UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALEX GOLDMAN, Plaintiff, -against- CATHERINE REDDINGTON, Defendant.	:	Case No. 1:18-cv-03662-JFB-ARL

DEFENDANT CATHERINE REDDINGTON'S MEMORANDUM IN SUPPORT OF FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

On April 22, 2017, Catherine Reddington ("Ms. Reddington" or "Defendant") attended a party at a Syracuse University ("the University") fraternity house to celebrate the end of her Spring semester classes. Ms. Reddington consumed alcohol at the party, and at some point in the evening, followed a fraternity member, Alex Goldman ("Plaintiff"), back to his room, where he sexually assaulted and injured her while she was incapacitated. When she awoke in Plaintiff's bed the next morning, her clothes were ripped, she felt pain in her vagina, and, as she would discover later that morning, she had sustained two vaginal tears that caused her to bleed through the leotard she was wearing. She went to the hospital and later reported this assault both to the Syracuse Police and to the Syracuse University Title IX office. The University investigated, and after a disciplinary hearing, the University found that Plaintiff was responsible for engaging in unwanted, violent sexual contact with and causing physical harm to Ms. Reddington. Syracuse University expelled Plaintiff from the University for violating the Student Code of Conduct via his assault on Ms. Reddington. Seven months later, Ms. Reddington wrote a blog piece that she posted on social media about her traumatizing experience, identifying Plaintiff as her attacker.

Plaintiff retaliated by filing this lawsuit, apparently in the hopes that his baseless damages claim would intimidate Ms. Reddington into silence. Even worse is his demand that this Court enter a permanent injunction preventing Ms. Reddington from speaking about her experiences. Plaintiff's Complaint should be dismissed in its entirety, as it fails to plead the essential elements of his defamation and tortious interference claims. As to the defamation claim, Plaintiff has not (and cannot) satisfy the required pleading standards for either falsity or fault. The tortious interference claim, largely derivative of the defamation claim, similarly fails because Plaintiff has not identified any wrongful interference, let alone any harm from such interference. Defendant

Reddington therefore asks this Court to grant her Federal Rule of Civil Procedure 12(b)(6) motion and dismiss the Complaint.

PLAINTIFF'S ALLEGATIONS[1]

On April 22, 2017, Plaintiff and Ms. Reddington attended a party at Plaintiff's fraternity house at Syracuse University, where they both consumed alcohol immediately prior to and during the party. (Compl. ¶¶ 5, 28-29.) At approximately 12:30 am on April 23, 2017, Ms. Reddington and Plaintiff went to Plaintiff's room together, where they remained until approximately 10:30 am on April 23, 2017. (*Id*. at ¶¶ 29-30.) Neither Plaintiff nor Ms. Reddington recalled what occurred between the hours of 12:30 am and 10:30 am on April 23, 2017. (*Id*. at ¶¶ 5, 7, 11, 30-32.) No one else entered the room during that time. (Compl., Ex. A, DE 1-2 at PageID #25.)

When Ms. Reddington awoke on the morning of April 23, 2017, she was lying on Plaintiff's bed with her clothing on. (Compl. ¶ 30; Compl., Ex. A, DE 1-2 at PageID #28). Ms. Reddington later told Syracuse Police that she was lying on her side and Plaintiff was lying behind her in a "spooning" position, and that he was "'rubbing his hands on her' in an effort to touch her vagina." (Compl., Ex. A, DE 1-2 at PageID #28.) Ms. Reddington left Plaintiff's room at approximately 10:30 am on April 23, 2017. (Compl. ¶ 30.)

One day later, on April 24, 2017, Ms. Reddington went to Crouse Hospital complaining of vaginal pain and bleeding. (Compl., Ex. A, DE 1-2 at PageID #26.) She claimed that she believed she was sexually assaulted at the fraternity party the day before. (*Id.*) During this hospital visit, hospital staff observed that Ms. Reddington "had a few bruises on her outer buttock" and "[i]t was also noted that there were two tears to her left labia." (*Id*.) During this visit, Ms. Reddington also

[1] For purposes of this Motion and Supporting Memorandum only, Defendant Reddington accepts all cited allegations from Plaintiff's Complaint as true, but reserves her rights, defenses, and objections to their accuracy and truthfulness.

submitted a leotard with a "blood stain in the crotch area." (*Id*.) A nurse at the hospital administered a Sexual Assault Nurse Examination ("SANE") and a toxicology screening exam to Ms. Reddington. (Compl. ¶¶ 6, 33.) The "DNA analysis of Ms. Reddington's vagina was negative for male DNA" and the toxicology exam indicated "no evidence of any intoxicants in her bloodstream . . . ." (*Id*. at ¶ 6.)

