SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Chrismy Sagaille, Plaintiff-Respondent, - against - Christina Carrega, Defendant-Appellant, - and - New York Daily News Company, and Daily News, L.P., Defendants.	Supreme Court, New York County Index No. 154010/2018 First Dep't Case No. 2020-02369 NOTICE OF MOTION TO FILE A BRIEF AMICI CURIAE OF THE NATIONAL WOMEN'S LAW CENTER AND 39 OTHER ORGANIZATIONS

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Yosef J. Riemer sworn to on August 10, 2020, and all exhibits attached thereto including the accompanying proposed brief *amici curiae*, and upon all papers, pleadings, and proceedings had herein, the National Women's Law Center, A Better Balance, the American Association of University Women (AAUW), the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), Autistic Self Advocacy

Network, Civil Liberties and Public Policy Program, Clearinghouse on Women's Issues, Cyber Civil Rights Initiative, Desiree Alliance, Equal Rights Advocates, Feminist Majority Foundation, Gender Justice, Girls Inc., Konidaris Law PLLC, KWH Law Center for Social Justice and Change, Legal Aid at Work, Legal Voice, National Alliance to End Sexual Violence, National Asian Pacific American Women's Forum (NAPAWF), National Association of Social Workers (NASW), National Association of Women Lawyers, National Coalition Against Domestic Violence, National Consumers League, National Council of Jewish Women, National Crittenton, National Immigrant Women's Advocacy Project (NIWAP, Inc.), National Network to End Domestic Violence, National Organization for Women Foundation, National Partnership for Women & Families, National Women's Political Caucus, Partnership for Working Families, Religious Coalition for Reproductive Choice, SisterLove, Inc., The Women's Law Center of Maryland, Transgender Law Center, Women Lawyers On Guard Inc., Women of Reform Judaism, Women's Bar Association of the District of Columbia, Women's Institute for Freedom of the Press, and Women's Law Project will move this Court on Monday August 24, at 10:00 a.m., or as soon

thereafter as counsel may be heard, at the courthouse located at 27 Madison Avenue, New York, NY 10010, for an order granting them leave, pursuant to 22 N.Y.C.R.R. § 1250.4(f), to serve and file a brief *amici curiae*, in support of reversal.

Dated: New York, New York
August 10, 2020

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Council of Jewish Women, National Crittenton, National Immigrant Women's Advocacy Project (NIWAP, Inc.), National Network to End Domestic Violence, National Organization for Women Foundation, National Partnership for Women & Families, National Women's Political Caucus, Partnership for Working Families, Religious Coalition for Reproductive Choice, SisterLove, Inc., The Women's Law Center of Maryland, Transgender Law Center, Women Lawyers On Guard Inc., Women of Reform Judaism, Women's Bar Association of the District of Columbia, Women's Institute for Freedom of the Press, and Women's Law Project

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Chrismy Sagaille, Plaintiff-Respondent, - against - Christina Carrega, Defendant-Appellant, - and - New York Daily News Company, and Daily News, L.P., Defendants.	Supreme Court, New York County Index No. 154010/2018 First Dep't Case No. 2020-02369 AFFIRMATION OF YOSEF J. RIEMER IN SUPPORT OF MOTION TO FILE A BRIEF AMICI CURIAE OF THE NATIONAL WOMEN'S LAW CENTER AND 39 OTHER ORGANIZATIONS

YOSEF J. RIEMER, pursuant to CPLR 2106, affirms as follows under penalty of perjury:

1. I am a member in good standing of the Bar of the State of New York and a partner with the law firm of Kirkland & Ellis LLP, counsel for the proposed *amici curiae*, National Women's Law Center, A Better Balance, American Association of University Women (AAUW), American Federation of State, County and Municipal Employees, AFL-

CIO (AFSCME), Autistic Self Advocacy Network, Civil Liberties and Public Policy Program, Clearinghouse on Women's Issues, Cyber Civil Rights Initiative, Desiree Alliance, Equal Rights Advocates, Feminist Majority Foundation, Gender Justice, Girls Inc., Konidaris Law PLLC, KWH Law Center for Social Justice and Change, Legal Aid at Work, Legal Voice, National Alliance to End Sexual Violence, National Asian Pacific American Women's Forum (NAPAWF), National Association of Social Workers (NASW), National Association of Women Lawyers, National Coalition Against Domestic Violence, National Consumers League, National Council of Jewish Women, National Crittenton, National Immigrant Women's Advocacy Project (NIWAP, Inc.), National Network to End Domestic Violence, National Organization for Women Foundation, National Partnership for Women & Families, National Women's Political Caucus, Partnership for Working Families, Religious Coalition for Reproductive Choice, SisterLove, Inc., The Women's Law Center of Maryland, Transgender Law Center, Women Lawyers On Guard Inc., Women of Reform Judaism, Women's Bar Association of the District of Columbia, Women's Institute for Freedom of the Press, and Women's Law Project.

2. I make this affirmation in support of the proposed *amici*'s motion for leave to file a brief *amici curiae* in the above-captioned matter.

3. NWLC and the additional *amici*, 39 other organizations, including civil rights organizations, professional organizations, and a labor union, are groups committed to preventing and addressing sexual harassment, including through addressing the needs of survivors through litigation, policy, and culture change work. These organizations have a demonstrated interested in this matter and can be of special assistance to the Court. A copy of the *amici*'s proposed brief is annexed hereto as **Exhibit A**.

4. NWLC and the additional amici have significant experience representing and advocating for sexual harassment survivors and, from that expertise, *amici* are familiar with the host of barriers survivors face in reporting sexual assault and other sexual harassment to relevant authorities, including law enforcement, workplaces, and schools, and the range of retaliation survivors all too often face when they do report. *Amici* are also familiar with the harmful and false

assumptions that courts often make about survivors who report sexual harassment.

5. *Amici* seek to file the proposed brief in order to assist the Court with understanding the broader significance of this matter. Sexual assault and other forms of sexual harassment affect millions of people in this country, mostly women and girls and LGBTQ+ individuals. Survivors face substantial hurdles to reporting, and when they do report the abuse, whether to an employer, to a school or to law enforcement, they frequently face retaliation. One increasingly common form of retaliation is that the named harasser threatens to sue them if they report the incident. All too often, the threat of a retaliatory defamation lawsuit has its desired effect: survivors do not report; sexual harassers abuse more people, threatening to ruin them if they report; and the cycle repeats. And all too often, when survivors do report, especially Black women like Defendant Christina Carrega, they face an unfair presumption that they are not telling the truth.

6. New York's qualified privilege for reporting misconduct is intended to protect the critical public interest in reporting misconduct to law enforcement, workplaces, and schools, and to protect survivors

from the specific type of retaliation—a defamation lawsuit—that is at issue in this case. But in this matter, the motion court allowed the retaliatory lawsuit to proceed and denied Ms. Carrega these very protections that New York law affords to all those reporting misconduct, including sexual assault. The motion court's decision and order allowing this lawsuit to proceed unchecked should be reversed.

7. Annexed hereto as **Exhibit B** is a true and correct copy of the Notice of Appeal in this matter, and annexed hereto as **Exhibit C** is a true and correct copy of the order sought to be reviewed.

8. For these reasons, and for those stated in the proposed *amici curiae* brief, the proposed *amici curiae* respectfully seek the Court's permission to serve and file the attached proposed *amici curiae* brief.

Dated: New York, New York
August 10, 2020

Yosef J. Riemer, P.C.

EXHIBIT A

Oral Argument time not requested by amici

New York County Clerk's Index No. 154010/2018
First Department Case No. 2020-02369

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

CHRISMY SAGAILLE,

Plaintiff-Respondent,

- against -

CHRISTINA CARREGA,

Defendant-Appellant,

- and -

NEW YORK DAILY NEWS COMPANY, and
DAILY NEWS, L.P.

Defendants.

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND 39 OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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PRELIMINARY STATEMENT

Sexual assault and other forms of sexual harassment are notoriously underreported, due in large part to retaliation. This case highlights one form of retaliation—when named harassers bring defamation lawsuits against survivors who report to law enforcement, employers, or schools. In this matter, the motion court allowed such a defamation case to proceed, denying a survivor's motion to dismiss, despite the qualified privilege that is supposed to protect those who report misconduct.

In this case, Defendant Christina Carrega reported to law enforcement that after a mutual friend's baby shower in April 2017, Plaintiff Chrismy Sagaille, who was then a Kings County Assistant District Attorney, sexually assaulted her by kissing her, licking her face, and groping her breast.[1] While the criminal case was pending,[2] Plaintiff sued Ms. Carrega for defamation.

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[1] The record below indicates that Ms. Carrega originally asked only for an order of protection but was told that the only way she could obtain such an order was to provide a police report. (*E.g.*, NYSCEF Doc. 30 at 142:12-13.)

[2] The record below suggests that the criminal trial jurors ultimately hung on the issue of reasonable doubt. (NYSCEF Doc. 14 at 2:17-19

New York law affords people who report misconduct to the authorities protections against defamation liability in the form of a qualified privilege, to encourage people to report misconduct for the overall benefit of society. But the motion court concluded that if sexual assault is the type of misconduct reported, the court can *presume* malice and the qualified privilege will thus not provide a basis for a motion to dismiss. Thus, the named harasser could continue with his defamation lawsuit and evade the qualified privilege. The motion court also held that Plaintiff adequately alleged malice by relying on the faulty sex stereotype that reporting sexual assault can somehow advance a survivor's career. This appeal presents this Court with the opportunity to correct this harmful carving-out of those who report sexual assault from the protections against defamation liability afforded to others who report misconduct.

Everyone, whether they know it or not, has a friend or relative who lives with the physical, psychological, and economic scars of sexual assault or other sexual harassment. The CDC estimates that in the

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["[D]ifferent conclusions of what is reasonable and what is unreasonable are continually reached"].)

U.S., one in five women and one in fourteen men are raped during their lifetime. In addition, more than two in five women and one in four men suffer other forms of sexual assault during their lifetime. LBGTQ+ individuals also suffer disproportionately from sexual assault. Survivors rarely come forward because they know they will likely face disbelief or even retaliation instead of help. Women of color—particularly Black women like Ms. Carrega—are especially likely to be disbelieved or punished when they come forward because of pernicious race- and sex-based stereotypes.

The result is predictable: few survivors report due to the real fears of losing their job and not being hired again if the report becomes public. Survivors are often unwilling to put at risk their ability to pay the rent and put food on the table. And so, those who sexually assault women are not stopped, and often do so again. And the cycle repeats; new survivors also fear coming forward.

In this brief, *amici* detail the broader policy concerns implicated here, including the prevalence and underreporting of sexual assault, the increasing use of defamation lawsuits against survivors, and the broad

and devastating effects of carving out sexual assault survivors from existing protections against defamation lawsuits.

This Court can mitigate the trend of survivors facing retaliation through the legal system by recognizing the crucial errors in the decision below. Reversing the motion court's decision is critical so as to not embolden sexual harassers who seek to weaponize the legal system through threatening and bringing defamation lawsuits to silence survivors. *Amici* respectfully request that this Court reverse the motion court's decision allowing this meritless defamation case against Ms. Carrega to continue.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Women's Law Center (NWLC) is a nonprofit legal organization dedicated to advancing and protecting the legal rights of women and girls and all people to be free from sex discrimination. Since 1972, NWLC has worked to secure equal opportunity in income security, employment, education, and reproductive rights and health, with particular attention to the needs of low-income women and girls and those who face multiple and intersecting forms of discrimination. The NWLC Fund also houses and administers the TIME'S UP Legal

Defense Fund. NWLC has participated as counsel or amicus curiae in a range of cases to secure the equal treatment of women and girls under the law.

