accusation is general and implies the commission of unspecified misconduct of a particular type, the statement is true if the plaintiff committed any misconduct of that type.’” (*Id.* at p. 937, 19 Cal.Rptr.3d 247.) “[C]onsider the case of a plaintiff objecting to the defendant’s accusation that the plaintiff is a thief. It is well established that, although the charge is general, proof of a single instance of larceny will establish the truth thereof.” (Murnaghan, *Ave Defamation, Atque Vale Libel and Slander* (1976) 6 Balt. L.Rev. 28, 40.) “The issue of whether a statement is true or substantially true is normally considered to be a factual one. [Citations.]” (*Hughes v. Hughes, supra*, 122 Cal.App.4th at p. 937, 19 Cal.Rptr.3d 247.)

*6 Regarding Ortiz’s statement that plaintiff “is a thief,” whether it concerned the particular crime of theft, or whether the “gist” or “sting” of the statement implied that plaintiff committed a general crime, plaintiff provided prima facie evidence that neither was true. Plaintiff declared he was not a thief or a crook, that he had never stolen or misappropriated anything from Jackson, and that he had never been charged with or convicted of a crime. Similarly, Jackson’s financial advisor declared that he was familiar with Jackson’s books and records pertaining to the costs and expenditures associated with Jackson’s training, and he had not seen any irregularities by plaintiff in his charges to Jackson.

Ortiz’s statement that plaintiff “is a thief,” however, does not stand alone. As previously noted, its impact must be viewed in the context of the “totality of the circumstances.” (*Nygaard, Inc. v. Uusi-Kerttula, supra*, 159 Cal.App.4th at pp. 1048–1049, 72 Cal.Rptr.3d 210; see also *Regalia v. The Nethercutt Collection, supra*, 172 Cal.App.4th at p. 368, 90 Cal.Rptr.3d 882.) The court in *Franklin v. Dynamic Details, Inc., supra*, 116 Cal.App.4th 375, 10 Cal.Rptr.3d 429, in holding that statements that plaintiff “stole” copyrighted material and “plagiarized” data, in context, were rhetorical hyperbole, stated: “[The defendant] is not, and did not purport to be, an attorney. The average reader therefore would not have assumed the statements ... had the weight of a legal opinion. Although [the defendant] did not temper his opinions with words of transparency, neither did he present his opinions as legal truths framed in legal verbiage. Indeed, his statements that [the plaintiff] ‘stole’ copyrighted material, ‘compromised’ [defendant’s company], and ‘plagiarized’ data appear in context as rhetorical hyperbole. (*Moyer v. Amador Valley J. Union High School Dist.* [(1990)] 225 Cal.App.3d [720], 726, 275 Cal.Rptr. 494; see also *Letter Carriers v. Austin* [1979] 418 U.S. [264], 283, 94 S.Ct. 2770, 41 L.Ed.2d 745 [“ ‘traitor [s]’ “ understood to mean that plaintiffs’ actions

were reprehensible, not that plaintiffs had committed treason]; *Greenbelt Coop. Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 13–14 [26 L.Ed.2d 6, 90 S.Ct. 1537] [“ ‘blackmail’ “ a vigorous epithet used to describe unreasonable negotiations]; *Rosenauro v. Scherer* (2001) 88 Cal.App.4th 260, 278–279, 105 Cal.Rptr.2d 674 [calling plaintiff a ‘thief’ and ‘liar’ during political campaign was hyperbole]; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 687–694 [29 Cal.Rptr.2d 547] [title stating “ ‘Lies, Damn Lies, and Fund Advertisements’ “ held not to imply money management fund actually lied].”) (*Franklin v. Dynamic Details, Inc.*, *supra*, 116 Cal.App.4th at p. 389, 10 Cal.Rptr.3d 429; see also *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1119–1120, 26 Cal.Rptr.3d 350 [“dumb asses”].)

Applying the totality of the circumstances test, Ortiz's statement that plaintiff was a thief cannot reasonably be understood to mean in the literal sense that plaintiff had committed the crime of theft⁵ or any other similar crime. Ortiz's statement that plaintiff “is a thief,” when read in context with Ortiz's other statements, reasonably meant that plaintiff overcharged Jackson to attend training camp. Whether plaintiff overcharged Jackson is not a verifiable fact, but instead is an

*7 But Ortiz's opinion that plaintiff was overcharging Jackson to attend training camp and thereby taking advantage of Jackson, was premised upon Ortiz's *factual* statement that plaintiff charged Jackson \$65,000 to attend the training camp. An opinion is actionable if it discloses all the statements of fact on which the opinion is based and those statements are false. (*Franklin v. Dynamic Details, Inc.*, *supra*, 116 Cal.App.4th at pp. 386–387, 10 Cal.Rptr.3d 429.) Plaintiff provided prima facie evidence that he did not charge Jackson \$65,000 to attend camp. Plaintiff declared that he did not have a camp for which he could charge Jackson, that he did not charge Jackson any amount to attend Jackson's own camp, that he never obtained any fees in connection with the costs associated with plaintiff's training. Also, in opposition to PDG defendants' special motion to strike, plaintiff submitted a declaration that he “never charged [plaintiff] for anything.” In addition, plaintiff submitted the declaration of one of Jackson's financial advisors⁶ that every month he met with Jackson and Jackson's other financial advisor to discuss Jackson's business affairs; that he was unaware of plaintiff having received any money from Jackson's bank account for fees or costs in connection with Jackson's camp; and that he had not seen any evidence that plaintiff took advantage of Jackson or that plaintiff engaged in any self-dealing to Jackson's detriment. Plaintiff and the financial advisor also declared in opposition to PGD defendants' special motion to strike, that plaintiff did not charge Jackson \$65,000. Plaintiff, therefore, made a prima facie showing in opposition to the special motions to strike that the Ortiz's statements were premised on the false statement of fact that plaintiff charged Jackson \$65,000 to attend a training camp.

Regarding the statements published by Chronicle defendants, in addition to publishing a quote from PDG defendants' interview of Ortiz and citing the source of the quote, Chronicle defendants published Barnes's statements. Barnes's statements, however, were merely his opinions. Barnes's statements were critical of Jackson's reaction to his business dealings with plaintiff. Barnes also stated that Jackson should have taken plaintiff “to court or publically state how much of a crook [plaintiff] is which is sure to blackball him from the sport.” It is not reasonable to conclude that Barnes was calling plaintiff “a crook” in the literal sense.⁷ Barnes was merely stating his opinion of how Jackson should have handled the scenario, instead of “his hit-and-run antics[,] temporary God complex,” and dealing with it “like a kid with access to a monster truck”. In addition, the statement “how much of a crook he is” implies that plaintiff may not be a crook at all. Furthermore, the statement is based upon Ortiz's opinion that plaintiff overcharged Jackson for attending training camp. A reasonable trier of fact could not conclude that Barnes's statements were statements of fact.

4. Lack of Actual Malice

*8 As discussed *ante*, the only false statement published by defendants was Ortiz's statement that plaintiff charged Jackson \$65,000 to attend a training camp. Plaintiff “must prove by clear and convincing evidence that [defendants] knew the statements [were] false or had serious doubts about the truth of the statements.” (Judicial Council of California Civil Jury Instructions, CACI Nos. 1700, 1701.)

Plaintiff contends that defendants acted with actual malice because defendants failed to investigate Ortiz's statements before publishing them. But the failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice,

nor even necessarily raise a triable issue of fact on that controversy. (See *St. Amant v. Thompson*, *supra*, 390 U.S. at p. 733; *Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81, 84–85, 88 S.Ct. 197, 19 L.Ed.2d 248.) “ ‘[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient.’ [Citation.]” (*Khawar v. Globe Internat., Inc.*, *supra*, 19 Cal.4th at pp. 276, 79 Cal.Rptr.2d 178, 965 P.2d 696.) “ ‘ “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” [Citation.] Lack of due care is not the measure of liability, nor is gross or even extreme negligence.’ [Citation.]” (*Christian Research Institute v. Alnor*, *supra*, 148 Cal.App.4th at p. 90, 55 Cal.Rptr.3d 600.) Actual malice may be shown by a failure to investigate “ ‘where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’ [Citation.]” (*Id.* at p. 85, 55 Cal.Rptr.3d 600.)