Ms. Reddington reported the alleged sexual assault to the Syracuse Police Department in May 2017. (*Id.* at ¶ 3.) In June 2017, Ms. Reddington also reported the alleged sexual assault to Syracuse University's Title IX office. (*Id*. at ¶ 10.) The Syracuse Police "believed there was no evidence a sexual assault occurred," and the Onondaga County District Attorney's office thereafter declined to charge Plaintiff with a crime. (*Id*. at ¶¶ 34-35; Compl., Ex. A-F.) The Syracuse University Title IX office, however, conducted its own investigation into Ms. Reddington's sexual assault complaint and determined that Plaintiff had "violated the Student Code of Conduct and in November 2017 expelled him." (Compl. ¶¶ 11, 36-37.)

Plaintiff alleges that after he was expelled from Syracuse University, Ms. Reddington made the following six defamatory statements about him:

1. Text to Thomas Aiello, a friend of Plaintiff, referring to Plaintiff as a "violent rapist." (Compl. ¶¶ 38, 56; Compl., Ex. B.)

2. Text to Dennis Kadric, a friend of Plaintiff, referring to Plaintiff as a "monster." (Compl. ¶¶ 39, 56.)

3. June 4, 2018 Facebook post, referring to Plaintiff as a "rapist" and saying this is not the first time he "has raped someone and I want to make sure that it is the last." (*Id*. at ¶¶ 42, 56; Compl, Ex. C.)

4. June 4, 2018 LinkedIn post – "an almost identical post" in which Ms. Reddington called Plaintiff a "rapist." (*Id*. at ¶¶ 44, 56; Compl., Ex. D.)

5. June 5, 2018 contact to Bohler Engineering via Facebook messaging, which was reposted on Facebook. Only a portion of the message was available and stated, in its entirety,

"…syracuse did when they deemed him dangerous and expelled him. Thank you for your time." (*Id*. at ¶¶ 45-46, 56; Compl., Ex. E.).

6. June 6, 2018 post on Facebook reviews section of NJIT that stated "[a] school that accepts recently expelled rapists, despite it being marked on their transcript." (*Id*. at ¶¶ 49, 56; Compl., Ex. F.)

Plaintiff states "[t]hese statements were false when made and Defendant knew they were false – based on her repeated inability to recall the events of the night in question and the findings of the SPD and OCDA investigations…." (*Id*. at ¶ 15). Plaintiff alleges that Defendant is liable for defamation and tortious interference with prospective economic advantage and business relations, and seeks damages and injunctive relief.

ARGUMENT

I. FEDERAL PLEADING STANDARDS REQUIRE THAT CLAIMS BE SUPPORTED BY NON-CONCLUSORY, PLAUSIBLE ALLEGATIONS OF FACT.

In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006); *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005). The Court must accept well-pleaded facts, but should ignore "bald allegations" or "legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 681 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). Pleadings that are "no more than conclusions, are not entitled to the assumption of truth," *Iqbal*, 556 U.S. at 679, and dismissal is required unless a plaintiff's well-pleaded facts support "a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. "[A] federal court sitting in diversity must test state-law claims against the standard in *Twombly* and *Iqbal*." *Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 864 F.3d 236, 247 (2d Cir. 2017).

II. PLAINTIFF'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW.

To state a claim for defamation under New York law, a plaintiff must allege that the defendant made a statement that was: (1) false, defamatory, and of and concerning the plaintiff; (2) published to a third party; (3) made with the applicable level of fault; and (4) defamatory *per se* or caused the plaintiff special harm. *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 280–81 (S.D.N.Y. 2016) (citing *Chandok v. Klessig*, 632 F.3d 803, 814 (2d Cir. 2011) and *Peters v. Baldwin Union Free Sch. Dist.*, 320 F.3d 164, 169 (2d Cir. 2003)). Plaintiff's defamation claim should be dismissed because it fails to adequately plead essential elements of the cause of action – namely falsity or fault.

