Davis Wright Tremaine LLP

1251 Avenue of the Americas
21st Floor
New York, NY 10020-1104

Elizabeth A. McNamara
212.603.6437 tel
212.489.8340 fax

lizmcnamara@dwt.com

October 6, 2015

BY ECF

The Hon. P. Kevin Castel
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Elias v. Rolling Stone LLC, et al.*, Civ. No. 15-5953 (PKC)

Dear Judge Castel:

We represent Rolling Stone LLC, Sabrina Rubin Erdely, and Wenner Media LLC, defendants in this action (together, "Defendants"). Under Rule 4.A.1 of the Court's Individual Practices, we write to set forth the legal and factual basis for Defendants' anticipated motion to dismiss under Fed. R. Civ. P. 12(b)(6) and to propose the following schedule for the motion: (1) motion to be filed by October 23, 2015; (2) opposition to be filed by November 6, 2015; and (3) reply to be filed by November 13, 2015. As set forth below, Plaintiffs' Complaint should be dismissed because no reasonable reader could understand the allegedly defamatory statements to be "of and concerning" the three plaintiffs.

Complaint and Factual Background

This defamation action arises out of an article titled "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" (the "Article"), which was written by Defendant Erdely and published by Defendants Rolling Stone and Wenner Media in November 2014. Cplt. ¶¶ 10-11, 33. Although Plaintiffs failed to attach the Article to the Complaint, the Court may consider it on a Rule 12(b)(6) motion because "it forms the entire basis for Plaintiffs' claims." *Triano v. Gannett Satellite Info. Network, Inc.*, No. 09-CV-2497 KMK, 2010 WL 3932334, at *3 (S.D.N.Y. Sept. 29, 2010). A copy of the Article is attached hereto as Exhibit A.

The Article describes the alleged gang rape of a woman named Jackie at a Phi Kappa Psi ("PKP") fraternity party at UVA in the fall of 2012 and reports on the University's response to Jackie's claims. It also chronicles UVA's troubling history of indifference to other alleged sexual assaults, a history that was recently confirmed in a September 21, 2015 Department of Education, Office of Civil Rights Report. The Article opens with the detailed description by

Jackie, then a freshman at UVA, of her alleged gang rape. Jackie recounts that she attended a PKP "date function" in September 2012 with a PKP brother named "Drew," a "good-looking junior" who she met while working shifts with him at the University's pool. Ex. A at 68, 70, 76. During the party, Drew invited Jackie to "go upstairs" with him. *Id.* at 70. Jackie is described as "climbing the frat-house stairs," and then Drew ushers her into a pitch-black bedroom, where the rape allegedly took place. *Id.* The Article describes nine men participating in the attack – Drew and "another man" gave instruction and encouragement, while seven other unidentified men raped Jackie. *Id.* One of the seven men is described as "attending [Jackie's] tiny anthropology discussion group." *Id.* The other six men are not described, except for vague observations that they were drinking beers, smelling of marijuana, and using nicknames like "Armpit" and "Blanket." *Id.* When the last of the seven men, the student from Jackie's freshman class, has trouble performing, the others egg him on, saying "Don't you want to be a brother? We all had to do it, so you do, too." *Id.* The Article then describes how Jackie awoke alone in the bedroom and fled the PKP house. *Id.* She later reports her rape to UVA Dean Nicole Eramo. *Id.* at 74.

The Article describes further claims that Jackie made to Dean Eramo about PKP in the spring of 2014. According to the Article, as part of her victim network, "Jackie had come across something deeply disturbing: two other young women who, she says, confided that they, too, had recently been Phi Kappa Psi gang-rape victims." *Id.* at 76. The Article provides no additional information regarding the perpetrators of these alleged attacks, but notes that UVA "placed Phi Kappa Psi under investigation" in the fall of 2014 (a statement unchallenged by Plaintiffs). *Id.* at 77. The Article calls into question the University's commitment to the investigation, however, stating that Jackie "may have gotten a glimpse into the extent of the investigation" when Dean Eramo told Jackie and a friend that "she'd learned 'through the grapevine' that 'all the boys involved have graduated.'" The Article notes that Dean Eramo's comment "mystified" Jackie and her friend because "Jackie [had] just seen one of the boys riding his bike on grounds." *Id.* 77. Beyond "Drew," nowhere does the Article identify the purported rapists by name or any other specific information.

In the Complaint, Plaintiffs nonetheless allege that the Article libels them by identifying them as "participants in [Jackie's] alleged gang rape," Cplt. ¶¶ 81, 95, 107, 133, 149. They claim they were identified as among the alleged rapists because (1) "The article claimed Jackie was told in the fall of 2014 that 'all the boys involved have graduated,' indicating that the alleged attackers were part of the class of 2013 and/or 2014" (*id.* ¶ 44); and (2) Plaintiff Elias "lived in the fraternity house in the first room at the top of the first flight of stairs at the time the alleged crime took place" (*id.* 4). *See also id.* ¶¶ 3, 45-47. Plaintiffs claim that the Article therefore identifies the alleged perpetrators of Jackie's rape as "Plaintiffs' pledge class" and "immediately identified Plaintiffs Elias, Hadford and Fowler as three of the participants in the alleged gang rape." *Id.* ¶ 48. On the same facts, the Complaint also alleges a claim for negligent infliction of emotional distress.

