SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MEGAN CARSON GRIFFITH,	:	
	:	Index No. 100114/2020
Plaintiff,	:	
	:	Hon. Kathryn E. Freed
- *against* -	:	
	:	
THE DAILY BEAST, NOAH SHACHTMAN, and MAXWELL TANI,	:	
	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiff Megan Carson Griffith submits this memorandum of law in opposition to the motion by defendants The Daily Beast Company LLC ("Daily Beast"), Noah Shachtman and Maxwell Tani to dismiss the First Amended Complaint pursuant to CPLR §§ 3211(a)(1) and (7).

Plaintiff's career as a magazine and newspaper editor was destroyed after the *Daily Beast* defamed her in a January 23, 2019 article, refusing to correct the record even after being shown that its claims were false and despite an investigation by a national law firm establishing the falsity of the claims. In this article, writer Maxwell Tani depicted Ms. Griffith as someone who routinely made racist and transphobic comments in the workplace and as an unfit manager and journalist. Tani's article, however, was the product of highly biased sources and suspect motives and disregard of minimal journalistic standards. In his haste to put out a damaging story targeting plaintiff, a key hire at a new, rival publication ("Gawker 2.0"), Tani failed to make even the token gestures of fairness exhibited by the most base tabloids—such as interviewing or seeking comment from the subject of an article.

Unfortunately, Tani's smear of plaintiff and Gawker 2.0 in the Daily Beast effectively cancelled Gawker's revival, along with plaintiff's personal reputation and career. She is now unemployable as a journalist despite years of success because of the damage done by defendants in defaming her. Plaintiff, who uses the name Carson Griffith, brings this lawsuit to correct the record, mend her reputation, and hold defendants accountable for the damage they have wrought on her and her career.

ALLEGATIONS OF THE COMPLAINT

1. Gawker 1.0, its self-destruction, and the Daily Beast as heir apparent

As set forth in the Amended Complaint, Gawker (formally Gawker Media, Inc., then Gawker Media, LLC) was originally an online media company that operated a blog network and

flagship website at the domain Gawker.com. Its coverage revolved around gossip and scandals in a certain social set, primarily the entertainment and media world centered on New York City and other media centers, though its coverage involved people both famous and unknown to the public. It gathered a wide and loyal readership among that same set and attracted heavy internet traffic to its site. Gawker was popular with the New York–centered media community because it treated them like celebrities, worthy of both adulation and targeting. Following a series of dramatic and controversial changes in management and business model, however, Gawker met its demise with the publication of two pieces. One was a 2007 article "outing" Silicon Valley magnate Peter Thiel as gay. Unlike Gawker and most of its readership, Thiel is a political conservative, and the revelation provided Gawker with a powerful enemy in Thiel. The second was the publication by Gawker, in 2012, of a sex tape depicting Hulk Hogan, a prominent professional wrestler and entertainer, cavorting with his friend's wife. Having raised the ire of the intensely private Mr. Thiel, he applied his considerable fortune to fund lawsuits against Gawker, including one by Mr. Hogan. The latter led to a $140 million judgment against an unapologetic and defiant Gawker in 2016 and its subsequent bankruptcy.

The scramble to claim Gawker's legacy for muckraking and strong brand value began almost immediately, and two frontrunners emerged quickly. One was defendant Daily Beast, which scooped up the core of Gawker's talent and staff writers, including former Gawker president Heather Dietrick (who became the CEO of the Daily Beast), and former Gawker editor-in-chief, defendant Noah Shachtman. Shachtman was clear about his aspiration for the Daily Beast to take on Gawker's mantle in a November 2018 interview published in Vox, a magazine with similar political and cultural leanings, in an article entitled "Is the Daily Beast the new Gawker?" There, Shachtman stated: "I think that we like to embrace the gonzo and that Gawker was an inheritor of

that gonzo spirit that didn't originate with Gawker, but that they carried that mantle for a little while. We really like the gonzo . . . . We really like the fun and we don't give that many fucks . . . There's been very little successful litigation against us." Gonzo journalism, of course, is a style of journalism that abandons any claim to objectivity, often including the reporter as part of the story via a first-person narrative. Shachtman also described the Daily Beast oxymoronically as a "high-end tabloid," and crowed about its financial invulnerability to defamation liability, in contrast to Gawker, because it was owned by a "giant globo-corp[]."

The Daily Beast's aspirations to make the Daily Beast "Gawker 2.0" were threatened, however, by another well-heeled entrant: Bryan Goldberg, head of Bustle Digital Group Media ("BDG Media") and the owner of online publications Bustle and Elite Daily, who purchased the Gawker domain in July 2018 and had his own plan to build Gawker 2.0. Mr. Goldberg's ambitions drew widespread resentment from the New York media community. Unmoved by the irony of the economic crises that led to Gawker's editorial desperation and resultant demise, former Gawker staffers viewed and characterized Goldberg as an outsider and conservative businessman whose past management history showed a greater predilection for cost-cutting than for cultivating culture.

As set forth in the First Amended Complaint, these considerations led to a plan to destroy Mr. Goldberg's Gawker 2.0—not by confronting the feisty millionaire himself, but by identifying and "taking down" its weakest link. That link turned out to be Carson Griffith.

2. The Daily Beast "hit piece" on Ms. Griffith

Emboldened by its "globo-corp" owner's resources and "crack team of lawyers," defendants set about in earnest to reclaim the crown of "don't give that many fucks" journalism from Mr. Goldberg's outré Gawker 2.0. The result of that approach, as set forth in the FAC, was the destruction of plaintiff, an essentially apolitical journeyman magazine editor and former newspaper gossip columnist who had been named Editorial Director of the new publication.