A. Plaintiff has failed to plead that any of the allegedly defamatory statements were false.

"[A] plaintiff in New York courts generally must identify how the defendant's statement was false to survive a motion to dismiss" with respect to a defamation claim. *Tannerite Sports*, 864 F.3d 236, 245 (2d Cir. 2017); *see also Verragio, Ltd. v. AE Jewelers, Inc.*, No. 15 CIV. 6500 (CM), 2017 WL 4125368, at *6 (S.D.N.Y. Aug. 23, 2017) (dismissing counterclaim on a Fed. R. Civ. P. 12(c) motion "because Defendants have failed to plead—or even brief—any facts establishing that Verragio's statements in its July 15, 2015, letter were false, *i.e.*, that the statements were not substantially true"). Plaintiff's theory of falsity here rests on the sum of two facts: Ms. Reddington's statements were false because (1) Ms. Reddington could not recall what occurred between herself and Plaintiff on April 23, 2017, and (2) the prosecutor could not determine what, if anything, occurred between them for purposes of bringing criminal charges. (Compl. ¶¶ 8, 35). As a matter of law, this falls well short of adequately pleading falsity and, as discussed below, Plaintiff's other factual allegations undermine his claim of falsity.

First, Plaintiff's emphasis on Defendant's alleged lack of memory invites this Court to commit a clear error of law, as it is a patently inappropriate attempt to shift the falsity burden to Defendant. While truth is indeed an absolute defense to a defamation claim, *Goldberg v. Levine*, 97 A.D.3d 725, 726, 949 N.Y.S.2d 692, 693 (2012), to survive a motion to dismiss, the *plaintiff* bears the burden of pleading falsity; it is not, as Plaintiff's allegations suggest, Defendant's obligation to prove the truth of the allegedly defamatory statement. *Tannerite Sports*, 864 F.3d at 245. Plaintiff's allegations with respect to Ms. Reddington's alleged lack of memory turns this well-settled principle of law on its head.

Second, Plaintiff's reliance on the prosecutor's refusal to prosecute him for a sex crime is fundamentally misplaced. The standard of proof in criminal complaints – beyond a reasonable doubt – is far different and much more demanding than the preponderance of the evidence standard employed during Title IX hearing procedures.[2] Furthermore, a lack of consent sufficient to constitute a violation of section 130 of the New York State Penal Law – cited by the prosecutor in

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[2] *See* 2011 Dear Colleague Letter, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (describing the U.S. Department of Education's standard of review applicable in university disciplinary hearings as preponderance of the evidence); U.S. Department of Education, Office for Civil Rights, September 2017 Q&A on Campus Sexual Misconduct, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (rescinding the 2011 Dear Colleague Letter and providing that the standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other misconduct cases). This Court may take judicial notice of these documents and consider them on a Fed. R. Civ. P. 12(b)(6) motion. *See Pers. v. White*, No. 09-CV-3920 (JS)(ARL), 2010 WL 2723210, at *3 (E.D.N.Y. July 2, 2010) ("the Court may take judicial notice of records and reports of administrative bodies, items in the record of the case, matters of general public record, and copies of documents attached to the complaint.") (internal quotations omitted); *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004) ("we may also look to public records, including complaints filed in state court, in deciding a motion to dismiss.")

Plaintiff's Complaint, Ex. A, DE 1-2 at PageID #28 – requires proof of a clear "no means no" element. Under New York's Enough is Enough law, however, the standard for consent for sexual activity in all higher education institutions – including Syracuse University – is affirmative consent. *See* N.Y. Educ. Law § 6441. Thus, the fact that a local prosecutor declined to bring criminal charges against Plaintiff does not conclusively establish that no sexual assault occurred. To the contrary, the factual allegations that Plaintiff presents in his own Complaint – including that he was expelled from Syracuse University following a Title IX investigation of Ms. Reddington's sexual assault complaint – strongly supports that Ms. Reddington had a credible, objective basis in truth (in addition to her own personal knowledge of what happened to her) for making her statements about how Plaintiff sexually assaulted her.