Plaintiff argues that defendants should have investigated Ortiz's statements before publishing them based on “Ortiz's statements that [plaintiff] is a ‘thief’ and [that] he does not care if [plaintiff] reads his remarks or hears about them because [plaintiff] already knows he is blackballed from the sport...” Those statements, however, do not establish that defendants had obvious reasons to doubt the truth of Ortiz's statement that plaintiff charged Jackson \$65,000 to attend a training camp, or that defendants knew it was false or that [defendants] subjectively entertained serious doubts as to the truth of the statement. (*Harte-Hanks Communications v. Connaughton*, *supra*, 491 U.S. at p. 688.) As noted, *ante*, Ortiz's statement that plaintiff was a “thief,” in context, reasonably meant that plaintiff overcharged Jackson to attend training camp. In addition, Ortiz's statement that he did not care if plaintiff read or heard his remarks suggests that Ortiz was confident about the truthfulness of his statements. Reliance on a source known to be hostile towards plaintiff could suggest a reason to doubt the source's veracity and thus result in malice. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497, 45 Cal.Rptr.2d 624.) As to defendants' knowledge of any such hostility by Ortiz, just an adversarial relationship is not sufficient. (*Ibid.*) Plaintiff argues that the “hostile and contemptuous” nature of Ortiz's remarks should have put defendants on notice to investigate them. That the statements might be hostile or contemptuous does not adequately indicate that the fact of the \$65,000 training camp charge is false. Plaintiff's evidence, at best, raises “a speculative possibility that [defendants] might have known or suspected” that the statement was incorrect and that is not sufficient. (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1170, 15 Cal.Rptr.3d 100; see *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 848, 52 Cal.Rptr.2d 831.)

*9 Plaintiff also contends that defendants acted with actual malice because, after they published the statements, they failed to investigate and issue retractions based upon correspondence they received from plaintiff's counsel claiming that the statements were false. The failure to conduct a postpublication investigation and retraction after notice of falsity does not constitute malice at the time the publication was made. Actual malice is measured by the defendant's subjective awareness of falsity at the time of publication. (*New York Times Co. v. Sullivan*, *supra*, 376 U.S. at p. 286; *Khawar v. Globe International, Inc.*, *supra*, 19 Cal.4th at p. 262, 79 Cal.Rptr.2d 178, 965 P.2d 696.) Defendants' publication on the Internet, no matter how long it remained available thereafter, is deemed a single publication as of the date it was first posted. (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 890, 70 Cal.Rptr.3d 178, 173 P.3d 1004; *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 395, 402–404, 13 Cal.Rptr.3d 353.) The failure of defendants to retract or correct a story does not itself constitute actual malice. (*New York Times Co. v. Sullivan*, *supra*, 376 U.S. at p. 286.)

Although failure to conduct a postpublication investigation and retraction after notice of falsity does not constitute actual malice at the time the publication was made, the failure to investigate or retract “*might be relevant*” to show actual malice at the time the statement was published. (Restatement (Second) of Torts, § 580A comment d (1977), at p. 219; italics added; see, also, *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012, 193 Cal.Rptr. 206; *Church of Scientology of California v. Dell Publishing Co., Inc.* (1973) 362 F.Supp. 767, 770.) Plaintiff has not submitted a prima facie case of clear and convincing evidence that defendants acted with malice.

Three weeks before plaintiff filed his lawsuit, plaintiff's counsel sent a letter to PDG defendants stating that the statements PDG defendants published—over eight months earlier—that plaintiff was a thief, and conveying that plaintiff stole from Jackson and took advantage of him, were false and defamatory, and plaintiff's counsel demanded an immediate retraction. The letter did not advise PDG defendants that plaintiff did not charge Jackson \$65,000 to attend the training camp. In response, PDG defendants invited plaintiff “to offer [to PDG defendants] his side of the events which ... could appear on the front page of PDG.” The PDG

defendants also offered to plaintiff's attorney "to provide the time and space on the website that Plaintiff deemed necessary to present 'his side' of the developing controversy—equal time and space or 'whatever it took.' [Plaintiff's] attorney [however] did not accept [the] offer." This evidence does not establish that PDG defendants acted eight months earlier with a conscious disregard of the truth of the published statements.

Also, plaintiff contends his attorney sent a letter to Chronicle, virtually identical to the one sent to PDG defendants, over eight months after Chronicle defendants published their statements, and only over two weeks before plaintiff filed his lawsuit.⁸ Chronicle defendants removed the statements from their website after they were sued. Defendants' responses to plaintiff's letters demanding a retraction does not establish that defendants' acted with actual malice at the time they published the statements. When it is undisputed that the Chronicle defendants knew plaintiff contended the statements were false, they removed the statements from their website.

***10** Plaintiff did not show a probability of prevailing on his claim of defamation because plaintiff did not submit sufficient evidence to establish a prima facie showing that defendants acted with malice. Because we hold that plaintiff did not establish by clear and convincing evidence that defendants acted with malice, we do not reach defendants' additional arguments concerning liability for the statements in question.

5. Plaintiff's Other Causes of Action

Plaintiff also asserted causes of action for invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress. As the trial court ruled, each of those claims is based upon plaintiff's claim of defamation. Plaintiff does not dispute the argument by PDG defendants that plaintiff's causes of action for invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress are "in substance equivalent" to the defamation claim. Moreover, plaintiff did not address specifically whether he established a probability of prevailing on the merits of these claims other than to state in a footnote in his opening brief that his "showing on his defamation claim is sufficient to allow him to go forward on his related claims for invasion of privacy and intentional and negligent infliction of emotional distress."

To prevail on a false light invasion of privacy claim, a plaintiff must show that the defendants made statements placing him in a false light that would be highly offensive to a reasonable person. (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 238–239, 228 Cal.Rptr. 215, 721 P.2d 97; see also *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 636, 107 Cal.Rptr.2d 504 [a false light invasion of privacy claim "exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such"].) "An action for invasion of privacy by placing the plaintiff in a false light in the public eye [citation] is in substance equivalent to a libel claim." (*Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1133, 212 Cal.Rptr. 838.)

To establish a claim for intentional infliction of emotional distress, a plaintiff must show that the defendant engaged in extreme or outrageous conduct with the intent of causing, or in reckless disregard of the probability of causing, emotional distress. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903, 2 Cal.Rptr.2d 79, 820 P.2d 181.) "[T]he tort does not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496, 76 Cal.Rptr.2d 540.)

A claim of negligent infliction of emotional distress is not an independent tort but rather is a negligence tort to which the traditional elements of duty, breach of duty, causation, and damages apply. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984, 25 Cal.Rptr.2d 550, 863 P.2d 795; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072, 9 Cal.Rptr.2d 615, 831 P.2d 1197; *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588, 257 Cal.Rptr. 98, 770 P.2d 278.) To recover damages for emotional distress on a claim of negligence where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was "serious." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927–930, 167 Cal.Rptr. 831, 616 P.2d 813; *Burgess v. Superior Court*, *supra*, 2 Cal.4th at p. 1073, fn. 6, 9

Cal.Rptr.2d 615, 831 P.2d 1197; *Potter v. Firestone Tire & Rubber Co.*, *supra*, 6 Cal.4th at p. 999, 25 Cal.Rptr.2d 550, 863 P.2d 795; *Thing v. La Chusa* (1989) 48 Cal.3d 644, 667–668, 257 Cal.Rptr. 865, 771 P.2d 814.) “ ‘[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.’ [Citation.]” (*Molien v. Kaiser Foundation Hospitals*, *supra*, 27 Cal.3d at p. 928, 167 Cal.Rptr. 831, 616 P.2d 813, quoting *Rodriguez v. State* (1970) 52 Haw. 156, 283, 472 P.2d 509.) Plaintiff has not submitted sufficient evidence to support such a claim.

***11** As with plaintiff's defamation claim, plaintiff has not submitted evidence showing a *prima facie* case on his claims for invasion of privacy (false light), intentional infliction of emotional distress, and negligent infliction of emotional distress. His invasion of privacy (false light) claim “is in substance equivalent to a libel claim.” (*Selleck v. Globe International, Inc.*, *supra*, 166 Cal.App.3d at p. 1133, 212 Cal.Rptr. 838.) Similarly, plaintiff has failed to provide evidence or argument that defendants engaged in extreme or outrageous conduct or breached a duty owed to plaintiff.

Our conclusions are based solely on the evidence submitted in connection with the anti-SLAPP motions. We do not opine on any legal or evidentiary issues beyond the issues raised by those motions.

D. Attorney Fees and Costs

Defendants contend they are entitled to their attorney fees and costs on appeal. Section 425.16, subdivision (c)(1) states that, “[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.”⁹ “ ‘A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]’ (*Evans v. Unknow*, *supra*, 38 Cal.App.4th at pp. 1499–1500, 45 Cal.Rptr.2d 624.) Section 425.16, subdivision (c) provides that a prevailing defendant is entitled to recover attorney fees and costs, and does not preclude recovery on appeal. [Citation.]” (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659, 49 Cal.Rptr.2d 620, overruled on other grounds as stated in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5, 124 Cal.Rptr.2d 507, 52 P.3d 685; see also *Liu v. Moore* (1999) 69 Cal.App.4th 745, 754, 81 Cal.Rptr.2d 807.) Defendants, therefore, are entitled to their attorney fees and costs on plaintiff's appeal as the parties prevailing on the appeal. (Cal. Rules of Court, rule 8.278(a)(2) [“The prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal”]; *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448, 121 Cal.Rptr.2d 275 [defendant is entitled to attorney fees and costs incurred in plaintiff's appeal as prevailing defendant on the anti-SLAPP motion]. We remand for the limited purpose of permitting the trial court to exercise its discretion on the amount to award defendants for their attorney fees and costs for the appeal.