Despite her years of experience in the field, Ms. Griffith had no political significance or power in the New York media community. Her destruction led to the "cancellation" of Gawker 2.0 at the hands of defendants, self-appointed bearers of the Gawker flame. Defendant Maxwell Tani, a Daily Beast writer, wrote the hit piece.

It was published on January 23, 2019 under the title, "Gawker 2.0 Implodes as Its Only Reporters Quit" (the "Article") and described the sudden resignation of Gawker's "only reporters," Maya Kosoff and Anna Breslaw. Tani, in fact, relied exclusively on Kosoff and Breslaw as sources for the article despite their obvious bias, not only because they had quit and thereby "made" the news being "reported" in the first place, but because they had, in their brief two-week sojourns at Gawker, keenly urged Gawker management to remove Ms. Griffith from her position as their supervisor. Tani's reliance on Kosoff and Breslaw also violated basic journalism ethics, especially because Kosoff was one of his closest personal friends.

The Article's claims about plaintiff were false and defamatory. Even then, they were, in and of themselves, thin soup, but they hit the necessary notes of claimed sexual and racial insensitivity on Ms. Griffith's part to secure the result expected in the present Cultural Revolution–type environment. They included the following (emphasis added) false claims:

- "***The new site's only two full-time writers exited Wednesday in protest of editorial director Carson Griffith's offensive remarks about everything from race to penis size***";
- "The two reporters said they decided to leave the new Gawker after ***Bustle Digital Group***—which bought the shuttered Gawker.com domain and its archives in a mid-2018 fire sale—***refused to oust Griffith over offensive***

workplace comments about everything from ***poor people*** to ***black writers*** to her ***acquaintance's penis size***";

- "In a Slack message reviewed by The Daily Beast, ***Griffith seemed to brag to Gawker staff that she had gotten them out of a company-wide diversity training session, though neither Kosoff nor Breslaw had asked her to do so***";
- "Kosoff additionally told HR of an exchange in which ***Griffith took a dismissive stance towards the recruiting of a writer who identifies as nonbinary***. Kosoff, who was tasked with recruiting some new editorial, wrote in a Slack message that she was going to meet with a potential staffer 'who is a person of color and nonbinary (uses they/them pronouns).' When she returned from the meeting two hours later, ***Griffith initially laughed off the preferred pronouns.*** 'lol is [name redacted] a girl? Griffith asked[]"; and
- "During one of Breslaw's interviews for the job, ***Griffith mentioned*** the snack selection at the office, and noted ***that she had a snack saved in her pocket. 'That's so poor person of me,' she joked."***

These statements were each either demonstrably false or were so twisted from their original context that the suggested defamatory meaning was a false representation of the actual communication. Plaintiff never made the alleged comments about "poor people," "black writers," or male genitalia. As to the second bulleted claim, the referenced Slack message nowhere contained the term "diversity training session," but, as the context makes clear, expressed plaintiff's sense that she had done Kosoff and Breslaw a favor—one obviously not left unpunished by them—in allowing them to attend two short meetings instead of a four-hour meeting. As to the third bulleted point, the Slack message made clear that Plaintiff expressed enthusiasm for meeting

the nonbinary candidate, and that she was seeking clarification from Kosoff on which pronouns to use to address the candidate.

That objective journalism, so scorned by the gonzo ethic of The Daily Beast, was never involved here is beyond question. Defendant Tani never asked plaintiff—the protagonist of the Article—for comment or explanation concerning the "scandalous" allegations against her. Such opportunity for comment would have been appropriate under any circumstances, but here, where the Slack messages Tani claimed to review readily revealed the dubious nature of his friend's interpretations of them, such an omission was even more acutely inappropriate. Tani's perfunctory request to Gawker 2.0 for a comment about the completed article, conveyed **less than an hour before publication**, was not merely perfunctory; it was the height of cynicism.

The Article's publication had the desired effect, quickly surrounding Ms. Griffith and Gawker with expressions of outrage, feigned or otherwise, from the audience to which it was directed. Wasting little time, Gawker's Mr. Goldberg contacted Shachtman and Daily Beast CEO Heather Dietrick to lay out his obvious concerns about what he readily perceived to be highly biased and dishonest claims about Ms. Griffith.

Mr. Goldberg followed up with an email memorializing the telephone conversation and attaching documentation showing the entirety of the communications that Kosoff had provided to Tani, which showed how they had been deceptively cherry-picked for the Article. Despite their acknowledgement of the defamatory nature of the article and this extensive documentation absolving plaintiff of accusations leveled at her, defendants made no effort to correct or retract the Article. No proof would have caused them to do that, because the effect they sought by commissioning and publishing the Article—a firestorm of online vitriol directed at plaintiff, and by proxy to Gawker 2.0—was well under way, and, as planned, was laying waste to Gawker 2.0's

rebuilding efforts. Advertisers pulled out, and BDG Media employees called for plaintiff to be removed as well as engaging in a broad campaign of intimidation and obloquy toward her at work.

3. Gawker's independent investigation of the allegations and defendants' refusal to cooperate

BDG Media resisted the pressure to fire Ms. Griffith while an outside law firm, Goodwin Proctor, was retained to investigate the Article's allegations. The firm interviewed all Gawker 2.0 employees and reviewed the entirety of plaintiff's digital communication history during her employment at BDG Media. Breslaw and Kosoff, however—the sole sources relied on by Tani in preparing the Article—refused to meet with the outside investigators.