The additional 39 *amci* are organizations, including civil rights organizations, professional organizations, and a labor union, committed to the rights of survivors to bring their claims forward without facing retaliation, including in the form of baseless defamation lawsuits.

ARGUMENT

In the decision below, the motion court held that Plaintiff adequately alleged that Ms. Carrega made her police report with "malice" *solely because* sexual assault was the type of misconduct she reported. The court also held that Plaintiff adequately pleaded malice by asserting that Ms. Carrega reported the sexual assault to "further her career." The motion court thus held that qualified privilege did not protect Ms. Carrega at the pleadings stage.

Notably, Plaintiff did not plead any facts showing that Ms. Carrega's statements in her police report were made out of spite or with knowledge or reckless disregard of their falsity. The motion court's ruling thus means sexual assault survivors must litigate—well past the

initial stages—even the most frivolous retaliatory defamation lawsuits. Such a framework not only burdens sexual assault survivors, but is also clearly contrary to New York's well-established pleading standard for defamation claims, which requires more than conclusory and speculative allegations of facts sufficient to infer that "malice was the one and only cause for the publication." (*Liberman v Gelstein*, 80 NY2d 429, 439 [1992]; *see also Lemieux v Fox*, 135 AD3d 713, 715 [2d Dept 2016].) Plaintiff has failed to meet this mark. This Court has the opportunity to undo the dangerous precedent created by the motion court and dismiss the baseless and harmful defamation claims against Ms. Carrega.

I. SEXUAL ASSAULT AND OTHER FORMS OF SEXUAL HARASSMENT ARE PERVASIVE AND UNDERREPORTED, AND SURVIVORS ROUTINELY FACE RETALIATION.

A. Sexual Assault and Other Forms of Sexual Harassment Are A Systemic Problem.

Sexual assault is not just an everyday occurrence—it is almost an every *minute* occurrence. Every 73 seconds, someone in the U.S. is

sexually assaulted.[3] The CDC estimates that one in every five women and one in fourteen men in the United States experience a completed or attempted rape in their lifetime,[4] and that more than 40% of women and about 25% of men in the U.S. experience some form of sexual violence in their lifetime.[5] These rates are even higher for transgender people, nearly half of whom experience sexual assault at some point in their lives.[6] In New York State, more than 2.8 million women have been victims of sexual assault, including 1.2 million victims of rape or attempted rape.[7] In New York City alone, an estimated 50,000 women

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[3] Rape, Abuse & Incest National Network (RAINN), *Scope of the Problem: Statistics* ("RAINN Sexual Assault Statistics"), https://rainn.org/statistics/scope-problem.

[4] CDC, *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief—Updated Release* ("CDC 2015 Data Brief"), 1-2 (Nov. 2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf.

[5] *Id.* at 2, 3.

[6] Nat'l Ctr. for Transgender Equal., 2015 U.S. Transgender Survey Complete Report ("Transgender Survey") 198 (2016), http://www.ustranssurvey.org/reports.

[7] CDC, *National Intimate Partner and Sexual Violence Survey: 2010-12 State Report* ("CDC 2010-2012 Study"), 34 (April 2017),

are raped *each year*.[8] Sexual assault has remained at those same epidemic levels for decades.[9]

These experiences often start at a young age and continue into adulthood. In schools, more than one in five girls ages 14 to 18 are kissed or touched without their consent,[10] and more than one in four women and more than one in fifteen men are sexually assaulted during their time in college.[11] In the workplace, as many as 85% of women have

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https://www.cdc.gov/violenceprevention/pdf/nisvs-statereportbook.pdf.

[8] New York City Alliance Against Sexual Assault, *Research*, http://www.svfreenyc.org/research.

[9] *See* Patricia Tjaden, et al., Prevalence, Incidence, and Consequence of Violence Against Women: Findings from the National Violence Against Women Survey at 3 (1998), https://www.ncjrs.gov/pdffiles/172837.pdf.

[10] Nat'l Women's Law Ctr., Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence ("NWLC 2017 Study") 1 (2017), https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.

[11] Ass'n of Am. Univs., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* ("AAU 2019 Study") ix (2019), https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019.

experienced sexual harassment,[12] with Black women filing sexual harassment charges with the EEOC at three times the rate of white women.[13] Half of sexual assault victims report, as Ms. Carrega did, that they were assaulted by an acquaintance.[14]

The named harasser here was a prosecutor, and sexual assault by government officials is also pervasive.[15] For example, among law enforcement officers, sexual misconduct is the second most common form of police misconduct, after excessive force.[16] In the two years

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[12] U.S. Equal Emp't Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace ("EEOC Workplace Harassment Study") at II.B (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

[13] Nat'l Women's Law Ctr., Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women 5 (2018), https://nwlc.org/resources/out-of-the-shadows-an-analysis-of-sexual-harassment-charges-filed-by-working-women.

[14] CDC 2010-2012 Study at 22.

[15] Jamillah Bowman Williams, #MeToo and Public Officials: A Post-Election Snapshot of Allegations and Consequences 2-3 (Nov. 9, 2018), https://www.law.georgetown.edu/wp-content/uploads/2018/11/MeToo-and-Public-Officials.pdf.

[16] Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, Wash Post (Jan. 12, 2018), https://www.washingtonpost.com/outlook/how-some-cops-use-the-

following the 2016 election, at least 138 elected or appointed government officials were *publicly* reported for sexual harassment, including sexual assault, against women; one in four remained in office even after they were reported.[17] The alarming frequency of sexual abuse by government officials reflects the reality that sexual harassment is about power and control.[18] Because government officials already hold greater power than other individuals, those who sexually harass often use their title and position of power as a pass to abuse those with less power, often as repeat offenders.[19]

B. Sexual Assault and Other Forms of Sexual Harassment Are Vastly Underreported.

Despite their prevalence, sexual assault and other forms of sexual harassment are severely underreported. DOJ estimates that only 23%

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badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html.

[17] Williams, #MeToo and Public Officials at 2.

[18] Fred C. Lunenburg, *Sexual Harassment: An Abuse of Power*, 13 Int'l J Mgmt Bus & Admin 1 (2010); *see also* Brendan L. Smith, *What it Really Takes to Stop Sexual Harassment*, Am Psych Ass'n (Feb. 2018), https://www.apa.org/monitor/2018/02/sexual-harassment.

[19] Williams, #MeToo and Public Officials at 3.

of sexual assaults are reported to the police.[20] In the workplace, an estimated 6-13% of employees who are sexually harassed file a complaint with their employer.[21] In college, only 11% of student survivors report their sexual assault to campus police and only 9% to local police.[22] Among girls aged 14-18 who are kissed or touched without their consent, just 2% report it to schools and only 1% to police.[23]

When it comes to law enforcement, survivors give many reasons for not reporting sexual assault, including shame or embarrassment, fear that the police would not or could not help them, fear that the incident was not "important enough" to report, and a desire not to get their assailant in trouble.[24] These fears are well-documented and

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[20] Bureau of Justice Statistics, Criminal Victimization, 2018, at 8 (2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf.

[21] EEOC Workplace Harassment Study at II.C.

[22] AAU 2019 Study at xv.

[23] NWLC 2017 Study at 2.

[24] RAINN, The Criminal Justice System: Statistics, https://www.rainn.org/statistics/criminal-justice-system.

survivors who are Black, Indigenous,[25] undocumented,[26] and/or LGBTQ+[27] are even less likely to contact police due to an increased risk of harassment, violence, or deportation. Similarly, survivors with disabilities fear that police will not view them as credible because of their disability.[28] Notably, according to a 2013 DOJ study, fear of retaliation is the most common reason survivors give for not reporting to the police.[29]

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[25] National Organization for Women, Black Women & Sexual Violence 3, https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence.pdf.

[26] Stavey Ive, et al., *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, The Police Chief, Apr. 2018, at 34 https://www.policechiefmagazine.org/overcoming-fear-building-trust-immigrant-communities/.

[27] Transgender Survey at 14.

[28] The Arc, People with Intellectual Disabilities and Sexual Violence 2 (2011), https://thearc.org/wp-content/uploads/forchapters/Sexual%20Violence.pdf.

[29] Michael Planty, et al., Female Victims of Sexual Violence, 1994-2010 ("BJS 2013 Study") 7 (March 2013), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf; *see also* RAINN, The Criminal Justice System: Statistics, https://www.rainn.org/statistics/criminal-justice-system (collecting data from several studies).

In the rare instances where survivors do report sexual assault to law enforcement, they typical do not receive adequate care and services. The New York City Department of Investigation issued a 2018 report concluding that NYPD's Special Victims Division frequently does not investigate reported sexual assaults by acquaintances or intimate partners because it treats them as less serious than stranger-rape cases.[30] Reports indicate that police question witnesses or conduct searches in less than half of reported cases and collect physical or forensic evidence in less than a fifth of reported cases.[31] Given these realities, individuals who do come forward and risk it all cannot be further punished by being carved out of legal protections afforded to others who report misconduct.

New York State and New York City have both long recognized the problem of underreporting of sexual assault and have declared a strong interest in addressing underreporting. In 1991, Governor Mario Cuomo

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[30] N.Y.C. Dep't of Investigation, Press Release and Report, *An Investigation of NYPD's Special Victims Division—Adult Sex Crimes* 1 (March 27, 2018), https://www1.nyc.gov/assets/doi/reports/pdf/2018/Mar/SVDReport_32718.pdf.

[31] BJS 2013 Study at 8.

signed into law an amendment to Civil Rights Law § 50-c, creating a private right of action for sexual assault survivors whose identities are disclosed by public employees, stating that "sexual offenses are vastly underreported. Undoubtedly, there is even less incentive for the victim to report the sexual assault if [their] identity may become public."[32] In 2015, Governor Andrew Cuomo signed into law what he called "the most aggressive policy in the nation" to fight against sexual assault on college campuses, including strengthened reporting procedures to make it easier for victims to report to campus or local law enforcement.[33] Similarly, in 2018, the NYPD launched its "The Call Is Yours" campaign and a dedicated 24-hour hotline to encourage sexual assault survivors to report in order to "connect survivors with important

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[32] Governor's Mem approving L 1991, ch 346, 1991 Legis Ann at 129-130; *see also Doe v New York Univ.*, 6 Misc 3d 866, 880 (Sup Ct, NY County 2004).

[33] Office of the Governor, Press Release, *Governor Cuomo Signs "Enough Is Enough" Legislation to Combat Sexual Assault on College and University Campuses* (July 7, 2015), https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university.

resources" and "prevent future assaults."[34] As such, New York has placed a value on encouraging reporting, but the motion court's ruling will only embolden named harassers to retaliate against survivors through bringing these kinds of defamation lawsuits against those who come forward.

C. Survivors of Sexual Assault and Other Forms of Sexual Harassment Often Face Retaliation, including Retaliatory Defamation Lawsuits.

Far too many survivors who report sexual assault are met with disbelief and retaliation rather than assistance. In New York City[35] and across the country, students who report sexual harassment, including sexual assault, are disciplined or even expelled for engaging in so-called

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[34] NYPD, Press Release, *NYPD Launches Campaign to Encourage Sex Crime Reporting* (Apr. 6, 2018), https://www1.nyc.gov/site/nypd/news/pr0406/nypd-launches-campaign-encourage-sex-crime-reporting#/0.

[35] Aviva Stahl, *'This Is an Epidemic': How NYC Public Schools Punish Girls for Being Raped*, Vice (June 8, 2016), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girlsfor-being-raped.