DISPOSITION

The trial court's orders granting defendants' special motions to strike pursuant to section 425.16 are affirmed, and the matter is remanded for an award of attorney fees and costs for the appeal.

We concur: TURNER, P.J., and ARMSTRONG, J.

All Citations

Not Reported in Cal.Rptr.3d, 2011 WL 925719, 39 Media L. Rep. 1766

Footnotes

- 1 Carpinello and PDG are referred to as PDG defendants.
- 2 Hearst and Chronicle are referred to as Chronicle defendants.
- 3 All statutory citations are to the Code of Civil Procedure unless otherwise noted.
- 4 *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1463–1464, fn. 21, 44 Cal.Rptr.3d 72 (explaining that “the term ‘blog’ “ was “apparently derived from ‘we blog,’ a whimsical deconstruction of ‘weblog,’ a compounding of ‘Web log,’ which originally described a kind of online public diary in which an early Web user would provide links to, and commentary on, interesting Web sites.... [Citation]. The term [blog] may now be applied to any Web site sharing some of the characteristics of these early journals”).
- 5 Penal Code section 484, subdivision (a) provides in part that, “Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.”
- 6 The PDG defendants argue that the declaration from Jackson's financial advisor is based only on his “awareness” and therefore did not support plaintiff's showing that the statements were false. The declaration, however, establishes that the declarant's “awareness” was broad. It provides that the declarant was Jackson's business and financial advisor, and in that capacity he became familiar with the books and records pertaining to Jackson's business, including the costs and expenditures associated with Jackson's training. The declaration also provides that every month the declarant met with Jackson and Jackson's other financial advisor to discuss Jackson's business affairs. In any event, plaintiff's declaration alone provides sufficient prima facie evidence of the falsity of defendants' statements.
- 7 A crook is “a dishonest person, esp a swindler or thief.” (Collins English Dictionary—Complete & Unabridged (10th Ed.2009) retrieved Feb. 2, 2011, from dictionary.com website.)
- 8 Plaintiff argues the trial court erred by excluding the letter. The trial court sustained Chronicle defendants' objections to the letter; those objections were based on the grounds that the letter lacked authentication and on that basis was irrelevant. A declaration from the document's author explaining and verifying the document is sufficient to authenticate it. (*Landale–Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, 1409, 66 Cal.Rptr.3d 776.) Here, plaintiff's counsel, the letter's author, submitted a declaration that attached a “true and correct copy of my letter.” Also, the letter provides that it was sent “VIA FIRST CLASS U.S. MAIL,” and plaintiff's counsel declared under penalty of perjury that it was “sent to Defendants.” There is a presumption that the letter is received where there is evidence that it has been mailed. (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421, 100 Cal.Rptr.2d 818.) The trial court, therefore, erred by sustaining Chronicle defendants' objections to the letter. The error was not prejudicial, however. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, 16 Cal.Rptr.3d 374, 94 P.3d 513.)
- 9 Section 425.16, subdivision (c)(1) states in full, “[I]n any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.”

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2024 N.H. 49

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Supreme Court of New Hampshire.

Daniel RICHARDS

v.

UNION LEADER CORPORATION & a.

Case No. 2022-0197

|

Argued: March 21, 2023

|

Opinion Issued: September 4, 2024

Synopsis

Background: Resident in local school district, who had submitted public testimony in favor of bill addressing scope of public school instruction regarding racism and related issues, filed suit against newspaper and author of op-ed newspaper column, alleging defamation and invasion of privacy based on certain statements contained in column opposing the bill. The Superior Court, Grafton County, granted defendants' motions to dismiss. Resident appealed and defendants cross-appealed.

Holdings: The Supreme Court, [Bassett](#), J., held that:

as apparent matter of first impression, allegedly defamatory statement accusing resident of disseminating “white supremacist” ideology constituted non-actionable statement of opinion;

as apparent matter of first impression, statements purporting to accuse resident of favoring suppression of grievances and rights, as well as franchise, of certain other Americans constituted non-actionable statements of opinion; and

Supreme Court would not recognize new cause of action for false light invasion of privacy.

Affirmed.

[Countway](#), J., filed an opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Grafton

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American Civil Liberties Union of New Hampshire Foundation, of Concord ([Gilles R. Bissonnette](#) and [Henry R. Klementowicz](#) on the brief), for American Civil Liberties Union of New Hampshire, New England First Amendment Coalition, and GLBTQ Legal Advocates & Defenders, as amici curiae.

Opinion

[BASSETT](#), J.

*1 [¶1] The plaintiff, Daniel Richards, appeals a decision of the Superior Court ([Bornstein](#), J.) dismissing his complaint alleging defamation and invasion of privacy — false light against the defendants, Union Leader Corporation (Union Leader) and Robert Azzi. Union Leader cross-appeals the superior court's finding that certain statements contained in the newspaper column at issue (hereinafter, “op-ed”) pertained to the plaintiff, and its decision not to take judicial notice “about the existence of controversy and debate surrounding Critical Race Theory and the definition of White supremacy.” We affirm.

I

[¶2] The following facts are derived from the plaintiff's complaint, or from documents sufficiently referred to in the complaint and whose authenticity no party disputes. See [Beane v. Dana S. Beane & Co.](#), 160 N.H. 708, 711-12, 7 A.3d 1284 (2010). The plaintiff is the father of two children enrolled in the Hanover School District (the district). In 2021, the district “began sending parents an increasing number of communications about [its] increasing focus on ‘equity’ and ‘anti-racism.’ ” The communications indicated that the district was planning “significant curricular changes around these issues.” The plaintiff was “concerned by materials that he learned were in use in the school district.” While he believed the curricular changes were “well-intentioned,” the plaintiff believed that the changed curriculum was “deeply divisive and ultimately harmful to the goal of a quality education and a society where everyone is treated equally.”

[¶3] As a result of his concerns about the district's proposed curriculum changes, the plaintiff supported “legislation that prohibits New Hampshire schools from teaching children that they are ‘inherently racist, sexist, or oppressive, whether consciously or unconsciously.’ ” The parties agree that this legislation was House Bill 544 (HB 544). The plaintiff submitted public testimony in favor of the bill.

[¶4] On June 18, 2021, the Union Leader published the following op-ed, written by Azzi, titled “White supremacists reveal content of their character”:

YET ANOTHER white supremacist — Newt Gingrich — has emerged to hector New Hampshire about what it should think about Critical Race Theory (CRT) and systemic racism by misappropriating MLK's “... dream of a nation in which people are judged not by the color of their skin, but by the content of their character ...”

Today, we know well the content of Gingrich's character.

Desperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples, Gingrich, Frank Edelblut, Dan Richards, Mike Moffett, Joseph Mendola, and others have disseminated, across multiple media platforms, white supremacist ideology to keep Americans from learning an unexpurgated American history from its 1619 origins alongside the dominant White 1776 narrative.

Today, we know well the content of their character.

Espousing a form of anti-American excrescence entitled “1776 Action” — Gingrich and fellow travelers falsely assert: “Critical Race Theory-based curriculum, which pits students against one another on the basis of race, is being forced on

students all across America. It rejects the central message of our founders as well as Martin Luther King Jr. — that we are all individuals created equal in the image of God — and it's taking our country backwards.”

***2** Whoever utters such calumnies are either ignorant beyond redemption or, more likely, unreconstructed White apologists looking to conceal the truth of systemic racism and its pernicious effects on people of color and minority communities.

While it's true, as Gingrich says, that “America is a better place today because great leaders like Rev. Martin Luther King Jr. chose to embrace the premise, and the promise, of America ...” it is equally true that in spite of generations of promises, America has failed many of them.

It's equally true that many Americans — like MLK, Medgar Evers, Fred Hampton, and Malcolm X — were harassed, spied upon, and assassinated fighting for respect, dignity, and rights promised to them in the Declaration of Independence so highly valued by HB 544's proponents.

It's not just about the 1830 Indian Removal Act, the 1882 Chinese Expulsion Act, the over 4,400 lynchings, the 1921 Tulsa pogrom, the “Tuskegee Study of Untreated Syphilis in the Negro Male,” the 1939 refusal to allow the SS St. Louis to disembark 900 Jews fleeing Nazi Germany, the internment of Japanese-Americans — about Emmett Till, Tamir Rice, George Floyd — it's about contextualizing American history; about persistent racial exploitation and trauma and their disproportionate effects on generational health and wealth.