Goodwin Proctor concluded that the Article's allegations were false, but even after the results of the investigation were released, defendants persisted in refusing to retract or correct the Article. At this point, due to the Daily Beast's large audience and online presence, virtually everyone in the New York media world had read the Article. Plaintiff's Twitter account was inundated with death and rape threats, countless insults, and messages urging her to commit suicide. Plaintiff's coworkers, none of whom claimed to ever have had an inappropriate encounter with Ms. Griffith herself, nonetheless shunned her, insulted her, and agitated for her to be removed because of the allegations broadcast in the Article.

BDG Media was, as intended by defendants, put between a rock and hard place. Defendants' misrepresentations had made Plaintiff into a pariah, and BDG Media was in the position of trying to build an online magazine while being unable to hire staff to work with that magazine's Editorial Director. Faced with the situation and having done everything it reasonably could have to stand by its wrongly-accused employee, BDG Media nonetheless reluctantly informed Ms. Griffith that they would have to let her go.

BDG's immediate problem was solved, but the damage was done; BDG Media had to drop its plans to launch Gawker 2.0. Ms. Griffith's professional and personal lives are in ruins because of defendants' mercenary smear campaign against her. This lawsuit is an attempt to rectify the wrong done by defendants in their determination to "not give many fucks" about whoever got in the way of their determination to be the next, the only and the entirely appropriate successor to the appropriately unlamented original Gawker.

PROCEDURAL HISTORY

On January 23, 2020, plaintiff filed the original complaint in this action *pro se*. On April 22, 2020, defendants filed a motion to dismiss. Plaintiff then retained the undersigned counsel and, on July 23, 2020, filed an amended complaint (the "First Amended Complaint" or "FAC"). On August 24, 2020, defendants moved to dismiss the First Amended Complaint (the "Motion").

The First Amended Complaint readily makes out a cause of action for defamation, so rather than move based on its legal sufficiency, defendants have submitted a motion that looks more like a final pretrial order than a motion on the pleadings. It includes a raft of documentary evidence, including Slack messages between Kosoff or Breslaw and plaintiff, a secret recording of a BDG Media human resources meeting by Kosoff and Breslaw that was certainly not referred to in the FAC, and an article in a magazine called *Splinter*. Motion, Bolger Aff., Exs. C, F-H. This evidentiary material was neither attached to nor, contrary to defendants' assertion, incorporated into the First Amended Complaint by reference.

LEGAL STANDARD

"On a motion to dismiss pursuant to CPLR 3211, the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.' " *Wiesen v.*

New York Univ., 304 A.D.2d 459, 460 (1st Dept 2003) (citations omitted). When evidentiary material outside the pleading's four corners is considered, and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader has stated one and, unless it has been shown that a material fact as claimed by the pleader is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate. *Kunik v. New York City Dep't of Educ.*, 142 A.D.3d 616, 618 (2d. Dept 2016).

Defendants' insistence that plaintiff "incorporated by reference into the FAC" the documents that they attached as exhibits to their Motion (Motion, p. 21) is baseless, and would if accepted amount to so great an exception to the general rule as to devour it. Defendants provide scant authority for the assertion, moreover, that even to the extent such material could be construed as having been referred to in the FAC, that would suffice to justify this Court's consideration of it at the pleadings stage, relying on *Lore v. New York Racing Ass'n. Inc.*, 12 Misc. 3d 1159(A), at *3 (Sup. Ct. Nassau Cty. 2006), an unpublished trial court decision that relies on federal decisions involving motions under Federal Rule of Civil Procedure 12(b)(6). Nor may defendants bootstrap their extensive factual submissions onto exhibits that were part of the initial complaint; how best to present her claims in a pleading is plaintiff's prerogative. It is well-established that when "[a]n amended complaint [has] been served, it supersede[s] the original complaint and bec[o]me[s] the only complaint in the case . . . [and] the action . . . proceed[s] as though the original pleading has never been served." *Halmar Distributors, Inc. v. Approved Mfg. Corp.*, 49 A.D.2d 841, 841, 373 (1st Dept 1975) (citations and quotation marks omitted). Separate and apart from the possible question of judicial admissions—an evidentiary matter unrelated to the proper standard for

evaluating the sufficiency of a pleading—defendants must dismiss the pleadings as they are now, not as they were before.

In any event, to the extent that federal doctrine regarding incorporation by reference applies to a motion under CPLR 321, a document is not considered "incorporated by reference" merely by inclusion of short quotations from it. *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989). Here the FAC did not have attached as exhibits any of the documents that defendants attach as exhibits to their Motion or quote them at length, and fall short of the "quot[ing] entire text of [document]" that courts have found to constitute "incorporation by reference." *Id*. (citations and parenthetical omitted). The evidence thrown at the Court in defendants' motion is just that: evidence. As such, it is subject to authentication challenges, impeachment, cross-examination of the speakers or recipients of written communications and testimony concerning its meaning and context. None of that is part of modern-day notice pleading.

Defendants' implied suggestion is that, to show that she has stated a cause of action, plaintiff must use her response to the Motion to counter **their** evidence with **her own** evidentiary submissions, which, by their argument, would include other documents referred to in the First Amended Complaint. This would necessarily, and quite legitimately, include—just to cite one example—plaintiff's submission of the Goodwin Proctor investigative report that concluded, contrary to defendants' insistence here, that the allegations of the Article **were not true**. Such a submission would inevitably lead to objections in defendants' reply concerning authentication of the report—a matter outside of plaintiff's hands at this stage—as well as hearsay and perhaps other evidentiary issues. It is for this reason that a motion on the pleadings is based on the pleadings and not on a movant's self-serving evidentiary submissions denying the facts alleged. Here, as shown below, those pleadings readily state a claim for defamation against the defendants.