Moreover, the Second Circuit explained in *Tannerite:*

> [A] statement is substantially true if the statement would not have a different effect on the mind of the reader from that which the pleaded truth would have produced. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.

Tannerite, 864 F.3d at 242-43. Under that definition and the facts alleged in the Complaint, there can be no question that Defendant's statements that, *inter alia*, Plaintiff is a rapist and that he sexually assaulted her, are substantially true. These statements have no different effect on the mind of the listener than the truth which Plaintiff himself acknowledges in his Complaint – that he was expelled from school at the conclusion of a Title IX investigation and disciplinary proceeding based on Ms. Reddington's complaint that he sexually assaulted her. In the words of the Second Circuit Court of Appeals, given the fine and shaded distinctions between Defendant's statements and the acknowledged truth, no legal harm to the Plaintiff has been done.

Plaintiff's theory of falsity is further undermined by numerous other facts in his Complaint that he either attempts to downplay or simply ignore. For instance, Plaintiff's supporting exhibits show that Ms. Reddington had tearing injuries to her vagina when she awoke in his bed next to him the morning after the party. (Compl., Ex. A, DE 1-2 at PageID #26.) Plaintiff admits that Syracuse University investigated Ms. Reddington's complaint of sexual assault, found him responsible for violating the Student Code of Conduct based on that complaint, and expelled him. (Compl. ¶¶ 11, 36-37.) And, importantly, Plaintiff repeatedly admits that that ***he too*** has no recollection of what occurred between him and Ms. Reddington on the morning of April 23, (*id.* at ¶¶ 5, 7, 11, 30-32.), and therefore cannot refute Ms. Reddington's statements that he sexually assaulted her and caused her injuries on April 23, 2017. In sum, Ms. Reddington did not have any injuries to her vagina when she went into his room in the early morning of April 23, she awoke 10 hours later with vaginal tearing injuries, and Plaintiff cannot refute Ms. Reddington's or Syracuse University's factually-founded conclusion that Plaintiff was the only one who could have caused, and in fact did cause, her injuries. Based on the facts as Plaintiff has pled them, therefore, he has clearly fallen short of adequately and plausibly pleading that Ms. Reddington's allegedly defamatory statements were false. Because Plaintiff has failed to properly plead falsity, his defamation claim fails.

B. Plaintiff has failed to plead facts to show that the allegedly defamatory statements were made with gross irresponsibility.

In addition to pleading falsity, "the plaintiff in a libel case must also demonstrate that the defendant culpably published the alleged false and defamatory statements." *Greene v. Paramount Pictures Corp.,* 138 F. Supp. 3d 226, 236 (E.D.N.Y. 2015). Under New York law, when the plaintiff is a private figure and the communication relates to a matter public of concern, the plaintiff must plead and prove that the statements were made in a "grossly irresponsible manner." *Id.* at

237, *accord Chapadeau v. Utica Observer–Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975) (Plaintiff must prove "the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."). In *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 486 N.Y.S.2d 11 (1985), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125 (1986), for example, the court considered which standard of fault applied to an allegedly defamatory statement regarding a matter of public concern that was made by a nonmedia defendant about a private figure plaintiff. *Id*. at 15. Relying on *Chapadeau*, the court held that the gross irresponsibility standard applied:

> [W]e conclude, as have virtually all State and lower Federal courts passing on the issue (*see*, Nimmer, *Introduction -- Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech*?, 26 Hastings LJ 639, 649, n 57), that a nonmedia individual defendant who utilizes a public medium for the publication of matter deemed defamatory should be accorded the same constitutional privilege as the medium itself (*see also*, Watkins and Schwartz, op cit , 15 Tex Tech L Rev 823).

Id. at 16; *see also Albert v. Loksen*, 239 F.3d 256, 269 (2d Cir. 2001) ("the standard also governs suits by private plaintiffs such as Albert against non-media defendants such as Loksen if the allegedly defamatory statements were 'arguably within the sphere of public concern' and admit of measurement by the *Chapadeau* standard, at least when they are publicly made."); *Konikoff v. Prudential Ins. Co. of Am.,* 234 F.3d 92, 101–02 & n. 8 (2d Cir. 2000) (same).