When Education Commissioner Edelblut says that proposed state legislation “will help instill confidence in parents that our basic values are not being compromised,” which values is he touting? The values of the last state to have a paid holiday honoring MLK or the values of a just people committed to truth and human dignity?

It is not true that CRT teaches children that one race is superior to another and to assert such is dishonest, provocative and dangerous.

It is true, as Edelblut notes, that Ibram X. Kendi wrote that “... [t]he only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination ... The only remedy to present discrimination is future discrimination,” but Edelblut fails to allow Kendi to define what he means.

Kendi continues: “... As President Lyndon B. Johnson said in 1965, ‘You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘You are free to compete with all the others,’ and still justly believe that you have been completely fair.’ ” As U.S. Supreme Court Justice Harry Blackmun wrote in 1978, ‘In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.’ ”

Buried in the budget bill because it can't pass on its own, it may be moot whether this illegitimate calumny passes, whether a politically-ambitious governor signs it or not.

Those who favor whitewashing history — favor suppressing the grievances and rights of Americans unlike themselves — favor suppressing the franchise of citizens who don't look like them — have shown they'll lie, go to any lengths, propose any laws, to protect their privilege and power over others. Most repugnant are those who distort, decontextualize, and misrepresent truth-tellers like MLK and Kendi when they talk about race and oppression.

***3** Today, we know who they are.

That such a coven of mendacious White men — who arrogantly assume they've a right to speak for both oppressor and oppressed — is so willing to reveal such bias is not only repugnant but anti-American, contrary not only to Granite State values but contrary to universal values of social justice, freedom, equity, equal rights and human dignity.

Today, we know them well.

(Emphases added.)

[¶5] In September 2021, the plaintiff filed his complaint, alleging that the publication of the op-ed has lowered his reputation in his community, threatens his business interests, and may negatively influence employees within his company. The complaint alleged one count of defamation and one count of invasion of privacy — false light, based upon the language in the op-ed that is emphasized above. Each defendant filed a motion to dismiss the complaint. Among the arguments made for dismissal were: (1) the op-ed is constitutionally protected speech related to matters of public concern; (2) the statements contained within the op-ed are non-actionable opinion; (3) the plaintiff is a public figure and the defendants did not act with actual malice; (4) the court should not recognize the common law tort of false light; and (5) even if it were to recognize the tort, the plaintiff failed to allege sufficient facts to sustain a cause of action.

[¶6] After conducting a hearing on the motions to dismiss, the trial court issued a narrative order granting the motions with prejudice. The trial court first set forth the five statements that the plaintiff alleged are defamatory and paint him in a false light:

1. That the plaintiff and other named individuals are “[d]esperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples;”
2. This group, including the plaintiff, has “disseminated, across multiple media platforms, white supremacist ideology;”
3. “Those who favor whitewashing history ... favor suppressing the grievances and rights of Americans unlike themselves;”
4. “Those who favor whitewashing history ... favor suppressing the franchise of citizens who don't look like them;” and
5. “Those who favor whitewashing history ... have shown they'll lie ... to protect their privilege and power.”

The trial court sorted the statements into two groups. Statements in the first group it identified mention the plaintiff by name, while statements in the second group generally reference “those who favor whitewashing history” without identifying any named individuals. The trial court concluded, however, that when read as a whole, the entire op-ed “is clearly directed at the plaintiff as being a member of the small group identified at the beginning of the op-ed” and, therefore, the question becomes whether all five identified statements “are provable false and defamatory or merely opinion.”

[¶7] After reviewing the challenged statements, the trial court concluded that each amounted to non-actionable opinion, not premised on any undisclosed defamatory facts, and dismissed the claim. In doing so, the trial court declined to take judicial notice, as requested by the defendants, of the debate surrounding “Critical Race Theory, as well as the debate surrounding what is meant by white supremacist or white supremacy,” concluding that it did not need to do so in order to make its decision. It also declined to address whether the plaintiff “can properly be considered a public figure or official.” In addition, having found that the statements were non-actionable opinion, the trial court declined to address the defendants’ constitutional arguments.

*4 [¶8] Finally, the trial court considered whether the plaintiff had stated a claim for invasion of privacy — false light. The defendants argued that the tort of false light has not been, and should not be, recognized in New Hampshire, but even if it were, the plaintiff had failed to state a claim. The trial court declined to address whether a tort of invasion of privacy — false light should be recognized in New Hampshire, ruling instead that even if such a tort were to be recognized in New Hampshire, the plaintiff's claim would fail. The court ruled that because the statements were Azzi's opinion, the plaintiff had failed to demonstrate that Azzi “ ‘had knowledge of or acted in reckless disregard as to the falsity of the publicized matter.’ ” (Quoting [Restatement \(Second\) of Torts § 652E](#).) Accordingly, the trial court dismissed the claim. This appeal and cross-appeal followed.

[¶9] In reviewing an order granting a motion to dismiss, we assume the truth of the facts as alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to the plaintiff. ¹ [Beane](#), 160 N.H. at 711, 7 A.3d 1284. The standard of review when considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery. [Id.](#) This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. [Id.](#) The trial court may also consider documents attached to the plaintiff's pleadings, or documents whose authenticity no party disputes, official public records, or documents sufficiently referred to in the complaint. [Id.](#) We will uphold the granting of the motion to dismiss if the facts pled do not constitute a basis for legal relief. [Id.](#)

III

[¶10] The plaintiff argues that the trial court erred in concluding that the second, fourth, and fifth statements quoted above are not defamatory. In support of this position, he asserts: (1) the term “white supremacist” has an accepted meaning capable of being proved demonstrably true or false; (2) the challenged statements imply undisclosed defamatory facts; and (3) calling the writing an “op-ed” does not render it “judgment-proof.” We construe each of these arguments as a challenge to the trial court's overall conclusion that the op-ed as a whole constituted non-actionable opinion.

[¶11] We note that this case arises from the publication of an op-ed piece addressing, *inter alia*, issues related to Critical Race Theory, systemic racism, and proposed legislation then pending before the New Hampshire legislature. As we have recently explained, discussion of public issues is “integral to the operation of the system of government established by our Constitution.” [Hynes v. N.H. Democratic Party](#), 175 N.H. 781, 785, 302 A.3d 47 (2023) (quotation omitted). The United States Supreme Court has expressed “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” [Rosenblatt v. Baer](#), 383 U.S. 75, 85, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (quotation omitted). “[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” [Snyder v. Phelps](#), 562 U.S. 443, 452, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (quotation omitted). “The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” [Hynes](#), 175 N.H. at 785, 302 A.3d 47 (quotation and brackets omitted). Thus, “in public debate we must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” [Snyder](#), 562 U.S. at 458, 131 S.Ct. 1207 (quotation and brackets omitted). It is against this backdrop that we consider the challenged statements.

*5 [¶12] For a cause of action in defamation to survive a motion to dismiss, the plaintiff must have alleged facts that would show that the defendants failed to exercise reasonable care in publishing false and defamatory statements of fact about the plaintiff to a third party. See [Automated Transactions v. Am. Bankers Ass'n](#), 172 N.H. 528, 532, 216 A.3d 71 (2019). Embedded in this recitation is the requirement that the challenged statement be one “of fact.” [Id.](#) Conversely, a statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory facts as the basis for the opinion. [Id.](#) A further corollary of defamation law's factual requirement is that statements of “imaginative expression” or “rhetorical hyperbole” are not actionable because they cannot reasonably be interpreted as factual assertions. [Id.](#) at 533, 534, 216 A.3d 71. Whether a given statement can be read as being or implying an actionable statement of fact is a question of law to be determined by the trial court in the first instance. [Id.](#) at 533, 216 A.3d 71. Words alleged to be defamatory must be read in the context of the publication taken as a whole. [Id.](#)

[¶13] An important criterion for distinguishing statements of opinion from statements of fact is verifiability — *i.e.*, whether the statement is capable of being proven true or false. [Id.](#) “Where an expressive phrase, though pejorative and unflattering, cannot be objectively verified, it belongs squarely in the category of protected opinion.” [Id.](#) (quotation omitted). The vaguer a term, or the more meanings it reasonably can convey, the less likely it is to be verifiable and hence actionable. [Id.](#) at 533-34, 216 A.3d 71.