LEGAL ARGUMENT

Under New York law, a plaintiff bringing a defamation claim must establish: (1) a false statement of fact, (2) of and concerning the plaintiff, (3) published to a third party, (4) that either causes special harm to the plaintiff or is defamatory *per se*, and (5) that was published with constitutional malice, gross irresponsibility, or negligence. *See Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 198-99 (1975) (standard for defamation claim by private figure against media defendant for publication covering matter of public concern is gross irresponsibility); *Huggins v. Moore*, 253 A.D.2d 297, 313 (standard for defamation claim by private figure against media defendant for publication covering matter of private nature is negligence), *rev'd on other grounds* 94 N.Y.2d 296 (1999). Negligence is a lower standard than gross irresponsibility.

Defendants' motion hinges primarily on two grounds: (1) that defendant Tani met the journalistic standards required to pass the "gross irresponsibility" test in relying on two biased sources and the documents the two provided; and (2) that the defamatory statements at issue are "substantially true." (Motion, p. 17.)

Neither argument wins the day. The first would have the Court rule, as a matter of law and on a highly disputed and nuanced record, that Tani was not grossly irresponsible when he submitted for publication by the Daily Beast a devastating account alleging scandalous conduct by a competitor's key employee, i.e., the plaintiff, without making any effort to get her side of the story before publication and relying entirely on the accounts concerning her conduct relayed by one of his closest friends. And while the second argument of "substantial truth" is one defendants must make as a matter of strategy, if only because their first defense is so weak, it is based largely on documentary evidence from outside the pleadings, which are almost all inappropriate for consideration on a motion for failure to state a claim, as set forth above. All the same, this material

fails to establish, much less to the level of certainty that this Court could find as a matter of law, that the characterizations of Ms. Griffith's behavior in the Article were, contrary to the conclusion reached by Goodwin Proctor in its investigation, "substantially truthful."

I. Plaintiff pleads sufficient facts to establish that defendants acted with gross irresponsibility.

Under the "*Chapadeau*" or "gross irresponsibility" standard, "the party defamed [must show] . . . by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, 38 N.Y.2d at 199. Whether the applicable standard is gross irresponsibility or negligence, plaintiff satisfied both standards by alleging that defendants were grossly irresponsible in their publication of the Article because defendant Tani failed to contact plaintiff for comment or explanation concerning allegations against her made by patently biased sources, i.e., disgruntled former co-workers of the plaintiff including one of Tani's closest, personal friends. FAC ¶¶ 58-59.

A. Defendants failed to meet the *Chapadeau* standard by relying uncritically on biased sources.

Defendants place great emphasis, relying on factual submissions from outside the pleadings, on the raw number of sources they claim to have relied on in producing the Article in question. Motion at p. 14. Plaintiff, of course, has had no opportunity to utilize the tools provided by pretrial disclosure to confirm the truth of these claims. But even if they were undisputed, the standard for gross irresponsibility does not solely depend upon the number of sources questioned but whether the publisher "had no good reason to doubt the veracity of that source or the accuracy of the information he or she provided . . . ." *Visentin v. Haldane Cent. Sch. Dist.* 4 Misc.3d 918, 922 (Sup. Ct. Putnam County 2004). If, as by every indication appears to be the case here, a

source—or two sources, or five, or a dozen—ultimately "g[ave] incorrect information to the newspaper, [] was known by the Newspaper to harbor ill will towards plaintiff or that h[er] account contained some glaring error, ambiguity or inherent contradiction[,] that should have caused the newspaper defendants to continue gathering information . . . ." *Id*. at 922-23.

Every one of these factors militating against uncritically accepting information from a source is present here, as the FAC makes crystal clear. The allegations and indeed the undisputed facts establish that the two primary sources quoted in the Article, Breslaw and Kosoff, had reason to be biased against and indeed disliked plaintiff—so much so that they preferred to quit rather than work with her and almost immediately ran to their reporter friend to disparage her, knowing that their comments would almost certainly be published. Motion at p. 6. These were not neutral sources. Whether the bias of Tani's sources was justified is a matter of disputed fact that cannot be resolved based on either the pleadings or even the evidentiary submissions by defendants, but more importantly it is irrelevant to the prima facie matter of their objectivity; they had none, and Tani was well aware of it. For that reason, it was grossly irresponsible for Tani to rely on them in preparing the Article, and there is nothing in the record, properly before the Court or otherwise, to suggest that he corroborated their claims by interviewing anyone in a position to know the truth but lacking an axe to grind—or even the subject of the defamation herself.

The argument that defendant Tani discharged his duty of "checking out" his close friend's scandalous narrative by reading documents provided by those same friends which supposedly corroborated their claims fares no better. Motion at p. 14. In fact, as set out in greater detail below, *see, infra*, § II.B, these documents not only fail to corroborate Kosoff's and Breslaw's stories, but on their own terms cast serious doubt on them. Their contents at least raised enough questions and contradictions regarding the Kosoff and Breslaw narrative that Tani was grossly irresponsible not

to resolve them through interviews with unbiased sources or seeking more information. Tani did nothing of the sort, and his employer and supervisor did nothing to ensure that he had.