Legal Grounds for Dismissal

"Hornbook libel law requires that an allegedly defamatory statement must be 'of and concerning' a particular individual," and "[a] complaint must be dismissed where this requirement is not satisfied." *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 355 (S.D.N.Y. 1998). "Whether a challenged statement reasonably can be understood as of and concerning the plaintiff is a question of law for the Court, which should ordinarily be resolved at the pleading stage." *Gilman v. Spitzer*, 902 F. Supp.2d 389, 394-395 (S.D.N.Y. 2012) (internal quotation marks omitted), *aff'd*, 538 F. App'x 45 (2d Cir. 2013). New York courts routinely dispose of libel claims on motions to dismiss where the statement at issue cannot reasonably be understood as "of and concerning" the plaintiff. *See, e.g.*, *Diaz v. NBC Universal, Inc.*, 536 F. Supp.2d 337, 344 (S.D.N.Y. 2008), *aff'd*, 337 F. App'x 94 (2d Cir. 2009); *Cerasani*, 991 F. Supp. at 356.

"[W]here the person defamed is not named in the defamatory publication, it is necessary, if it is to be held actionable as to him, that the language used be such that persons reading it will, in the light of the surrounding circumstances, be able to understand that it refers to the person complaining." *Algarin v. Town of Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005). In determining whether the challenged statements are "of and concerning" the plaintiff, courts look to the natural meaning of the text in question and reject strained, illogical, and unreasonable interpretations. *See, e.g.*, *Gilman*, 538 F. App'x at 47 ("Given the numerous linguistic and logical flaws with Gilman's claim, we determine that the challenged statements cannot reasonably be understood to be 'of and concerning' him."); *Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, No. 06-CV-1260 KAM, 2009 WL 4547792, at *11, 13-14 (E.D.N.Y. Dec. 1, 2009) (dismissing libel counterclaims because House Report did not support interpretation placed on it by counterclaim plaintiffs).[1]

Here, Plaintiffs allege that the Article identifies them as "participants in [Jackie's] alleged gang rape," Cplt. ¶¶ 48, 81, 95, 107, 133, 149, but no reasonable reader could reach that conclusion. The Article does not refer to Plaintiffs by name, nor does it describe them physically or provide biographical information about them. The *only* perpetrator described in any detail in the Article is "Drew," but the Complaint itself acknowledges that "no member of the [PKP] house matches the description detailed in the Rolling Stone account." Cplt. ¶ 57. The other perpetrators are described sketchily at best, and the minimal information provided belies any plausible conclusion that Plaintiffs were these individuals. The Article suggests that the seven alleged rapists were underclassmen who were not members of PKP, specifically it suggests that they were freshman and one of the seven was in Jackie's (presumably first year) anthropology class. Yet, Plaintiffs were *seniors and already members of PKP at the time of the alleged crime*. Cplt. ¶¶ 7-9, 45-46. Thus, Plaintiffs' claim that this identified their pledge class is inherently

[1] Because the Complaint alleges a strong nexus between the cause of action and New York (Cplt. ¶ 15), Defendants proceed on the understanding the New York law applies to this action. But Virginia law includes the same basic principles regarding the "of and concerning" requirement. *See, e.g.*, *Hanks v. Wavy Broad., LLC*, No. 2:11-cv-439, 2012 WL 405065, at *6-9 (E.D. Va. Feb. 8, 2012) (under Virginia law, granting motion to dismiss when the allegedly defamatory statements could not be reasonably read as "of or concerning" the plaintiff).

implausible. Likewise, Plaintiff Elias's allegation that he is identified by the location of his bedroom in the PKP house is contradicted by the Article, which does not say that the rape took place in the "first bedroom at the top of the first flight of stairs" (Cplt. ¶ 45) or give any other textual clues that suggest the alleged rape took place in that location. *See* Ex. A at 70 (noting that Jackie "felt excited" as she climbed "the frat-house stairs with Drew," and that Drew "ushered Jackie into a bedroom"); *id.* at 77 (recounting a dream where Jackie watches herself "climb those Phi Kappa Psi stairs" and go into "that terrible room"). Therefore, no reasonable reader could infer that Plaintiffs are identified as the perpetrators of Jackie's alleged gang rape.[2]

