UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

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

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## INTRODUCTION

Plaintiff's Response fails to meaningfully respond to Defendant Catherine Reddington's Motion to Dismiss. Though long on rhetoric, Plaintiff's 27-page Response Brief avoids several critical legal issues and disregards this Court's rules,[1] the Federal Rules of Civil Procedure, and binding and persuasive legal authority to arrive at the incorrect conclusion that Plaintiff's Complaint has stated plausible claims to relief. Moreover, Plaintiff also ignores or unfairly downplays material factual details – facts he pled in his Complaint – which, taken together, render his claims to relief implausible. In the end, Plaintiff has failed to allege facts sufficient to nudge his allegations from conceivable to plausible, and this Court should therefore dismiss the Complaint in its entirety.

## ARGUMENT

### I. PLAINTIFF RELIES ON PRE-*TWOMBLY* PRECEDENT AND INCORRECTLY STATES THE LEGAL STANDARD FOR FED. R. CIV. P 12(B)(6).

Plaintiff misstates the governing legal standard for Fed. R. Civ. P. 12(b)(6) motions to dismiss, erroneously relying upon pre-*Twombly*[2] cases. Plaintiff declares, incorrectly, that this Court "may not dismiss a complaint unless the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (DE 35 at PageID # 279). This "no set of facts" formulation was expressly abrogated in *Twombly*, and is no longer the governing standard for Rule 12(b)(6) motions. *See Twombly*, 550 U.S. at 563-64 ("*Conley's* 'no set of facts' language . . . is best forgotten as an incomplete, negative gloss on an accepted pleading standard."). The correct standard to be applied on a Rule 12(b)(6) motion to

[1] This Court's rules provide for memoranda of only 25 pages. *See* Individual Motion Practice and Rules of Judge Joseph F. Bianco, Section III.C. There is no indication on the docket that Plaintiff sought leave of the Court before exceeding the Court's page limit.

[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

dismiss is plausibility. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Dismissal is required unless Plaintiff's factual allegations "nudge [his] claims across the line from conceivable to plausible. . . ." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 678.

## II. PLAINTIFF'S DEFAMATION CLAIM DOES NOT STATE A PLAUSIBLE CLAIM TO RELIEF

### A. Plaintiff applies an incorrect and incomplete legal standard for defamation.

In addition to relying on an overruled Fed. R. Civ. P. 12(b)(6) standard, Plaintiff further misstates and oversimplifies the applicable legal standard for defamation cases in New York courts. Plaintiff bears the burden to "identify how the defendant's statement was false to survive a motion to dismiss." *Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 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). "'Substantial truth' is the standard by which New York law, and the law of most other jurisdictions, determines an allegedly defamatory statement to be true or false." *Tannerite Sports*, 864 F.3d at 242.[3] At the pleading stage, therefore, Plaintiff bears the burden to demonstrate that Defendant's statements were not substantially true. He has failed to do so.

### B. Plaintiff has failed to plead falsity.

Plaintiff's defamation claim is deficient not because it lacks pleaded facts about the falsity of Defendant's statements, but because the facts that are pled prove too much and undermine Plaintiff's assertion of falsity. When considering a motion to dismiss a defamation claim, the Court must consider *all* the facts appearing in the complaint as a whole. *See Thai v. Cayre Grp.,*

[3] *See also* Defendant's Memorandum in Support of Motion to Dismiss, DE 34, at Page ID # 254.

*Ltd.*, 726 F. Supp. 2d 323, 335 n. 96 (S.D.N.Y. 2010). Plaintiff attempts to distance his claims of falsity from the pleaded facts that Syracuse University investigated the alleged sexual assault, found Plaintiff responsible, and expelled him. Plaintiff also overlooks other compelling alleged facts included in his own Complaint, such as that Defendant was incapacitated and alone with Plaintiff in his room for several hours; that she awoke next to Plaintiff with her clothing torn and blood from two vaginal lacerations soaked through her leotard; and that Plaintiff himself cannot remember – and therefore cannot refute – Defendant's statements that he assaulted her. (DE 1 ¶¶5, 7, 11, 30-32; Ex. A, DE 1-2, PageID # 26-28).

Plaintiff mentions none of these facts in his Response, evidently believing that by ignoring some facts from his Complaint and emphasizing others, he can avoid dismissal by arguing that "reasonable" people can differ as to the falsity of the alleged defamatory statements. Plaintiff contends that he has pled falsity because the SANE exam conducted 26 hours after Defendant left Plaintiff's bedroom identified no physical evidence of sexual assault (other than vaginal lacerations, which Plaintiff conveniently disregards), which led the prosecutor to decline to file charges. But even if all of these alleged facts are true, taking the Complaint as a whole, it still falls short of plausibly demonstrating that the statements which Plaintiff alleges to be defamatory were actually false. At best, these facts as pled reveal only that law enforcement officials determined that they lacked sufficient evidence to file criminal sexual assault charges against Plaintiff.[4] The absence of criminal charges does not make it more plausible that Defendant's statements regarding Plaintiff's conduct toward her were demonstrably false.