The initial inquiry to be made under *Chapadeau*, therefore, is whether the allegedly defamatory statement relates to a matter of public concern. *See Nelson v. Globe Int'l, Inc.*, 626 F. Supp. 969, 976 (S.D.N.Y. 1986). "What constitutes a matter of public concern is a question of law for the court," *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 874 (N.D.N.Y. 1995), *aff'd,* 112 F.3d 504 (2d Cir. 1996), and a statement "is arguably within the sphere of legitimate public concern" when "reasonably related to matters warranting public exposition." *Chapadeau*, 38 N.Y.2d at 199.

Defendant's statements are unquestionably a matter of significant public concern. Issues related to sexual assault, the #MeToo movement (which Ms. Reddington explicitly cites in her Facebook post, as Plaintiff admits, Compl. ¶ 42), and women coming forward with reports of their experiences of sexual assault have garnered global attention.[3] The issue of sexual assault on college campuses has also for years been taken up and discussed by courts, media, politicians, and academics across the nation. *See, e.g., Doe v. HarperCollins Publishers, LLC*, No. 17-CV-3688, 2018 WL 1174394, at *5 (N.D. Ill. Mar. 6, 2018) (stating that "investigation of sexual assaults on college campuses constitute matters of legitimate public concern").[4] Additionally, the manner in which law enforcement officers and prosecutors handle sexual assault complaints and treat victims bringing forth sexual assault allegations is an important and timely issue of public concern. *See, e.g., Pollnow*, 107 A.D.2d at 15 (finding "a private person's alleged criminal conduct and the operation of the criminal justice system with respect to the disposition of the charges against such an individual are matters of legitimate public concern").[5] There simply can be no question that

[3] John Feffer, *The #MeToo Movement Goes Global*, fairobserver.com (September 28, 2018), https://www.fairobserver.com/region/north_america/metoo-movement-around-world-brett-kavanaugh-hearing-news-headlines-24020/

[4] *See also, e.g.,*; Jane Stancill, *More Join Fight To End Sexual Assaults on College Campuses*, newsobserver.com (April 8, 2015), http://www.newsobserver.com/news/local/education/article17896547.html (noting that some universities around the country have only just begun measuring the frequency of such incidents); Dan Messineo, *McCaskill Challenges MU Students to Speak Up About Sexual Assault*, abc17news.com (April 18, 2015), http://www.abc17news.com/news/mccaskill-challenges-mu-students-to-speak-up-about-sexual-assault/32446120 (describing Senator McCaskill's efforts to encourage sexual assault reporting at the University of Missouri).

[5] *See, e.g.,* Nancy Kaffer, *The Odds are Against Women When Reporting Sexual Assault*, usatoday.com (October 3, 2018), https://www.usatoday.com/story/opinion/nation-now/2018/10/03/blasey-ford-sexual-assault-column/1482294002/; Kaelyn Forde, W*hy More Women Don't Report Sexual Assaults: A Survivor Speaks Out*, abcnews.com (September 27, 2018), https://abcnews.go.com/US/women-report-sexual-assaults-survivor-

Ms. Reddington's allegedly defamatory statements regarding her experiences of being sexually assaulted, along with her account of the aftermath following the reporting process, are matters of public concern.

Because the subject of the allegedly defamatory statements relate to important and timely matters of public concern, the *Chapadeau* "gross irresponsibility" standard applies. Gross irresponsibility, in this context, means something more than negligence, and "the test is an objective one that is not dependent upon the defendant's state of mind." *Mott*, 910 F. Supp. at 875, citing *Weiner v. Doubleday & Co., Inc.,* 74 N.Y.2d 586, 595, 550 N.Y.S.2d 251, 254–55, 549 N.E.2d 453, 456 (1989), *cert. denied,* 495 U.S. 930 (1990), and *Gaeta v. New York News, Inc.,* 62 N.Y.2d 340, 350–51, 477 N.Y.S.2d 82, 86, 465 N.E.2d 802, 806 (1984).