To the extent Plaintiffs base their claims solely on their PKP membership in 2012, those claims are barred by the group libel doctrine. First, the "group" at issue is not clearly established. The Article does not even make clear that the rapists were members of PKP; instead, they appear to be freshmen non-members of the fraternity. Thus, the "group" may well be all males at UVA, or all males in the freshman class, or possibly all members of PKP. However defined, the group is not small. When an allegedly defamatory statement makes reference to a large group of people, no individual within that group can fairly say that the statement is "of and concerning" him or her, nor can the "group" as a whole state a claim for defamation. *See, e.g., Algarin*, 421 F.3d at 139-40 (affirming dismissal of police officers' libel claim because statements did not identify specific officers involved in alleged wrongdoing). If the group *was* limited to PKP members – and that is not evident – the Complaint does not allege the total number of PKP members in 2012. Yet, when a defamation claim is based on group membership, the *plaintiff* bears the burden of alleging facts sufficient to "establish that the alleged defamatory remark was directed at a specific group that is sufficiently small so that the disparaging terms may be said to apply to all members of the group." *Truong v. American Bible Soc'y*, 367 F. Supp.2d 525, 528-29 (S.D.N.Y. 2005) (granting motion to dismiss because the "the complaint contains no such allegations").

Moreover, even if the group is properly defined as PKP members in 2012 (which is not a small group),[3] any claim based on PKP membership would fail because the Article cannot plausibly be read as accusing *all* PKP brothers of participating in Jackie's alleged rape. Rather, the Article at most accuses a small unidentified subset of students who were either PKP brothers

[2] Plaintiffs also allege that friends, family members, colleagues, and reporters questioned them about the controversy because of the Article. *See, e.g.* Cplt. ¶¶ 82-86, 88, 91, 96-97, 99, 100, 103, 109-114, 117. Plaintiffs cannot back into an identification by claiming that third parties incorrectly identified them when the Article itself does not do so. *See Springer v. Viking Press*, 90 A.D.2d 315, 318-22, 457 N.Y.S.2d 246 (1st Dep't 1982) (dismissing libel claim because reasonable reader would not conclude that fictional character in novel was plaintiff, notwithstanding letter in record from third party stating that she understood the fictional character to be plaintiff), *aff'd*, 60 N.Y.2d 916 (1983); *Carter-Clark v. Random House, Inc.*, 196 Misc. 2d 1011, 1015, 768 N.Y.S.2d 290, 294 (Sup. Ct. 2003) ("The reliance by plaintiff on minimal superficial similarities between her and Ms. Baum, and speculative gossip by some people who knew plaintiff, is not enough to create any issue of fact to be tried in this action."), *aff'd*, 17 A.D.3d 241, 793 N.Y.S.2d 394 (1st Dep't 2005).

[3] The Interfraternity Council at UVA lists the current chapter size of PKP as 82 members. http://virginiaifc.com/chapters/%CF%86%CE%BA%CF%88-phi-kappa-psi/.

or UVA students hoping to pledge PKP. *See, e.g.*, *Algarin*, 421 F.3d at 140 (assuming that size of police department was "small," but concluding that no libel claim could be stated because, among other things, the challenged report "made no defamatory statements about the entire Wallkill Police Department or even most of the police officers").

Finally, Plaintiffs' attempt to narrow the group to PKP brothers who graduated in 2013 and 2014 likewise fails because it is contradicted by the Article itself. Plaintiffs base this theory on a single out-of-context sentence that the Article attributes to Dean Eramo in fall 2014, in which she says that "she'd learned 'through the grapevine' that 'all the boys involved have graduated.'" Ex. A at 77. But far from crediting the accuracy of Dean Eramo's statement, the Article specifically disputes the statement, noting that Jackie and Alex were "mystified" by it because Jackie recently had observed one of her assailants on the grounds of UVA. Moreover, when viewed in context, it is clear the Article cites Eramo's comment as evidence of the deficiencies in the University's investigation of PKP, prefacing it with the sardonic comment that "Jackie may have gotten a glimpse into the extent of the investigation" when Dean Eramo called Jackie and Alex into her office and made this statement. In short, no reasonable reader could conclude that the Article actually credited Dean Eramo's statement as accurate.

Plaintiffs' identification theory rests on their contention that the perpetrators were PKP members in their junior or senior years. But, in addition to using Dean Eramo's statement out of context, this contention cannot be squared with the Article's description of the circumstances of the rape and its perpetrators, which suggests that they were underclassmen partygoers seeking to become members of PKP. Courts routinely reject attempts like this to artificially narrow the scope of a group libel claim. *See, e.g. Diaz*, 337 F. App'x at 96 (rejecting attempt to narrow group to nine DEA agents who searched a drug dealer's house because the challenged film portrayed the individuals searching the house as NYPD officers); *see also Gilman*, 902 F. Supp. at 397 ("The law does not permit a defamation plaintiff to impose such an extraneous gloss on the challenged language to artificially narrow the scope of its subject.").

In sum, because no reasonable reader could understand the allegedly defamatory statements to be "of and concerning" Plaintiffs, their defamation claims should be dismissed with prejudice. Plaintiffs' negligent infliction of emotional distress claim also should be dismissed as duplicative of their failed libel claims. *Diaz*, 536 F. Supp.2d at 345; *Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690, 693-94 (S.D.N.Y. 1995).

Respectfully yours,

Elizabeth A. McNamara

cc: All counsel of record (via ECF)