One example, worth considering because of its centrality to the claims here, suffices to demonstrate that the Amended Complaint alleges conduct which at the very least constitutes gross irresponsibility. It involves the HR recordings and Slack conversations supposedly reviewed by Tani, which at once purport to say: (1) Kosoff did **not** tell plaintiff about a job candidate's nonbinary status before Kosoff's meeting with the candidate; and (2) Kosoff **did** tell plaintiff about that candidate's nonbinary status before Kosoff's meeting. *Compare* Motion at p. 5 (citing Bolger Aff. Ex. E) ("Kosoff met with a non-binary person of color to discuss a potential job at *Gawker*. Kosoff explained, "**I didn't tell [Griffith] beforehand** because I knew she wouldn't get it.") *with* Motion at p. 6 (citing Bolger Aff. Ex. C) ("the Article recounts that **Kosoff told Griffith that she would be meeting with a nonbinary person** who uses they/them pronouns, but Griffith nonetheless later asked whether the person was a girl.").

One version of events, unsurprisingly the original one, completely undermines Kosoff's claim—uncritically cut and pasted into Tani's Article—that plaintiff "laughed off" the preferred pronouns of a nonbinary person. Ms. Griffith **could not have done this if Kosoff never told her** about the preferred pronouns until after Plaintiff asked if the candidate was a girl. The second version, by contrast, aligns with the Article's condemnatory narrative. But **the existence of two irreconcilable versions** of a factual timeline so central to the attack on Ms. Griffith was a red flag that no real journalist would have failed to notice, much less disregarded. The next step would have been to seek additional, unbiased information, or to acknowledge that he had until then been relying on a biased source, which should have caused him to retrace all his investigatory steps.

Tani did not bother or, discovery may well show, did not care—or worse. Either way, this omission was at least grossly irresponsible and actionable.

B. Defendants exacerbated their omission by failing to contact plaintiff for comment or explanation before publication.

New York appellate courts have ruled that a journalist fails the "gross irresponsibility" test and fails to meet the "ordinary standards of sound journalism" if he does not contact and question the subject of an article before publication. *Ocean State Seafood, Inc. v. Capital Newspaper, Div. of Hearst Corp.*, 112 A.D.2d 662, 665 (3d Dept 1985) (denying summary judgment for defendant report that clams for sale were contaminated with hepatitis published without making an inquiry to the clam supplier raised factual dispute whether journalist was grossly irresponsible and breached ordinary standards of journalism); *Greenberg v. CBS Inc.*, 69 A.D.2d 693, 706 (2d Dept 1979) (disingenuous attempt to interview subject was "not sufficient to support a finding that defendants acted responsibly" under *Chapadeau*'s standard of information gathering and verification). In light of the manifold problems with defendants' sources and the obvious bias of disgruntled employees regarding the conduct of a co-worker they tried to get removed before resigning, it is axiomatic that defendants failed to meet journalistic standards, and were grossly irresponsible under New York law, when they decided not to pick up the phone or email the subject of their calumny for comment or explanation. FAC ¶ 66.

Defendants claim, nonetheless, that a journalist can discharge his duty to follow up with the subject of an article by following up with the subject's employer instead, citing *Starlight Rainbow v. WPIX*, Inc., 179 A.D.3d 561, 563 (1st Dept 2020). Motion at p. 16. Here Tani emailed BDG Media the article about to be published forty minutes before it was to be uploaded, providing BDG Media with the unappetizing opportunity—if the email happened to be read in time—to either issue a wan "no comment" or to state toothlessly that it was unaware of the truth of the

allegations and would investigate them. While someone's understanding of this purported "employer exception" obviously animated the drive-by request for comment emailed to Mr. Goldberg right before publication, that understanding is incorrect. Unlike in *Starlight Rainbow v. WPIX*, where "[the reporter] was . . . not allowed to reach out to the teacher, . . . she would have been routed to [the Department of Education]," no such situation existed here. There was no institutional structure, no collective bargaining agreement, and no government entity that would "not allow" communication between Maxwell Tani and Carson Griffith—only, at best, gross irresponsibility.

In fact, even if Tani's "by the way" email to BDG Media had been directed directly to plaintiff, it was so perfunctory that it would not meet the legal standard of what courts require to establish the minimal level of diligence in investigative reporting, which is the appropriate standard to apply to the Article. See, *Visentin*, *supra*, 4 Misc 3d at 919. Courts apply "rigorous standards of investigative reporting" to journalistic content such as the Article, whereas the requirements of follow-up regarding basic or breaking news coverage are relaxed due to "[p]ressures of time, staff and budget" and limitations relating to "the topic's continuing newsworthiness." *Greenberg,* 69 A.D.2d at 710-11. There was no press of time or breaking nature to the Article, however. Nor was there—certainly based on the pleadings, nor otherwise—any "newsworthiness" justification for refusing to either contact Ms. Griffith for comment or delay publication of the story to allow for her, or even BDG Media, an opportunity to refute allegations which, as proved to be the case, Tani and the Daily Beast must have known would result in her being laid off and likely end her career once published.

II. Plaintiff pleads sufficient facts to establish that the statements at issue were substantially false.

Defendants posit that plaintiff has failed to sufficiently plead the "statement is false" element of a defamation cause of action because: (1) a defamatory meaning cannot be attributed to the statements at issue, which resulted in plaintiff's loss of a job and subsequently unemployability based on their publication; and (2) the actual content of the Article is "substantially true." Motion at p. 20-21.

A. Plaintiff sufficiently pleaded that the statements at issue had a defamatory meaning.

The complaint in a defamation action cannot be dismissed unless the court determines that the contested language is **incapable** of a defamatory meaning **as a matter of law**. *See*, e.g., *Frank v. Nat'l Broad. Co.*, 119 A.D.2d 252, 261 (2d Dept 1986). Words are defamatory when they "arouse in the mind of the average person in the community an evil or unsavory opinion []or expose plaintiff to public hatred, contempt, or aversion." *Pritchard v. Herald Co.*, 120 A.D.2d 956, 956 (4th Dep't 1986) (citations omitted). It has long been the rule that words charged to be defamatory are to be taken in their natural meaning and that the courts will not strain to interpret them in their mildest and most inoffensive sense to hold them non-libelous. *Mencher v. Chesley*, 297 N.Y. 94, 99 (1947) (citations omitted).