"consensual" sexual activity[36] or premarital sex,[37] for physically defending themselves,[38] or for merely talking about their harassment with other students.[39] In the workplace, retaliation is by far the most common type of discrimination reported to the EEOC,[40] and workers

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[36] *See*, *e.g.*, Brian Entin, *Miami Gardens 9th-Grader Says She Was Raped by 3 Boys in School Bathroom*, WSVN-TV (Feb. 8, 2018), https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom; Nora Caplan-Bricker, *"My School Punished Me"*, Slate (Sept. 19, 2016), https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html.

[37] Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, Chronicle of Higher Educ. (Aug. 6, 2018), https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164.

[38] NAACP LDF & Nat'l Women's Law Ctr., Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity 25 (2014), https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf.

[39] Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, Huffington Post (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

[40] *E.g.*, EEOC, *EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data* (Jan. 24, 2020), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data.

who report sexual harassment face not only demotions and shadow smear campaigns at work but also surveillance by private investigators, attacks in the press, and threats of physical violence outside of work.[41]

Black women like Ms. Carrega, in particular, are often disbelieved and blamed when they report sexual assault due to race- and sex-based stereotypes that label them as more "promiscuous," more "aggressive," and less credible than white women.[42] As a result, their experiences are less likely to be considered sexual assault, they are more likely to be blamed or punished for their own assault, and others are less likely to believe that Black women should report the incident to police at all.[43]

Filing a defamation suit, or threatening one, is a tactic that many sexual harassers use to silence survivors from coming forward. Such lawsuits not only enable sexual harassers to retaliate against those who

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[41] Hillary Jo Baker, Note, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 Hastings Women's LJ 83, 104-19 (2009).

[42] Joel R. Anderson et al., *Revisiting the Jezebel Stereotype: The Impact of Target Race on Sexual Objectification*, 42 Psych of Women Q 399, 463 (2018).

[43] *Id.*

summon the courage to speak out, but also serve to continue the cycle of abuse. [44] Like others who bring strategic litigation against public participation (SLAPP) suits,[45] named sexual harassers who file defamation suits typically do not expect to win on the merits of their claim.[46] Rather, their ultimate goal is to devastate the survivor financially, chill the survivor's right to public participation, continue the cycle of abuse of power, and suppress the survivor's ability to seek help from their schools, employers, and other institutions, including the civil and criminal legal system.[47]

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[44] Madison Pauly, *She Said, He Sued*, Mother Jones (Mar. 2020), https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault.

[45] Anti-SLAPP statutes have been enacted across the country in response to predatory litigation initiated to stifle protected activity. *See* Andrew Roth, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L Rev 741, 741-45 (2016). Anti-SLAPP motions provide a mechanism to "weed[] out, at an early stage, meritless claims arising from protected activity." *Dickinson v Cosby*, 17 Cal App 5th 655 (2017).

[46] Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Am L Rev 441, 448 (2019).

[47] Recognizing that sexual harassment is an important public policy concern and that harassers are increasingly weaponizing defamation suits against their victims, courts around the country have allowed

Defamation suits can be effective in silencing victims or coercing them into withdrawing their claims, even when the allegations are compelling. In almost every news article, book, or documentary about a sexual predator, we can expect to learn about survivor after survivor saying that they feared speaking out. Most victims cannot afford to hire an attorney and endure years of aggressive litigation[48]—and that is quite aside from the risk that jurors might believe false and harmful sex stereotypes and "rape myths" (common false beliefs about sexual assault, including rape, that are used to dismiss or minimize allegations

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individuals subjected to retaliatory defamation lawsuits after reporting sexual assault to use anti-SLAPP statutes to obtain quick dismissals and to recover litigation fees and costs from the plaintiff. (*See Schwern v Plunkett*, 845 F3d 1241, 1245 [9th Cir 2017] [dismissing a retaliatory defamation suit under Oregon's anti-SLAPP law]; *Godin v Schencks*, 629 F3d 79, 81 [1st Cir 2010] [dismissing a retaliatory defamation suit under Maine's anti-SLAPP law]; *Vander-Plas v May*, No. 07-15-00454-CV, 2016 WL 5851913 [Tex App Oct. 4, 2016] [same under Texas Citizens Participation Act].)

[48] Lesley Wexler et al., *#metoo, Time's Up, and Theories of Justice*, 2019 U Ill L Rev 45, 58 (2019) (noting that most of those requesting representation from the Time's Up Legal Defense Fund are low-income wage-earners).

and shift blame to victims).[49] Already bearing physical and mental health consequences from the underlying incidents,[50] survivors are forced to repeatedly relive their trauma through litigation, including court filings, depositions, and court testimony. They are forced to disclose potentially embarrassing private information through invasive discovery. And perhaps most troubling, they must endure continued unwanted interaction with their named harasser throughout the litigation process—often being forced to testify at deposition within feet of the person who harmed them.[51]

In the wake of the #MeToo movement's going viral in 2017, as more and more survivors began coming forward, defamation suits by

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[49] Diana Scully, Understanding Sexual Violence: A Study of Convicted Rapists 52 (1990).

[50] *See, e.g.*, RAINN, Victims of Sexual Violence: Statistics, https://rainn.org/statistics/victims-sexual-violence (collecting studies showing that "94% of women who are raped experience symptoms of [PTSD] during the two weeks following the rape[;] 30% of women report symptoms of PTSD 9 months after the rape[;] 33% of women who are raped contemplate suicide[;] 13% of women who are raped attempt suicide[;] [a]pproximately 70% of rape or sexual assault victims experience moderate to severe distress" (footnotes omitted)).

[51] Leader, 17 First Am L Rev at 448.

named sexual harassers and abusers have become increasingly common—and have even been filed by individuals like Bill Cosby who were later convicted of serial sexual assault.[52]

The New York state legislature has sought to give survivors more tools to defend against defamation lawsuits. The legislature recently passed S52/A5991 to allow survivors to defeat defamation suits in early stages and obtain costs and fees under anti-SLAPP law.[53] Both the Senate and Assembly majorities' joint press release[54] and the lead senate sponsor's public statements[55] expressly cited the abuse of

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[52] Mark Mulholland & Elizabeth Sy, *Victim Defamation Claims in the Era of #MeToo*, 260 NYLJ 23, Aug. 2, 2018 at 1; Pauly, *She Said, He Sued.*

[53] 2020 NY Senate-Assembly Bill S52-A, A5991-A.

[54] New York State Legislature, Press Release, *Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech* (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php ("This broken system has led to journalists, consumer advocates, survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them.").

[55] Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286002032701210626?s=20 ("This bill is going to protect survivors. Jennifer Klein of @TIMESUPNOW: 'Senator Hoylman's bill will make it harder both to punish survivors who have the guts to speak out and to scare

defamation lawsuits against sexual assault survivors as a core reason for this bill. But both New York's existing qualified privilege, which should have protected Ms. Carrega, and this upcoming new anti-SLAPP law will be rendered meaningless if this Court does not overturn the motion court's ruling that reports of sexual assault are presumptively malicious and defamatory.

D. False Sexual Assault Accusations Are Rare.

The motion court's ruling that all reports of sexual assault are presumptively malicious follows from the toxic rape myth that false allegations of sexual assault are common. This myth has been debunked by numerous studies finding that false reports of sexual assault are rare, and that it is "routine" for police to incorrectly classify reports of sexual assault as "false."[56] For example, many police departments

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others from doing the same.'"); Senator Brad Hoylman (@bradhoylman), Twitter (July 22, 2020), https://twitter.com/bradhoylman/status/1286032867152334851?s=20 ("Thank you to all the advocates with @TIMESUPNOW who organized for our bill. Survivors in New York must be able to speak without threat of impoverishment and intimidation.").

[56] David Lisak, et al., *False Allegations of Sexual Assault: an Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318, 1321 (2010).

misclassify sexual assault reports as "false" merely because police believe there is insufficient evidence for a criminal prosecution ("unsubstantiated," in law enforcement jargon) or conflate "false" and "unsubstantiated" reports by combining them into one category.[57] Others misclassify true reports of sexual assault as "false" by relying on rape myths that blame or discredit victims who are not sexually assaulted by a stranger, who are intoxicated during their assault, or who delay reporting their assault.[58]

While a commonly cited study estimates that 2-10% of police reports of sexual assaults are "false,"[59] that estimate is likely to be inflated. For example, in their review of one data set, the researchers classified certain reports as "false" merely because "there *appeared* to be

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[57] *Id.* at 1321-22.

[58] *Id.* at 1321-22.

[59] *See* Kimberly A. Lonsway, et al., False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault 2-3 (2009), https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf; Lisak 16 Violence Against Women at 1318; Melanie Heenan & Suellen Murray, Study of Reported Rapes in Victoria 2000-2003: Summary Research Report (2006).

evidence that a rape did not occur"—without confirming that a rape did not, in fact, occur.[60] As a point of comparison, the number of people who have been exonerated for murder since 1989 is *fifteen times higher* than the number of people exonerated for sexual assault.[61] The fear of false allegations, in the context of sexual assault, is thus highly misplaced.

The reality is that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it. As discussed above, one in fourteen men in the U.S. experience a completed or attempted rape in their lifetime, and one in four experience some form of sexual violence in their lifetime. Accordingly, the carving out of these legal protections by the motion court would harm male survivors as well.

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[60] Lisak, 16 Violence Against Women at 1324 (emphasis added).

[61] Sandra Newman, *What Kind Of Person Makes False Rape Accusations?*, Quartz (May 11, 2017), https://qz.com/980766/the-truth-about-false-rape-accusations (analyzing National Registry of Exonerations).

II. BY INFERRING MALICE SOLELY BECAUSE MS. CARREGA REPORTED SEXUAL ASSAULT, THE DECISION BELOW RELIES ON HARMFUL SEX STEREOTYPES AND RENDERS QUALIFIED PRIVILEGE ILLUSORY.

A. A Qualified Privilege Protects Individuals Who Report Misconduct to Law Enforcement and Other Authorities.

The decision below threatens to make survivors even less likely to come forward. As detailed, retaliatory defamation suits deter reporting of sexual assault and other forms of sexual harassment to the relevant authorities, such as schools, employers, or the police. In fact, many states (though not New York), recognize the important public interest in protecting individuals who report crimes to law enforcement from retaliation by affording them an *absolute* privilege.[62] This means alleged perpetrators cannot retaliate against those who report crimes

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[62] *E.g.*, *M.J. DiCorpo, Inc. v Sweeney*, 634 NE2d 203, 209 (Ohio 1994); *McGranahan v Dahar*, 119 NH 758, 769 (1979); *Abrahams v Young & Rubicam Inc.*, 79 F3d 234, 240 (2d Cir 1996) (Connecticut law); *Hagberg v California Fed. Bank*, 32 Cal 4th 350, 364 (2004); Prosser & Keeton, Torts § 114, at 819-20 (5th ed. 1984); Restatement (Second) of Torts § 598, Comment *e* (1977) ("Formal or informal complaints to a prosecuting attorney or other law enforcement officer concerning violations of the criminal law are absolutely privileged under the rule stated in § 587.").

with defamation lawsuits but must instead meet the higher standards for a malicious prosecution or abuse of process lawsuit.

New York, however, applies only a *qualified* privilege to further the public interest in having individuals report incidents of misconduct to the relevant authorities. (*Toker v Pollak*, 44 NY2d 211, 220 [1978]; *see also Dunson v Tri-Maint. & Contractors, Inc.*, 171 F Supp 2d 103, 116 [EDNY 2001] ["The qualified privilege has long been recognized as a means of protecting the free flow of information important to the public interest."].) Even under this standard, however, an individual who reports misconduct cannot be sued for defamation unless a plaintiff sufficiently alleges that their statements were made with common-law malice (i.e., ill will or spite) or constitutional malice (i.e., knowledge of their falsity or reckless disregard as to their truth or falsity). (*Liberman*, 80 NY2d at 442.). Moreover, where—as here—the Plaintiff was a public official, "specificity in the pleading of constitutional or actual malice is required." (*Themed Rests., Inc. v Zagat Survey, LLC*, 4 Misc 3d 974, 982 [Sup Ct, NY County 2004], *aff'd*, 21 AD3d 826 [1st Dept 2005].).