Plaintiff has not pled, and cannot plead, that Ms. Reddington acted with gross irresponsibility. Plaintiff alleges Ms. Reddington's statements were "knowingly false" because the Onondaga District Attorney's Office refused to bring criminal charges against Plaintiff. (Compl. ¶ 15.) But Plaintiff also admits that Ms. Reddington's statements came after his expulsion from Syracuse University, which was based on facts ascertained after an independent investigation into Ms. Reddington's sexual assault allegations and evidence presented by both sides at a disciplinary hearing. (*Id*. at ¶¶ 11, 36-37.) After an investigation and a hearing, the University found, by a preponderance of the evidence, that Plaintiff did what Ms. Reddington said he did, and then expelled him based on those findings.[6] Given these facts as pled by Plaintiff, he cannot show

speaks/story?id=57985818 (noting that "[o]ut of every 1,000 rapes, 994 perpetrators will walk free").

[6] It is also noteworthy that Syracuse University made these findings of responsibility against Plaintiff even after Plaintiff submitted the letter from the Onondaga District Attorney's office attached as an exhibit to Plaintiff's Complaint. (DE 1-2, Ex. A.)

that Ms. Reddington's statements were made with gross irresponsibility, *even if they are ultimately determined to have been "false" when made because of a lack of sufficient admissible evidence*. For this additional reason, the defamation claim should be dismissed.

C. Several of the allegedly defamatory statements are matters of opinion, were not made by Defendant, and/or are not "of and concerning" Plaintiff.

In addition to Plaintiff's failure to adequately plead falsity and fault, with respect to several of the individual allegedly defamatory statements, the defamation claim additionally fails for other, independent reasons.

First, the text message to Dennis Kadric, which refers to Plaintiff as a "monster," (Compl. ¶¶ 39, 56.) is a protected opinion and therefore not actionable. *See Jacobus v. Trump*, 55 Misc. 3d 470, 475, 51 N.Y.S.3d 330 (N.Y. Sup. Ct.) ("Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable."). Asserting that Plaintiff is a "monster" has no "precise, readily understood meaning," nor is it "capable of being proven true or false." *Jacobus*, 55 Misc. 3d at 476. Indeed, the law is well established that a plaintiff bears the burden of proving "that in the context of the entire communication a disputed statement is not protected opinion." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 179 (2d Cir. 2000.) Here, the statement that Plaintiff is a "monster" is not an actionable mixed opinion under *Jacobus*, particularly given the lack of specific context for the statement alleged in the Complaint. It therefore cannot form the basis of Plaintiff's defamation claim.

Second, the June 6, 2018 post on the Facebook reviews section of NJIT, which stated "[a] school that accepts recently expelled rapists, despite it being marked on their transcript," is not actionable because it is not "of and concerning" Plaintiff. (Compl. ¶¶ 49, 56; Compl., Ex. F.) "[T]he Court properly may dismiss an action pursuant to Rule 12(b)(6) where the statements are incapable of supporting a jury's finding that the allegedly libelous statements refer to plaintiff."

Greene, 138 F. Supp. 3d at 234 (internal quotations omitted). This allegedly defamatory statement was made on a public, online message board with no surrounding context, without naming Plaintiff by name, and which provided no other details about him or the circumstances of the assault. Such a statement cannot be "of and concerning" Plaintiff and therefore is not defamatory as a matter of law. *See, e.g., Carlucci v. Poughkeepsie Newspapers, Inc.*, 57 N.Y.2d 883, 885, 442 N.E.2d 442, 443 (1982) (holding that article "which never mentioned the corporation" could not be "of and concerning" the corporation); *Texas 1845 LLC v. Wu Air Corp.*, No. 11-CV-1825 JS ETB, 2012 WL 382828, at *5 (E.D.N.Y. Feb. 6, 2012) (finding the allegedly defamatory statement not "of and concerning" defendants where the "speaker did not mention the [] Defendants" and there was no indication that any listener understood that the speaker was referring to defendants).