Defendants first argue that the statements at issue are not susceptible to the defamatory meaning plaintiff alleges—that she is "racist, homophobic, xenophobic, and transphobic"—because the Article never "makes those claims." Motion at p. 21. This is no defense, as a court will read the statements in the context of the publication (the Article) and give the language used the same natural reading as would the public. *Martin v. Daily News L.P.*, 121 A.D.3d 90, 99 (1st Dept 2014) (citations omitted). Additionally, courts examine not only if the statements at issue have a

defamatory **meaning**, but a "defamatory **interpretation**." *Id*. (emphasis added). The claims in the Article about plaintiff satisfy these criteria, as explained below.

1. Accusations that Someone Engaged in Discrimination on the Basis of Race Are Susceptible to a Defamatory Meaning

The statements at issue that made plaintiff out to be racist were:

- "***The new site's only two full-time writers exited Wednesday in protest of editorial director Carson Griffith's offensive remarks about everything from race to penis size***";
- "The two reporters said they decided to leave the new Gawker after ***Bustle Digital Group***—which bought the shuttered Gawker.com domain and its archives in a mid-2018 fire sale—***refused to oust Griffith over offensive workplace comments about*** everything from poor people to ***black writers*** to her acquaintance's penis size";
- "In a Slack message reviewed by The Daily Beast, ***Griffith seemed to brag to Gawker staff that she had gotten them out of a company-wide diversity training session, though neither Kosoff nor Breslaw had asked her to do so***"; and
- "The two also told HR that they were particularly disturbed when ***Griffith commented*** in the small Gawker office ***that it may be difficult to hire writers of color because, in her estimation, people of color prefer to only write serious pieces about race***."

It can hardly be questioned that these statements make plaintiff out to be someone who discriminated on the basis of race or color of skin and made racist remarks, which in the present time is perhaps the most "serious evil or unsavory opinion" or characteristic capable of exposing

a person "to public hatred, contempt, or aversion." If one accuses another of engaging in racist conduct, then the "natural reading" of that accusation is that the accused is racist. Accusing someone of discrimination on the basis of race is defamatory, because others will hold an "evil opinion" of that someone as engaging in a "revolting moral evil," i.e., racism. *Sullivan v. Am. Airlines, Inc.*, 26 Misc. 3d 1202(A) (Sup. Ct. Suffolk County 2009) (accusations that plaintiffs discriminated on basis of race was defamatory) *modified and affirmed on other grounds*, 80 A.D.3d 600, 601 (2d Dept 2011); *see also Sachs v. Matano*, 50 Misc. 3d 420, 423 (Sup. Ct. Nassau County 2015) (among other things, remark that plaintiff was an "Anti-Semite" was defamatory).

2. Accusations that Someone Engaged in Discrimination on the Basis of Gender Identity Are Susceptible to a Defamatory Meaning

The statements at issue that made Plaintiff out to be transphobic were:

- Kosoff additionally told HR of an exchange in which ***Griffith took a dismissive stance towards the recruiting of a writer who identifies as nonbinary***. Kosoff, who was tasked with recruiting some new editorial, wrote in a Slack message that she was going to meet with a potential staffer 'who is a person of color and nonbinary (uses they/them pronouns).' When she returned from the meeting two hours later, ***Griffith initially laughed off the preferred pronouns.*** 'lol is [name redacted] a girl? Griffith asked."

These claimed statements made plaintiff out to be someone who lacked respect for and discriminated on the basis of someone's gender identity. Similar to accusations to discrimination on the basis of race, accusations of discrimination on the basis of gender identity makes others create an "evil opinion" of the accused, and "exposes them to public hatred, contempt, or aversion." This is evident from the vitriol directed at plaintiff's Twitter account and person from countless strangers and all of her co-employees after the Article's publication. FAC ¶¶ 14-15.

3. Statements that effectively accuse one of being unfit for their job because of discriminatory behavior and inappropriate workplace comments are susceptible to a defamatory meaning.

Certain categories of statements leave no question of a defamatory meaning and have been recognized as such by courts. One such category is that of comments that tend to injure another in his or her trade, business, or profession. *Liberman v. Gelstein*, 80 N.Y.2d 429, 437–438 (1992). The aforementioned statements and others bulleted below also impugned plaintiff in her profession by depicting her as someone who would be universally understood not to appropriately serve as the editor or manager of a publication because she was racist, transphobic, made inappropriate workplace comments about male genitalia and mocked poverty. Specifically, the latter comments were:

- "The two reporters said they decided to leave the new Gawker after ***Bustle Digital Group***—which bought the shuttered Gawker.com domain and its archives in a mid-2018 fire sale—***refused to oust Griffith over offensive workplace comments about*** everything from poor people to black writers to ***her acquaintance's penis size***."
- "During one of Breslaw's interviews for the job, ***Griffith mentioned*** the snack selection at the office, and noted ***that she had a snack saved in her pocket. 'That's so poor person of me,' she joked."***

The Article was thus "reasonably susceptible to a defamatory meaning" not only because it made Ms. Griffith out to be racist and transphobic, but also because the statements at issue "disparage[d] [plaintiff] in [her] profession" as an editor. *Guerrero v. Carva*, 10 A.D.3d 105, 113 (1st Dept 2004). In *Guerrero*, an allegation in a flyer of racial discrimination against employees and racist remarks ("how he treats the Puerto Rican/Latinas Employees and how he fires them . . . and what

he is always saying about AFRICAN AMERICANS") against a property manager was held to be susceptible to a defamatory meaning because it disparaged the property manager's profession. 10 A.D.3d at 113 (emphasis original). Similarly, the Article contends that two writers quit because they refused to work with a managing editor who made racist, transphobic, and other inappropriate comments in the workplace. Accordingly, the statements at issue are reasonably susceptible to a defamatory meaning because they disparage plaintiff's professional fitness.