Recognizing the critically important policy goals served by the privilege, this Court and others have emphasized that in defamation suits, "conclusory allegations do not suffice." (*L.Y.E. Diamonds, Ltd. v Gemological Inst. of Am., Inc.*, 169 AD3d 589, 591 [1st Dept 2019].) And in speech about public officials, which is "prima facie protected by the First Amendment," it is especially "imperative that there be a clear and sufficient pleading of intent," as "the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." (*Themed Rests.*, 4 Misc 3d at 981, 982 [quoting *Franchise Realty Interstate Corp. v S.F. Local Joint Executive Bd. of Culinary Workers*, 542 F2d 1076, 1082-83 [9th Cir 1976]]). In other words, qualified privilege provides a critical legal protection to those who come forward with reports of misconduct, particularly as it relates to government officials.

B. Harmful and False Sex Stereotypes Cannot be the Basis for Denying Qualified Privilege and Allowing Retaliation Lawsuits against Survivors to Proceed.

The motion court erred in considering speculative and stereotyped allegations as sufficient to plead malice. Most egregiously, it inferred malice from the very nature of reporting sexual assault, effectively

negating the qualified privilege entirely. Similarly, it allowed the case to proceed based on "rape myths" about people who report sexual assaults—again, effectively allowing *any* defamation complaint to recite harmful and false sex stereotypes to defeat the qualified privilege. These generalized assertions are not "sufficient to permit an inference that defendant acted out of . . . spite or ill will, with reckless disregard for the statements' truth or falsity, or with a high degree belief that [the] statements were probably false." (*Sborgi v Green*, 281 AD2d 230, 230 [1st Dept 2001].) To protect sexual assault survivors from lawsuits based on harmful and false stereotypes, this Court should clarify that such allegations are precisely the type of conclusory allegations that do not adequately plead malice.

1. A Report of Sexual Assault Is Insufficient to Infer Malice.

Under the motion court's erroneous reasoning, *every* report of sexual assault is presumptively malicious. That is not an exaggeration: the decision holds that "[f]rom such accusations of reprehensible criminal conduct, common-law malice and constitutional actual malice may be inferred." (Decision at 8-9.) As support for this, the motion paraphrased *Herlihy v Metropolitan Museum of Art* (214 AD2d 250, 258

[1st Dept 1995]), for the proposition that "[a]n inference of malice is warranted from a statement that is so extravagant in its denunciations or so vituperative in its character." (Decision at 9.) But there is nothing "extravagant" or "vituperative" about reporting sexual assault. There is simply no reason to carve sexual assault survivors, mostly women, out of applicable legal protections.[63]

There was once a time when all-male judges instructed all-male juries that they should assume that women who accused men of sexual assault might well be liars,[64] and when all-male legislatures defined sexual assault so excruciatingly narrowly as to render most sexual

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[63] While the motion court suggested that "workplace" cases were distinguishable, *id.*, there is no clear legal distinction to be made here, since reports of sexual assaults to an employer would also be denied qualified privilege if this decision were not reversed.

[64] *See* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum L Rev 10 (1977) (discussing the notorious instruction by a 17th century English judge that a sexual assault allegation "is one which is easily made and, once made difficult to defend against, even if the person accused is innocent"); A. Thomas Morris, Book Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 Duke LJ 154 (1988) (noting some states continued to permit judges to instruct juries that sexual assault survivors were presumptively liars into the 1980s).

assaults non-criminal.[65] Until 1972, New York law made sexual assaults the *only* crimes in which a woman's testimony standing alone was not admissible evidence; in fact, New York had the strictest corroboration requirements in the country.[66] As Chief Judge Cooke later noted in the *Report of the New York State Task Force on Women in the Courts*, a woman's allegation was "incredible as a matter of law."[67]

Yet, according to the decision below, that same presumption that people reporting sexual assault—primarily women and girls—are liars survives under libel law, excusing defamation plaintiffs from pleading anything more than the underlying report itself in order to defeat the

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[65] *E.g.*, Duncan Chappell, et al., Forcible Rape: The Crime, The Victim And The Offender 74-78, 177 (1977) (discussing requirements such as resistance and corroboration); Rosemarie Tong, Women, Sex, and the Law 104-05 (1984).

[66] Dawn M. DuBois, Note, *A Matter of Time: Evidence of A Victim's Prompt Complaint in New York*, 53 Brook L Rev 1087, 1098 (1988); *see People v Radunovic*, 21 NY2d 186, 190 (1967) ("the corroboration must extend to every material fact essential to constitute the crime" and finding that physical injuries did not sufficiently corroborate the "testimony of the woman"); *id.* at 192 (Breitel, J., concurring) (the evidence was "all but overwhelming, but lacked technical corroboration.").

[67] Report of the New York State Task Force on Women in the Courts 50 (1986).

qualified privilege. Nothing in this Court's precedent requires such an anomalous and outdated result; the *Herlihy* case upon which the motion court relied, for example, involved allegations that museum volunteers conspired to attribute outrageously anti-Semitic statements to the plaintiff in revenge for her reprimanding their work performance and questioning their requests for time off so that the plaintiff would be fired. (214 AD2d at 254.) It nowhere held, as the motion court seemed to believe, that reporting misconduct in the form of sexual assault is inherently enough to infer malice—a result that would render qualified privilege essentially a nullity at the motion to dismiss stage. Still less did it hold that reports of sexual assault are singled out for a presumption of malice, which would be the same discredited, outrageous, and discriminatory approach as pre-1970s criminal law. Such a presumption is especially harmful to survivors like Ms. Carrega, who are *required* to file a report with law enforcement before receiving an order of protection, if they can then be sued by the named harasser for having filed a report.[68]

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[68] New York, unlike some other states, requires pending criminal charges to obtain orders of protection against persons other than

As such, courts cannot infer malice from a report of sexual assault and a plaintiff bringing a defamation case regarding a sexual assault report must allege specific facts concerning any alleged malice. Just as this Court has routinely held that generic allegations of falsity do not support an inference of malice, a bare allegation of falsity plus the subject matter's being sexual assault does not equal a non-conclusory allegation of malice. The significant public interest in encouraging reporting of sexual assault and other forms of sexual harassment demands that pleadings in defamation cases such as this one contain some actual basis to infer malice—not just that a sexual assault report was made.

2. Reporting Sexual Assault and Other Forms of Sexual Harassment Does Not Advance Survivors' Careers.

Contrary to the decision below, Plaintiff cannot support his defamation lawsuit by claiming, without any particular facts to support the accusation, that Ms. Carrega reported him to police "because she saw an opportunity to further her career." Decision at 9. That is *precisely* the sort of unsupported allegation that this Court has held to

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intimate partners or family members. *Compare* CPL § 530.13 *with* Fam. Ct. Act § 842.

be conclusory. (*Hanlin v Sternlicht*, 6 AD3d 334, 334 [1st Dept 2004] [affirming grant of motion to dismiss, holding that "Plaintiff's allegations that defendant made the offending statements *in order to get her job* rest only on surmise and conjecture, not evidentiary facts."].)

Far from deriving career *benefits*, people who report sexual assault or other forms of sexual harassment typically suffer significant *harms*. Survivors cite fear of retaliation as their top reason for not reporting sexual assault to the police,[69] and retaliation for alleging harassment or other forms of discrimination is by far the most common type of workplace discrimination reported to the EEOC.[70] For many survivors, the prospect of retaliation makes *not* reporting sexual harassment "the most 'reasonable' course of action."[71]

As a journalist, Ms. Carrega works in the media industry, and many survivors in the media are rejected by their entire industry after

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[69] RAINN, The Criminal Justice System: Statistics.

[70] *E.g.*, EEOC, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data.

[71] Mindy E. Bergman et al., *(Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J Applied Psych 230, 237 (2002).

reporting sexual harassment.[72] As Judith Avner, then Director of the New York State Division for Women and Chair of the Governor's Task Force on Sexual Harassment wrote, "[v]irtually every victim with whom the Task Force met had lost a job, and in some cases a career, subsequent to making a complaint about sexual harassment. Some even had their lives and their families threatened. Many of the victims were blackballed from the industries in which they worked."[73]

The rape myth that there is money to be made in making an allegation of sexual harassment is a sexist stereotype routinely employed to discredit survivors—even those who, like Ms. Carrega, did not seek any money related to this matter. In fact, she only brought a counterclaim *after* Plaintiff sued her. The claim that a survivor is somehow in it for the money and thus can be dismissed as a so-called "gold-digger" is a classic rape myth and one often used against Black

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[72] Diana Falzone, *"You Will Lose Everything": Inside The Media's #Metoo Blacklist*, Vanity Fair (Apr. 16, 2019), https://www.vanityfair.com/news/2019/04/the-metoo-blacklist.

[73] Judith I. Avner, *Sexual Harassment: Building A Consensus for Change*, 3 Kan JL & Pub Pol'y 57, 58 (1994); *see also* Baker, *No Good Deed Goes Unpunished*, 20 Hastings Women's LJ at 94, 114-19.

women like Ms. Carrega.[74] But the rape myth of the "gold-digger" is easily debunked: even in cases of high-profile, notorious, and criminally convicted serial sexual abusers like Harvey Weinstein, Bill Cosby, and Larry Nassar, their victims have not become wealthy as a result of coming forward or being extensively covered by the media.

Stereotypes like these—allegations that by definition could be copied and pasted into any defamation complaint against a person reporting sexual harassment—are exactly the type of allegations that fail to rise above "surmise and conjecture." (*Hanlin*, 6 AD3d at 334.) Stereotyped allegations are, by definition, conclusory; courts often use the two words synonymously. (*See, e.g.*, *Miscellaneous Docket Matter No. 1 v Miscellaneous Docket Matter No. 2*, 197 F3d 922, 926 [8th Cir

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[74] *See, e.g.*, Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 Violence Against Women 1335, 1341 (2010) ("Can a victim ever charge a powerful, wealthy, and/or celebrity male with rape without being seen as a 'gold-digger' or/and a 'liar'?"), Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 Wm & Mary J Women & L 495 (2016) (discussing at length Twitter users' reactions to credible accusations against sports stars and celebrities, including routine use of the "gold-digger" trope); *see also* Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 UC Davis L Rev 123, 136-37 (1997); Deb Waterhouse-Watson, Athletes, Sexual Assault, and "Trials by Media" (2013).

1999] ["stereotypical and conclusory statements" could not support protective order in sex discrimination lawsuit].) Otherwise, any named harasser willing to hurl harmful and false stereotypes concerning survivors into a defamation complaint could be permitted by our legal system to proceed with baseless and retaliatory defamation lawsuits. Just as stereotypes based on protected classes like race or religion have no place or weight in a complaint, rape myths and other sex stereotypes similarly cannot be the basis for any complaint.

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Under the standards applied below, every sexual assault survivor who reports their assault becomes a potential defendant in a defamation lawsuit that will survive a motion to dismiss. The qualified privilege means little if the mere fact that sexual assault was the type of misconduct reported is sufficient for a court to infer that the survivor acted with ill will or spite, lied about the assault, or both—even where, as here, several jurors believed that even the *criminal* standard of proof was satisfied. Nor does qualified privilege have much value if a named harasser or abuser can recite harmful, false and debunked sex stereotypes and thereby be deemed to have adequately pleaded

common-law malice, constitutional malice, or both. The end result of such a standard is predictable: even fewer survivors will come forward to risk financial ruin and years of reliving their trauma through discovery and trials to report sexual harassment to their school, to their employer, or to law enforcement. Even more sexual harassers will escape accountability, and the cycle of harm will continue. Already there are far too many barriers and obstacles for survivors to report sexual assault and other forms of sexual harassment; this Court should not make it worse by carving those who report sexual assault out of existing legal protections afforded to others who report misconduct.