Third, Plaintiff erroneously attributes the June 5, 2018 contact to Bohler Engineering via Facebook messaging to Defendant, but Plaintiff's own exhibit plainly demonstrates that Ms. Reddington did not make that statement. (*Id*. at ¶¶ 45-46, 56; DE 1-2 Ex. E.) Before Defendant can be held liable for making a defamatory statement, Plaintiff must first plausibly allege that *Defendant* made the statement. *Enigma Software*, 194 F. Supp. 3d at 280–81. Here, Defendant's Exhibit E clearly shows that another individual, identified in the Exhibit as "Catherine Schay," contacted Bohler Engineering. *See* Compl., Ex. E., DE 1-2 at PageID #44 (Catherine Schay commenting: "[I] genuinely didn't expect them to answer me but I'm so glad that they did and in the way that they did. nothing made me happier than to share"). Defendant therefore cannot be held liable for any allegedly defamatory material in this statement.

Finally, Plaintiff's request for injunctive relief is not appropriate and must be dismissed. Courts have held that injunctions in defamation cases are likely to violate First Amendment rights. *See Dollar Tree Stores, Inc. v. Serraty*, 2018 WL 1180165, at *13 (E.D.N.Y. Feb. 14, 2018) ("the

Second Circuit has held 'that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases.'") (*citing Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172, 176 (2d Cir. 2001)). Accordingly, any claim for injunctive relief must be dismissed.

III. PLAINTIFF'S TORTIOUS INTERFERENCE CLAIM FAILS AS A MATTER OF LAW.

Plaintiff's poorly pled tortious interference claim also fails as a matter of law.[7] To state a claim for tortious interference with prospective economic advantage, a party must allege that (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) the defendant's interference caused injury to the relationship with the third party. *See, e.g. Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003); *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40 (1st Dep't 2009), *leave to appeal dismissed in part, denied in part*, 14 N.Y.3d 736 (2010). For Defendant's alleged interference to constitute "wrongful means," "one of the following must be true: (1) that conduct must amount to an independent crime or tort; (2) that conduct must have been taken solely out of malice; or (3) that conduct must amount to 'extreme and unfair' economic pressure." *Friedman v. Coldwater Creek, Inc.*, 551 F. Supp. 2d 164, 170 (S.D.N.Y. 2008), *aff'd,* 321 F. App'x 58 (2d Cir. 2009). The Complaint alleges that Ms. Reddington made defamatory statements that

[7] As an initial matter, Plaintiff improperly confounds two separate and distinct New York causes of action into one: tortious interference with business relations and tortious interference with prospective economic advantage. *See NBT Bancorp Inc. v. Fleet/Norstar Financial Group Inc.*, 87 N.Y.2d 614, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996) (holding that "greater protection [is] accorded an interest in an existing contract … than to the less substantive, more speculative interest in a prospective relationship (as to which liability will be imposed only on proof of more culpable conduct on the part of the interferer)") (internal citation omitted).

interfered with Plaintiff's "business relations" with three institutions: Syracuse University, NJIT, and Bohler Engineering. (DE 1 at ¶¶ 71-74.) For multiple reasons, Plaintiff's allegations with respect to each of these entities fail to state a legally sufficient claim for relief.

A. Plaintiff has not alleged facts to plausibly support that Defendant's alleged interference constituted "wrongful means."

Plaintiff's tortious interference claim fails because he has not adequately alleged that Defendant's alleged interference constituted "wrongful means." To the extent Plaintiff's tortious interference claim is based on the defamation claim (*i.e.*, independently tortious conduct), it must be dismissed along with the defamation claim for the reasons explained in the preceding section. *See, e.g., McNally v. Yarnall*, 764 F. Supp. 838, 853 (S.D.N.Y. 1991); *Stillman v. Ford*, 22 N.Y.2d 48, 54 n.3, 238 N.E.2d 304, 307 (1968). Moreover, the allegations in the Complaint, and more specifically, the content of Ms. Reddington's alleged communications as reflected in the Complaint's exhibits, belie Plaintiff's conclusory assertion that Ms. Reddington communicated to Syracuse University, NJIT, and Bohler Engineering "solely out of malice." For example, the Facebook and LinkedIn postings attributed to Ms. Reddington and attached to the Complaint as Exhibits C and D, both include the following statements:

> I won't allow him to damage someone else just as he did to me. Even though I will never get back what I lost that night, at least I can prevent others from having to endure his cruel and demeaning violence. Because being able to do that makes the fight that I have been fighting for these past 13 months worth it.