[¶14] Although we have not had cause to consider whether characterizations like the terms “racist” or “white supremacist” can be considered actionable under a theory of defamation, numerous other jurisdictions have considered the question. See, *e.g.*,

[Law Offices of David Freydin, P.C. v. Chamara](#), 24 F.4th 1122, 1131 (7th Cir. 2022); [La Liberte v. Reid](#), 966 F.3d 79, 93 (2d Cir. 2020); [Overhill Farms, Inc. v. Lopez](#), 190 Cal. App. 4th 1248, 1261-62, 119 Cal.Rptr.3d 127 (2010); [Olthaus v. Niesen](#), 232 N.E.3d 932, 940 (Ohio Ct. App. 2023). The Ohio Court of Appeals recently concluded that the term “white supremacist” lacks precise meaning, and is an “inherently value-laden” label that conjures “a vast array of highly emotional responses that will vary from reader to reader.” [Olthaus](#), 232 N.E.3d at 940 (quotation omitted). The court explained that “because labels like ‘white supremacist’ lack a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content.” [Id.](#) (quotation and brackets omitted). The United States Court of Appeals for the Second Circuit, applying California tort law, has held that “accusations of concrete, wrongful conduct are actionable while general statements charging a person with being racist, unfair, or unjust are not.” [La Liberte](#), 966 F.3d at 93 (quotations and brackets omitted). Likewise, the United States Court of Appeals for the Seventh Circuit, applying Illinois defamation law, has held that the statement “racist” is actionable “when based on identifiable conduct but [is] non-actionable when stated in general terms.” [Law Offices of David Freydin, P.C.](#), 24 F.4th at 1131. So too has the United States Court of Appeals for the Third Circuit held that “derogatory characterizations without more are not defamatory,” concluding that “a simple accusation of racism is not enough.” [McCafferty v. Newsweek Media Group, Ltd.](#), 955 F.3d 352, 358 (3d Cir. 2020) (quotation omitted).

[¶15] We find the reasoning of these cases persuasive. See, e.g., [Stevens v. Tillman](#), 855 F.2d 394, 402 (7th Cir. 1988) (the derogatory characterization of the plaintiff as a “racist” was non-actionable because it did not “impl[y] the existence of undisclosed, defamatory facts”); [Automated Transactions](#), 172 N.H. at 534, 216 A.3d 71 (“an opinion ... is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion” (quotation omitted)). Reading the op-ed as a whole, we agree with the trial court that the op-ed merely expressed the author's political opinions and beliefs that he individually held about the plaintiff and others not based on any undisclosed defamatory facts.

*6 [¶16] The first allegedly defamatory statement identified by the plaintiff (statement 2) cannot be read in isolation, but rather must be read within the context of the paragraph in which it appears. See [Automated Transactions](#), 172 N.H. at 533, 216 A.3d 71 (“Words alleged to be defamatory must be read in the context of the publication taken as a whole.”). The paragraph reads in its entirety:

Desperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples, Gingrich, Frank Edelblut, Dan Richards, Mike Moffett, Joseph Mendola, and others have disseminated, across multiple media platforms, white supremacist ideology to keep Americans from learning an unexpurgated American history from its 1619 origins alongside the dominant White 1776 narrative.

When read in context, the language used is unquestionably “imaginative expression.” See [id.](#) at 534, 216 A.3d 71. As the trial court pointed out, no rational finder of fact could read this paragraph and conclude that the author was claiming that the plaintiff “has engaged in the act of enslaving people” or that the plaintiff was desirous of committing genocide. Rather, as the trial court aptly observed, the author “made an ‘imaginative expression,’ which, although unflattering, reflects what Azzi believes the plaintiff desires.” In addition, it is clear from the context in which it is contained that the phrase “disseminated ... white supremacist ideology” falls into the realm of non-actionable derogatory characterization. See [Stevens](#), 855 F.2d at 402. Nothing within this paragraph or the greater context of the op-ed states or implies that the plaintiff has engaged in “concrete, wrongful conduct.” [La Liberte](#), 966 F.3d at 93. Rather, the paragraph speaks generally about ideology the author considers to be “white supremacist” — ideology which the author believes the plaintiff supports. As the trial court points out, such a characterization “cannot be objectively verified ... because whether a statement espouses white supremacist ideology is a matter of socio-political opinion that differs between individuals.” Cf. [Olthaus](#), 232 N.E.3d at 940 (“because labels like ‘white supremacist’ lack a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content” (quotation and brackets omitted)).

[¶17] Thus, we agree with the trial court that language contained within this paragraph is merely expressive rhetoric meant to convey the author's opinion of the plaintiff's political views and is not designed to assert factual allegations related to the plaintiff's conduct. For these reasons, we conclude that the trial court did not err in concluding that this challenged statement constituted non-actionable opinion. See [Automated Transactions](#), 172 N.H. at 533, 216 A.3d 71.

[¶18] Likewise, the other two statements the plaintiff challenges (statements 4 and 5) cannot be read in isolation. The paragraph in which the challenged statements appear states:

Those who favor whitewashing history — favor suppressing the grievances and rights of Americans unlike themselves — favor suppressing the franchise of citizens who don't look like them — have shown they'll lie, go to any lengths, propose any laws, to protect their privilege and power over others. Most repugnant are those who distort, decontextualize, and misrepresent truth-tellers like MLK and Kendi when they talk about race and oppression.

*7 (Emphases added.) We will assume, as the trial court ruled, that the implication of the challenged statements, which are emphasized above, is directed at the plaintiff as a member of the group identified at the beginning of the op-ed. However, when read as a whole, the general tenor of the rhetoric in the paragraph, and the challenged language especially, is hyperbolic and, therefore, does not create the implication that the author is stating actual facts. [Id.](#) (explaining that statements of “rhetorical hyperbole” are not actionable because they cannot reasonably be interpreted as factual assertions). This language does not accuse the plaintiff of actual conduct — for example, as the trial court noted, it does not claim that the plaintiff prevented anyone from voting or personally lied to “protect his supposed privilege and power.” Rather, the author merely expresses his opinion of the behavior of all people who hold this purported ideology and projects it onto those who, like the plaintiff, supported HB 544. As the trial court concluded, “the statements are what Azzi claims to be attributes of a group that ‘favor[s] whitewashing history.’” At its core, as the trial court noted, this rhetoric expresses the author's “socio-political opinion and cannot be verified.” Accordingly, we conclude that the language falls within the realm of non-actionable opinion and, therefore, the trial court did not err. See [id.](#)

[¶19] The plaintiff next asserts that the trial court erred in concluding that “none of the challenged statements imply undisclosed defamatory facts.” Although the plaintiff argues that a statement of “opinion” is actionable if it may reasonably be understood to imply the existence of defamatory facts as the basis for the opinion, as explained above, we agree with the trial court that the challenged rhetorical language does not imply the existence of any non-disclosed defamatory facts. Moreover, the author explains that his opinion derives from the plaintiff's support of HB 544, a fact which the plaintiff does not dispute. Thus, while the op-ed does not imply the existence of undisclosed defamatory facts, it also states the factual basis on which it relies. Therefore, we conclude that the trial court did not err.

[¶20] Lastly, the plaintiff asserts that the trial court erred in ruling “that because the Union Leader published Azzi's column in its ‘op-ed’ section, everything in the article is simply Azzi's opinion of the plaintiff and others identified in the op-ed.” (Quotation omitted.) As an initial matter, we note that the trial court did not rule that because the writing appeared in the newspaper's op-ed section that everything that followed was clearly opinion. Rather, within its order, the trial court opined that it “is significant that Azzi's column is published in the ‘Op-Ed’ section of the Union Leader,” because it “signal[s] to readers that this is Azzi's opinion of the plaintiff and others identified in the op-ed.” We agree. “Although the appearance of the column on the op-ed page, without more, is not at all dispositive, it is nevertheless some indication that the statements made in the column are opinions.” [Aldoupolis v. Globe Newspaper Co.](#), 398 Mass. 731, 500 N.E.2d 794, 797 (1986). “[R]eaders of the op-ed page no doubt expect to read columnists’ views and opinions as opposed to factual news stories.” [Id.](#) Further, as explained above, the trial court carefully analyzed the challenged statements within the context of the op-ed itself, and we find no error in its analysis.

[¶21] We next consider the plaintiff's contention that the trial court erred in dismissing his claim for invasion of privacy — false light. As the trial court correctly stated, we have never recognized the tort of invasion of privacy — false light. Rather, when the issue has arisen in the past, we have declined to address it. *See, e.g., Hynes*, 175 N.H. at 792, 302 A.3d 47; *Thomas v. Telegraph Publ'g Co.*, 151 N.H. 435, 440, 859 A.2d 1166 (2004); *see also Mansfield v. Arsenault*, No. 2020-0100 (non-precedential order), 2021 WL 72370 (N.H. Jan. 8, 2021). Because the issue is presented and briefed in this case, we will consider it now.

[¶22] Whether to recognize a new cause of action presents a question of policy — would it be wise to provide the relief that the plaintiff seeks? *See Numerica Savings Bank v. Mountain Lodge Inn*, 134 N.H. 505, 509, 596 A.2d 131 (1991). Reaching an answer to this question requires two separate steps, for we must determine whether the interest that the plaintiff asserts should receive any legal recognition and, if so, whether the relief that the plaintiff requests would be an appropriate way to recognize it. *Id.*

*8 [¶23] The plaintiff argues that we should recognize the cause of action for false light invasion of privacy as set forth in the Restatement (Second) of Torts:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977).