[4] It is self-evident that the lack of physical evidence, especially coming more than a day after conduct is alleged to have occurred, does not affirmatively disprove any sexual conduct or sexual assault. Indeed, the Assistant Onondaga District Attorney said as much. *See* DE 1-2 Ex. A at PageID # 29-30 ("sexual assault cases are inherently difficult cases to prove . . . it is impossible to determine what, if anything, occurred that evening between Ms. Reddington and Mr. Goldman.").

Relatedly, Plaintiff has failed to demonstrate that the allegedly defamatory statements – that Plaintiff raped Defendant – were not substantially true as that term is legally defined. The issue here is what constitutes the "pleaded truth." Plaintiff would have this Court believe that the "pleaded truth" is simply that he did not rape Defendant, but that is incorrect.[5] The pleaded truth – that Plaintiff was expelled from Syracuse University after an investigation revealed he was responsible for violating the University's sexual violence policy and causing injury to Defendant – does not, as a matter of law, have a different effect on the mind of the reader than Defendant's statement that Plaintiff raped her. Stated differently, comparing a statement that "Goldman was expelled from Syracuse University because he committed a sexual assault that violated University policy" with a statement that "Goldman raped me" presents exactly the type of "fine and shaded distinction" the Second Circuit has held is insufficient to support a claim of defamation. *Tannerite Sports*, 864 F.3d at 242.

Plaintiff attempts to explain away the Syracuse University investigation, however, by claiming that it is "of no avail" because it is unreliable. (DE 35 at PageID # 281). Plaintiff cites a recent Sixth Circuit case, *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), for the proposition that courts have increasingly required public universities to permit the accused in Title IX investigations to cross-examine their accusers, to protect their due process rights.[6] Whether or not there were

[5]As an initial matter, Plaintiff never affirmatively pled that he did not sexually assault Defendant. Indeed, Plaintiff's reliance on other alleged facts (*i.e.*, that he cannot recall what happened on the morning of April 23 and that the district attorney could not determine what, if anything, occurred between Plaintiff and Reddington) preclude him from doing so. Nonetheless, Plaintiff attempts to improperly point this Court to an affidavit submitted in support of his motion to show cause, not to anything pled in his Complaint. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991) ("In considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.")

[6] As an initial matter, Syracuse University is a private university and therefore not a state actor subject to due process requirements. *See McRae v. Sweet*, No. 91-CV-1403, 1991 WL 274261, at *5 (N.D.N.Y. Dec. 13, 1991) ("Syracuse University cannot be considered a state actor.").

"flaws" in the Title IX process is wholly irrelevant to whether Defendant's statements were substantially true, because at the time Defendant made those statements, the result of the university investigation and hearing process provided more than a sufficient factual basis to support Defendant's statement that he raped her.

**C. Plaintiff cannot, as a matter of law, demonstrate that Defendant's statements were made with the requisite level of fault.**

Private figures speaking about a matter of public concern are only liable for defamation if the allegedly false statements were made in a grossly irresponsible manner. *See Chapadeau v. Utica Observer–Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975). A statement "is arguably within the sphere of legitimate public concern" when "reasonably related to matters warranting public exposition." *Id*. Plaintiff's attempt to explain away the elevated level of fault applicable here is unavailing.

Plaintiff first disputes that Defendant's statements involve a matter of public concern because he contends "the case law cited in the Motion to Dismiss fails to establish [it]" and because Defendant "cites no legal authority" for that proposition. (DE 35 at PageID # 16-17.) As the *Chapadeau* Court held, a matter of public concern is anything that "is reasonably related to matters warranting public exposition." 341 N.E.2d at 571. In any event, Plaintiff's argument fails because Defendant indeed provided recent legal authority. *See Doe v. HarperCollins Publishers, LLC*, No. 17-CV-3688, 2018 WL 1174394, at *5 (N.D. Ill. Mar. 6, 2018).[7] New York courts have made similar observations. *See Doe v. Daily News, L.P.*, 167 Misc. 2d 1, 3, 632 N.Y.S.2d 750, 752 (Sup. Ct. 1995) ("There is no question that violence towards women and rape in particular is a matter of paramount public concern."). It is incontrovertible that the issue of sexual assault and, in

[7] According to Plaintiff, *HarperCollins* is distinguishable because that case concerned a "claim for public disclosure of private facts and not defamation." (DE 35, at PageID # 289). This is simply a distinction without a difference.

particular, women coming forward with their experiences as victims of sexual assault, is a front-and-center national issue.