(Compl., Exs. C, D.) In addition, the Facebook posting goes on to discuss the motivation of trying to protect others and prevent further sexual assaults: "My motive is to try to stop him from ruining another person's life, as this will not be the last time . . . . This is more than just seeking justice; this is seeking prevention." (Compl., Ex. C.) On their face, these communications – which form the foundation of Plaintiff's tortious interference claims – reveal the author's manifold motivations

beyond malice for expressing her views publicly: preventing other women from being victimized, educating others about the risks of sexual assault, and exposing the frequently re-traumatizing consequences of reporting assaults to law enforcement. Because Plaintiff fails to plead "wrongful means," his tortious interference claim fails.

B. Plaintiff has failed to allege actual injury attributable to Defendant's alleged conduct.

Next, Plaintiff's tortious interference claim should be dismissed as to Syracuse University and NJIT because the Complaint fails to allege cognizable injury to Plaintiff's "business relationships" with either school caused by Ms. Reddington's conduct. With respect to Syracuse University, even taking the allegations in the Complaint as true, Plaintiff has failed to allege how Ms. Reddington's filing of an allegedly false Title IX complaint interfered with Plaintiff's business relationship with the University. To the contrary, Plaintiff himself alleges that "Syracuse University [conducted] its own Title IX investigation pursuant to Syracuse University's Code of Student Conduct," (Compl. ¶¶ 10, 36), and subsequently, "Syracuse University determined that Mr. Goldman violated the Student Code of Conduct and in November 2017 expelled him." (Compl. ¶ 37.) Such allegations do not allege a proximate causal link between Ms. Reddington's Title IX complaint and his expulsion, as in fact, Plaintiff acknowledges that the University conducted its own investigation before his expulsion.

Relatedly, Plaintiff's allegations do not set forth any "injury" to his relationship with Syracuse University; to the contrary, the allegations state that Ms. Reddington's Title IX complaint prompted the University to follow the Code of Student Conduct that governed Plaintiff's relationship with Syracuse University by conducting an investigation and disciplinary proceeding. The fact that Plaintiff was ultimately expelled does not constitute injury to his relationship with Syracuse University, as expulsion was always a potential sanction under the terms of his

relationship with the University under the Code of Student Conduct. Plaintiff has not alleged that Defendant's allegedly false report of sexual assault led Syracuse University to in any way depart from its normal policies and procedures in disciplining Plaintiff. In short, Plaintiff has failed to allege any harm to him caused by Ms. Reddington that was outside of the terms of his defined relationship with Syracuse University.

Plaintiff's Complaint fares no better with respect to his tortious interference claims involving NJIT. Indeed, Plaintiff fails to allege any actual harm to his relationship with NJIT whatsoever and instead alleges that he is "currently a student at NJIT." (Compl. ¶ 71). Without alleging a specific cognizable injury to his "business relationship" with NJIT (such as that he was terminated from his program), his tortious interference claim with respect to his alleged relationship with that school cannot stand. *See, e.g., Mattesich v. Hayground Cove Asset Management, LLC*, 61 A.D.3d 487, 876 N.Y.S.2d 405 (2009) (plaintiff cannot sustain claim for tortious interference with prospective economic advantage without alleging actual non-speculative damages).

CONCLUSION

For the foregoing reasons, Defendant Catherine Reddington asks this Court to grant her Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss with prejudice,[8] and grant any other further relief the Court deems just, including costs and attorneys' fees.

[8] *See Bennett v. Care Correction Sol. Med. Contracter*, No. 15 CIV. 3746 (JCM), 2017 WL 1167325, at *6 (S.D.N.Y. Mar. 24, 2017) ("a plaintiff can plead himself out of court by alleging facts which show that he has no claim") (internal quotations and citation omitted); *See also Knafel v. Chicago Sun-Times, Inc.*, 413 F.3d 637 (7th Cir. 2005) (affirming grant of Rule 12(b)(6) motion to dismiss defamation claim with prejudice after finding the alleged defamatory statements established defendant was entitled to judgment as a matter of law).

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Respectfully Submitted,

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