[¶24] We begin by noting that we have long recognized a right of privacy in this state. *See Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964). It is the scope of that right that is here at issue. In *Hamberger*, we explained that invasion of the right of privacy consists of four distinct torts: “The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff to be let alone.” *Id.* at 110, 206 A.2d 239 (quotation omitted). “The four kinds of invasion comprising the law of privacy include: (1) intrusion upon the plaintiff's physical and mental solitude or seclusion; (2) public disclosure of private facts; (3) publicity which places the plaintiff in a false light in the public eye; [and] (4) appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.” *Id.*

[¶25] We have recognized three of these privacy-related torts. *See id.* at 112, 206 A.2d 239 (recognizing tort for invasion of plaintiff's solitude or seclusion); *Karch v. BayBank FSB*, 147 N.H. 525, 534-35, 794 A.2d 763 (2002) (recognizing tort for public disclosure of private facts); *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 157, 816 A.2d 1001 (2003) (recognizing tort for appropriation of plaintiff's name or likeness). Here, however, even accepting that the interest that the plaintiff asserts — protection against publicity which places a plaintiff in a false light in the public eye — should receive legal recognition, we conclude that the relief the plaintiff requests would be neither an appropriate nor necessary way to recognize it.

[¶26] It is true that a number of jurisdictions have recognized the tort of false light invasion of privacy as set forth in the Restatement (Second) of Torts. We find persuasive, however, the Florida Supreme Court's analysis, declining to recognize the tort, in *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1114 (Fla. 2008). The tort is largely duplicative of existing causes of action, particularly defamation, both in the conduct alleged and the interests protected. While it is often argued that the tort of false light invasion of privacy allows recovery for “literally true statements that create a false impression,” *Rapp*, 997 So. 2d at 1106, the tort of defamation already recognizes that concept. *See Martin v. Hearst Corp.*, 777 F.3d 546, 552 (2d Cir. 2015) (noting that even a technically true statement can carry a defamatory meaning by implication) (cited in *Hynes*, 175 N.H. at 789, 302 A.3d 47). We see no reason to recognize a cause of action for false light invasion of privacy when recovery for that tort is substantially duplicated by torts already established in this state.

*9 [¶27] We find support for our conclusion in a 1992 law review article in which the author, Professor J. Clark Kelso, reviewed over 600 cases mentioning false light privacy by name. Professor Kelso noted that “[w]ith over six hundred cases mentioning false light privacy by name, one would expect to find at least one or two opinions in which false light was actually necessary to a proper decision.” J. Clark Kelso, [False Light Privacy: A Requiem](#), 32 Santa Clara L. Rev. 783, 785 (1992). Professor Kelso concluded, however, that there was not “a single good case in which false light can be clearly identified as adding anything distinctive to the law. In the overwhelming majority of cases, false light is simply added on at the end of the complaint to give the complaint the appearance of greater weight and importance.” *Id.*

[¶28] Accordingly, we join those jurisdictions that, like Florida, have declined to recognize a common law false light invasion of privacy action. See, e.g., [Renwick v. News and Observer Pub. Co.](#), 310 N.C. 312, 312 S.E.2d 405, 413 (1984); [Cain v. Hearst Corp.](#), 878 S.W.2d 577, 579 (Tex. 1994). As we noted above, whether to recognize a new cause of action presents a question of policy. Although we have the power to recognize a new common law cause of action, we are mindful that we should make such changes sparingly. See [Aranson v. Schroeder](#), 140 N.H. 359, 365, 671 A.2d 1023 (1995). Matters of public policy are primarily matters for the legislature, not the court, see [Zannini v. Phenix Mut. Fire Ins. Co.](#), 172 N.H. 730, 734, 234 A.3d 269 (2019), and we conclude that if a false light invasion of privacy cause of action is to be recognized in this jurisdiction, it should be crafted by the legislature, not the court. Cf. R.I. Stat. Ann. § 9-1-28.1(a)(4) (2012) (providing a “right to be secure from publicity that reasonably places another in a false light before the public”).

[¶29] In light of our rulings above, we need not consider Union Leader's cross-appeal. We affirm the trial court's dismissal of the plaintiff's complaint.

Affirmed.

MACDONALD, C.J., and DONOVAN, J., concurred; COUNTWAY, J., concurred in part and dissented in part; HICKS, J., sat for oral argument but did not participate in the final vote, see N.H. CONST. pt. II, art. 78; HANTZ MARCONI, J., sat for oral argument but did not participate in the final vote.

COUNTWAY, J., concurring in part and dissenting in part.

[¶30] I agree with the majority's analytical approach and conclusions regarding false light and agree with its conclusion that the statement “[t]hose who ... favor suppressing the franchise of citizens who don't look like them—have shown they'll lie” is not actionable in defamation. I disagree, however, that the statement identifying the plaintiff by name and asserting that he has “disseminated, across multiple media platforms, white supremacist ideology” is necessarily non-defamatory. In my view, the majority's analysis places too much emphasis on the general context of the statement, and does not sufficiently consider the specific language used and whether it states or implies the existence of facts that could be proven true or false.

[¶31] Not every statement that might be labeled “opinion” is categorically exempt under federal constitutional law from being actionable in defamation. See [Milkovich v. Lorain Journal Co.](#), 497 U.S. 1, 18, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Rather, the question is whether the statement at issue “present[s] or impl[ies] the existence of facts that can be proven true or false.” [Gray v. St. Martin's Press](#), 221 F.3d 243, 248 (1st Cir. 2000) (citing [Milkovich](#), 497 U.S. at 18-20, 110 S.Ct. 2695). In [Automated Transactions v. American Bankers Ass'n](#), 172 N.H. 528, 532 n.2, 216 A.3d 71 (2019), we recognized that this is also the appropriate inquiry under New Hampshire common law. The majority asserts that the phrase “ ‘disseminated ... white supremacist ideology’ falls into the realm of non-actionable derogatory characterization,” and that “nothing within this paragraph or the greater context of the op-ed states or implies that the plaintiff has engaged in ‘concrete, wrongful conduct.’ ” I disagree, because I would distinguish a statement accusing someone of being a white supremacist, see [Olthaus v. Niesen](#), 232 N.E.3d 932, 940 (Ohio 2023) (noting that the plaintiff made no argument “for how someone would plausibly go about proving or disproving one's white supremacist bona fides”), from the statement at issue here. In the present case, it would be possible

to examine the information that, according to Azzi, the plaintiff has disseminated over multiple media platforms to determine whether it contains white supremacist ideology.

*10 [¶32] In concluding that the statement is “rhetorical” and “does not imply the existence of any non-disclosed defamatory facts,” the majority states that “the author explains that his opinion derives from the plaintiff’s support of HB 544, a fact which the plaintiff does not dispute.” The majority evidently concludes that defendant Azzi’s statement that the plaintiff disseminated white supremacist ideology was a statement of Azzi’s opinion that by supporting HB 544 and opposing the teaching of critical race theory, the plaintiff disseminated white supremacist ideology. Were it clear on the face of the article that this was the factual basis of defendant Azzi’s assertion, I would agree that the statement would not be actionable. In such a case the reader would have had the opportunity to assess the basis on which the statement was founded, allowing the reader to draw his or her own conclusions concerning the opinion’s validity. See [Davis v. Boeheim](#), 24 N.Y.3d 262, 998 N.Y.S.2d 131, 22 N.E.3d 999, 1004 (2014); [Automated Transactions](#), 172 N.H. at 534, 216 A.3d 71 (“[E]ven a provably false statement is not actionable ... when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts.” (quotation omitted)). But the article does not make that clear. While defendant Azzi asserts that the article, in electronic form, links to columns and articles written by others named in the opinion piece, specifically, Gingrich, Edelblut, and Mendoza, the defendants do not contend that the article contains links to the plaintiff’s statements, writings or actions. Accordingly, it is not clear what facts defendant Azzi relies upon to support his assertion that the plaintiff disseminated white supremacist ideology.

[¶33] In light of the foregoing, I would reverse and remand the case for further proceedings, including a determination of whether the plaintiff is a public figure, in which case he would be required to prove, not only that the stated or implied assertions of fact are false, but also that the statement was made with actual malice. [New York Times Co. v. Sullivan](#), 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); [Nash v. Keene Publishing Corp.](#), 127 N.H. 214, 222, 498 A.2d 348 (1985). These further proceedings would not undermine the strong societal interest in robust discussion of public issues, but would better balance that interest with the plaintiff’s reputational interests and his right to the protection of his own good name, honoring “the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.” [Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 341, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (quotation omitted); see also [New York Times Co.](#), 376 U.S. at 269-70, 84 S.Ct. 710 (identifying the constitutional safeguards for freedom of expression on public questions).