B. Plaintiff sufficiently pleaded that the statements at issue were substantially false, and the motion to dismiss must be denied because the defendants' documentary evidence fails to establish beyond a doubt that the statements at issue were substantially true.

Finally, defendants' argument that this Court can find that the statements at issue were "substantially true" as a matter of law fails because: (1) the pleaded truth differs substantially from the impression that the Article made; and more importantly, (2) the argument relies on extraneous documentary evidence that do **not** conclusively establish the substantial truth of the statements at issue.

To satisfy the falsity element of a defamation claim, plaintiff must allege that the complained-of statement is "substantially false." *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87, 94 (1st Dept 2015) (citation omitted). The contrapositive is that if an allegedly defamatory statement is "substantially true," than the plaintiff does not satisfy the falsity element of a defamation claim. *Id*. A statement is substantially true if the statement would not "have a different [or no worse an] effect on the mind of the reader from that which the pleaded truth would have produced." *Id*. Additionally, it is no defense even if the allegedly defamatory statement is quoted ad verbatim from the plaintiff, if the statement in its original context has a different connotation that as quoted in isolation. *Id*.

On this point, the issue of documentary evidence is somewhat more subtle. "[I]f . . . 'documentary evidence' is submitted specifically to establish the truth of its contents, it must be of such nature and reliability as to be **'essentially undeniable'** and must '**utterly refute**' the plaintiff's factual allegation that the allegedly defamatory statement is false. This is an exacting standard, which is not easily met at the pre-answer stage." *Matovcik v. Times Beacon Record Newspapers*, 46 A.D.3d 636, 638 (2d Dept 2007) (emphasis added). Defendants' position, that this Court should essentially weigh these submissions and decide on their interpretation of them, is not supported by the law.

1. The claim regarding statements about male genitalia is substantially false.

The first statement at issue—"The two reporters said they decided to leave the new Gawker after Bustle Digital Group – which bought the shuttered Gawker.com domain and its archives in a mid-2018 fire sale – refused to oust Griffith over offensive workplace comments about everything from poor people to black writers to her acquaintance's penis size"—is substantially false when compared to the pleaded truth: that **plaintiff never made those comments at all**. FAC ¶ 10. One cannot simultaneously have made a comment about male genitalia and not have made a comment about male genitalia; the two statements constitute a contradiction. Only one of those statements can be false, and because on a motion to dismiss the pleadings are taken to be true and given an interpretation in favor of the plaintiff, it follows that the Article's claim that Plaintiff made offensive workplace comments about male genitalia must, for purposes of this motion, be deemed false.[1]

[1] Defendants try to misdirect the proper focus of the analysis (i.e., the statements alleged in the FAC, which were in the heading and subheading of the Article) by discussing statements in the body of the Article, asserting that they were true because "Plaintiff does not deny . . . that she sent this email chain to Kosoff." The statements at issue here are **not** those in the body of the Article, however, but in its heading and subheading. Whether these were contained in the body of the

2. The claim regarding statements about diversity training is substantially false and defendants' documentary evidence on the issue does not conclusively settle the factual dispute.

The second statement at issue—"In a Slack message reviewed by The Daily Beast, **Griffith seemed to brag to Gawker staff that she had gotten them out of a company-wide diversity training session**, though neither Kosoff nor Breslaw had asked her to do so"—is substantially false when compared to the pleaded truth: that the Slack message **did not contain the term or even allude to a "diversity training session."** FAC ¶ 31. Plaintiff cannot have "brag[ged] . . . that she had gotten them out of a company-wide diversity training session" if she neither alluded to nor explicitly mentioned a "diversity training session," i.e., referred to it.

Tacitly acknowledging that this analysis goes against their spin, defendants yet again rely on an evidentiary submission from outside the pleadings, specifically a Slack message where plaintiff purportedly made the "bragging" statement. Motion at 24 (citing Bolger Aff. Ex. F). Although consideration of this evidentiary material is inappropriate in this posture, defendant's submission actually **supports** plaintiff's pleaded truth: that she never alluded to or specifically mentioned a diversity training session.[2] Motion, Bolger Aff., Ex. F. Accordingly, because the

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Article has no bearing here except to the extent that headings are arguably actually more damaging than article text.

More troubling is the fact that defendant falsely claims that "the pleaded truth [is] that Griffith forwarded comments about penis size." Motion at p. 23. Plaintiff **never pleaded that** as the truth; rather, **she pleaded that she "never made comments** about penis size . . . ." FAC ¶ 50. That the Article suggests the contrary, i.e., that plaintiff did make such comments, cannot seriously be disputed.

[2] Defendants also argue that because plaintiff did not specifically plead that the meeting **was not** a diversity training session, she has somehow conceded that the meeting **was** a diversity training session. Motion at 24 ("Plaintiff does not deny . . . that the meeting included a diversity training session. As a result, the statement is substantially true."). Plaintiff is not obligated to "deny" anything in her own pleading, and defendants' calculus of implied "admission" of the truth of defendants' claim has no basis in law or reason.

documentary evidence does not "conclusively" establish that the accusation—that Plaintiff "bragged" about getting out of a diversity training program—is substantially true, the motion to dismiss cannot be granted as to this part per *Matovcik*, 46 A.D.3d at 638.