CONCLUSION

For the foregoing reasons, and those stated in Defendant-Appellant's brief, this Court should reverse the motion court's order.

Dated: New York, New York
August 10, 2020

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EXHIBIT B

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

CHRISMY SAGAILLE, Plaintiff, - against - CHRISTINA CARREGA, NEW YORK DAILY NEWS COMPANY and DAILY NEWS, L.P., Defendants.	Index No. 154010/2018 **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Defendant-Appellant Christina Carrega ("Appellant"), by her undersigned attorneys, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from a Decision and Order of the New York Supreme Court, New York County dated September 3, 2019, entered with the Clerk of the Court on September 9, 2019, and served with notice of entry on September 9, 2019, denying in part Appellant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). A true and correct copy of the Decision and Order is attached as Exhibit A.

Dated: New York, New York
October 8, 2019

Respectfully submitted,

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 14

Acting Justice

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CHRISMY SAGAILLE,

Plaintiff,

- v -

CHRISTINA CARREGA, NEW YORK DAILY NEWS COMPANY, DAILY NEWS, L.P.

Defendants.

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INDEX NO. 154010/2018

MOTION DATE 04/16/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 21-34, 36-44, 47 were read on this motion to/for DISMISS THE AMENDED COMPLAINT.

This action arises out of an encounter between Plaintiff Chrismy Sagaille ("Sagaille") and Defendant Christina Carrega ("Carrega") which began at a mutual friend's baby shower on April 30, 2017. After the party, Carrega agreed to give Sagaille a ride home in her car. During that drive home, Carrega asserts Sagaille kissed her twice and touched her left breast above her clothes without her consent. Sagaille posits that all contact among the parties was consensual. Carrega reported the encounter to both her brother and the New York City Police Department ("NYPD"). At the time, Plaintiff was employed as an assistant district attorney with the Office of the Kings County District Attorney and Carrega was employed as a reporter for the Defendant Daily News, LP ("Daily News").

In his amended pleading, Plaintiff alleges that Carrega went to the 84th Precinct of the NYPD and made the following false allegations in writing (*see* NYSCEF Document #18, page 2, paragraph 15 a-g):

a. Plaintiff said "You know what time it is right?"
b. Plaintiff "grabs my face and shoves tongue in my mouth"
c. Plaintiff said "Your mouth taste good. I like you"
d. At another red light...left breast grabs"
e. Plaintiff said "he was not getting out until I gave him a kiss"
f. Plaintiff said "if I [g]ave him a kiss on cheek that he would get out"
g. Plaintiff "licked my face"

Plaintiff also pleads Carrega communicated her allegations about Plaintiff's behavior to her brother (*see* NYSCEF Document #18, page 3, paragraph 19; page 5, paragraphs 35-36) and that she testified to these claims during the underlying criminal trial (*see* NYSCEF Document #18, page 3, paragraph 19). Plaintiff asserts Carrega's statement to the NYPD was false, deliberately inflammatory and was made with reckless disregard of the truth (*see* NYSCEF

Document #18, page 3, paragraph 16, 18). Plaintiff stated that Carrega made false allegations against him to further her career by creating a false sex crimes story against an assistant district attorney whose job it was to prosecute sex crimes (*see* NYSCEF Document #18, page 4, paragraph 26). Plaintiff claims Carrega acted with actual malice since she was aware her statements about Plaintiff to the NYPD were untrue and Carrega caused damage to Plaintiff's reputation and furthered her career with the false allegations (*see* NYSCEF Document #18, page 5, paragraph 39). Plaintiff further avers in the complaint that Carrega used her position at the Daily News to cause it to publish false allegations on May 4, 2017 and that Carrega "fed" the Daily News a second article, published on July 20, 2017, which reported that the felony charge against Sagaille was dropped (*see* NYSCEF Document #18, page 4, paragraph 32).

Both Plaintiff and Defendants attach the articles at issue to the moving and opposition papers (*see* NYSCEF Document ##25, 26, 38, 39). The article dated May 4, 2017 is titled, "Brooklyn Prosecutor sexually assaulted woman in car, police say" (*see* NYSCEF Document ##25 and 38). The article reads as follows:

> "A Brooklyn sex crimes prosecutor, already suspended for a DWI bust, was arrested Wednesday for sexually assaulting a woman as she drove him home from a party. Chrismy Sagaille, 32, surrendered at NYPD's Special Victims Unit in Harlem over the Sunday night attack in which he allegedly groped the victim's breast and forced his tongue into her mouth.
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> The assistant district attorney, his hands cuffed behind his back, remained silent as he walked out of the building between two detectives. He wore a blue hoodie, a puffy gray vest and jeans as cops led him away.
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> The prosecutor initially grabbed the woman's face and began aggressively kissing her as she fought off his unwanted advances, sources said.
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> In the car, Sagaille told her she "makes him feel different," and said, "I really like you" and "you know what time it is," according to prosecutors.
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> The driver then stopped the car and screamed at the passenger to get out, Sagaille said that he would leave – but only if the woman agreed to give him a kiss, which she did on his cheek, according to a criminal complaint.
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> "This is a serious allegation that will be handled by a special prosecutor," said Oren Yanly, spokesman for Acting Brooklyn District Attorney Eric Gonzalez. "This employee has been on suspension without pay since August 6, 2016, following his arrest on charges of driving while intoxicated."

Sagaille was arraigned late Wednesday on charges of sex abuse, forcible compulsion and forcible touching tied to the incidents inside the car.

He was released on $10,000 bond and an order of protection was issued against him. Sagaille maintains that everything that happened was consensual, his lawyer said.

He walked out of Brooklyn Criminal Court accompanied by his father, mother and another woman who put her arm around him. None responded to questions before getting into awaiting car.

The Staten Island District Attorney will handle the case to avoid any conflict of interest.

The prosecutor was arrested last summer for drunken driving after cops watched him run a red light in Canarsie around 4 a.m. He was driving a 2012 Nissan Maxima when cops pulled him over at E. 85th St. and Flatlands Ave.

Sagaille reeked of liquor and his eyes were bloodshot, according to cops. He was arrested after refusing to take a Breathalyzer test.

He had two additional prior arrests that were sealed.

The prosecutor was earning an annual salary of $63,654 when the DA benched him following the DWI charge. He had been a prosecutor in Brooklyn since 2013."

The July 20, 2017 article is titled, "Brooklyn prosecutor avoids felony charge in sex assault case, but faces misdemeanors" (*see* NYSCEF Document ##26, 39). The article reads:

"The top sexual assault charge against a Brooklyn sex crimes prosecutor was dropped Wednesday.

Prosecutor Chrismy Sagaille – already suspended from work after a DWI bust – will no longer face a first-degree felony charge after allegedly sexually assaulting a woman who was giving him a ride home from a party. He faces two misdemeanor charges of forcible touching and forcible compulsion. He has pleaded not guilty.

Oren Yanly, a spokesman for the Brooklyn District Attorney's office, said Sagaille remains suspended without pay pending the outcome of his case. Sagaille was suspended in 2016 after his DWI arrest."

Plaintiff accuses the Daily News of acting with "actual malice because they were highly aware that Carrega was using her position as a reporter at the Daily News to continue to spread her false publications against Plaintiff" (*see* NYSCEF Document #18, page 5, paragraph 40).

Plaintiff also claims that the Daily News acted in a "grossly irresponsible" manner by permitting Carrega to publish articles in furtherance of a personal agenda (*see* NYSCEF Document #18, page 5, paragraph 42). Because of Defendants' actions, Plaintiff claims that he lost his job as an assistant district attorney and his ability to practice law and retain clients is forever hindered (*see* NYSCEF Document 18, page 3 paragraph 24 and page 4, paragraph 27).

Based on the foregoing allegations, Plaintiff asserts four causes of action: libel *per se* (against all Defendants), defamation to a public official (against all Defendants), injurious falsehood (against Carrega only) and *prima facie* tort (against Carrega only).

Discussion

Defendants Carrega and Daily News move to dismiss Plaintiff's amended complaint pursuant to CPLR §3211[a][1] and [7]. On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see e.g. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (*see Guggenheimer*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Stated differently, "[w]here the facts are not in dispute, the mere iteration of a cause of action is insufficient to sustain a complaint where such facts demonstrate the absence of a viable cause of action" (*Allen v Gordon*, 86 AD2d 514, 515 [1st Dept 1982]).

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, *CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers,* 83 New York State Bar Journal 32, 34-35 [2011]).

Causes of Action Against Defendant Daily News

By their motion, Defendants argue that Plaintiff's claims are barred by application of New York Civil Rights Law §74. That section prohibits the prosecution of any civil action against any person or entity for the publication of a fair and true report of any judicial

proceeding. Relying on the criminal pleadings and court transcripts attached to their motion, Defendants argue that they fairly and truly reported the criminal proceedings. They further assert that Plaintiff was a public official and failed to plead "actual malice" sufficiently as against the Daily News. In addition, Defendants claim that Plaintiff fails to identify in his pleading a false or defamatory statement in the second article.

New York Civil Rights Law §74 reads:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published. This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

The statutory standard is satisfied and absolute immunity attaches when a report is "substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]). Moreover, "a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated" (*Briarcliff Lodge Hotel v Citizen-Sentinel Publishers*, 260 NY 106, 118 [1932]). The protection afforded by the statute is so broad that "[e]ven news articles containing false factual statements capable of defamatory interpretation will be protected by the absolute privilege afforded by Civil Rights Law § 74 if the gist of the articles constitutes a 'fair and true report'" (*Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014]).

Specifically, as pled, Plaintiff claimed that the following was falsely reported in the first article:

> "The prosecutor initially grabbed the woman's face and began aggressively kissing her as she fought off his unwanted advances, sources said. In the car, [Plaintiff] told her she "makes him feel different," and said "I really like you" and "you know what time it is," according to prosecutors. She screamed at [Plaintiff] and pulled away, but he went after the woman a second time" (*see* NYSCEF Document #18, page 4, paragraph 30).

In support of the motion, Defendants attached to the motion to dismiss, *inter alia,* copies of the two articles (Exhibits B & C; NYSCEF Document ##25, 26), a copy of the criminal complaint (Exhibit D; NYSCEF Document #27), a copy of the arraignment transcript (Exhibit E; NYSCEF Document #28), copies of excerpts from the criminal trial on June 4, 5 and 13, 2018 (Exhibit G; NYSCEF Document #30). These materials are unambiguous, are of undisputed authenticity and can be considered for purposes of a motion to dismiss (*see* CPLR §3211 [a][1]; *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

These documents demonstrate that the articles published accurately reflected what was contained in the criminal complaint and the transcripts of court proceedings. As such, the article

fairly and truly reported court proceedings and is subject to absolute protection under New York Civil Rights Law §74 (*see Alf v Buffalo News, Inc.*, 21 NY3d 988 [2013]; *Gillings v New York Post*, 166 AD3d 584 [2d Dept 2018]; *Rodriguez v Daily News, L.P.*, 142 AD3d 1062 [2d Dept 2016]; *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258 [1st Dept 2008]). Although information gained from sources other than official records are not protected under the statute (*see* Civil Rights Law §74; *Freeze Right Refrigeration & Air Conditioning Services, Inc. v New York*, 101 AD2d 175, 183 [1st Dept 1984]), the attribution of one of the statements in the first article to "sources" rather than the above documentation is of no moment. That statement accurately reflected information in the official proceeding and, overall, the article did not constitute an attempt to "back in" to the information in the official proceedings (*cf. Corporate Training Unlimited v NBC*, 868 F Supp 501, 509 [EDNY 1994]). Further, any inaccuracies noted by the Plaintiff in the article were not egregious enough to remove the article from the protection of the statute (*see e.g. Saleh v New York Post*, 78 AD3d 1149, 1152 [2d Dept 2010]).