Plaintiff attempts to recast Defendant's allegedly defamatory statements as mere "pinpointed allegations" of "individualized" sexual assault and not "centered on social issues." (DE 35 at PageID # 289). This significantly mischaracterizes the allegedly defamatory statements cited in the Complaint. The form, context, and content of Ms. Reddington's publications as a whole demonstrate that they implicate a matter of important public concern. Defendant posted her experiences on social media platforms Facebook and Linkedin, opening with "[a] recognition of all survivors of assault and rape who have felt the need to stay quiet." (DE 1, Ex. C, DE 1-2 at PageID # 33). Defendant focused significantly on reporting the assault to the police and prosecutor, the ensuing investigation, the broader implications of sexual assault reporting in the legal system, and the effect that these experiences had on her.[8] (*Id.*) There can be little doubt that Ms. Reddington was speaking on matters of legitimate public concern, and the *Chapadeau* gross irresponsibility standard applies.

Plaintiff next argues that even if the gross irresponsibility standard applies, his Complaint meets it because Defendant supposedly knew her statements were false "based on the lack of any evidence whatsoever of sexual assault in addition to Ms. Reddington's admitted inability to recall what occurred . . ." (DE 35 at PageID # 289-90). Plaintiff only arrives at this conclusion, however, by ignoring countervailing facts appearing in his Complaint. Defendant woke up in Plaintiff's bed with vaginal lacerations and torn clothing, and she reported the incident to Syracuse University,

[8] Plaintiff's attempt to distinguish *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) from the instant case is without merit (*see* DE 35, at PageID # 288), because, as noted, Ms. Reddington did discuss in the posts at issue her views on the "the operation of the criminal justice system" with respect to its handling of the complaint that she made against Plaintiff as an individual. Under *Pollnow* expressions like this are "matters of legitimate public concern." *Pollnow*, 107 A.D.2d at 15.

which investigated and found Plaintiff responsible for her assault and injuries. This is more than enough to provide a sound basis in fact for Ms. Reddington's statements about the incident and to preclude a finding of gross irresponsibility.

**D. Several of the challenged statements are not defamatory for additional and independently sufficient reasons.[9]**

Plaintiff argues that the text message to Dennis Kadric referring to Plaintiff as a "monster" is an actionable mixed opinion, proceeding under the specious theory that the text message "must be analyzed given the sequential proximity of Ms. Reddington's social media campaign against Mr. Goldman and the text message at issue." (DE 35 at PageID # 292). Notably, Plaintiff fails to cite any legal authority for such an expansive reading of the mixed opinion doctrine. But more to the point, Plaintiff concedes that this text message to Kadric (which is not quoted within or attached as an exhibit to the Complaint, and therefore lacks ***any*** context whatsoever) predated the so-called "social media campaign against Mr. Goldman." Plaintiff's "sequential proximity" theory therefore does not withstand scrutiny.[10]

Plaintiff similarly argues that Defendant's June 6, 2018 post comment on NJIT's Facebook reviews section, which stated "[a] school that accepts recently expelled rapists, despite it being marked on their transcript" (DE 1 ¶¶ 49, 56; Ex. F., DE 1-2 at PageID # 46), can be "of and concerning" Plaintiff because of the separate statements made by Defendant in her Facebook and LinkedIn posts 2 days earlier which "tagged" NJIT. (DE 35 at PageID # 293). Plaintiff's theory is speculative at best, and unsupported by New York law: "Although it is not necessary for the

[9] Plaintiff's statement that Defendant has only specifically challenged "the last three of Ms. Reddington's statements" (DE 35 at PageID # 291) is incorrect; Defendant has clearly moved to dismiss claims involving *all* of the allegedly defamatory statements because they do not constitute defamation as a matter of New York law.

[10] As stated in Defendant's Motion to Dismiss, asserting that Plaintiff is a "monster" has no "precise, readily understood meaning," it is not "capable of being proven true or false," and the circumstances and context (which are not addressed at all by Plaintiff's pleading) do not support its supposed defamatory nature. *Jacobus v. Trump*, 55 Misc. 3d 470, 476, 51 N.Y.S.3d 330 (N.Y. Sup. Ct.).

plaintiffs to be named in the publication, they must plead and prove that the statement referred to them and that a person hearing or reading the statement reasonably could have interpreted it as such . . . . [t]his burden is not a light one." *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82, 86–87, 65 N.E.3d 35, 37 (2016). Plaintiff has not met the heavy burden of demonstrating that this communication to NJIT was "of and concerning" Plaintiff, as required to survive dismissal on a Rule 12(b)(6) motion.