3. The claim regarding statements about nonbinary people is substantially false and defendants' documentary evidence on the issue does not conclusively settle the factual dispute.

The third statement— "Kosoff additionally told HR of an exchange in which **Griffith took a dismissive stance towards the recruiting of a writer who identifies as nonbinary**. Kosoff, who was tasked with recruiting some new editorial, wrote in a Slack message that she was going to meet with a potential staffer 'who is a person of color and nonbinary (uses they/them pronouns).' When she returned from the meeting two hours later, **Griffith initially laughed off the preferred pronouns.** 'lol is [name redacted] a girl? Griffith asked."—is substantially false when compared to the pleaded truth: that plaintiff inquired "[I]s [the candidate] a girl?" because of the potential staffer's unisexual name, "Pilot." FAC ¶ 55. The statement at issue is at complete odds with the pleaded truth. The former depicts plaintiff as disrespectful and uncaring about gender identity pronouns, while the latter establishes the complete opposite, that is, that she took care to establish what kind of pronouns a person preferred or what gender. Accordingly, the statement at issue is substantially false.

Again, as well, the documentary evidence (again, Slack messages) that defendants submit on this point actually contradicts the false and defamatory statement at issue, namely that plaintiff was "dismissive" of nonbinary writers and "laughed off" pronoun preferences. Asking the Court to essentially rule on a disputed, nuanced and context-based factual issue at the pleadings stage, defendants argue that "a comparison of the Slack message and the reporting shows that Defendants' account was true," and then selectively quotes from the Slack message. Motion at p. 25. The Article, however, did not summarize the Slack message. Instead, it **characterized** it in a

defamatory manner: (1) "Griffith [taking] a dismissive stance towards the recruiting of a writer who identifies as nonbinary"; and (2) that she "laughed off the preferred pronouns." FAC ¶ 54.

What the documents submitted by defendants show, in fact, is that plaintiff did not take a "dismissive stance" towards the recruiting of a nonbinary writer at all. After the meeting, when Kosoff reported to plaintiff that the "[m]eeting went very well. [the writer's] definitely interested in staff job . . . could I possibly send an email connecting you with them," plaintiff responded "yes great!" and complimented Kosoff for "doing great with the rec[omendations for Gawker staff]." Motion, Bolger Aff. Ex. G. Plaintiff's expression of enthusiasm for the nonbinary candidate was omitted from both the Article and the Motion, giving the substantially false impression that plaintiff's stance towards the recruiting of a nonbinary writer was dismissive when the documentation directly contradicts that characterization.

Second, the evidence submitted by defendants demonstrate that, contrary to the claims in the Article, plaintiff did not "laugh[] off the preferred pronouns" of the nonbinary writer. Rather, after plaintiff agreed to be connected with the nonbinary writer through email—again, **for purposes of employing the candidate!**—plaintiff inquired: "lol is Pilot a girl," in order to ascertain how the writer wished to be addressed. FAC ¶ 55. Although, again, these submissions should not be considered here, a fair reading of defendants' documentary evidence shows that plaintiff's "lol" ("laughing out loud") related to a humorous comment ("[coworker] has like a man crush on [another coworker]") and not mockery of the candidate. Motion, Bolger Aff. Ex. G. When Kosoff informed her that the prospective hire used to identify as a woman but now identified as nonbinary and preferred "them/they" pronouns, plaintiff replied: "ah ok, i assumed by the name a guy, but I think you told me that." Motion, Bolger Aff. Ex. G. Again, both the Article and the

Motion to Dismiss omitted this line, and substantially misrepresented the truth in a defamatory way.

Accordingly, the pleaded truth—that plaintiff asked whether the nonbinary writer was a girl in order to ascertain how the candidate wished to be addressed—has a profoundly different effect on the mind of a reader than the effect that the Article gives, which is that plaintiff was hostile towards transgender people, "dismissive" of a nonbinary writer's candidacy and "laugh[ing] off" the writer's pronoun preferences. The Article's statement is substantially false. And as the Motion depends entirely on documentary evidence proffered by defendants which is at once inappropriate for consideration on a motion to dismiss but whose content nonetheless undermines the Article's depiction of plaintiff as transphobic, the motion to dismiss should be denied as in *Matovcik*, 46 A.D.3d at 638 at the very least on grounds that the documentation is inconclusive. *Id.*

Finally, defendants argue that the defamatory meaning they spun out of plaintiff's conduct—that she made "inappropriate racial and other comments about people"—is "substantially true" because **another** magazine article published before the Article claimed the same thing. Motion at p. 26. Defendants even submit the magazine article as an exhibit. Motion, Bolger Aff., Ex. C. There is no plausible justification for such a submission of unauthenticated hearsay to prove the truth of the matter asserted under any circumstances, and it certainly should not be considered by the Court at all on this motion to dismiss for failure to state a claim.

CONCLUSION

Defendants' massive submission is a tacit admission of the facial sufficiency of the FAC. These submissions, however, do not bolster their case but rather undermine it, demonstrating as they do the existence of serious factual disputes over the truth of the defamatory comments at issue

and which only discovery can begin to resolve. With or without consideration of this documentary evidence, plaintiff sufficiently pleads a defamation claim, and for this reason plaintiff respectfully requests that this Court deny defendants' motion to dismiss the FAC for failure to state a claim.

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