The second article requires little discussion. In addition to being absolutely privileged under the statute, Plaintiff failed to identify in his complaint and opposition papers anything reported in the second article was false. Regardless of whether or not Carrega was the author, as constituted, the second article merely relayed information regarding the status of the Plaintiff's underlying criminal case and was not defamatory (*see generally James v Gannett Co.*, 40 NY2d 415 [1976]).

Accordingly, based on the foregoing, the causes of action against Defendant Daily News are dismissed. To the extent Plaintiff's first and second cause of action makes claims against Carrega in her capacity as a reporter for the Daily News and participating in the reporting of these stories, those claims are similarly barred.

Causes of Action Against Defendant Carrega Individually

Plaintiff's first and second causes of action for libel *per se* and defamation to a public official as against Defendant Carrega pertain to her statements made to the NYPD about her encounter with Plaintiff. Defendants assert Carrega's statements to the NYPD are entitled to an absolute privilege in keeping with public policy to encourage victims of sex crimes to come forward. In the alternative, if only afforded a qualified privilege, Defendant's argue the claims against Carrega still fail since Plaintiff he failed to adequately plead the existence of malice by either "ill will" or "knowing or reckless disregard of a statement's falsity. Plaintiff acknowledges Defendant Carrega's statements to the NYPD are entitled to a qualified privilege, but claims the privilege is "dissolved" because malice on her part is properly pled.

As to the claim of a privilege absolutely immunizing Carrega for her statements to the NYPD, the court could find no statutory or appellate case law supporting the existence of such a principle. At issue is the tension between the need for protecting society's interest in encouraging a crime victim to report wrongdoing to the police and an aggrieved party's right to protect his or her good reputation and standing in society. "Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether" (*Liberman v Gelstein,* 80 NY2d 429, 437 [1992] *citing Bingham v Gaynor,* 203 NY 27, 31 [1911]).

The case most analogous containing an analysis of this balancing test is *Toker v Pollak*, 44 NY2d 211 [1978]. In *Toker*, Plaintiff brought causes of action in libel and slander against two individuals who accused him of taking a bribe while an assistant corporation counsel for the City of New York (*Toker v Pollak*, 44 NY2 at 217). On the underlying criminal accusation, the District Attorney found that there was no legal evidence of Toker's wrongdoing and ultimately "concluded that presentment to the grand jury was unnecessary" (*id.*, at 217). At issue were oral and written statements made by Stern, one of the Defendants, to the District Attorney's Office and to the Department of Investigation (*id.*, at 218). After the trial court denied Stern's motion for summary judgment, the Appellate Division modified the order and dismissed the libel cause of action, finding that Stern's affidavit to the District Attorney was in lieu of his grand jury testimony and therefore was entitled to absolute privilege (*id.*). It affirmed the balance of the trial court's decision, holding that Stern's "oral statements to the Department of Investigation were only qualifiedly privileged" (*id.*).

On appeal, the Court of Appeals held that Stern's written and oral statement to the District Attorney's Office as well as his oral statement to the Department of Investigation were only to be afforded a qualified privilege (*see Toker*, 44 NY2d at 218). Finding that communications made as part of a judicial function warrant absolute protection from civil liability, the Court of Appeals made a distinction as to those statements made to a policeman as being "from removed from a judicial proceeding," and therefore, only entitled to a qualified privilege rather than absolute immunity (*id.*, at 219-220). Analogizing the function of the District Attorney in *Toker* to that of the policeman, the Court held,

> "A qualified privilege is sufficient to foster the public purpose of encouraging citizens to come forth with information concerning criminal activity. If the information is given in good faith by an individual who believes the information to be true, he is protected against the imposition of liability in a defamation action, notwithstanding that another, perhaps possessed of greater wisdom, would not have reported the information" (*id.*, at 221 *citing Pecue v West*, 233 NY 316, 322 [1922]).

The cases relied upon by Defendant in support of her claim for an absolute privilege, *Rosenberg v Metlife, Inc.*, 8 NY3d 359 [2007] and *Weiner v Weintraub*, 22 NY2d 331 [1968], are not persuasive. In *Rosenberg*, the Court of Appeals considered whether the statements made by an employer on a National Association of Securities Dealers (NASD) employee termination notice, filed as required per NASD By-laws, were subject to an absolute privilege (*Rosenburg v Metlife*, 8 NY3 at 362). Recognizing NASD as the largest self-regulatory organization subject to US Securities and Exchange Commission (SEC) oversight, the Court found the mandatory termination notice played a significant role in the NASD self-regulatory process that not only led to quasi-judicial action but was also an invaluable resource used by its members to hire potential employees (*id.* at 367-368). Thus, the Court held that "[t]he [employee termination notice] form's compulsory nature and its role in the NASD's quasi-judicial process, together with the protection of public interests, lead us to conclude that statements made by an employer on the form should be subject to an absolute privilege" (*id.*, at 368).

Similarly in the libel action in *Weiner*, Plaintiff accused Defendants of falsely and maliciously charging him, in a letter addressed to the Grievance Committee of the Association of the Bar of the City of New York, with dishonesty and fraud (*Weiner v Weintraub*, 22 NY2d at 331). The Court of Appeals found that petitions charging professional misconduct of an attorney that are investigated and acted upon by the bar association's grievance committee are done so as a quasi-judicial body and, as an arm of the Appellate Division, the filing the complaint initiated a "judicial proceeding" (*id.*, at 331-332). As such, the Defendants' communication to the Grievance Committee was absolutely privileged (*id.*, at 332).

However, the *Weiner* Court noted as to the filing of a false and malicious complaints, the accused were safeguarded (*Weiner v Weintraub*, 22 NY2d at 332). The Court observed, "[a] lawyer against whom an unwarranted complaint has been lodged will surely not suffer injury to his reputation among the members of the Grievance Committee since it is their function to determine whether or not the charges are supportable. Any other risk of prejudice is eliminated by the provision of the Judiciary Law (§ 90, subd. 10) which declares that "all papers ... upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney ... shall ... be deemed private and confidential" (*id.*).

In the case at bar, the statements made by Carrega to a NYPD detective are protected by a qualified privilege which Plaintiff acknowledges (*see Stega v New York Downtown Hosp.*, 31 NY3d 661 [2018]). Unlike the declarants in *Rosenberg* who complied with the mandatory reporting requirements of NASD, a self-regulatory agency, Carrega was not legally required to file a report. As well, unlike the case in *Weiner*, where the accused was protected against unwarranted injury to his reputation, the Plaintiff in this case was afforded no similar protection. Overall, since Carrega did not make her statements to the NYPD in an official capacity while discharging a governmental duty, nor in a judicial, quasi-judicial or administrative hearing, she is not afforded absolute immunity (*see Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 258 *citing Missick v Big V Supermarkets*, 115 AD2d 808 [3d Dept 1985]).

While Carrega is entitled to a qualified privilege for her statements to the NYPD, this privilege is "conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity" (*Loughry v Lincoln First Bank*, 69 NY2d 369, 376 [1986]). Common-law malice has been defined as "personal spite or ill will, or culpable recklessness or negligence" (see *Pezhman v City of New York*, 29 AD3d 164,168 [1st Dept 2006] *quoting Stuklus v State of New York*, 42 NY2d 272, 279 [1977]). The constitutional actual malice standard requires that statements be made with knowledge of their falsity or with reckless disregard of whether they were true or false (*see Hoesten v Best*, 34 AD3d 143, 155 [1st Dept 2006] *citing New York Times v Sullivan*, 376 US 254, 279-280 [1964]).

While movants are correct that mere surmise and conjecture are insufficient to support allegations of malice, in this procedural context, evidentiary facts are not required to be proffered to support allegations of malice (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]). Here, Plaintiff accuses Carrega of falsely pressing criminal charges against him by reporting to the police that he sexual attacked her (*see* NYSCEF Document #18, page 3, paragraphs 16, 18). From such accusations of reprehensible criminal conduct, common-law

malice and constitutional actual malice may be inferred (*see Pezhman, v City of New York*, supra at 168; *Herlihy v Metropolitan Museum of Art*, supra at 260-261 [An inference of malice is warranted from a statement that is so extravagant in its denunciations or so vituperative in its character]; *see also LaBarge v Holmes*, 30 AD3d 1087 [4th Dept 2006]). In any event, in the amended complaint, Plaintiff set forth Carrega's purported motivation for doing so, to wit that Carrega made false allegations against the him, because she saw an opportunity to further her career by creating a false sex crimes story against an assistant district attorney whose job it was to prosecute sex crimes (*see generally Liberman v Gelstein*, 80 NY2d 429, 439 [1977][Malice refers to the speaker's motivation for making the defamatory statements]). Further, where the parties offer radially divergent versions of the underlying salient facts, the claims typically present credibility issues best left to the trier of fact (*see Rabushka v Marks*, 229 AD2d 899, 901 [3d Dept 1996]).

The cases cited by Defendants to demonstrate Plaintiff's failure to plead malice are inapposite to the case at bar. All three cases – *Red Cap Valet, Ltd. v Hotel Nikko (USA), Inc*, 273 AD2d 289 [2d Dept 2000], *Hanlin v Sternlicht*, 6 AD3d 334 [1st Dept 2004] and *Weitz v Bruderman*, 14 AD3d 354 [1st Dept 2005]) – involve conversations held between Defendants and their co-workers regarding each Plaintiff's quality of work and the statements in each case warranted a qualified privilege under the theory of common interest. In those cases, the challenged statements were deemed to be uttered to third parties for the betterment of the workplace and from which no malice could be inferred. Unlike those cases, Carrega accused Plaintiff of wrongdoing that resulted in the issuance of a felony indictment against him. There can be no dispute that if the alleged statements to the NYPD were false, a trier of fact could determine they were made solely to harm Plaintiff (*see Herlihy v Metropolitan Museum of Art*, supra at 260).

Accordingly, based on the foregoing, Plaintiff has sufficiently pled malice for his libel *per se* and defamation to a public official causes of action so to avoid dismissal.

Concerning the viability of the first and second causes of action based upon Carrega's purported statements to her brother, Plaintiff makes the conclusory claims in the complaint that on the night in question Carrega "immediately went home after the alleged incident and confided in her brother [Brian]..." and that Carrega "knew the statements made to Brian were false and deliberately inflammatory when she made them" (*see* NYSCEF Document #18, page 3, paragraph 19 and page 5, paragraph 36). By not setting forth neither the specific words complained of nor making an allegation of an actual injury resulting from this conduct, this claim is insufficiently pled (*see* CPLR §3016[a]; *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 151 AD3d 603 [1st Dept 2017]).

Plaintiff's third and fourth causes of action alleging injurious falsehood and *prima facie* tort fail as duplicative of his libel *per se* and defamation causes of action since they are based on the same operative facts and allege no distinct damages (*see Matthaus v Hadjedj*, 148 AD3d 425 [1st Dept 2017]; *see also Curiano v Suozzi*, 63 NY2d 113, 117 [1984]).