Finally, Plaintiff argues that Defendant "is responsible" for the Facebook message to Bohler Engineering, even though an attachment to Plaintiff's own Complaint makes such a conclusion implausible. Plaintiff complains that Defendant did not "submit[] any evidence" that Catherine Schay, not Defendant, submitted the message to Bohler Engineering. (DE 35 at PageID # 295). Of course, Defendant is neither required nor permitted to submit such evidence on a Fed. R. Civ. P. 12(b)(6) motion. *Kramer*, 937 F.2d at 773. Moreover, such additional evidence is unnecessary to conclude that Defendant did not, in fact, make that statement; Plaintiff's Complaint supplies all the "evidence" needed. *See* DE 1-2, Ex. F PageID # 44 (Catherine Schay stating "genuinely didn't expect them to answer me but I'm so glad they did . . .").

## III. THE TORTIOUS INTERFERENCE CLAIM IS FATALLY DEFICIENT

Plaintiff's Complaint is deficient with respect to two key elements required for a tortious interference with prospective economic advantage claim: that Defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and that Defendant's interference caused injury to Plaintiff's 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).[11]

[11] Plaintiff acknowledges that he does not seek to hold Defendant liable based on a claim that she "acted solely out of malice." Rather, Plaintiff maintains that his tortious interference claim "is founded on a viable defamation claim."

With respect to injury, Plaintiff posits that his expulsion from Syracuse University was caused by Ms. Reddington filing "a knowingly false complaint with Syracuse University." (DE 35, at PageID # 297). "In other words," Plaintiff continues, "without Defendant's false complaint to Syracuse University, Mr. Goldman would never have been expelled, at least for these particular events." *Id*. But this "causal link" theory of tortious interference ignores the intervening causes of the Title IX investigation and disciplinary hearing that Syracuse University conducted, in accord with its own Code of Student Conduct, before expelling Plaintiff. Indeed, Ms. Reddington's report of the assault to the university (which, for all the reasons cited in Defendant's opening brief and herein, was not a "false report") did not trigger any disturbance or termination of Plaintiff's relationship with Syracuse University. Rather, it prompted Syracuse to enact the policies and procedures that defined Plaintiff's student relationship with the school – namely conducting an investigation and administrative proceeding in accord with its Code of Student Conduct. A defendant's conduct toward a third party that does not actually interfere with the third party's relationship with the plaintiff cannot constitute "injury to the business relationship" for purposes of setting forth a tortious interference claim:

> Where 'the underlying business relations remained undisturbed,' a claim for tortious interference is "fatally defective." [citing *PPX Enters. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 270 (2d Cir. 1987) (abrogated on other grounds).] Interference that does not rise to the level of a breach of agreement or severance of the relationship does not amount to an injury sufficient to make a tortious interference claim. *Id.*

*RFP LLC v. SCVNGR, Inc.*, 788 F.Supp.2d 191, 198 (S.D.N.Y. 2011). Stated another way, a plaintiff cannot sustain a tortious interference with prospective economic relations claim unless he demonstrates "both wrongful means and that the wrongful acts were the ***proximate cause*** of the

(DE 35, at PageID # 296). Because the defamation claims on which Plaintiff's tortious interference claims are premised fail for multiple reasons, Plaintiff's tortious interference claims under Court II should also be dismissed.

rejection of the plaintiff's proposed contractual relations." *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir. 2004) (emphasis added) (citing *Pacheco v. United Medical Assoc., P.C.*, 759 N.Y.S.2d 556, 559 (3d Dep't 2003) (citation and internal quotation marks omitted)); *see also Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F.Supp.2d 489, 533 (S.D.N.Y. 2011) (same). Because the end of Plaintiff's relationship with Syracuse University came as a result of the school's investigation and disciplinary proceeding (and not directly from Defendant's sexual assault allegation alone), and because Plaintiff does not allege that Defendant's assault allegation caused the University to depart from its normal policies in any way, Plaintiff has failed to set forth the necessary injury prong to sustain a tortious interference claim with respect to Syracuse University. This claim should be dismissed.

Finally, Plaintiff fails to respond to Defendant's argument that he has not alleged any injury as it relates to NJIT. That portion of the motion should be deemed uncontested and the claim should be dismissed. *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, No. 08-CV-442 TPG FM, 2014 WL 4723299, at *7 (S.D.N.Y. Sept. 23, 2014) ("a plaintiff abandons a claim by failing to address the defendant's arguments in support of dismissing that claim.").

## 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, and grant any other further relief the Court deems just, including costs and attorneys' fees.

Date: October 29, 2018

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2018 I electronically filed the foregoing Reply Memorandum in the United States District Court for the Eastern District of New York using the CM/ECF system which will send a notice of electronic filing to the following:

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