All Citations

--- A.3d ----, 2024 N.H. 49, 2024 WL 4031395

Footnotes

- 1 Citing [Howard v. Antilla](#), 294 F.3d 244, 249 (1st Cir. 2002), Union Leader argues that because this case raises First Amendment considerations, we may “deviate from the ordinary standard of review in considering a Motion to Dismiss, and consider facts outside of the four corners of the Complaint.” Because we affirm the trial court’s decision using our established standard of review, we need not today decide whether to adopt a different review standard for cases raising First Amendment considerations.

2017 WL 6733971

Only the Westlaw citation is currently available.

United States District Court, W.D. Missouri, Central Division.

SHIPYARD BREWING COMPANY, LLC, Plaintiff,

v.

LOGBOAT BREWING COMPANY, LLC, et al., Defendants.

No. 2:17-cv-04079-NKL

|

Signed 12/29/2017

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ORDER

NANETTE K. LAUGHREY, United States District Judge

*1 Defendant Logboat Brewing Company moves to dismiss Count V of the Amended Complaint for failure to state a claim. Doc. 39. Plaintiff Shipyard Brewing Company, LLC opposes the motion, but asks in the alternative for leave to amend. For the reasons discussed below, Logboat's motion to dismiss Count V is granted in part, and Shipyard is granted seven days from the date of this Order in which to file an amended Count V.

I. Background

Shipyard alleges that it is a craft brewery with registered trademarks that it uses in connection with its goods and services, most notably, its varieties of beer. Count V is a claim for defamation against Logboat. Shipyard alleges in the "Facts" section of the Amended Complaint:

33. Shortly [after filing this lawsuit on May 15, 2017], one star reviews begin appearing on Shipyard's Facebook page from Facebook members living in or near Columbia, Missouri. Most of the comments referenced the lawsuit. All of the comments directed negative sentiments towards Shipyard. One of the commenters appears to be a relative of Logboat co-founder Judson Ball.

34. Presently, 193 comments appear on Shipyard's Facebook page. Of those, 189 comments are of the nature described above.

35. Upon information and belief, Logboat, through its principals or its agents acting at the encouragement of and for the benefit of its principals, made defamatory statements concerning Shipyard to members of the general public as retribution for Shipyard filing suit.

36. The hundreds of one star reviews on Shipyard's Facebook page, as well as negative articles in the press, are a result of Logboat's actions.

37. Such defamatory statements include, but are not limited to, suggestions that Shipyard is pursuing this lawsuit for ulterior motives, unsubstantiated claims that Shipyard is a trademark bully, and general insults concerning Shipyard's business and the quality of its beers.

Doc. 38, p. 9. Under “Count V—Defamation,” Shipyard alleges:

82. Logboat, through its principals, or its agents acting at the encouragement of and for the benefit of its principals, made defamatory statements as described herein concerning Shipyard to members of the general public as retribution for Shipyard filing suit.

83. Logboat was at fault for making such statements.

84. Such statements tended to expose Shipyard to hatred, contempt, or ridicule, or to deprive Shipyard the benefit of public confidence, as evidenced in the hundreds of one star reviews on Shipyard's Facebook page.

85. Logboat's statements were heard by members of the general public in and around Logboat's location in Columbia, Missouri.

86. Shipyard's reputation was damaged by Logboat's defamatory statements.

Id., pp. 15–16.

II. Discussion

Logboat argues that Count V should be dismissed for three reasons: Shipyard does not plead sufficient facts, Shipyard fails to allege the falsity of any alleged defamatory statement, and to the extent any statement is alleged, such statement is an opinion and therefore not actionable. Doc. 40, p. 2.

*2 For purposes of deciding a motion to dismiss for failure to state a claim, a court accepts the factual allegations contained in the complaint as true, and liberally construes the allegations in favor of the plaintiff. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008). To survive a motion to dismiss, the complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint is plausible if its “factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

In analyzing a claim for defamation, Missouri courts ask first whether the statement is defamatory at all and if so, whether a privilege, such as the one applicable to statements of opinion, shelters the maker from legal action. See *Kennedy v. Microsurgery & Brain Research Inst.*, 18 S.W.3d 39, 44 (Mo. App. 2000) (citing *Pape v. Reither*, 918 S.W.2d 376, 380 (Mo. App. 1996), and *Diez v. Pearson*, 834 S.W.2d 250, 252 (Mo. App. 1992)). The elements of a claim of defamation are: (1) the publication, (2) of a defamatory statement, (3) that identifies the plaintiff, (4) that is false, (5) that is published with the requisite degree of fault, and (6) that damages the plaintiff's reputation. *Smith v. Humane Society of U.S.*, 519 S.W.3d 789, 798 (Mo. 2017) (en banc) (citing *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 598–99 (Mo. 2013) (en banc)).

A. Sufficiency of the facts pleaded

With respect to sufficiency of the facts pleaded, Logboat argues that while Count V alleges “Logboat ... made defamatory statements as described herein concerning Shipyard to members of the general public as retribution for filing suit[,]” the Amended Complaint does not describe what defamatory statements Logboat made. Doc. 40, p. 3 (quoting Doc. 38, ¶ 82). However, in the “Facts” section of the Amended Complaint, Shipyard alleges that Logboat made defamatory statements through its principals or its agents to members of the general public, Doc. 38, ¶ 35, and two paragraphs later, alleges that “[s]uch defamatory statements include, but are not limited to, suggestions that Shipyard is pursuing this lawsuit for ulterior motives,

unsubstantiated claims that Shipyard is a trademark bully, and general insults concerning Shipyard's business and the quality of its beers[.]" *id.*, ¶ 37. Shipyard has therefore sufficiently identified the allegedly defamatory statements that Logboat made.

B. Allegations of falsity

Logboat next argues that Shipyard does not plead the falsity of any statement that Logboat made. Doc. 40, p. 3. Shipyard responds that it did so when it alleged that "[s]uch defamatory statements include, but are not limited to, suggestions that Shipyard is pursuing this lawsuit for ulterior motives, *unsubstantiated* claims that Shipyard is a trademark bully, and general insults concerning Shipyard's business and the quality of its beers." Doc. 44, p. 5 (emphasis in original). Shipyard continues, "The word 'unsubstantiated' is defined as 'not proven to be true.... In other words, Logboat's claims that Shipyard is a trademark bully are false.'" *Id.*, pp. 5–6 (citing www.merriam-webster.com/dictionary/unsubstantiated). Logboat replies that the definition quoted by Shipyard—"not proven to be true"—"does not include or reference the word false or falsity in general[.]" and that Shipyard has therefore failed to plead falsity with respect to its defamation claim. Doc. 46, p. 3. But Logboat has construed the allegations in its favor, when they must be construed in Shipyard's favor for purposes of the motion to dismiss. *See Eckert*, 514 F.3d at 806. A reasonable inference may be drawn that in alleging Logboat made an "unsubstantiated" claim, Shipyard has alleged that Logboat made a false claim. Therefore, Logboat's argument concerning the insufficiency of the pleading of falsity fails with respect to this statement.

*3 Shipyard did not specifically respond to Logboat's argument concerning the sufficiency of pleading of falsity of the other two statements, concerning "ulterior motives" and "general insults." But Shipyard elsewhere in its response argues that Logboat's statements imply assertions of objective facts, or undisclosed defamatory facts, and are therefore actionable. Those arguments will be discussed below.

C. Statements of opinion

Finally, Logboat argues that Shipyard has failed to allege an actionable statement under Missouri's defamation law because any alleged statements merely qualify as opinions. Doc. 40, pp. 3–4. Statements of opinion are privileged under the First Amendment's guarantee of freedom of speech and cannot be the basis of a defamation claim. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). Missouri has adopted "an absolute privilege for expressions of opinion, broadly holding that any alleged defamatory statements that 'can be characterized as opinions,' are 'subject to the First Amendment absolute privilege.'" *Smith*, 519 S.W.3d at 799 (quoting *Henry v. Halliburton*, 690 S.W.2d 775, 787 (Mo. 1985) (en banc)). "[T]here can be no liability under state defamation law for statements of opinion." *Id.* (citing *Gertz*, 418 U.S. at 339–40).

Nonetheless, "a statement labeled as an 'opinion' can be the basis of an actionable defamation claim if the alleged 'opinion' statement implies an assertion of objective facts." *Smith*, 519 S.W.3d at 799 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). *See also Pape v. Reither*, 918 S.W.2d 376, 380 (Mo. App. 1996) (explaining that the privilege for pure opinion "does not apply when the statement of opinion necessarily implies the existence of undisclosed defamatory acts"). But this exception does not swallow the rule. To qualify as defamatory under Missouri law, opinion statements must be provable as false. *Id.* In drawing the line between opinion and fact, Missouri courts ask whether "a reasonable factfinder could conclude that the statement implies an assertion of objective fact." *Id.* (quoting *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 314 (Mo. 1993) (en banc)). *See also Clinch v. Heartland Health*, 187 S.W.3d 10–17–18 (Mo. App. 2006) ("Whether a statement is fact or opinion is a question of law, and we make this determination based on the totality of the circumstances surrounding a given statement.") (internal citation omitted)).

The three, allegedly defamatory statements attributed to Logboat are its "suggestions that Shipyard is pursuing this lawsuit for ulterior motives," "unsubstantiated claims that Shipyard is a trademark bully," and "general insults concerning Shipyard's business and the quality of its beers." A reasonable fact finder could conclude that the first statement, "that Shipyard is pursuing this lawsuit for ulterior motives," implies an assertion of objective fact, based on the totality of the circumstances. An "ulterior motive" is simply "a secret reason." *See* <https://www.merriam-webster.com/dictionary/ulterior%20motive>. Whether Shipyard

has a reason for filing the lawsuit, that it has kept secret and beyond the reasons expressly stated in the complaint, is capable of being proven. Under Missouri law, the alleged statement is more than mere opinion.

The other two alleged statements, concerning “unsubstantiated claims that Shipyard is a trademark bully,” and “general insults about Shipyard's business and the quality of its beers,” are opinions. As discussed above, the allegation that Logboat made an “unsubstantiated” claim is sufficient to allege a falsity, but even so, calling Shipyard a trademark bully is merely an expression of an opinion, and is a statement similar to ones that Missouri courts have found do not support a claim of defamation. In *Smith*, 519 S.W.3d at 800–01, for example, the Missouri Supreme Court held that use of the phrase “puppy mill” in a report describing a kennel was not actionable. The phrase was “ ‘imprecisely used’ as ‘rhetorical hyperbole,’ and a ‘lusty and imaginative expression of [] contempt[.]’” *Id.* (citing *Milkovich*, 497 U.S. at 16–17, and *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 314 (Mo. 1993) (en banc) (considering whether a term is too “imprecise” to be actionable)). Although “puppy mill” carried a negative connotation, a negative connotation alone does not make a statement actionable. *Id.* at 801. The Missouri Supreme Court further held that statements about the “severity” of the business's violations, and that it was one of “worst licensed kennels in the state”, were subjective assessments that did not state an actionable claim for defamation. *Id.* at 801–02. See also *Pujols v. Pujols Family Foundation*, 2017 WL 4310436, * 5 (E.D. Mo. Sept. 28, 2017) (statement that “these two young men have ruined many lives” was not an objective fact capable of being proven as false; what constitutes “ruining a life” is subjective, and the opinion, while a pejorative one, was not actionable in defamation as a matter of law) (citing *Old Dominion Branch No. 496, Nat'l Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284–85 (1974) (finding the terms “scab” and “traitor” were protected speech and not subject to liability under state defamation laws)).

*4 Similar to the statements in *Smith*, the phrase “trademark bully” is an imprecise description or subjective assessment of Shipyard's conduct, and cannot be proven as an objective fact. The phrase may carry a negative connotation, but that alone does not suffice to make it defamatory. Likewise, general insults about Shipyard's business and the quality of its beers are merely subjective assessments. Such expressions of opinion are protected by absolute privilege under the First Amendment.

Shipyard argues generally that statements do not qualify as pure opinion when they contain assertions of objective facts that can be verified as true or false. Doc. 44, pp. 6–7 (citing *Castle Rock Remodeling, LLC v. Better Business Bureau*, 354 S.W.3d 234, 241 (Mo. App. 2011), and *Pape v. Reither*, 918 S.W.2d 376, 382 (Mo. App. 1996) (explaining that an objective fact is one that can be verified as true or false)). But Shipyard does not suggest how the “trademark bully” and “general insults” statements could be verified as true or false. See Doc. 44, pp. 6–7.

Shipyard also argues that the allegedly defamatory statements imply the existence of undisclosed defamatory facts, and are therefore actionable. Doc. 44, p. 8 (citing *Pape*, 918 S.W.2d at 380; and *Restatement (Second) of Torts* § 566, cmt. b (1977)). It states that its defamation claim arises out of the marked increase in negative comments that the public posted on Facebook after the lawsuit was filed, and which Logboat's principals or agents encouraged by making defamatory statements to the members of the public. Shipyard argues that it “should be allowed to pursue the undisclosed defamatory acts that give rise to the negative comments through discovery.” *Id.* The argument is not persuasive. Nothing that Shipyard alleges in connection with the “trademark bully” and “general insults” statements implies the existence of undisclosed defamatory facts. As discussed above, Shipyard has alleged statements of opinion. Shipyard does not even suggest what the undisclosed defamatory facts might be.

Finally, Shipyard argues that the “trademark bully” statement is defamatory *per se* because it falsely imputes conduct to Shipyard that is incompatible with its business and therefore actionable. Doc. 44, p. 7 (citing *Pape*, 918 S.W.2d at 380). Shipyard says that it is required by law to protect its trademarks or risk losing them, and that it is good business practice to do so because the maintenance of strong marks is important to its brand. *Id.*, pp. 7–8. Whether the statement is defamatory *per se* does not change the outcome, however. In the case that Shipyard cites, *Pape*, a construction project owner wrote a letter to the construction firm and others, attempting to enforce settlement of a dispute that had arisen over the project. In the letter, the project owner stated, “It is my position that you participated in fraudulent and or [sic] illegal acts.” 918 S.W.2d at 380. Mr. Pape, an employee of the construction firm who had worked on the project, sued the project owner for defamation. The Court of Appeals held that the statement clearly identified Mr. Pape and that the subject of the statement was not vague or imprecise. “Furthermore,” the court

explained, “statements which falsely impute conduct incompatible with one’s business, trade or profession are defamatory per se.” *Id.* (citation omitted). The court held that “[i]t is clear that the allegation of ‘fraudulent and or illegal acts’ pertains to a professional context. Fraudulent or illegal conduct committed in one’s professional endeavors is, of course, incompatible with those endeavors, so that this statement is defamatory per se (assuming, as we must, that appellant can demonstrate its falsity).” *Id.* The court “next inquire[d] whether some privilege applies to this statement which prevents it from being actionable[.]” *Id.* such as “[s]tatements of opinion [which] are protected by an absolute privilege...rooted in the First Amendment[.]” *Id.* The court held that the statement was a protected opinion, inasmuch as it was qualified by the phrase, “It is my position[.]” *Id.* “[I]t is impossible to interpret this statement as positing a verifiable proposition, and verifiability is the crux of the fact/opinion distinction in defamation law.” Thus here, even if the “trademark bully” statement is defamatory *per se*, it does not establish an actionable claim of defamation. As discussed above, the statement is an expression of opinion and therefore protected by absolute privilege under the First Amendment.

*5 To summarize, the Court has held that Shipyard has stated a claim with respect to Logboat’s alleged statement that Shipyard is pursuing this lawsuit for ulterior motives, but has failed to state a claim with respect to the alleged statements concerning unsubstantiated claims that Shipyard is a trademark bully, and general insults concerning Shipyard’s business and the quality of its beers.

D. Request for leave to amend

Finally, Shipyard has asked for leave to amend if the Court dismisses Count V of the Amended Complaint. Doc. 44, p. 9. Shipyard points out that leave to amend should be freely granted. *Id.* (citing *Fed. R. Civ. P. 15(a)(2)*, and *Tyler v. Armontrout*, 917 F.2d 1138, 1143 (8th Cir. 1990)). It further argues that none of the “limited circumstances” justifying denial of leave exist, such as undue delay, bad faith on the part of the movant, futility of amendment, or unfair prejudice to the nonmovant. *Id.* (citing *Roberson v. Hayti Police Dep’t*, 241 F.3d 992, 995 (8th Cir. 2001)). Logboat opposes amendment, on the basis that the deadline to amend the pleadings, which has already been extended once, passed two months ago on October 21, 2017, Doc. 37, and that the deadline for completion of discovery is February 3, 2018, Doc. 43. Because the Court has dismissed at least part of Count V, and leave to amend should be freely granted, the Court will permit Shipyard to file an amended Count V within seven days of the date of this Order, and as consistent with this Order. Although the discovery deadline is February 3, 2018, a defamation claim has already been part of this lawsuit since at least October 17, 2017, so Logboat should not be unfairly prejudiced by amendment of Count V. If Logboat requires additional time to complete discovery with respect to amendments to the claim, it may make an appropriate motion.

III. Conclusion

Defendant Logboat Brewing Company, LLC’s motion to dismiss Count V, Doc. 39, is granted in part, consistent with this Order. Plaintiff Shipyard Brewing Company, LLC shall have seven days from the date of this Order in which to file an amended Count V, consistent with this Order.

All Citations

Not Reported in Fed. Supp., 2017 WL 6733971

CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with § 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: October 15, 2024.

Electronically signed by Luke N. Berg
LUKE N. BERG