Based upon the foregoing, it is

ORDERED that Defendants' motion is granted to the extent that Plaintiff's first and second causes of action alleging libel per se and defamation to a public official are dismissed against Defendant Daily News, L.P.; and it is further

ORDERED that Defendants' motion is granted only to the extent that Plaintiff's first and second causes of action alleging libel *per se* and defamation to a public official are dismissed against Defendant Christina Carrega as it concerns her participation in preparation of the subject articles published in the Daily News and based upon any statements to her brother, otherwise that branch of the motion to dismiss the first and second causes of action against Carrega based upon her statements to the NYPD is denied; and it is further

ORDERED that Defendants' motion is granted and Plaintiff's third and fourth causes of action alleging injurious falsehood and *prima facie* tort are dismissed, and it is

ORDERED, that all remaining parties will appear for a preliminary conference on **October 1, 2019 at 9:30 a.m.** in IAS Part 14, Courtroom 1045, located at 111 Centre Street.

9/3/2019
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 14**

Acting Justice

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CHRISMY SAGAILLE,

Plaintiff,

- v -

CHRISTINA CARREGA, NEW YORK DAILY NEWS COMPANY, DAILY NEWS, L.P.

Defendants.

----------X

INDEX NO. 154010/2018

MOTION DATE 04/16/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 21-34, 36-44, 47 were read on this motion to/for DISMISS THE AMENDED COMPLAINT.

This action arises out of an encounter between Plaintiff Chrismy Sagaille ("Sagaille") and Defendant Christina Carrega ("Carrega") which began at a mutual friend's baby shower on April 30, 2017. After the party, Carrega agreed to give Sagaille a ride home in her car. During that drive home, Carrega asserts Sagaille kissed her twice and touched her left breast above her clothes without her consent. Sagaille posits that all contact among the parties was consensual. Carrega reported the encounter to both her brother and the New York City Police Department ("NYPD"). At the time, Plaintiff was employed as an assistant district attorney with the Office of the Kings County District Attorney and Carrega was employed as a reporter for the Defendant Daily News, LP ("Daily News").

In his amended pleading, Plaintiff alleges that Carrega went to the 84th Precinct of the NYPD and made the following false allegations in writing (*see* NYSCEF Document #18, page 2, paragraph 15 a-g):

a. Plaintiff said "You know what time it is right?"
b. Plaintiff "grabs my face and shoves tongue in my mouth"
c. Plaintiff said "Your mouth taste good. I like you"
d. At another red light…left breast grabs"
e. Plaintiff said "he was not getting out until I gave him a kiss"
f. Plaintiff said "if I [g]ave him a kiss on cheek that he would get out"
g. Plaintiff "licked my face"

Plaintiff also pleads Carrega communicated her allegations about Plaintiff's behavior to her brother (*see* NYSCEF Document #18, page 3, paragraph 19; page 5, paragraphs 35-36) and that she testified to these claims during the underlying criminal trial (*see* NYSCEF Document #18, page 3, paragraph 19). Plaintiff asserts Carrega's statement to the NYPD was false, deliberately inflammatory and was made with reckless disregard of the truth (*see* NYSCEF

Document #18, page 3, paragraph 16, 18). Plaintiff stated that Carrega made false allegations against him to further her career by creating a false sex crimes story against an assistant district attorney whose job it was to prosecute sex crimes (*see* NYSCEF Document #18, page 4, paragraph 26). Plaintiff claims Carrega acted with actual malice since she was aware her statements about Plaintiff to the NYPD were untrue and Carrega caused damage to Plaintiff's reputation and furthered her career with the false allegations (*see* NYSCEF Document #18, page 5, paragraph 39). Plaintiff further avers in the complaint that Carrega used her position at the Daily News to cause it to publish false allegations on May 4, 2017 and that Carrega "fed" the Daily News a second article, published on July 20, 2017, which reported that the felony charge against Sagaille was dropped (*see* NYSCEF Document #18, page 4, paragraph 32).

Both Plaintiff and Defendants attach the articles at issue to the moving and opposition papers (*see* NYSCEF Document ##25, 26, 38, 39). The article dated May 4, 2017 is titled, "Brooklyn Prosecutor sexually assaulted woman in car, police say" (*see* NYSCEF Document ##25 and 38). The article reads as follows:

> "A Brooklyn sex crimes prosecutor, already suspended for a DWI bust, was arrested Wednesday for sexually assaulting a woman as she drove him home from a party. Chrismy Sagaille, 32, surrendered at NYPD's Special Victims Unit in Harlem over the Sunday night attack in which he allegedly groped the victim's breast and forced his tongue into her mouth.
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> The assistant district attorney, his hands cuffed behind his back, remained silent as he walked out of the building between two detectives. He wore a blue hoodie, a puffy gray vest and jeans as cops led him away.
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> The prosecutor initially grabbed the woman's face and began aggressively kissing her as she fought off his unwanted advances, sources said.
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> In the car, Sagaille told her she "makes him feel different," and said, "I really like you" and "you know what time it is," according to prosecutors.
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> She screamed at Sagaille and pulled away, but he went after the woman a second time. The attorney, while forcing himself on the woman, grabbed at her breast during the second incident, prosecutors said at his arraignment.
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> The driver then stopped the car and screamed at the passenger to get out, Sagaille said that he would leave – but only if the woman agreed to give him a kiss, which she did on his cheek, according to a criminal complaint.
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> "This is a serious allegation that will be handled by a special prosecutor," said Oren Yanly, spokesman for Acting Brooklyn District Attorney Eric Gonzalez. "This employee has been on suspension without pay since August 6, 2016, following his arrest on charges of driving while intoxicated."

Sagaille was arraigned late Wednesday on charges of sex abuse, forcible compulsion and forcible touching tied to the incidents inside the car.

He was released on $10,000 bond and an order of protection was issued against him. Sagaille maintains that everything that happened was consensual, his lawyer said.

He walked out of Brooklyn Criminal Court accompanied by his father, mother and another woman who put her arm around him. None responded to questions before getting into awaiting car.

The Staten Island District Attorney will handle the case to avoid any conflict of interest.

The prosecutor was arrested last summer for drunken driving after cops watched him run a red light in Canarsie around 4 a.m. He was driving a 2012 Nissan Maxima when cops pulled him over at E. 85th St. and Flatlands Ave.

Sagaille reeked of liquor and his eyes were bloodshot, according to cops. He was arrested after refusing to take a Breathalyzer test.

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Prosecutor Chrismy Sagaille – already suspended from work after a DWI bust – will no longer face a first-degree felony charge after allegedly sexually assaulting a woman who was giving him a ride home from a party. He faces two misdemeanor charges of forcible touching and forcible compulsion. He has pleaded not guilty.

Oren Yanly, a spokesman for the Brooklyn District Attorney's office, said Sagaille remains suspended without pay pending the outcome of his case. Sagaille was suspended in 2016 after his DWI arrest."

Plaintiff accuses the Daily News of acting with "actual malice because they were highly aware that Carrega was using her position as a reporter at the Daily News to continue to spread her false publications against Plaintiff" (*see* NYSCEF Document #18, page 5, paragraph 40).

Plaintiff also claims that the Daily News acted in a "grossly irresponsible" manner by permitting Carrega to publish articles in furtherance of a personal agenda (*see* NYSCEF Document #18, page 5, paragraph 42). Because of Defendants' actions, Plaintiff claims that he lost his job as an assistant district attorney and his ability to practice law and retain clients is forever hindered (*see* NYSCEF Document 18, page 3 paragraph 24 and page 4, paragraph 27).

Based on the foregoing allegations, Plaintiff asserts four causes of action: libel *per se* (against all Defendants), defamation to a public official (against all Defendants), injurious falsehood (against Carrega only) and *prima facie* tort (against Carrega only).

Discussion

Defendants Carrega and Daily News move to dismiss Plaintiff's amended complaint pursuant to CPLR §3211[a][1] and [7]. On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see e.g. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (*see Guggenheimer*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Stated differently, "[w]here the facts are not in dispute, the mere iteration of a cause of action is insufficient to sustain a complaint where such facts demonstrate the absence of a viable cause of action" (*Allen v Gordon*, 86 AD2d 514, 515 [1st Dept 1982]).

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, *CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers,* 83 New York State Bar Journal 32, 34-35 [2011]).

Causes of Action Against Defendant Daily News

By their motion, Defendants argue that Plaintiff's claims are barred by application of New York Civil Rights Law §74. That section prohibits the prosecution of any civil action against any person or entity for the publication of a fair and true report of any judicial

proceeding. Relying on the criminal pleadings and court transcripts attached to their motion, Defendants argue that they fairly and truly reported the criminal proceedings. They further assert that Plaintiff was a public official and failed to plead "actual malice" sufficiently as against the Daily News. In addition, Defendants claim that Plaintiff fails to identify in his pleading a false or defamatory statement in the second article.

New York Civil Rights Law §74 reads:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published. This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

The statutory standard is satisfied and absolute immunity attaches when a report is "substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.,* 49 NY2d 63, 67 [1979]). Moreover, "a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated" (*Briarcliff Lodge Hotel v Citizen-Sentinel Publishers*, 260 NY 106, 118 [1932]). The protection afforded by the statute is so broad that "[e]ven news articles containing false factual statements capable of defamatory interpretation will be protected by the absolute privilege afforded by Civil Rights Law § 74 if the gist of the articles constitutes a 'fair and true report'" (*Martin v Daily News L.P.,* 121 AD3d 90, 100 [1st Dept 2014]).

Specifically, as pled, Plaintiff claimed that the following was falsely reported in the first article:

> "The prosecutor initially grabbed the woman's face and began aggressively kissing her as she fought off his unwanted advances, sources said. In the car, [Plaintiff] told her she "makes him feel different," and said "I really like you" and "you know what time it is," according to prosecutors. She screamed at [Plaintiff] and pulled away, but he went after the woman a second time" (*see* NYSCEF Document #18, page 4, paragraph 30).

In support of the motion, Defendants attached to the motion to dismiss, *inter alia,* copies of the two articles (Exhibits B & C; NYSCEF Document ##25, 26), a copy of the criminal complaint (Exhibit D; NYSCEF Document #27), a copy of the arraignment transcript (Exhibit E; NYSCEF Document #28), copies of excerpts from the criminal trial on June 4, 5 and 13, 2018 (Exhibit G; NYSCEF Document #30). These materials are unambiguous, are of undisputed authenticity and can be considered for purposes of a motion to dismiss (*see* CPLR §3211 [a][1]; *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

These documents demonstrate that the articles published accurately reflected what was contained in the criminal complaint and the transcripts of court proceedings. As such, the article

fairly and truly reported court proceedings and is subject to absolute protection under New York Civil Rights Law §74 (*see Alf v Buffalo News, Inc.*, 21 NY3d 988 [2013]; *Gillings v New York Post*, 166 AD3d 584 [2d Dept 2018]; *Rodriguez v Daily News, L.P.*, 142 AD3d 1062 [2d Dept 2016]; *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258 [1st Dept 2008]). Although information gained from sources other than official records are not protected under the statute (*see* Civil Rights Law §74; *Freeze Right Refrigeration & Air Conditioning Services, Inc. v New York*, 101 AD2d 175, 183 [1st Dept 1984]), the attribution of one of the statements in the first article to "sources" rather than the above documentation is of no moment. That statement accurately reflected information in the official proceeding and, overall, the article did not constitute an attempt to "back in" to the information in the official proceedings (*cf. Corporate Training Unlimited v NBC*, 868 F Supp 501, 509 [EDNY 1994]). Further, any inaccuracies noted by the Plaintiff in the article were not egregious enough to remove the article from the protection of the statute (*see e.g. Saleh v New York Post*, 78 AD3d 1149, 1152 [2d Dept 2010]).

The second article requires little discussion. In addition to being absolutely privileged under the statute, Plaintiff failed to identify in his complaint and opposition papers anything reported in the second article was false. Regardless of whether or not Carrega was the author, as constituted, the second article merely relayed information regarding the status of the Plaintiff's underlying criminal case and was not defamatory (*see generally James v Gannett Co.*, 40 NY2d 415 [1976]).

Accordingly, based on the foregoing, the causes of action against Defendant Daily News are dismissed. To the extent Plaintiff's first and second cause of action makes claims against Carrega in her capacity as a reporter for the Daily News and participating in the reporting of these stories, those claims are similarly barred.

Causes of Action Against Defendant Carrega Individually

Plaintiff's first and second causes of action for libel *per se* and defamation to a public official as against Defendant Carrega pertain to her statements made to the NYPD about her encounter with Plaintiff. Defendants assert Carrega's statements to the NYPD are entitled to an absolute privilege in keeping with public policy to encourage victims of sex crimes to come forward. In the alternative, if only afforded a qualified privilege, Defendant's argue the claims against Carrega still fail since Plaintiff he failed to adequately plead the existence of malice by either "ill will" or "knowing or reckless disregard of a statement's falsity. Plaintiff acknowledges Defendant Carrega's statements to the NYPD are entitled to a qualified privilege, but claims the privilege is "dissolved" because malice on her part is properly pled.

As to the claim of a privilege absolutely immunizing Carrega for her statements to the NYPD, the court could find no statutory or appellate case law supporting the existence of such a principle. At issue is the tension between the need for protecting society's interest in encouraging a crime victim to report wrongdoing to the police and an aggrieved party's right to protect his or her good reputation and standing in society. "Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether" (*Liberman v Gelstein,* 80 NY2d 429, 437 [1992] *citing Bingham v Gaynor,* 203 NY 27, 31 [1911]).

The case most analogous containing an analysis of this balancing test is *Toker v Pollak*, 44 NY2d 211 [1978]. In *Toker*, Plaintiff brought causes of action in libel and slander against two individuals who accused him of taking a bribe while an assistant corporation counsel for the City of New York (*Toker v Pollak*, 44 NY2 at 217). On the underlying criminal accusation, the District Attorney found that there was no legal evidence of Toker's wrongdoing and ultimately "concluded that presentment to the grand jury was unnecessary" (*id.*, at 217). At issue were oral and written statements made by Stern, one of the Defendants, to the District Attorney's Office and to the Department of Investigation (*id.*, at 218). After the trial court denied Stern's motion for summary judgment, the Appellate Division modified the order and dismissed the libel cause of action, finding that Stern's affidavit to the District Attorney was in lieu of his grand jury testimony and therefore was entitled to absolute privilege (*id.*). It affirmed the balance of the trial court's decision, holding that Stern's "oral statements to the Department of Investigation were only qualifiedly privileged" (*id.*).

On appeal, the Court of Appeals held that Stern's written and oral statement to the District Attorney's Office as well as his oral statement to the Department of Investigation were only to be afforded a qualified privilege (*see Toker*, 44 NY2d at 218). Finding that communications made as part of a judicial function warrant absolute protection from civil liability, the Court of Appeals made a distinction as to those statements made to a policeman as being "from removed from a judicial proceeding," and therefore, only entitled to a qualified privilege rather than absolute immunity (*id.*, at 219-220). Analogizing the function of the District Attorney in *Toker* to that of the policeman, the Court held,

> "A qualified privilege is sufficient to foster the public purpose of encouraging citizens to come forth with information concerning criminal activity. If the information is given in good faith by an individual who believes the information to be true, he is protected against the imposition of liability in a defamation action, notwithstanding that another, perhaps possessed of greater wisdom, would not have reported the information" (*id.*, at 221 *citing Pecue v West*, 233 NY 316, 322 [1922]).

The cases relied upon by Defendant in support of her claim for an absolute privilege, *Rosenberg v Metlife, Inc.*, 8 NY3d 359 [2007] and *Weiner v Weintraub*, 22 NY2d 331 [1968], are not persuasive. In *Rosenberg*, the Court of Appeals considered whether the statements made by an employer on a National Association of Securities Dealers (NASD) employee termination notice, filed as required per NASD By-laws, were subject to an absolute privilege (*Rosenburg v Metlife*, 8 NY3 at 362). Recognizing NASD as the largest self-regulatory organization subject to US Securities and Exchange Commission (SEC) oversight, the Court found the mandatory termination notice played a significant role in the NASD self-regulatory process that not only led to quasi-judicial action but was also an invaluable resource used by its members to hire potential employees (*id.* at 367-368). Thus, the Court held that "[t]he [employee termination notice] form's compulsory nature and its role in the NASD's quasi-judicial process, together with the protection of public interests, lead us to conclude that statements made by an employer on the form should be subject to an absolute privilege" (*id.*, at 368).

Similarly in the libel action in *Weiner*, Plaintiff accused Defendants of falsely and maliciously charging him, in a letter addressed to the Grievance Committee of the Association of the Bar of the City of New York, with dishonesty and fraud (*Weiner v Weintraub*, 22 NY2d at 331). The Court of Appeals found that petitions charging professional misconduct of an attorney that are investigated and acted upon by the bar association's grievance committee are done so as a quasi-judicial body and, as an arm of the Appellate Division, the filing the complaint initiated a "judicial proceeding" (*id.*, at 331-332). As such, the Defendants' communication to the Grievance Committee was absolutely privileged (*id.*, at 332).

However, the *Weiner* Court noted as to the filing of a false and malicious complaints, the accused were safeguarded (*Weiner v Weintraub*, 22 NY2d at 332). The Court observed, "[a] lawyer against whom an unwarranted complaint has been lodged will surely not suffer injury to his reputation among the members of the Grievance Committee since it is their function to determine whether or not the charges are supportable. Any other risk of prejudice is eliminated by the provision of the Judiciary Law (§ 90, subd. 10) which declares that "all papers ... upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney ... shall ... be deemed private and confidential" (*id.*).

In the case at bar, the statements made by Carrega to a NYPD detective are protected by a qualified privilege which Plaintiff acknowledges (*see Stega v New York Downtown Hosp.*, 31 NY3d 661 [2018]). Unlike the declarants in *Rosenberg* who complied with the mandatory reporting requirements of NASD, a self-regulatory agency, Carrega was not legally required to file a report. As well, unlike the case in *Weiner*, where the accused was protected against unwarranted injury to his reputation, the Plaintiff in this case was afforded no similar protection. Overall, since Carrega did not make her statements to the NYPD in an official capacity while discharging a governmental duty, nor in a judicial, quasi-judicial or administrative hearing, she is not afforded absolute immunity (*see Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 258 *citing Missick v Big V Supermarkets*, 115 AD2d 808 [3d Dept 1985]).

While Carrega is entitled to a qualified privilege for her statements to the NYPD, this privilege is "conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity" (*Loughry v Lincoln First Bank*, 69 NY2d 369, 376 [1986]). Common-law malice has been defined as "personal spite or ill will, or culpable recklessness or negligence" (see *Pezhman v City of New York*, 29 AD3d 164,168 [1st Dept 2006] *quoting Stuklus v State of New York*, 42 NY2d 272, 279 [1977]). The constitutional actual malice standard requires that statements be made with knowledge of their falsity or with reckless disregard of whether they were true or false (*see Hoesten v Best*, 34 AD3d 143, 155 [1st Dept 2006] *citing New York Times v Sullivan*, 376 US 254, 279-280 [1964]).

While movants are correct that mere surmise and conjecture are insufficient to support allegations of malice, in this procedural context, evidentiary facts are not required to be proffered to support allegations of malice (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]). Here, Plaintiff accuses Carrega of falsely pressing criminal charges against him by reporting to the police that he sexual attacked her (*see* NYSCEF Document #18, page 3, paragraphs 16, 18). From such accusations of reprehensible criminal conduct, common-law

malice and constitutional actual malice may be inferred (*see Pezhman, v City of New York*, supra at 168; *Herlihy v Metropolitan Museum of Art*, supra at 260-261 [An inference of malice is warranted from a statement that is so extravagant in its denunciations or so vituperative in its character]; *see also LaBarge v Holmes*, 30 AD3d 1087 [4th Dept 2006]). In any event, in the amended complaint, Plaintiff set forth Carrega's purported motivation for doing so, to wit that Carrega made false allegations against the him, because she saw an opportunity to further her career by creating a false sex crimes story against an assistant district attorney whose job it was to prosecute sex crimes (*see generally Liberman v Gelstein*, 80 NY2d 429, 439 [1977][Malice refers to the speaker's motivation for making the defamatory statements]). Further, where the parties offer radially divergent versions of the underlying salient facts, the claims typically present credibility issues best left to the trier of fact (*see Rabushka v Marks*, 229 AD2d 899, 901 [3d Dept 1996]).

The cases cited by Defendants to demonstrate Plaintiff's failure to plead malice are inapposite to the case at bar. All three cases – *Red Cap Valet, Ltd. v Hotel Nikko (USA), Inc*, 273 AD2d 289 [2d Dept 2000], *Hanlin v Sternlicht*, 6 AD3d 334 [1st Dept 2004] and *Weitz v Bruderman*, 14 AD3d 354 [1st Dept 2005]) – involve conversations held between Defendants and their co-workers regarding each Plaintiff's quality of work and the statements in each case warranted a qualified privilege under the theory of common interest. In those cases, the challenged statements were deemed to be uttered to third parties for the betterment of the workplace and from which no malice could be inferred. Unlike those cases, Carrega accused Plaintiff of wrongdoing that resulted in the issuance of a felony indictment against him. There can be no dispute that if the alleged statements to the NYPD were false, a trier of fact could determine they were made solely to harm Plaintiff (*see Herlihy v Metropolitan Museum of Art*, supra at 260).

Accordingly, based on the foregoing, Plaintiff has sufficiently pled malice for his libel *per se* and defamation to a public official causes of action so to avoid dismissal.

Concerning the viability of the first and second causes of action based upon Carrega's purported statements to her brother, Plaintiff makes the conclusory claims in the complaint that on the night in question Carrega "immediately went home after the alleged incident and confided in her brother [Brian]..." and that Carrega "knew the statements made to Brian were false and deliberately inflammatory when she made them" (*see* NYSCEF Document #18, page 3, paragraph 19 and page 5, paragraph 36). By not setting forth neither the specific words complained of nor making an allegation of an actual injury resulting from this conduct, this claim is insufficiently pled (*see* CPLR §3016[a]; *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 151 AD3d 603 [1st Dept 2017]).

Plaintiff's third and fourth causes of action alleging injurious falsehood and *prima facie* tort fail as duplicative of his libel *per se* and defamation causes of action since they are based on the same operative facts and allege no distinct damages (*see Matthaus v Hadjedj*, 148 AD3d 425 [1st Dept 2017]; *see also Curiano v Suozzi*, 63 NY2d 113, 117 [1984]).

Based upon the foregoing, it is

ORDERED that Defendants' motion is granted to the extent that Plaintiff's first and second causes of action alleging libel per se and defamation to a public official are dismissed against Defendant Daily News, L.P.; and it is further

ORDERED that Defendants' motion is granted only to the extent that Plaintiff's first and second causes of action alleging libel *per se* and defamation to a public official are dismissed against Defendant Christina Carrega as it concerns her participation in preparation of the subject articles published in the Daily News and based upon any statements to her brother, otherwise that branch of the motion to dismiss the first and second causes of action against Carrega based upon her statements to the NYPD is denied; and it is further

ORDERED that Defendants' motion is granted and Plaintiff's third and fourth causes of action alleging injurious falsehood and *prima facie* tort are dismissed, and it is

ORDERED, that all remaining parties will appear for a preliminary conference on **October 1, 2019 at 9:30 a.m.** in IAS Part 14, Courtroom 1045, located at 111 Centre Street.

9/3/2019
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE