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INTRODUCTION

This case is about a malicious journalist with a preconceived storyline — drafted in her own mind before ever interviewing her first UVA source — who found, manipulated, and pressured Jackie into participating in the article, whose fabricated story of sexual assault was seriously lacking in credibility. As Sabrina Rubin Erdely set about her reporting for “A Rape On Campus,” she discovered that Jackie had told multiple different tales of her sexual assault to different people (Erdely never bothered to clear up the discrepancies), and that Nicole Eramo had worked assiduously to help Jackie and to bring punitive, criminal action against those Jackie (eventually) claimed assaulted her. Erdely learned that Jackie — far from feeling that she had been met with indifference to her claims of assault — had only positive things to say about the way she had been treated by Ms. Eramo. Erdely learned that Ms. Eramo was lauded by survivors for her work — and that she was passionate about seeking justice for those perpetrating sexual assaults on UVA’s campus. And Erdely learned through her reporting that Jackie had lied about many things — relating both to her alleged assault and to more mundane topics.

But Erdely did not let the facts — or *Rolling Stone’s* fact-checker — get in the way of telling the story she set out to write. Instead, she wrote, and *Rolling Stone* ultimately published, a narrative about a horrific crime supposedly perpetrated by multiple fraternity brothers on an innocent victim who was met with indifference by an administrator more concerned with protecting the reputation of the institution for whom she worked than she was about taking action against the perpetrators of the crime. Erdely’s and *Rolling Stone’s* work is not mere opinion — and this lawsuit does not challenge Defendants’ (unwise and untenable) positions on the topic of whether UVA should do more when presented with allegations of sexual assault. Instead, Defendants published a feature length article riddled with false “facts” about Jackie’s alleged assault and the “ordeal” and “abuse” Jackie allegedly suffered at Ms. Eramo’s hands in the

aftermath. And they did so with actual malice. Indeed, as laid out in the briefing and in Ms. Eramo's counterstatement of facts, this may well be one of the clearest cases of actual malice the Fourth Circuit has ever seen.

In their Motion for Summary Judgment, Defendants raise only two challenges to Ms. Eramo's claims — relating to “opinion”/defamatory meaning and actual malice — but, as explained herein, Defendants' challenges rest upon numerous disputed material issues of fact and misconstructions of the relevant law and, accordingly, cannot justify an award of even partial summary judgment in their favor.

First, Defendants contend they are entitled to summary judgment because some (but not all) of the defamatory statements identified in Ms. Eramo's Complaint — statements that (1) Ms. Eramo “[d]iscouraged Jackie from sharing her story,” (2) “silenc[ed]” Jackie after Jackie reported her alleged assault to Ms. Eramo, and (3) took “no action” in response to either Jackie's alleged sexual assault or the alleged sexual assaults of two other UVA students that Jackie reported to Ms. Eramo — are nonactionable because Defendants made them to support supposed opinions elsewhere in their “Rape on Campus” article. As explained below, however, Defendants' contention is based on a fundamental misconstruction of the law relating to “opinions,” as well as an improper attempt to ignore the actual statements on which Ms. Eramo bases her claims. Defendants cannot convert Ms. Eramo's Complaint into something it is not; and Defendants' argument that those statements are nonactionable because they support supposed opinions elsewhere in the article does not absolve them of liability for the defamatory nature of the statements themselves. Simply put, because, at the very least, a reasonable juror could understand the statements on which Ms. Eramo bases her claims as “contain[ing] a provably false factual connotation” or “as stating actual facts about a person,” they cannot be

held nonactionable as “pure” opinion as a matter of law. That is all that matters. Because those statements are capable of conveying, even implicitly, factual connotations, it is simply irrelevant whether, as Defendants now contend, Defendants express opinions elsewhere in their article (a contention belied by their own statements made contemporaneous with the article’s publication that the article is a factual “narrative”).

Defendants relatedly contend that one of the statements in their “Rape on Campus” article on which Ms. Eramo bases Counts 1 and 2 of her Complaint is not “of and concerning” Ms. Eramo and that that statement and two others are not capable of having a defamatory meaning as a matter of law. Both of those arguments likewise fail. As explained below, not only is the statement that Defendants’ challenge as not being “of and concerning” Ms. Eramo capable of being understood as referring to Ms. Eramo, the undisputed evidence demonstrates that the statement was actually understood by readers as being about Ms. Eramo. Furthermore, the plain text of the article, Defendants’ own statements contemporaneous with their initial publication of the article, and the overwhelming evidence of how the Article was actually understood by persons who read it make clear that the statements Defendants challenge were not only *capable of* tending “to harm the reputation of [Ms. Eramo] as to lower [her] in the estimation of the community or to deter third persons from associating or dealing with [her],” but *actually did* severely and irreparably harm Ms. Eramo’s reputation. Indeed, as further explained in Ms. Eramo’s affirmative Motion for Partial Summary Judgment, because the *only* reasonable understanding of Defendants’ statements is that they unambiguously imputed to Ms. Eramo “unfitness to perform the duties of her [employment],” “want of integrity in the discharge of the duties of [her] ... employment,” and/or “prejudice[d] [her] in ... her profession,” Ms. Eramo’s

Motion for Partial Summary Judgment that these statements are defamatory *per se* should be granted.

Second, as explained below and in Ms. Eramo's affirmative Motion for Partial Summary Judgment, Ms. Eramo is not a "public official" or a "limited purpose public figure," and therefore she is only required to prove negligence, rather than actual malice, in order to establish Defendants' liability on her defamation claims. But even if Ms. Eramo could be considered a public official or public figure, Defendants' Motion fails because Defendants cannot demonstrate that there are no disputed issues of fact with respect to whether Defendants acted with actual knowledge of falsity and/or reckless disregard for the truth in publishing their defamatory statements about Ms. Eramo. There is overwhelming evidence that Defendants began with a preconceived storyline about a rape victim and an indifferent educational institution that they adhered to regardless of the actual facts; that Defendants were subjectively aware that far from being indifferent to Jackie, Ms. Eramo was desperate to see Jackie's allegations investigated and adjudicated, repeatedly prodded Jackie to file a formal complaint, and took Jackie to the police; that *Rolling Stone's* own fact-checker attempted, in vain, to alert Defendants to the falsity of their statements about Ms. Eramo and that Defendants ignored her concerns; that Defendants knew that Jackie was not a reliable source but nevertheless forced her to continue to cooperate despite her desperate attempts to pull out of the article; that Defendants made numerous false and misleading statements about their reporting of the article in an attempt to cover up their knowledge that the article was likely false; and that Defendants' own source repeatedly and emphatically repudiated their false claims about Ms. Eramo's treatment of Jackie.

Accordingly, for the reasons set forth herein, supported by the facts set forth in Ms. Eramo's Counter-Statement of Material Facts filed contemporaneously herewith, Ms. Eramo respectfully requests that the Court deny Defendants' Motion for Summary Judgment.

ARGUMENT

I. DEFENDANTS CANNOT PROVE THEIR DEFAMATORY STATEMENTS NONACTIONABLE AS A MATTER OF LAW.

Defendants first contend that they are entitled to summary judgment because, according to them, "most" (but not all) of the defamatory statements identified in Ms. Eramo's Complaint are nonactionable because they support Defendants' opinions elsewhere in their article, because they are not susceptible to any defamatory construction, or because they are not "of and concerning" Ms. Eramo.¹ Defendants' contentions, however, rest on a misconstruction of the relevant law and a fundamental misreading of the "Rape on Campus" article, the defamatory statements therein, and Defendants' post-publication statements.

A. Defendants' Defamatory Statements Are Not "Pure Opinion" Incapable Of Being Proven True Or False.

Defendants' primary argument that some of the defamatory statements in the "Rape on Campus" article and some of Erdely's post-publication statements regarding the subject-matter of the article are nonactionable as a matter of law is their contention that those statements — that Ms. Eramo "[d]iscouraged Jackie from sharing her story," "silenc[ed]" Jackie after Jackie reported her alleged assault to Ms. Eramo, and took "no action" in response to either Jackie's alleged sexual assault or the alleged sexual assaults of two other UVA students that Jackie

¹ As made clear in Defendants' Memorandum of Law in Support of their Motion for Summary Judgment [Dkt. 102] and explained below, Defendants only assert that *some* of their allegedly defamatory statements are nonactionable because they support Defendants' supposed opinions, are not subject to a defamatory meaning, or are not "of and concerning" Ms. Eramo. Because the defamation claims in Ms. Eramo's Complaint are based on more than just the select statements that Defendants contend are nonactionable on these grounds, Defendants' Motion is more properly a Motion for *Partial* Summary Judgment on this issue and could not justify fully dismissing Ms. Eramo's claims on these grounds.

reported to Ms. Eramo — are nonactionable because they were made to support Defendants’ supposed opinions that (1) Ms. Eramo should have warned the UVA campus about Jackie’s alleged sexual assault and that (2) Ms. Eramo should not have honored Jackie’s decision not to pursue charges against her alleged assailant.² Notably, Defendants make this argument only with regard to *three* of the numerous statements that form the basis of Ms. Eramo’s defamation claims in Counts 1 and 2 of her Complaint and only *some* portions of the statements that form the basis of her defamation claims in Counts 3-6 of her Complaint (*see* Compl. ¶¶ 210, 225, 240, 255, 270, 285), and, as such, even if Defendants were correct in their argument, that would not justify dismissing those Counts.³ However, as explained herein, Defendants’ argument that the defamatory statements in the article and Erdely’s defamatory post-publication statements that assert Ms. Eramo “discouraged” Jackie from sharing the story of her sexual assault, “silenc[ed]” Jackie after she reported her alleged assault, took “no action” in response to Jackie’s alleged assault or other alleged assaults reported by Jackie, and “brushed off” Jackie when she reported her alleged assault constitute nonactionable opinion is fundamentally incorrect as a matter of law.

² Defendants self-servingly refer to these supposed “opinions” as their “Campus Safety Opinion” and their “Victim Choice Opinion.” Of course, turning those supposed issues into proper nouns (with capitalization) has no bearing on their legal merit.

³ Defendants do not (and could not reasonably) argue that their statements that (1) Ms. Eramo caused Jackie to suffer “a whole new kind of abuse” when Jackie sought to hold the perpetrators of her alleged assault accountable or that (2) Ms. Eramo callously told Jackie that UVA did not publish its sexual assault statistics “because nobody wants to send their daughter to the rape school” — which allege facts — constitute pure statements of Defendants’ opinion. (*See* Defs.’ Mem. of Law in Supp. of Defs.’ Mot. for Summ. J. (“Defs. Mem.”) [Dkt. 102] 27-42.) Defendants, having not challenged these statements in their opening Memorandum of Law, cannot do so for the first time in their Reply Brief; any such argument is waived. *See, e.g., Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 604 n.4 (4th Cir. 2010). Moreover, with regard to Defendants’ claim that Ms. Eramo told Jackie that UVA did not publish its sexual assault statistics “because nobody wants to send their daughter to the rape school,” the Virginia Supreme Court has expressly held that a statement falsely attributed to a person is actionable as defamation even if the underlying statement itself is not itself actionable. *Tharpe v. Saunders*, 285 Va. 476, 483-84 (2013). And Defendants especially have *no defense* for republishing that statement on December 5, after they knew that Jackie was not a credible source for information.

As an initial matter, as the U.S. Supreme Court and Virginia Supreme Court have explained — contrary to Defendants’ suggestion — there is no “wholesale defamation exemption for anything that might be labeled ‘opinion.’” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990) (rejecting the interpretation of its prior decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), as creating such an exception and explaining that “[w]e are not persuaded that ... an additional separate constitutional privilege for ‘opinion’ is required to ensure the freedom of expression guaranteed by the First Amendment”); *WJLA-TV v. Levin*, 264 Va. 140, 156 (2002) (“[T]he United States Supreme Court has specifically declined to hold that statements of opinion are categorically excluded as the basis for a common law defamation cause of action.”); *Fuste v. Riverside Healthcare Ass’n, Inc.*, 265 Va. 127, 132 & n.2 (2003) (same). Rather, only “speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action.” *Fuste*, 265 Va. at 132 (noting that speech incapable of being proven true or false is sometimes referred to as a “pure expression[] of opinion”; quotation marks omitted); *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 714 (2006) (same); *WJLA-TV*, 264 Va. at 156 (same). In other words, ***if a statement does “contain a provably false factual connotation” or can “be interpreted as stating actual facts about a person,” then it is not protected as “pure opinion” and can properly form the basis of a defamation claim.*** See *Milkovich*, 497 U.S. at 18-21; *Fuste*, 265 Va. at 132; *WJLA-TV*, 264 Va. at 156.⁴

Indeed, Virginia courts and the U.S. Supreme Court have repeatedly held that even “subjective” statements of opinion are actionable if they convey, even implicitly, facts. See, e.g., *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 297-98 (1987) (holding that “statements

⁴ Emphasis added unless otherwise noted.

of opinions[] laden with factual content” can support defamation claims); *Milkovich*, 497 U.S. at 18 (admonishing that an expression of “opinion” may often imply an assertion of objective fact, and consequently may be actionable); *Reynolds v. Pionear, LLC*, No. 15-cv-209, 2016 WL 1248866, at *7 (E.D. Va. Mar. 25, 2016) (“The Court [] concludes that the otherwise subjective first and second statements are ‘laden with factual content’ supporting a claim for defamation.”).⁵

As Defendants acknowledge, in determining whether a statement is capable of conveying a factual connotation, courts must “assess how an objective, reasonable reader would understand a challenged statement by focusing on the plain language of the statement and the context and general tenor of its message.” *Santos v. Christian*, No. 15-cv-476, 2015 WL 7738353, at *3 (E.D. Va. Nov. 30, 2015) (quotation marks and citation omitted); *see also Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 7 (1954) (similar). This is so because “it is not necessary that the defamatory charge be in direct terms but it may be made indirectly ... by inference, implication or insinuation.” *Carwile*, 196 Va. at 7. Thus, when determining if a statement is capable of supporting a defamation claim (or, conversely, is protected “pure opinion” incapable of stating any factual matter), courts must view the allegedly defamatory publication “as a whole,” and cannot take statements or portions of statements out of context so as to strip them of their innuendo or implications. *See WJLA-TV*, 264 Va. at 156; *Carwile*, 196 Va. at 7.

Accordingly, summary judgment that a statement constitutes a nonactionable “opinion” can only be granted when the statements that form the basis of a defamation claim, when read in

⁵ *See also, e.g., Cretella v. Kuzminski*, No. 08-cv-109, 2008 WL 2227605, at *5 (E.D. Va. May 29, 2008) (“[D]escribing a statement as an expression of a personal view does not make it an opinion.”); *Andrews v. Virginia Union Univ.*, No. 07-cv-447, 2008 WL 2096964, at *11 (E.D. Va. May 16, 2008) (similar); Restatement (Second) of Torts § 566 cmt. a (false statement of fact “expressly stated or implied from an expression of opinion” can form the basis of a defamation claim).

context, could not possibly be interpreted by any reasonable juror as having “a provably false factual connotation” or “stating actual facts about a person.” *Milkovich*, 497 U.S. at 18-21; *Fuste*, 265 Va. at 132; *WJLA-TV*, 264 Va. at 156; *Carwile*, 196 Va. at 7. As Virginia courts have explained, this is the case in the limited circumstances in which a statement is inherently “relative in nature **and** depend[s] largely upon the speaker’s viewpoint,” *Tronfeld*, 272 Va. at 714; *Fuste*, 265 Va. at 132 (same), or the speaker resorts to use of a rhetorical and hyperbolic epithet, *e.g.*, *Snyder v. Phelps*, 580 F.3d 206, 223-24 (4th Cir. 2009). This is confirmed by a review of the case law cited in Defendants’ brief — a significant amount of which pre-dates the U.S. Supreme Court’s seminal holding in *Milkovich* and relies on *dicta* in the Court’s earlier *Gertz* decision suggesting that any expression of opinion is protected, which the Court specifically rejected in *Milkovich*, 497 U.S. at 18, and is therefore bad law.⁶ *See, e.g.*, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091 (4th Cir. 1993) (assertion of “hefty” markup is inherently relative and indefinite); *Nat’l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc.*, 705 F.2d 98, 100-01 (4th Cir. 1983) (assertion that charity did not expend “reasonable” percentage of its income is an inherently relative and indefinite accusation); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 301 (4th Cir. 2008) (rhetorical epithet: calling plaintiffs “hired killers”); *Snyder*, 580 F.3d at 223-24 (rhetorical epithets: “Fag Troops” “Semper Fi Fags”; inherently unverifiable assertion that defendant thinks “God hates” certain groups); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184-85 (4th Cir. 1998) (writer used “indefinite” terms and offered “speculative supposition” about future stock performance without “claim[ing]

⁶ See, for example, the following pre-*Milkovich* cases relied on by Defendants: *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986) (citing *Gertz* for the conclusion that “[o]pinion is absolutely protected under the First Amendment”), *recognized as abrogated by Milkovich in Toney v. WCCO Tel., Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 393 (8th Cir. 1996); *Nat’l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc.*, 705 F.2d 98, 99 (4th Cir. 1983) (citing *Gertz* and holding district court’s ruling that a statement was not actionable because it “was a statement of opinion”); *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1287 (4th Cir. 1987) (citing *Gertz* for the conclusion that “opinion ... [is] not actionable”).

[[] first-hand knowledge”); *Lapkoff v. Wilks*, 969 F.2d 78, 82 (4th Cir. 1992) (use of well-known euphemism nothing more than “a relative statement completely dependent on [the speaker’s] obvious bias toward [plaintiff]”).

By contrast, summary judgment that a statement constitutes a nonactionable “opinion” is *inappropriate* if a reasonable juror could possibly interpret any statement that forms the basis of a defamation claim, when read in context, as having “a provably false factual connotation” or “stating actual facts about a person,” even if that statement is couched in terms of an opinion. *See, e.g., Fuste*, 265 Va. at 132-33 (purported opinion statements that plaintiff-doctors “abandoned” their patients and that there were “concerns about [plaintiff-doctors’] competence” contained provably false connotation because evidence could show whether plaintiff-doctors had failed to provide necessary services to patients and whether there were concerns about their competence); *Tronfeld*, 272 Va. at 714 (purported opinion statements that plaintiff-lawyer “just takes people’s money” and that his clients would be better off negotiating with insurance adjuster without him contained provably false connotations because evidence could show whether plaintiff-lawyer obtained favorable judgments or settlements for clients and whether plaintiff-lawyer obtained insurance company payouts exceeding amount adjuster offered to his clients); *Reynolds*, 2016 WL 1248866, at *7 (purported opinion statements that plaintiff engaged in “inappropriate” conduct with a co-worker and that plaintiff was discharged for “unfavorable employment” conduct held to be “laden with factual content” so as to support defamation claim); *see also Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 662 n.3 (1989) (treating purported opinion that an attorney was “unethical” and “capable of extortion” as a statement of fact).

Moreover, and significantly, the Virginia Supreme Court has repeatedly held that *even where a defendant expresses an otherwise protected “pure” opinion, “factual statements made to support or justify [that] opinion can form the basis of an action for defamation.”* *WJLA-TV*, 264 Va. at 156; *Williams v. Garrahty*, 249 Va. 224, 233 (1995).

Here, summary judgment that any of the statements in the “Rape on Campus” article and Erdely’s post-publication statements regarding the subject-matter of that article on which Ms. Eramo’s defamation claims are based (both those actually challenged by Defendants in their Motion or those not challenged by Defendants, which are therefore not before the Court on Defendants’ Motion) would be wholly improper because a reasonable juror could find that those statements convey facts or have factual connotations that can be proven true or false. Defendants try to avoid this inevitable conclusion by largely ignoring in their Motion the text of the article, the alleged defamatory statements therein, and Erdely’s post-publication statements, and instead argue that the statements underlying Ms. Eramo’s defamation claims simply support two different opinions that they claim are expressed (elsewhere) in the article. However, it is axiomatic that in assessing the defamatory nature of statements, a court must consider the statements themselves. Here, those statements include statements accusing Ms. Eramo of, among other things:

- “Discourag[ing] Jackie from sharing her story” (July 1, 2016 Pl.’s Statement of Undisputed Facts in Supp. of Pl.’s Mot. for Partial Summ. J. (“Pl. SJ SUF”) [Dkt. 99] ¶ 33);
- Having a “nonreaction” to Jackie’s claim that she was aware of two other gang rape victims, and failing to “take action out of regard for campus safety,” (*id.*);
- “[P]retending, or even thinking [she is] on the victim’s side, when [she’s] actually discouraging and silencing them” (*id.*);
- Doing “nothing,” “brush[ing] off” Jackie, and acting “with indifference” when Jackie came to her to report her alleged sexual assault and the alleged sexual assaults of two other women (*id.* ¶ 97);

- “Discourag[ing] [Jackie] from moving [] forward” with reporting her alleged sexual assault and instead attempting to “suppress” it in order to further her own “ethos” and put UVA’s interest above the interests of assault victims (*id.* ¶ 87);
- Doing “nothing” with the information Jackie provided about her alleged gang-rape and two other alleged gang-rapes, and showing a “level of indifference” (*id.*);
- Keeping “rapes quiet” because she is “less concerned with protecting students than [] with protecting [the University of Virginia’s] reputation from scandal” (*id.* ¶ 33); and
- Presenting a “sheer menu of choices, paired with the reassurance that any choice is the right one,” with the “end result of coddling the victim into doing nothing” (*id.*).

(See also Compl. ¶¶ 210, 225, 240, 255, 270, 285.)

These statements, far from consisting of only “relative” language inherently dependent on the speaker’s viewpoint or being nothing more than rhetorical epithets — or even any other form of overstated rhetoric easily understood by all readers not to constitute assertions of fact — plainly assert facts about Ms. Eramo that are capable of being proven true or false. For example:

- *Whether Ms. Eramo “discouraged Jackie from sharing her story”* can be proven true or false with evidence that Ms. Eramo told Jackie not to report her alleged assault or told Jackie not to tell anyone about it (which evidence confirms she did not do) or, conversely, that Ms. Eramo arranged for Jackie to meet with the police (which evidence confirms she did do) or support groups (which evidence also confirms she did do) to discuss her alleged sexual assault;
- *Whether Ms. Eramo had a “nonreaction” to Jackie’s claim that she was aware of two other gang rape victims and failed to “take action” regarding them* can be proven true or false with evidence regarding Ms. Eramo’s actions after Jackie reported those additional assaults, including evidence that Ms. Eramo did nothing at all in response to the report (which evidence confirms she did not do) or, conversely, that Ms. Eramo sought to obtain from Jackie (or otherwise) the names of the alleged victims (which evidence confirms she did do) so that she could speak with them and encourage an investigation into the assaults;
- *Whether Ms. Eramo “pretend[ed] ... [she is] on the victim’s side, when [she’s] actually discouraging and silencing them”* can be proven true or false with evidence that Ms. Eramo lied to the sexual assault victims she counseled or promised support or other services for them but then attempted to ensure that those services were never available or used (which evidence confirms she did not do) or, conversely, that Ms. Eramo genuinely supported and advocated for sexual assault victims (which evidence confirms she did do);

- *Whether Ms. Eramo did “nothing,” “brushed off” Jackie, and acted “with indifference” when Jackie came to her to report her alleged sexual assault and the alleged sexual assaults of two other women can be proven true or false with evidence that Ms. Eramo did nothing in response to Jackie’s reports (which evidence confirms she did not do) or did not take Jackie’s reports seriously (which evidence confirms she did not do) or, conversely, whether Ms. Eramo fully received Jackie’s reported assaults (which evidence confirms she did do) and took action in response to them (which evidence confirms she did do);*
- *Whether Ms. Eramo “discouraged [Jackie] from moving [] forward” with reporting her alleged sexual assault and instead attempted to “suppress” it in order to further her own “ethos” and put UVA’s interest above the interests of assault victims can be proven true or false with evidence that Ms. Eramo told, advised, or sought to convince Jackie not to pursue a formal or informal complaint against her alleged assailants or report them to the police (which evidence confirms she did not do) or, conversely, that Ms. Eramo arranged for Jackie to meet with the police (which evidence confirms she did do) or otherwise encouraged her to take steps to hold her alleged assailants accountable (which evidence confirms she did do);*
- *Whether Ms. Eramo did “nothing” with the information Jackie provided about her alleged gang-rape and two other alleged gang-rapes, and showed a “level of indifference” can be proven true or false, again, with evidence that Ms. Eramo did nothing in response to Jackie’s reports (which evidence confirms she did not do) or did not take Jackie’s reports seriously (which evidence also confirms she did not do) or, conversely, that Ms. Eramo fully received Jackie’s reported assaults (which evidence confirms she did do) and took any action in response to them (which evidence confirms she did do);*
- *Whether Ms. Eramo keeps “rapes quiet” because she is “less concerned with protecting students than [] with protecting [the University of Virginia’s] reputation from scandal” can be proven true or false with evidence that Ms. Eramo attempts to suppress or discourage the reporting of sexual assaults (which evidence confirms she did not do) or attempts to keep sexual assault victims from coming forward (which evidence confirms she did not do) or, conversely, that Ms. Eramo has encouraged alleged sexual assault victims to come forward and to pursue complaints against their alleged assailants to hold them accountable (which evidence confirms she did do); and*
- *Whether Ms. Eramo presented a “sheer menu of choices, paired with the reassurance that any choice is the right one,” in order to “coddle[] the victim into doing nothing”⁷ can be proven true or false with evidence that Ms. Eramo, by explaining to assault victims their options for obtaining support or counseling or seeking to holding their*

⁷ Defendants’ assertion that the term “coddle” has “no precisely defined meaning” — for which they offer no support beyond their own say-so — is entirely incorrect. Indeed, “coddle” is a well-known word with the fixed and definite meaning of “to treat with extreme or excessive care or kindness.” Merriam-Webster Dictionary, “Coddle” (2016), available at <http://www.merriam-webster.com/dictionary/coddle>.

assailants accountable, convinced assault victims to do nothing regarding their assault (which evidence confirms she did not do) or, conversely, that Ms. Eramo meaningfully presented victims with all of their options and encouraged them to pursue the avenue with which they were comfortable, including seeking to hold their assailants accountable (which evidence confirms she did do).⁸

Because these statements underlying Ms. Eramo's defamation claims (along with other statements that Defendants do not challenge) can be understood by a reasonable reader as containing factual connotations or stating actual facts about Ms. Eramo and her actions (or inactions), they cannot constitute "pure opinion" as a matter of law and Defendants' Motion for Summary Judgment on that ground should be denied.

Notably, this conclusion is the same regardless whether Defendants expressed opinions elsewhere in the article (as they now claim) that Ms. Eramo should have warned the UVA campus about Jackie's alleged sexual assault and that Ms. Eramo should not have honored Jackie's decision not to pursue charges against her alleged assailant — Defendants' *post hoc* and self-servingly labeled "Campus Safety Opinion" and "Victim Choice Opinion." Indeed, Defendants are entitled to their opinion that UVA should have issued a campus-wide warning about unverified and anonymous rape allegations, and Defendants are entitled to take the (indefensible) position that UVA should have defamed Phi Kappa Psi in the very same way that Defendants did in the article. But that, of course, is not how Ms. Eramo pled her complaint, it is

⁸ Similarly, the statements that Defendants do not challenge in their Motion for Summary Judgment unquestionably assert facts about Ms. Eramo that are capable of being proven true or false. For example:

- *Whether Ms. Eramo caused Jackie to suffer "a whole new kind of abuse" when Jackie reported her alleged sexual assault to Ms. Eramo* can be proven true or false with evidence (including from Jackie herself) that Ms. Eramo antagonized Jackie or caused Jackie to experience trauma or severely negative feelings as a result of reporting her alleged sexual assault to Ms. Eramo (which evidence confirms she did not do) or, conversely, that Ms. Eramo was supportive of and well-liked by Jackie (which evidence confirms she was).
- *Whether Ms. Eramo callously told Jackie that UVA did not publish sexual assault statistics "because nobody wants to send their daughter to the rape school"* can be proven true or false with evidence that Ms. Eramo made that statement to Jackie (which evidence confirms she did not do), or, conversely, that Ms. Eramo did not make that statement to Jackie (and evidence confirms that she did not make it).

not the basis on which she brings her defamation claims, and Ms. Eramo — not Defendants — is the master of her own complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“The [well-pleaded complaint] rule makes the plaintiff the master of the claim[.]”). Defendants’ attempt to inject their *post hoc* opinions into Ms. Eramo’s Complaint and sing a battle cry about the First Amendment does not absolve them from defamation liability.

But even *Rolling Stone* did not always hold the view that the “Rape on Campus” article is merely an opinion piece. To the contrary, *Rolling Stone* described the article in a press release issued contemporaneously with its publication as a factual “narrative [] about a girl who says she was gang raped at a fraternity and the school [that] has done nothing” about it. (CSF ¶ 353.)⁹ The idea that the article simply conveyed Defendants’ so-called “Campus Safety Opinion” and “Victim Choice Opinion” should be seen for what it is: nothing more than lawyer-driven *post hoc* framing meant to avoid liability. But even more fundamentally, even if the article did convey those two supposed opinions — despite it not being an “Opinion” column and not containing “cautionary language in the text in which the [defamatory] statement at issue is found” or “framing [of] the statement[s] as [] interrogator[ies]” so as to “put the reader on notice that what is being read is opinion,” *Ollman v. Evans*, 750 F.2d 970, 982-83 (D.C. Cir. 1984) — and even if those opinions themselves could not possibly be construed as conveying or implying facts, the statements about Ms. Eramo that form the basis of her claims constitute “factual statements made to support or justify [those] opinion[s]” which, under settled law, “*can* form the basis of an action for defamation.” *WJLA-TV*, 264 Va. at 156; *Williams*, 249 Va. at 233.

⁹ Citations to “CSF” refer to paragraphs of Plaintiff’s July 22, 2016 Counter-Statement of Material Facts in Support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment and the supporting exhibits thereto, filed contemporaneously herewith.

And even if the statements at issue were opinions and did not themselves convey facts, they are still actionable as a matter of law because they suggest that Defendants are aware of facts — that they do not disclose in the article or their post-publication statements — that would support those “opinions.” It has been the law since even before *Milkovich* that an opinion can be defamatory when it is based on, or suggests the existence of, undisclosed, false and defamatory facts. See, e.g., *Ollman*, 750 F.2d at 983; *Adler v. Am. Standard Corp.*, 538 F. Supp. 572, 576 (D. Md. 1982). Here, even if the statements forming the basis of Ms. Eramo’s claims that Defendants challenge could be viewed as opinions, they suggest, at the very least, that Defendants are privy to undisclosed facts that would support them, and those facts are demonstrably false.¹⁰ For example, Defendants’ statements that Ms. Eramo “did nothing” in response to Jackie’s reported assault and her report that two other women were assaulted and failed “to take action” in response to those reports suggest that Defendants are aware that Ms. Eramo in fact took no action — that Defendants are aware that Ms. Eramo did not seek information regarding those assaults, that she did not arrange for Jackie to meet with the police, and so forth. But undisputed evidence shows that those supposed underlying “facts” are untrue — and Defendants knew them to be untrue at the time of publication. (See *infra* Parts II.B-II.C) Similarly, Defendants’ statements that Ms. Eramo “discourage[ed] and silenc[ed]” Jackie and other victims of sexual assaults suggests that they are aware of actions by Ms. Eramo to hinder or interfere with the reporting of assaults or to pressure victims not to report their assaults. But again, undisputed evidence in this case shows that those supposed undisclosed “facts” are

¹⁰ Defendants do not move for summary judgment on the element of “falsity,” nor do they argue in their Memorandum of Law in Support of their Motion for Summary Judgment that the statements that form the basis of Ms. Eramo’s claims are true or substantially true (much less as a matter of law). Nor could they. As explained below, not only are those statements false but Defendants *knew they were false* at the time they published them. (See *infra* Part II.C.)

demonstrably false and defamatory — and Defendants knew them to be false at the time of publication. (*Id.*) And as yet another example, Defendants’ statements that Ms. Eramo keeps “rapes quiet” because she is “less concerned with protecting students than [] with protecting [the University of Virginia’s] reputation from scandal” also suggest that they are aware of actions by Ms. Eramo to suppress or discourage the reporting of sexual assaults or attempts to keep sexual assault victims from coming forward out of some expressed loyalty to UVA that trumped her duties as an employee responsible for supporting and counseling victims of sexual assaults and her responsibilities to those victims. And again, undisputed evidence in this case shows that those supposed undisclosed “facts” are demonstrably false and defamatory — and Defendants knew them to be false at the time of publication. (*Id.*) Accordingly, those statements, even if they are opinions (they are not) and even if they are not capable of themselves implying the existence of facts (they are), at the very least suggest that they are based on undisclosed facts to which Defendants are privy, and therefore cannot be held nonactionable as a matter of law. *See Ollman*, 750 F.2d at 983; *Adler*, 538 F. Supp. at 576.

Finally, these statements cannot be held nonactionable as a matter of law (and should be held *actionable* as a matter of law) because, at the very least, they constitute “mixed” statements of opinion and fact, which are actionable as a matter of law. *See, e.g., Swengler v. ITT Corp. Electro-Optical Prods. Div.*, 993 F.2d 1063, 1071 (4th Cir. 1993); *Tolman v. Doe*, 988 F. Supp. 582, 587 (E.D. Va. 1997) (same; granting *plaintiff’s* motion for partial summary judgment holding statements defamatory *per se*).

B. Defendants’ Challenge To Three Of The Statements On Which Ms. Eramo’s Claims Are Based, On “Of And Concerning” (One Statement) And “Defamatory Meaning” (Three Statements) Fail.

Defendants next challenge three specific statements in the article and, after removing them from their context, argue that one of those statements is not “of and concerning”

Ms. Eramo and that the three statements are not capable of having a defamatory meaning.¹¹ As explained below, Defendants are incorrect. Indeed, undisputed evidence demonstrates that, far from being entirely incapable of being “of and concerning” Ms. Eramo or having a defamatory meaning, these statements were actually understood by people who read them as being about Ms. Eramo (*see* Pl.’s Mem. in Supp. of Mot for Partial Summ. J. (“Pl. SJ Mem.”) [Dkt. 98] at 32-42), and were actually understood as not only damaging Ms. Eramo’s reputation, but as “imput[ing] to [her] unfitness to perform the duties of [her] ... employment of profit, or want of integrity in the discharge of the duties of [her] employment,” and/or “prejudic[ing] [her] in ... her profession or trade” so as to be defamatory *per se* as a matter of law, *see Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 713 (2006); *Carwile v. Richmond Newspapers*, 196 Va. 1, 7 (1954); Pl. SJ Mem. [Dkt. 98] at 42-50.

1. The “Deck” Of The Article — Which Claims Jackie Was “Subject To A Whole New Kind Of Abuse” When She Tried To Hold Her Alleged Assailants Accountable — Is “Of and Concerning” Ms. Eramo.

Defendants contend that the statement in the “deck” of the “Rape on Campus” article — the introductory paragraph summarizing the contents of the article — is not “of and concerning” Ms. Eramo as a matter of law. That statement, in large, bolded text alongside the headline on the first page of the article, provides: “Jackie was just starting her freshman year at the University of

¹¹ As Defendants’ Memorandum in Support of their Motion for Summary Judgment [Dkt. 102] makes clear, Defendants challenge only three of the numerous statements that form the basis of Ms. Eramo’s defamation claims in Counts 1 and 2 of her Complaint (the first, second, and fourth statements identified in those Counts (*see* Compl. ¶¶ 210, 225)) on these grounds. Defendants do not challenge any other statements that form the basis of Ms. Eramo’s claims in Counts 1-2 or *any* statements that form the basis of her claims in Counts 3-6 on these grounds. (*See generally* Defs.’ Mem. in Supp. of Mot, for Summ. J. [Dkt. 102] at 37-43 (challenging only three specific statements in the article on these grounds), 66-72 (challenging post-publication statements only on grounds that they are “pure opinion” and were made without actual malice).) Defendants, having not challenged those statements in their opening Memorandum of Law, cannot do so for the first time in their Reply Brief; any such argument is waived. *See, e.g., Equal Rights Ctr.*, 602 F.3d at 604 n.4. Thus, again, because Defendants only assert that *some* of their allegedly defamatory statements underlying *some* of Ms. Eramo’s claims are not actionable on these grounds. Defendants’ Motion is more properly a Motion for *Partial* Summary Judgment on these issues and could not justify fully dismissing Ms. Eramo’s claims.

Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began.” (CSF ¶ 252.)



(CSF ¶ 252.) As explained below and in Ms. Eramo’s Memorandum in Support of her Motion for Partial Summary Judgment (at pp. 32-42), not only is that statement not “not of and concerning” Ms. Eramo as a matter of law, it actually is “of and concerning” Ms. Eramo as a matter of law.

Under black-letter Virginia law, an allegedly defamatory statement is “of and concerning” a plaintiff if the statement “was intended to refer to [the plaintiff] and would be so understood by persons reading it who knew [the plaintiff].” *Gazette, Inc. v. Harris*, 229 Va. 1, 37 (1985); *AvePoint, Inc., v. Power Tools, Inc.*, 981 F. Supp. 2d 496, 506 (W.D. Va. 2013) (Conrad, J.). As the Virginia Supreme Court has explained, this “test is met if the plaintiff shows that the publication was in its description or identification such as to lead those who knew or

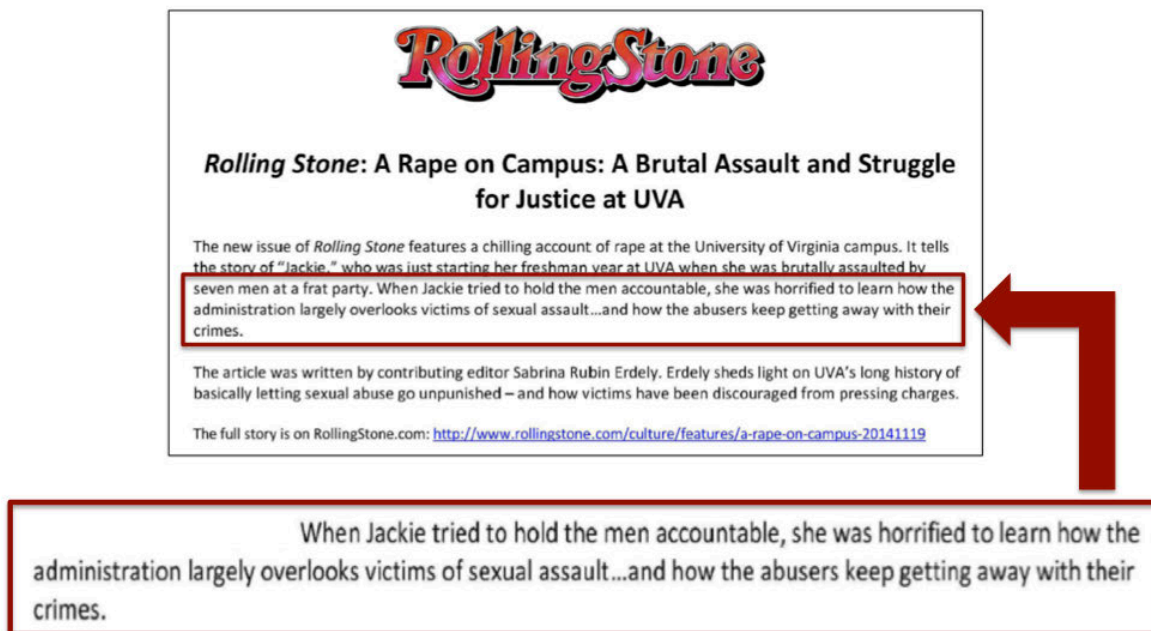
knew of the plaintiff to believe that the article was intended to refer to [him].” *Gazette, Inc.*, 229 Va. at 37.¹² Notably, as long as such a showing is possible, a statement need not even specifically identify a plaintiff by name to be “of and concerning” her. *Id.*; *AvePoint, Inc.*, 981 F. Supp. 2d at 506. Indeed, the Virginia Supreme Court has explained that a defamatory statement in an article can be “of and concerning” a plaintiff even where the plaintiff is not identified in the article at all, as long as it is clear, even if only from subsequent articles, that the statements referred to the plaintiff. *WJLA-TV*, 264 Va. at 156. Moreover, even where “the publication on its face does not show that it applies to the plaintiff,” the publication is still actionable if “contemporaneous facts connect the libelous words to the plaintiff.” *Gazette, Inc.*, 229 Va. at 37. Here, not only can Defendants not demonstrate that the deck of the “Rape on Campus” article — which stated, “Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began.” — is not “of and concerning” Ms. Eramo as a matter of law, undisputed evidence confirms that that statement *is* of and concerning Ms. Eramo as a matter of law.

As an initial matter, the article itself specifically claims that Jackie’s *only* attempt at holding her assailants “accountable” consisted of reporting her alleged assault to, and meeting with, Ms. Eramo (CSF at Ex. 16), and on multiple occasions the article further expressly and specifically identifies Ms. Eramo as the individual responsible for assisting Jackie in holding her assailants “accountable.” (*Id.*) Thus, the connection between Jackie’s efforts “to hold [her assailants] accountable” (particularly the beginning of those efforts, which the article makes clear began with Jackie reporting her alleged assault to Ms. Eramo), the “abuse” that the article

¹² The inquiry thus focuses on how statements were understood by the people who read them, and not on how a defendant may claim it intended the statements to be understood.

contends “began” when Jackie undertook those efforts (*i.e.*, when Jackie reported her alleged assault to Ms. Eramo), and Ms. Eramo are clear from the plain text of the article itself.

Moreover, Defendants have themselves conceded, including contemporaneously with their initial publication of the article, that this statement referred to Ms. Eramo. In a press release that Defendants issued contemporaneously with their initial publication of the Article — a press release that *Rolling Stone’s* then-Managing Editor admitted is a “fair summary” of the article (CSF ¶ 354) — Defendants expressly linked Jackie’s efforts “to hold [her assailants] accountable” with the UVA administration and Ms. Eramo, “the most public face [of the administration] because she’s the one who deals with students.” (Pl. SJ SUF ¶ 76.) In that press release, in language virtually identically tracking the article’s deck, Defendants stated: “When Jackie tried to hold the men accountable, she was horrified to learn how the administration largely overlooks victims of sexual assault.” (CSF ¶ 353.)



(*Id.*)

In this press release promoting and “summar[izing]” the article, Defendants thus expressly linked Jackie’s efforts “to hold [her assailants] accountable” with the UVA administration, and further with Ms. Eramo, who is the only member of the UVA “administration” identified in the article as meaningfully interacting with Jackie (Pl. SJ SUF ¶¶ 42-43), who is explicitly referenced by name and/or title *thirty-three* times in the article, and who is the only person described in the article whose (intentionally altered) photograph was included in the print edition of the Article (*id.* ¶¶ 45-46). It is axiomatic that, in construing allegedly defamatory statements, the publication must be taken as a whole, *Carwile*, 196 Va. at 9; *Tomblin v. WCHS-TV8*, 434 F. App’x 205, 210 (4th Cir. 2011), and when viewed that way, the link between “the administration” and Ms. Eramo is clear.

This connection is likewise confirmed by the official statement about the “Rape on Campus” article that *Rolling Stone* released on December 1, 2014, shortly after its publication, that further described the article as “one woman’s account of a sexual assault at a UVA fraternity in October 2012 — and the subsequent *ordeal* she experienced at the hands of University administrators in her attempts to work her way through the trauma of that evening.” (CSF ¶ 357.)

Moreover, as set forth in Ms. Eramo’s Memorandum in Support of her Motion for Partial Summary Judgment, undisputed evidence adduced in this case shows that those who knew Ms. Eramo actually understood this statement (like others in the article) to refer to Ms. Eramo. (See Pl. SJ Mem. [Dkt. 98] at 32-42.) For example, Laura Casteen, a colleague of Ms. Eramo’s who has known Ms. Eramo since 1999, read the article and understood this statement to be referring to Ms. Eramo because “[t]he use of the phrase, ‘[w]hen she tried to hold them accountable’ in particular could only be plausibly read to refer to Jackie’s interactions with

Nicole Eramo as described in the article,” since “the article does not refer to or allude to any attempts by Jackie to hold her alleged perpetrators ‘accountable’ for her alleged assault other than meeting with Nicole Eramo.” (Pl. SJ SUF ¶ 50.) Similarly, UVA student-activist Sara Surface, who Erdely interviewed for the article and who knew both Jackie and Ms. Eramo prior to the publication of the article, has testified that she understood this statement in the article to refer to Ms. Eramo, and that she understood this “depiction of Dean Eramo” as “suggesting that essentially Dean Eramo’s actions are as bad as seven men gang raping [Jackie], which I think is ludicrous.” (*Id.* ¶ 48.) And as yet another example, sexual assault survivor Victoria Groves read the article and understood it to be about Ms. Eramo and was so “disgusted” by Ms. Eramo’s treatment of Jackie (as portrayed in the article) that she wrote to Ms. Eramo to tell her that her supposed conduct was “an atrocity” and “sicken[ed] me.” (CSF ¶ 378.)

And, as explained in greater detail in Ms. Eramo’s Memorandum in Support of her Motion for Partial Summary Judgment, Defendants have also produced numerous communications from members of the public that also understood the article as stating that Ms. Eramo mistreated Jackie. (*See* Pl. SJ Mem. [Dkt. 98] at 34-36, 38, 41, 48-49; CSF ¶¶ 371-79.) One person wrote a letter to the editor at *Rolling Stone* saying that “Dean Eramo smells of cover up, deflect, delay and fake text book sensitivity. Protecting UVA is her No. 1 priority. Sickening.” (CSF ¶ 372.) Another wrote that “Dean Eramo should be fired” because she “offer[ed] [Jackie] a soft shoulder to cry on instead of an iron fist to help her face her attackers and protect other students. This softballing was intentional, in my opinion, to keep the case from becoming public and out of UVA control.” (*Id.* ¶ 374.) Moreover, the caption underneath the doctored photograph of Ms. Eramo in the article asks, “Where’s the Justice?”— which clearly refers back to the article’s earlier statement about Ms. Eramo that “[w]hen [Jackie] tried to hold

[her assailants] accountable, a whole new kind of abuse began,” and the article’s title about Jackie’s “struggle for justice” at UVA. (CSF at Ex. 16, at RS001076.)



(*Id.*)¹³

In light of the plain text of the article, Defendants’ own statements contemporaneous with their initial publication of the article, and the overwhelming evidence of how the article was actually understood by persons who read it, Defendants’ contention that the “deck” of the article “plainly refers to Jackie having a bottle thrown at her face” — an incident briefly described near the end of the article and that took place *long after* Jackie reported her alleged assault to Ms. Eramo and “tried to hold [her assailants] accountable” — is mere makeweight. And it makes no logical sense — because the only time in the article that Jackie is portrayed as having

¹³ Because Ms. Eramo is the only individual who is depicted visually in the article, this alone is enough to conclude that the reference in the deck to Jackie’s abuse is “of and concerning” Ms. Eramo. See *Araya v. Deep Dive Media, LLC*, 966 F. Supp. 2d 582, 595-96 (W.D.N.C. 2013).

attempted to hold her attackers “accountable” is her meeting with Ms. Eramo. Defendants’ arguments should be rejected.

Accordingly, Defendants’ Motion for Summary Judgment that the “deck” of the “Rape on Campus” article is not “of and concerning” Ms. Eramo should be denied, and Ms. Eramo’s Motion for Partial Summary Judgment that this statement (and other statements in the article) *are* “of and concerning” her should be granted.

2. Defendants’ Claims That Ms. Eramo (1) Subjected Jackie To “Abuse” When She Reported Her Alleged Assault To Her, (2) “Discouraged [Jackie] From Sharing Her Story” And (3) Had A “Nonreaction” and “Took No Action” In Response To Jackie’s Report Of Her Alleged Assault Are Capable Of Having A Defamatory Meaning.¹⁴

Defendants next contend that three (and only three) specific statements in the article are incapable of having a defamatory meaning as a matter of law: Defendants’ statements (1) in the article’s deck that Ms. Eramo subjected Jackie to “abuse” when Jackie reported her alleged assault to her, (2) that Ms. Eramo “discouraged [Jackie] from sharing her story,” and (3) that Ms. Eramo had a “nonreaction” and took no action in response to Jackie’s report of her alleged assault. Defendants’ contentions, however, are based on nothing more than their own self-serving and for-litigation interpretations of their article and their improper attempt to remove the statements from their proper context so as to (improperly) strip them of their innuendo and implications. At bottom, however, Defendants ignore the undisputed evidence that those statements are not only capable of having a defamatory meaning, but that they were in fact

¹⁴ Again, as Defendants’ Memorandum in Support of their Motion for Summary Judgment [Dkt. 102] makes clear, Defendants only contend that *these three statements* are incapable of having a defamatory meaning. They do not challenge on this ground the other statements that form the basis of Ms. Eramo’s claims. (*See generally* Defs.’ Mem. in Supp. of Mot. for Summ. J. [Dkt. 102] at 37-43, 66-72.)

understood by readers as being defamatory — and that Defendants’ intended the defamatory meaning that readers understood those statements to convey.¹⁵

Under settled law, to have a defamatory meaning, a statement need only “tend so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Vaile v. Willick*, No. 07-cv-11, 2008 WL 2754975, at *3 (W.D. Va. July 14, 2008); accord *Tomblin v. WCHS-TV8*, 434 F. App’x 205, 218 (4th Cir. 2011) (vacating award of summary judgment to defendant). Moreover, as the Virginia Supreme Court has repeatedly held, some defamatory statements are actionable *per se*. A statement is defamatory *per se* if it (1) “impute[s] to a person unfitness to perform the duties of an office or employment of profit, *or* want of integrity in the discharge of the duties of such an office or employment,” *or* (2) “prejudice[s] such person in his or her profession or trade.” *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 713 (2006); *Carwile v. Richmond Newspapers*, 196 Va. 1, 7 (1954). To that end, the Virginia Supreme Court has held that statements that charge a professional “with unethical or unprofessional conduct” and that “tend to injure or disgrace him in his profession are actionable *per se*.” *Carwile*, 196 Va. at 8. Similarly, that Court has held that statements that imply “dishonesty” or “incompetence” are likewise actionable *per se*. *Tronfeld*, 272 Va. at 714 (statement that attorney “just takes people’s money” held defamatory *per se* because it implied he either unscrupulously took client funds or provided incompetent legal services); see also, e.g., *Singh v. Haas*, No. 09-cv-386, 2010 WL 1957410, at *5 (E.D. Va. Apr. 28, 2010) (holding false accusation of plagiarism against plaintiff-author defamatory *per se* because “[a]n accusation of plagiarism [is] perhaps the most serious

¹⁵ Again, as explained above (*see supra* note 10), Defendants do not move for summary judgment on the element of “falsity,” nor do they argue in their Memorandum of Law in Support of their Motion for Summary Judgment that the statements that form the basis of Ms. Eramo’s claims are true or substantially true (much less as a matter of law).

professional indictment that can be made against an author” (quotation marks omitted)); *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 708 (E.D. Va. 2000) (explaining that false accusation of plagiarism will cause plaintiff-author irreparable injury and granting injunction to plaintiff). In cases involving psychologists — persons who, like Ms. Eramo, have the responsibility to counsel and support persons — courts have likewise held allegations that a person is “abrasive, unprofessional, and rude,” that the person “lies,” that the person lacks integrity, *or* that the person’s “overall performance remains in need of improvement” to be defamatory *per se* because they “impl[y] that she is unfit for her position [of employment].” *Echtenkamp v. Loudon Cnty. Pub. Schs.*, 263 F. Supp. 2d 1043, 1064 (E.D. Va. 2003); *Baylor v. Comprehensive Pain Mgmt. Ctrs. Inc.*, No. 09-cv-472, 2011 WL 1327396, at *10 (W.D. Va. Apr. 6, 2011).

Importantly, as the Virginia Supreme Court has further explained, “it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. ... [A] defamatory charge may be made by inference, implication or insinuation.” *Carwile*, 196 Va. at 7. Accordingly, “[b]ecause Virginia law makes room for a defamation action based on a statement expressing a defamatory meaning ‘not apparent on its face,’ evidence is admissible to show the circumstances surrounding the making and publication of the statement which would reasonably cause the statement to convey a defamatory meaning to its recipients.” *Pendleton v. Newsome*, 290 Va. 162, 172 (2015) (vacating judgment of dismissal). Where there is any question as to whether “the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby,” the question is one “to be resolved by the fact-finder at trial.” *Id.* As Defendants concede, “allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by

courts and juries as other people would understand them, and according to the sense in which they appear to have been used.” *Carwile*, 196 Va. at 7.

And, critically, as the Fourth Circuit has admonished, at the summary judgment stage, if allegedly defamatory statements “are capable of multiple interpretations” or “there *could be* a question of fact as to whether the [article] produced a false ‘implication, innuendo or insinuation’ about the [plaintiff],” summary judgment is inappropriate. *Tomblin*, 434 F. App’x at 209-10, 218 (reversing summary judgment for defendant); *accord* *Tharp v. Media Gen., Inc.*, 987 F. Supp. 2d 673, 683 (D.S.C. 2013) (same; denying defendants’ motion for summary judgment).

Here, Defendants’ statements that Ms. Eramo subjected Jackie to “abuse,” that she “discouraged” her from sharing her story, and that she had a “nonreaction” and took no action in response to Jackie’s report of her alleged assault are plainly capable of having a defamatory meaning. In fact, not only are Defendants’ statements are plainly capable of having a defamatory meaning, but the only reasonable construction of those statements is that they are not just defamatory, but defamatory *per se*.

As set forth more fully in Ms. Eramo’s Memorandum in Support of her Motion for Partial Summary Judgment, at the time Defendants published the article in November and December 2014, Ms. Eramo was an Associate Dean at UVA whose job responsibilities focused on working with and supporting victims of sexual violence and assisting with the University’s sexual assault prevention initiatives. (Pl. SJ SUF ¶¶ 7-8; Pls. SJ Mem. 42-50.) In her role as an Associate Dean,

one of Ms. Eramo’s primary job responsibilities ... at the time the article was published was doing intake for students who alleged they were victims of sexual misconduct and/or intimate partner violence. In this role, Ms. Eramo’s primary duties were to support and comfort the students, assist them in seeking options for medical and/or mental health treatment, to assist them with seeking any necessary housing or academic accommodations that the University could provide, to

explain to students their options for pursuing a criminal complaint with the police and/or a sexual misconduct complaint through the University's disciplinary process, and to support and assist students with whichever option(s) they chose to pursue.

(Pl. SJ SUF ¶ 8.) As part of her job, Ms. Eramo was further responsible for “coordinating student leadership programming offered by the Office of the Dean of Students; serving on an on-call rotation for the Dean of Students Office to assist callers and walk-in students with a variety of issues such as mental health issues, academic issues, roommate conflicts, and the like; serving as a liaison to University's student-run Honor Committee; and assisting with prevention programming for sexual violence and hazing.” (*Id.* ¶ 7.)

Defendants' defamatory statements about Ms. Eramo took direct aim at her ability to perform her employment responsibilities assisting and supporting victims of sexual violence and not only tended “to harm [her] reputation ... as to lower [her] in the estimation of the community or to deter third persons from associating or dealing with [her],” *Vaile*, 2008 WL 2754975, at *3; *Tomblin*, 434 F. App'x at 21, but unambiguously imputed to her “unfitness to perform the duties of her [employment],” “want of integrity in the discharge of the duties of [her] ... employment,” and “prejudice[d] [her] in ... her profession” — any one of which renders those statements defamatory *per se*, *Tronfeld*, 272 Va. at 713; *Carwile*, 196 Va. at 7.

As explained above, the plain text of the article, Defendants' own statements contemporaneous with their initial publication of the article, and the overwhelming evidence of how the Article was actually understood by persons who read it make clear that Defendants' statement in the article's deck that “when Jackie tried to hold [her assailants] accountable, a whole new kind of abuse began” plainly refers to Ms. Eramo (and not the “bottle throwing incident” briefly described near the end of the article). (*See supra* Part I.B.1). That statement clearly imputes to Ms. Eramo “unfitness to perform the duties of her [employment],” *Tronfeld*,

272 Va. at 713, because no advocate or supporter of victims of sexual assault would be properly performing her duties to those survivors if she “abused” them.

Defendants’ next contention — that their statement that Ms. Eramo “discouraged Jackie from sharing her story” cannot possibly be construed as suggesting that Ms. Eramo discouraged Jackie from sharing her story with the administration or authorities — is meritless. Indeed, Defendants’ insistence that that statement can only be understood as conveying that Ms. Eramo discouraged Jackie from sharing her story *with Rolling Stone* is contradicted by a reasonable reading of the plain text of the article, Defendants’ own admissions, and contemporaneous evidence from Defendants themselves.

To begin, the plain text of the article makes clear that Defendants’ statements — that Ms. Eramo “discouraged Jackie from sharing her story” — in fact suggest that Ms. Eramo discouraged Jackie from sharing her story with UVA investigatory/disciplinary personnel and the authorities. This is confirmed by the very next sentence in the article, which explains that “[o]n this deeply loyal campus, even some of Jackie’s closest friends see her going public as tantamount to betrayal.” (CSF at Ex. 16, at RS001072). That sentence clearly continues and refers back to Defendants’ discussion in the immediately preceding paragraph that, when Jackie went to her friends in the immediate aftermath of her alleged assault, those friends stated that “[Jackie’s] reputation will be shot for the next four years” if she reported her alleged assault or went to the hospital and that those friends engaged in “a heated discussion about the social price of **reporting** Jackie’s rape.” (*Id.*) Defendants thus clearly linked their statement about Ms. Eramo supposedly “discourag[ing] Jackie from sharing her story” with the reporting of Jackie’s alleged assault to UVA personnel and the authorities such that the statement is at the very least “capable of” that interpretation, and raising, at the very least, “a question of fact as to

whether” the statement conveyed that meaning. *See Tomblin*, 434 F. App’x at 218; *Tharp*, 987 F. Supp. 2d at 683.

Moreover, Will Dana, *Rolling Stone*’s Managing Editor at the time the article was published, expressly confirmed that not only is the interpretation of Defendants’ statement that Ms. Eramo “discouraged Jackie from sharing her story” capable of being interpreted as conveying that Ms. Eramo discouraged Jackie from reporting her alleged sexual assault, but Defendants in fact intended the statement to convey that meaning. In his deposition, Mr. Dana acknowledged that the article asserts that Ms. Eramo discouraged Jackie from reporting her gang-rape allegations, testifying, “[t]hat’s exactly what the story says.” (CSF ¶ 356.)

This conclusion is also reinforced by Defendants’ pre-publication rejection of multiple edits to the statement in the article that “Lots of people have discouraged her from sharing her story, Jackie tells me with a pained look, including the trusted UVA dean [Ms. Eramo] to whom Jackie reported her gang rape allegations more than a year ago.” For example, during fact-checking for the article, *Rolling Stone* fact-checker Elisabeth Garber-Paul suggested editing that sentence to read, “Lots of people have discouraged Jackie from sharing her story so publicly...,” in order to make it clear that Defendants were not suggesting that Ms. Eramo discouraged Jackie from speaking about her assault or going to the authorities regarding her assault. (CSF ¶ 258.) Defendants, however, made the decision *not* to include that change in the final, published version of the article. (*Id.* ¶ 259.) Similarly, Garber-Paul made another note on this same sentence, suggesting it be edited further to say, “Lots of people have discouraged her from sharing her story so publicly, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang rape allegations more than a year ago, who fretted that the article might complicate future proceedings.” (*Id.* ¶ 260.)



(*Id.* ¶ 260.) But Defendants rejected this proposed edit as well, and it was likewise not included in the final, published version of the article. (*Id.* ¶ 261.) Ultimately, the statement about Ms. Eramo discouraging Jackie from sharing her story was published unedited in the final version of the article, without any of the edits that the fact-checker proposed. (*Id.*) This further confirms that that statement, as written and published, alleged (or was, at least, capable of suggesting) that Ms. Eramo discouraged Jackie **not** from sharing her alleged sexual assault with *Rolling Stone*, but from reporting her sexual assault **period**.

Finally, as set forth above, this statement is nearly identical to the contemporaneously published press release, which accuses Ms. Eramo of “letting sexual abuse go unpunished” and summarizes the article’s theme about “how victims have been discouraged **from pressing charges**.”



Rolling Stone: A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA

The new issue of *Rolling Stone* features a chilling account of rape at the University of Virginia campus. It tells the story of “Jackie,” who was just starting her freshman year at UVA when she was brutally assaulted by seven men at a frat party. When Jackie tried to hold the men accountable, she was horrified to learn how the administration largely overlooks victims of sexual assault...and how the abusers keep getting away with their crimes.

The article was written by contributing editor Sabrina Rubin Erdely. Erdely sheds light on UVA’s long history of basically letting sexual abuse go unpunished – and how victims have been discouraged from pressing charges.

The full story is on RollingStone.com: <http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119>

Erdely sheds light on UVA’s long history of basically letting sexual abuse go unpunished – and how victims have been discouraged from pressing charges.

(CSF ¶ 353.) It is beyond dispute that if an individual’s job function is to aid sexual assault victims and she is alleged to have “discourage[d] a [rape victim] from sharing her story” with the police, that would be tantamount to being “unfit [] to perform the duties of [her] ... employment” and of having a “want of integrity in the discharge of the duties of [her] ... employment,” and it would “prejudice[d] [her] in ... her profession.” *Tronfeld*, 272 Va. at 713; *Carwile*, 196 Va. at 7.

Defendants’ statements that Ms. Eramo had a “nonreaction” and took “no action” in response to either Jackie’s alleged sexual assault or the alleged sexual assaults of two other UVA students that Jackie reported to Ms. Eramo, especially when viewed in the context of the article as a whole, as they must be, *see WJLA-TV*, 264 Va. at 156; *Carwile*, 196 Va. at 7, further allege inaction and callous indifference by Ms. Eramo and reinforce the narrative that Ms. Eramo was unwilling to perform her primary job function of aiding victims of alleged sexual assaults.

These statements alleging that Ms. Eramo was unwilling to support sexual assault victims — that she subjected Jackie to “abuse,” that she “discouraged” Jackie from sharing and reporting her assault, that she had a “nonreaction” and took “no action” when Jackie reported her

alleged sexual assault and two other alleged sexual assaults to her, and further statements that Ms. Eramo “brushed off” Jackie, “silenc[ed]” Jackie and other sexual assault victims, attempted to “suppress” Jackie’s alleged assault, and acted toward victims with “a level of indifference,” including because she is “less concerned with protecting students than [] with protecting [the University of Virginia’s] reputation from scandal” — when considered either individually or, as they must be, together, are clearly, at the very least, **capable of** tending “to harm the reputation of [Ms. Eramo] as to lower [her] in the estimation of the community or to deter third persons from associating or dealing with [her].” *Vaile*, 2008 WL 2754975, at *3; *Tomblin*, 434 F. App’x at 218. Indeed, as detailed in Ms. Eramo’s Memorandum in Support of her Motion for Partial Summary Judgment, the **only** reasonable interpretation of those statements is that they “impute[d] to [Ms. Eramo] unfitness to perform the duties of [her] ... employment” as an Associate Dean at UVA responsible for supporting and assisting sexual assault victims, imputed to her a “want of integrity in the discharge of [those] duties,” and “prejudice[d] [her] in ... her profession.” *Tronfeld*, 272 Va. at 713; Pl. SJ Mem. 42-50.

Tellingly, Erdely herself has admitted that she knew Defendants’ article and statements “might make [Ms. Eramo] look bad,” and that she intended to convey the impression in the article that — rather than properly perform her job — Ms. Eramo “coddled” victims of sexual assault into doing nothing. (Pl. SJ SUF ¶¶ 80-82.) Even prior to the publication of the article, Erdely expressly admitted her feeling Ms. Eramo improperly performed her job, telling one of her sources, in an attempt to elicit a quote: “I have to level with you here: this dean ... not everything that’s been said about her has rubbed me the right way.” (*Id.* ¶ 81.)

And as set forth above, following Defendants’ publication of their defamatory statements about Ms. Eramo, both Ms. Eramo and *Rolling Stone* received many emails from members of the

public who read the article and understood it as attributing to her unfitness to perform the duties of her employment as an Associate Dean of Students, and as accusing her of lacking integrity in the discharge of her employment duties. (CSF ¶¶ 371-79.) In those emails, numerous members of the public expressed their understanding that, based on Defendants' statements, Ms. Eramo is unfit to perform her duties as an Associate Dean charged with supporting and aiding victims of sexual assault, writing, among other things, that "Dean Eramo smells of cover up, deflect, delay, and fake textbook sensitivity"; that "protecting UVA is [Ms. Eramo's] No. 1 priority"; that "[t]he Dean clearly sent Jackie further adrift with her ambivalent response" to her reported assault; that Ms. Eramo sought to "keep the case from becoming public and out of UVA control"; that Ms. Eramo's actions as an Associate Dean (as told by Defendants) were "baffling" and "despicable," that Ms. Eramo "is a horrible person" and "a despicable human being," that Ms. Eramo "clearly do[es] not contain the needed skills as a human/woman to do [her] job correctly," that she should "do the great state of Virginia a favor and resign," and that Ms. Eramo should "RESIGN so [she] do[esn't] ruin another student's life." (*Id.*)

As those emails make clear, examples of readers of Defendants' article who understood the article to severely damage Ms. Eramo's reputation and to impute Ms. Eramo unfitness to perform her duties as an Associate Dean of Students charged with supporting victims of sexual assault and a lack of integrity in the discharge of those duties are plenty. By way of yet further example, Laura Casteen, a colleague of Ms. Eramo's who has known Ms. Eramo since 1999, read the article and has explained in a sworn declaration, referring to Defendants' statement that "[w]hen [Jackie] tried to hold [her assailants] accountable, a whole new kind of abuse began," that "[b]ased on the wording of the statement, the context of the entire article, and my prior understanding of Nicole Eramo's employment position with the University of Virginia, the

conclusion that this statement refers to Nicole Eramo abusing Jackie is the only rational inference that I can draw from this statement.” (Pl. SJ SUF ¶ 92.) Similarly, UVA student-activist Sara Surface, who Erdely interviewed for the article and who knew both Jackie and Ms. Eramo prior to the publication of the article, has testified that she understood the “depiction of Dean Eramo” in the article as “suggesting that essentially Dean Eramo’s actions are as bad as seven men gang raping [Jackie], which I think is ludicrous.” (*Id.* ¶ 48.) And as yet another example, sexual assault survivor Victoria Groves — one of the many people who, after reading the article, was motivated to email Ms. Eramo to express “how ‘disgusted’ I was about how Dean Eramo treated Jackie and how she ‘sicken[ed] me,’” has explained in a sworn affidavit that she understood the article as stating that “Dean Eramo was not a real advocate for sexual assault victims and survivors, she was not aware of victim’s rights and the duties of individuals in positions like hers to protect and advocate on behalf of sexual assault victims, and that she was directly responsible for the fact that Jackie’s attackers never saw justice.” (CSF ¶ 377.)

Also tellingly, following Defendants’ publication of their defamatory statements about Ms. Eramo, she *did* in fact lose her job as an Associate Dean at UVA. (Pl. SJ SUF ¶ 116.) Although her immediate supervisor believes she did an “excellent” job in that position, she was removed from it — and her role working with survivors of sexual assault — “due to the negative perception of Ms. Eramo and the damage done to the perception of Ms. Eramo by” Defendants’ defamatory statements. (*Id.* ¶¶ 118-21.)

Quite simply, there can be no question that Defendants’ statements, identified herein, are plainly *at least capable of* having a defamatory meaning. Indeed, the undisputed evidence adduced in this case makes clear that not only are Defendants’ statements are plainly capable of having a defamatory meaning, but the only reasonable construction of those statements are that

they are not just defamatory, but defamatory *per se*. Because those statements can be reasonably understood to harm Ms. Eramo's reputation or to deter people from "associating or dealing with [her]," Defendants' Motion for Summary Judgment on this issue should be denied. *See Vaile*, 2008 WL 2754975, at *3; *Tomblin*, 434 F. App'x at 21; *see also Echtenkamp*, 263 F. Supp. 2d at 1064 (statements suggesting that person with responsibility to counsel and support people is "abrasive, unprofessional, and rude," that the person "lies," that the person lacks integrity, or that the person's "overall performance remains in need of improvement" are defamatory *per se*); *Baylor*, 2011 WL 1327396, at *10 (similar). And because the only reasonable understanding of Defendants' statements is that they unambiguously imputed to Ms. Eramo "unfitness to perform the duties of her [employment]," "want of integrity in the discharge of the duties of [her] ... employment," and/or "prejudice[d] [her] in ... her profession," Ms. Eramo's Motion for Partial Summary Judgment that these statements are defamatory *per se* should be granted. *See Carwile*, 196 Va. at 8; *Bromfield*, 272 Va. at 714; *Singh*, 2010 WL 1957410, at *5; *Cornwell*, 99 F. Supp. 2d at 708.

3. Defendants' Illustration Of Ms. Eramo Supports Ms. Eramo's Claim That The Article Created A Defamatory Implication About Her.

Defendants devote a portion of their Memorandum of Law to arguing that their "photo illustration" of Ms. Eramo cannot support Ms. Eramo's defamation claims relating to the "Rape on Campus" article. As an initial matter, Ms. Eramo does not include a defamation count in her complaint solely based on the illustration. Rather, as made clear in her Complaint, her claims relating to Defendants' article are based on the defamatory statements about her in the article, as well as the false and defamatory implications of those statements — which are further **supported by** the illustration. On such a theory of liability, of course, Defendants' "photo illustration" of Ms. Eramo **is relevant** to those claims because it supports and further paints a picture of

Ms. Eramo as callously indifferent to Jackie and failing to perform her duties as an employee responsible for supporting and counseling victims of sexual assaults and her responsibilities to those victims. *See, e.g., Tharpe v. Lawidjaja*, 8 F. Supp. 3d 743, 786 (W.D. Va. 2014) (holding altered photograph capable of supporting defamatory implication).

Moreover, Defendants protestations in their Memorandum of Law are based solely on their own made-for-litigation, self-interested assertions that they did not view the illustration as portraying Ms. Eramo in a negative light. But those assertions are flatly contradicted by *Rolling Stone's* own contemporaneous communications about the illustration. For example, when *Rolling Stone's* fact-checker, Elisabeth Garber Paul, first saw the illustration of Ms. Eramo, she specifically attempted to raise the issue of how it negatively portrayed Ms. Eramo with her editors. She memorialized her concerns on a draft in which she was making edits by asking the question about the illustration: “***Is this too mean?***”:

illustration portraying Ms. Eramo in a negative light and that Defendants were aware of that concern. And a jury should be permitted to determine whether the article as a whole — and when viewed in context with the illustration — portrayed Ms. Eramo in a false and defamatory light.

II. MS. ERAMO IS NOT REQUIRED TO PROVE ACTUAL MALICE TO PREVAIL, BUT THERE IS AMPLE EVIDENCE FROM WHICH A JURY COULD FIND CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE.

Defendants have failed to demonstrate that they are entitled to summary judgment on the issue of whether Ms. Eramo can demonstrate that Defendants acted with actual malice in publishing their defamatory statements about her. *First*, Defendants fail to meet their burden of demonstrating that Ms. Eramo is a public official or public figure that must prove Defendants acted with actual malice to recover compensatory damages. Rather, as demonstrated conclusively in Ms. Eramo's Memorandum of Law in Support of her Motion for Partial Summary Judgment, Ms. Eramo was a private figure at the time Defendants' published the statements at issue and therefore may recover compensatory damages on a showing of negligent conduct by Defendants. *Second*, even if Ms. Eramo is required to demonstrate actual malice, Defendants have not demonstrated that they are entitled to summary judgment. As set forth below, there is ample evidence from which a jury could find that Defendants acted with actual knowledge of falsity or reckless disregard for the truth, and therefore Defendants have failed to demonstrate that there is no genuine dispute of material fact on this issue. Accordingly, Defendants' Motion should be denied.

A. Ms. Eramo Was Not A Public Figure Or Public Official At The Time Defendants Published The Article.

To begin, Defendants incorrectly assert that Ms. Eramo is a public official or limited purpose public figure, and is therefore required to prove that Defendants acted with actual

malice, rather than negligence, to prevail on her claims. (Defs.’ Mem. of Law in Supp. of Defs.’ Mot. for Summ. J. (“Defs. Mem.”) [Dkt. 102] 43-50.)¹⁶ Ms. Eramo briefed this issue at great length in her Memorandum of Law in Support of her Motion for Partial Summary Judgment, demonstrating that there is no genuine issue of disputed fact and that the Court should hold that Ms. Eramo was a private figure at the time of publication and therefore is not required to prove actual malice in order to be entitled to compensatory damages. (See Pl. SJ Mem. 15-32.) Ms. Eramo relies on the arguments and authorities set forth in her summary judgment brief and incorporates those arguments herein. But three points bear repeating because Defendants’ misapprehension of the law and facts is fatal to their claim that Ms. Eramo is a public official or public figure. **First**, Defendants incorrectly attempt to define the scope of the “public controversy” in order to claim that Ms. Eramo had voluntarily injected herself into a preexisting public controversy when in fact none existed. **Second**, Defendants incorrectly assume that the fact that Ms. Eramo had given some limited media interviews to a campus newspaper about UVA’s sexual assault prevention initiatives prior to the publication of the article necessary means that she had access to effective channels of communication to counter Defendants’ defamatory statements. And **third**, Defendants exaggerate and misstate Ms. Eramo’s level of authority and prominence in claiming that merely being an employee of a public university renders her a public official.

¹⁶ As noted in Ms. Eramo’s Memorandum of Law in Support of her Motion for Partial Summary Judgment [Dkt. 98], Ms. Eramo does concede that the jury will need to find actual malice in order to award her **punitive** damages, but she is only required to demonstrate negligence to be awarded compensatory damages. (See Pl. SJ Mem. [Dkt. 98] 57 n.10.)

1. Defendants Fail To Show That Ms. Eramo Voluntarily Injected Herself Into A Particular Public Controversy Addressed By The Article.

First, Defendants acknowledge that in order for Ms. Eramo to be considered a limited purpose public figure, they are required to demonstrate that Ms. Eramo voluntarily injected herself into a particular public controversy that existed prior to the publication of Defendants' defamatory statements. (Defs. Mem. 47.) Defendants then claim that this factor is met here because "[Ms.] Eramo voluntarily injected herself into the public controversy surrounding how universities should respond to sexual assaults on campus." (*Id.* at 48.) Defendants' argument fails because they have improperly defined the scope of the controversy at issue in order to manufacture public figure status.

As Ms. Eramo explained at great length in her Memorandum, the U.S. Supreme Court, the Fourth Circuit, and the Virginia Supreme Court have all cautioned that a defamation defendant must show a plaintiff's voluntary involvement in the *particular controversy* at issue, and that a defendant cannot foist public figure status on the plaintiff by using broad "subject-matter classifications" in an effort to artificially broaden the true scope of the controversy at issue. (See Pl. SJ Mem. 21-26 (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 134-35 (1979); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 688 (4th Cir. 1989); *Fleming v. Moore*, 221 Va. 884, 892 (1981)).) This is so because allowing a defendant to artificially broaden the scope of the particular controversy would effectively make anyone a public figure; indeed, as Ms. Eramo noted in her Memorandum in Support of her Motion for Partial Summary Judgment, allowing Defendants to use the subject-matter classification of "public controversy surrounding how universities should respond to sexual assaults on campus" would necessarily result in a finding that any *victim* of a sexual assault on a college campus is a public figure. (Pl. SJ Mem. 27.)

Defendants' argument fails because Defendants ignore the particular controversy addressed in the article, which was *Ms. Eramo's response to Jackie's claim of sexual assault*. That this is the particular controversy addressed in the article is evident not only from a plain reading of the article itself, but also from Defendants' own contemporary statements asserting that the article was about Jackie's alleged sexual assault and Ms. Eramo's supposed indifference to that sexual assault. (See Pl. SJ Mem. at 21-24 (identifying several such statements by Defendants).) Defendants have not argued, or set forth any facts to demonstrate, that a pre-publication controversy existed regarding Jackie's sexual assault or her reporting of her sexual assault to UVA, nor have Defendants identified any actions or statements by Ms. Eramo whereby she purposefully injected herself into any such controversy prior to the publication of Defendants' article. (See generally Defs. Mem. 47-48.)

Accordingly, Defendants have failed to meet their burden of demonstrating that Ms. Eramo was a limited purpose public figure at the time of publication.

2. Ms. Eramo Did Not Have Access To Effective Channels Of Communication To Counter Defendants' Defamation Because She Was Prohibited From Publicly Discussing Her Interactions With Jackie.

Second, Defendants acknowledge that in order for Ms. Eramo to be considered a limited purpose public figure, Defendants are required to demonstrate that Ms. Eramo had "access to the effective channels of communication" in order to be able to engage in self-help and counteract Defendants' defamatory statements. (Defs. Mem. 49.) In a conclusory, one-sentence argument that cites no authority, Defendants claim that Ms. Eramo "beyond question" had such access because she had given previous media interviews (mostly to UVA's campus newspaper) about UVA's sexual misconduct prevention initiatives and because UVA has a public affairs department. (*Id.*) But Defendants' argument again ignores the actual subject matter of

Defendants’ article, and glosses over the fact that Ms. Eramo was in fact *legally prohibited* from effectively responding to Defendants’ defamation — a fact of which Defendants were aware prior to publication.

As explained at length in Ms. Eramo’s Memorandum of Law in Support of her Motion for Partial Summary Judgment and in Ms. Eramo’s Declaration, Ms. Eramo did not have any ability to use the media to counteract Defendants’ defamatory statements about her because she was legally prohibited by the federal Family Educational Rights and Privacy Act (“FERPA”), as well as UVA policy, from publicly discussing her interactions with Jackie. (*See* Pl. SJ Mem. 27-30.) Consistent with these proscriptions, Ms. Eramo had never publicly discussed her dealings with Jackie prior to the publication of the article, and was constrained not to do so after publication of the article even though she was aware of facts that would have demonstrated the falsity of Defendants’ statements. (*Id.* at 29.) Nor is there any question that Defendants were aware, prior to the publication of the article, that Ms. Eramo was prohibited from speaking to the media about Jackie’s allegations and her treatment of Jackie. (*Id.* at 28-29.) Moreover, Defendants — not Ms. Eramo — held the very keys to permit Ms. Eramo to speak about her interactions with Jackie. All *Rolling Stone* needed to do was to ask for, and secure from, their only source — Jackie — a FERPA waiver, which would have permitted Ms. Eramo to speak about Jackie’s case. *Rolling Stone* knew this — but they failed to do it. (Pl. SJ Mem. 28; CSF ¶ 290.) Having effectively silenced Ms. Eramo’s ability to respond to their defamatory charges, Defendants cannot now be heard to claim that Ms. Eramo had effective means to respond to Defendants’ statements.

Notably, the Virginia Supreme Court expressly held that precisely these facts weighed *against* finding a public school educator to be a public official in *Richmond Newspapers, Inc. v.*

Lipscomb, 234 Va. 277, 284-87 (1987). In a strikingly similar fact pattern involving charges that a public school teacher mistreated students, the Court held that the plaintiff could not be considered a public official because she did not have access to channels of effective communication to counteract the defendant's defamatory statements because privacy laws prohibited the teacher from publicly refuting the charges. *Id.* Defendants' briefing fails to distinguish *Richmond Newspapers* at all, and further fails to even generally address the undisputed fact that Ms. Eramo did **not** have access to the media to dispute Defendants' claims ***about her false quotations and treatment of Jackie***. Accordingly, Defendants have failed to demonstrate that they are entitled to summary judgment on the issue of whether Ms. Eramo is a public official or public figure.

3. Ms. Eramo Did Not Have Sufficient Policy-Making And Supervisory Authority To Be Considered A Public Official.

Third, Defendants fail to demonstrate that by virtue of her position as one of many "Associate Deans" at UVA, Ms. Eramo automatically qualifies as a "public official" that is required to prove actual malice. (*See generally* Defs. Mem. 43-47.) Defendants acknowledge that with respect to public-sector employees, this designation does not apply to any government employee, but is reserved for "[p]olicymakers, upper-level administrators, and supervisors." (*Id.* at 44 (quoting *Baumback v. Am. Broad. Cos.*, 161 F.3d 1, 3 (4th Cir. 1980).) Plaintiff has effectively demonstrated her entitlement to summary judgment on this issue because the undisputed facts show that Ms. Eramo's employment position did not fall within this definition, and Defendants have failed to demonstrate otherwise. Accordingly, Defendants are not entitled to summary judgment.

In her Motion for Partial Summary Judgment, Ms. Eramo set forth undisputed facts demonstrating that Ms. Eramo was neither an "upper-level administrator" nor a "supervisor" at

UVA. In fact, at the time the article was published, Ms. Eramo was one of seven “associate deans” in the Dean of Students Office alone, and one of dozens of similarly titled individuals at the University. (Pl. SJ Mem. 19.) In her role performing intake for students that alleged sexual assaults, Ms. Eramo did not supervise any other UVA employees, and she was subordinate to higher-level administrators who supervised her work and had ultimate authority. (*Id.*) Moreover, Ms. Eramo had no policy-making authority with respect to the University’s policies for responding to allegations of sexual assault, and did not in fact author any of UVA’s policies on this subject. (*Id.* at 19-20.) Courts have consistently held that lower-level public school educators and administrators like Ms. Eramo do not meet the requirements of the public official test. (*See id.* at 17-19.)

Defendants have failed to set forth undisputed facts demonstrating otherwise — and there are none. For example, Defendants rely heavily on the argument that Ms. Eramo at one time had responsibility for chairing hearings of UVA’s Sexual Misconduct Board (*see* Defs. Mem. 45), but Defendants ignore the undisputed fact that Ms. Eramo did not have this responsibility at the time that the article was published and in fact by November of 2014 had not presided over any sexual misconduct cases for at least a year. (July 1, 2014 Decl. of Nicole Eramo in Supp. of Pl.’s Mot. for Partial Summ. J. (“Eramo Decl.”) [Dkt. 99-11] ¶¶ 12-13.) Defendants further ignore the fact that even when she did administer such hearings, Ms. Eramo’s role was ministerial: Ms. Eramo was not a voting member of the panel, did not have any say in whether a student was found responsible or not responsible for the charges, and did not determine the ultimate sanction the student faced. (*Id.* ¶ 12.) Although she assisted in doing intake for students who alleged that they were victims of sexual assault, Ms. Eramo did not have authority for receiving formal complaints lodged by students; rather, students initiated a sexual misconduct complaint through

Ms. Eramo's supervisor, the Dean of Students. (*Id.* ¶ 8.) Finally, Defendants also gloss over Ms. Eramo's lack of policy-setting authority by claiming that she had such authority, without any citation to the record supporting this supposed fact. (*See* Defs. Mem. 46.) Bu in fact, Ms. Eramo did not have decision-making authority with respect to the University's sexual misconduct policies, and never personally authored any such policies. (Eramo Decl. ¶ 11.)

The undisputed facts and the law of this Circuit conclusively demonstrate that Ms. Eramo was not a public official or limited purpose public figure at the time of the publication of Defendants' defamatory statements. Defendants have failed to set forth undisputed facts showing that there is no genuine issue of material fact with respect to Ms. Eramo's status as a public figure. Accordingly, Defendants have not met their burden of demonstrating that they are entitled to summary judgment on this issue. And in sharp contrast, Ms. Eramo has set forth the law and undisputed fact demonstrating, as a matter of law, that she is not a public figure.

B. Defendants' Self-Serving Statements Do Not Negate Actual Malice Where, As Here, The Objective Evidence Convincingly Shows Defendants Acted With Reckless Disregard For The Truth.

Even if Ms. Eramo were required to prove that Defendants acted with actual malice in publishing their defamatory statements about her (she is not), Defendants have failed to demonstrate that they are entitled to summary judgment on the issue of actual malice. Defendants' argument that they did not act with actual malice in publishing false statements and implications about Ms. Eramo rests heavily on Defendants' own self-serving statements and declarations claiming that they believed Jackie to be fully credible and believed the statements in the article about Ms. Eramo to be true at the time of publication. But the U.S. Supreme Court has long recognized that, of course, defamation defendants "are prone to assert their good-faith belief in the truth of their publications," and that therefore "plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself." *Herbert v. Lando*,

441 U.S. 153, 170 (1979). Because a defamation defendant will nearly always claim subjective good faith in publishing, “a plaintiff is entitled to prove the defendant’s state of mind through circumstantial evidence.” *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989); *see also Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988) (“Therefore, objective circumstantial evidence can suffice to demonstrate actual malice. Such circumstantial evidence can override defendants’ protestations of good faith and honest belief that the report was true.”); *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1087 (9th Cir. 2002) (explaining that because courts “have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published,” the actual malice inquiry is “guided by circumstantial evidence.”); *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) (recognizing that defendants’ “statements of their subjective intention are matters of credibility for a jury”).

In evaluating the circumstantial evidence supporting a finding of actual malice, courts favor a holistic approach that examines the totality of the evidence to determine whether a reasonable jury could find knowledge of falsity or reckless disregard for the truth. For example, the Supreme Court has held that although evidence of a failure to properly investigate is not *alone* sufficient to support a finding of actual malice, a defamation plaintiff is able to show knowledge of falsity or reckless disregard through the *accumulation* of such circumstantial evidence as motive, lack of care, departure from accepted journalistic standards, failure to interview key witnesses, purposeful avoidance of the truth, and reasons to doubt the reliability of a source. *See Connaughton*, 491 U.S. at 668, 688, 692. Similarly, while a defendant’s rigid adherence to a preconceived storyline is not *alone* sufficient to demonstrate actual malice, it is evidence that may be considered *along with other evidence* of recklessness. *See Harris v. City*

of Seattle, 152 F. App'x 565, 568 (9th Cir. 2005) (“[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence”); *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969) (affirming denial of summary judgment in part because the jury could find actual malice based on “a predetermined and preconceived plan to malign [the plaintiff’s] character” when examining “the totality of [defendants’] conduct”). Likewise, a showing of bias or ill will toward the plaintiff, while not independently sufficient, can also be evidence of actual malice. *Connaughton*, 491 U.S. at 668; *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 315 n.10 (5th Cir. 1995) (“[E]vidence of ulterior motive can often bolster an inference of actual malice.”). And conducting an inadequate investigation, failing to interview obvious sources, and departing from normal standards of reporting can likewise support a finding of actual malice. *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983) (“When a story is not ‘hot news,’ actual malice may be inferred when the investigation ... was grossly inadequate in the circumstances.”); *Connaughton*, 491 U.S. at 682 (failure to interview obvious witness who could have corroborated or disproved a source’s story was actual malice).

The Fourth Circuit has specifically held that where there is evidence that a defendant was aware of “internal inconsistencies or apparently reliable information that contradict[ed] its libelous assertions, but nevertheless publishes those statements anyway” a fact question exists as to actual malice and summary judgment is inappropriate. *Tomblin v. WCHS-TV8*, 434 F. App'x 205, 211 (4th Cir. 2011). Summary judgment on the question of actual malice is also precluded where there are disputed issues of fact as to whether a defendant “deliberately or recklessly conveyed a false message” by omitting exculpatory details to create a “false innuendo.” *Id.* at

210. Moreover, summary judgment on the issue of actual malice is inappropriate where there is a genuine issue of material fact as to whether a defamation defendant knew that her source was unreliable, such as where the defendant had knowledge that the source had a history of mental illness and had changed her story several times. *Wells v. Liddy*, 186 F.3d 505, 542-44 (4th Cir. 1999); *see also Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 670 (4th Cir. 1982) (reversing district court's grant of summary judgment for the defendant where "there is evidence in the record that raises a substantial question of material fact as to whether the defendants had obvious reasons to doubt the veracity of the informant on whom they relied for the allegedly libelous part of the article").

Here, there is an overwhelming amount of evidence that is ***independently and cumulatively*** more than sufficient for a reasonable jury to find that Defendants published statements explicitly and implicitly defamatory of Ms. Eramo with reckless disregard for the truth of those statements. As set forth below and in Plaintiff's Counter-Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment, the evidence shows that (1) Defendant Erdely had a preconceived storyline about an innocent rape victim and an indifferent university administration more concerned about protecting its reputation than seeking justice, and was determined to paint Ms. Eramo as the scapegoat in this narrative regardless of the facts; (2) Erdely and *Rolling Stone* were subjectively aware that far from being indifferent to Jackie, Ms. Eramo was desperate to see Jackie's allegations investigated and adjudicated, repeatedly prodded Jackie to file a formal complaint, and took Jackie to the police; (3) *Rolling Stone's* own fact-checker attempted to delete, edit, and revise the defamatory statements about Ms. Eramo, but Defendants ignored those edits and revisions; (4) Defendants knew that Jackie had told them multiple falsehoods and inconsistent stories and thus was not a reliable source, but

Defendants forced her to continue to cooperate despite her desperate attempts to pull out of the article; (5) Defendants made numerous false and misleading statements about their reporting of the article in an attempt to cover up Jackie's lack of credibility, demonstrating subjective knowledge of probable falsity; and (6) Jackie herself, Defendants' primary source and the supposed victim of Ms. Eramo's abuse, has repeatedly and emphatically repudiated Defendants' claims about Ms. Eramo's treatment of Jackie. The totality of the evidence shows an astonishing and reckless disregard of the truth by Defendants, and Defendants have failed to demonstrate that there is no genuine issue of material fact for trial.

C. There Is Overwhelming Evidence That Defendants Recklessly Disregarded The Truth In Order To Defame Plaintiff Explicitly And By Implication.

1. Erdely Was Determined To Paint Ms. Eramo As The Face Of An Administration That Is Indifferent To Sexual Assault.

To begin, there is overwhelming evidence that Erdely approached her reporting with a preconceived storyline involving a victim of sexual assault who was ignored and brushed off by an indifferent educational institution. Even though Erdely admitted, repeatedly, that all of the sexual assault victims she spoke to said nothing but glowing things about Ms. Eramo, Erdely refused to deviate from her theme of an indifferent administration, with Ms. Eramo as the face of that indifference. In Jackie's false and incredible story, Erdely found her perfect injustice; but the story she wanted to tell also required a prestigious and indifferent institution that sought to cover up Jackie's supposed assault to protect its reputation. The hindrance to Erdely's preconceived narrative was the fact that Jackie — and every other sexual assault survivor Erdely spoke to — revered Ms. Eramo and her efforts to help them. And Jackie specifically made it clear to *Rolling Stone* that Ms. Eramo vigorously encouraged her to seek justice through an administrative complaint or police investigation, but that Jackie adamantly refused to pursue these options. But determined to tell the story of a cover up, Erdely simply ignored the facts and

told the story she wanted to tell from the start. Both Erdely's own statements and the testimony of many of her own sources demonstrate that Erdely was determined to paint a defamatory portrait of Ms. Eramo regardless of the actual facts she learned, which alone and in conjunction with Defendants' other actions is sufficient to demonstrate Defendants' actual malice.

Prior to "A Rape on Campus," Erdely had written several articles claiming that various institutions had been indifferent to, or attempted to cover up, allegations of rape. (CSF ¶¶ 1-6.) From the start, Erdely's written "pitch" for the article revealed an intention to write about how "administrations" have "turned a blind eye" to sexual assault on college campuses, and to show how a university's "institutional indifference ... deliberately shields those who commit rape from the consequences." (CSF ¶¶ 7-11.) Erdely wrote that she would "like to examine sexual assault on college campuses and the various ways colleges have resisted involvement, and ... juke their stats to make their campuses appear safer than they are; how they may now be scrambling to damp down (or sidestep liability).... As the story's main thread I'll focus on a sexual assault case in one particularly fraught campus—possibly at Yale, though the field is wide open—following it as it makes its way through university procedure to its resolution, or lack thereof." (*Id.* ¶ 11.)

Erdely also told sources long before she even began writing the article that the article she was going to write would mirror a similar article she had previously written about how sexual assaults are ignored by the military, called, "The Rape of Petty Officer Blumer: Inside the military's culture of sexual abuse, denial and cover-up." (*Id.* ¶¶ 12-13.) Like "A Rape on Campus," that article reported an entirely unproven and dubious sexual assault allegation as fact, and claimed that the military reacted with indifference and attempted to cover up the supposed assault. (*Id.* ¶ 6.) Once she began interviewing UVA sources in July 2014, Erdely told multiple

sources from the start — before she had even heard of Jackie or done any reporting on the subject — that she would be writing about UVA’s “institutional indifference” to sexual assault claims. (*Id.* ¶¶ 14-15.)

Notably, nearly every student source that Erdely spoke to at UVA has testified or stated that Erdely was, from the start, entirely biased, agenda-driven, and determined to write a one-sided story painting UVA as attempting to cover up sexual assault — with Ms. Eramo chosen as the specific scapegoat — regardless of their efforts to correct her and explain their deep admiration and regard for the way Ms. Eramo performed her duties. For example, Alex Pinkleton — a campus advocate on sexual assault issues who spoke with Erdely at length about the nuances of the issue of campus sexual assault, but was identified in the article only as a random “third-year bimbo” — testified that Erdely repeatedly attempted to blame Ms. Eramo for the fact that Jackie had not pursued an administrative or police complaint regarding her alleged assault, even though Jackie had adamantly stated to Pinkleton and Erdely that she was entirely unwilling to do so despite Ms. Eramo’s urging. (*Id.* ¶¶ 22, 26.) Pinkleton explained, “[Erdely’s] point of view was that the main issue Jackie was having with getting her case to go anywhere was the administration, and she came in thinking that; and then even after Jackie and we – and Sara [Surface] and I had said we didn’t think that was the case in regards to Dean Eramo, [Erdely] kept saying that.” (*Id.* ¶ 22.)

Pinkleton further testified that Erdely “manipulated” and “lied” to her by claiming originally that she wanted to do a fair examination of how sexual assault cases are handled, when in reality, “she was looking for evidence specifically that fit into her story from the beginning, so she just pulled at everything that I said that could be taken as evidence that the administration was to blame.... But I think its pretty clear to everyone else that what she really was going after

in the article and in our conversations where she's very aggressive towards wanting information about [the] administration, that that was her scapegoat." (*Id.* ¶¶ 23, 27.) Pinkleton testified that no matter how many times she and Jackie told Erdely that they supported Ms. Eramo, Erdely would come back with "leading questions" seeking disparaging comments about Ms. Eramo. (*Id.* ¶ 24.) Regarding her many interviews with Erdely, Pinkleton said, "The questioning [was] like a never-ending game of twenty questions and it [was] a rigged game at that. Because, as was in Sabrina's case, there was already a pre-formed storyline and other stories were going to have to adhere to it. The storyline was such that, (1) there would be – there would need to be a perfectly innocent victim and a monstrous perpetrator to have in the story; (2) there would be no advocacy on [campus]; and (3) Dean Eramo would be the scapegoat for [the] administration." (*Id.* ¶ 25.)

Sara Surface, another UVA student and friend of Jackie's that Erdely interviewed at length, testified that Erdely was "out to get" Ms. Eramo, and that Erdely explicitly told Surface that *Erdely wanted to get Ms. Eramo fired*. (*Id.* ¶ 28.) Surface worried that "[Erdely] wasn't accurately portraying Dean Eramo and a lot of the work of the administration and campus advocates correctly," and she repeatedly expressed to Erdely her two main concerns: "the portrayal of Dean Eramo and the use of Jackie's name" in the article. (*Id.* ¶¶ 29-30.) According to Surface, she, Alex, and Jackie all were concerned that Erdely intended to portray Ms. Eramo as not "helping Jackie or of having done everything she could for [Jackie]," and they all tried to make clear to Erdely that this was inaccurate. (*Id.* ¶ 31.) Surface further testified that "Sabrina made it clear" that "Dean Eramo was not going to be portrayed well," which caused Jackie to feel "extremely guilty" to the point where Jackie was "frequently calling Sabrina" and "saying that that portrayal of Dean Eramo was not correct." (*Id.* ¶ 32.) When Surface, who worked

closely with Ms. Eramo as a campus advocate on sexual assault issues, tried to tell Erdely “again and again” that her intended portrayal of Ms. Eramo was false, Erdely disparaged the accomplished college student as an “administrative watchdog.” (*Id.* ¶ 34.) Surface became so concerned with Erdely’s lack of “journalistic integrity” and her intended “portrayal of the administration” that she “considered reaching out to [Erdely’s] editor” to “question [Erdely’s] professionalism and accuracy in reporting.” (*Id.* ¶ 35.)

Similarly, Emily Renda, another former UVA student and campus sexual assault expert interviewed at length by Erdely, testified that Erdely had a “set narrative in mind” about Ms. Eramo, and could not be dissuaded from that narrative. (*Id.* ¶ 36.) Renda testified that the article “misrepresented a lot of things,” and “painted a particularly unnuanced picture of the administration and [Ms. Eramo] as being indifferent, which I thought was not the case and I felt several of the people that were interviewed for the article would not have said.” (*Id.* ¶ 362.) Erdely also hid her agenda from the UVA administration, which cooperated with Erdely and dutifully provided information and statistics she asked for, unaware that Erdely intended all along to write about UVA’s supposed institutional indifference to sexual assault. (CSF ¶¶ 280-90.) After the article was published, even Erdely’s own editor, Sean Woods, chided Erdely for failing to “air both sides of a narrative without judgment or bias.” (*Id.* ¶ 136.)

The facts that Erdely “conceived a story line in advance of an investigation” about a university administrator being indifferent to, and attempting to cover up, a sexual assault, that Erdely refused to deviate from this storyline, and that she “then consciously set out to make the evidence conform to the preconceived story,” are “powerful evidence” of Defendants’ reckless disregard for the truth in claiming that Ms. Eramo abused Jackie, discouraged Jackie from reporting, attempted to suppress Jackie’s sexual assault, and took no action in response to

Jackie's allegations. *See Harris*, 152 F. App'x at 568. The evidence that Erdely did in fact set out to report with a preconceived storyline is overwhelming, and the jury is entitled to consider it in evaluating Defendants' conduct. Accordingly, Defendants have failed to show that there is no genuine issue of material fact with respect to Defendants' reckless disregard for the truth in publishing the article.

2. Defendants Knew Prior To Publication That Ms. Eramo Proactively Sought An Investigation And Complaint, And Took Jackie To The Police.

In one of their first interviews, Jackie told Erdely about telling Ms. Eramo in the spring of 2013 that she had been sexually assaulted. (CSF ¶ 302.) Notably, and contrary to Defendants' claims in the article, Jackie did not tell Erdely that she told Ms. Eramo that she was gang raped, nor did she claim to have told Ms. Eramo where her supposed sexual assault occurred. (*Id.*) Instead Jackie told Erdely, referring to what she told Ms. Eramo, "I was crying and trying to explain to her what happened because I had never told anybody I had just broken it down into numbers, 'I was up in this room, there was 7 guys and 2 of them told them what to do,' talking incoherently and crying...." (*Id.*) Jackie told Erdely that Ms. Eramo immediately presented Jackie with the options of pursuing a sexual misconduct complaint with the university and/or criminal charges through the police. (*Id.* ¶ 303.) Jackie told Erdely that although she told Ms. Eramo she was unwilling to pursue any kind of complaint, Ms. Eramo contacted her multiple times over the summer and when she returned to campus to urge her to reconsider that decision. (*Id.*)

As early as July 2014, in one of their first interviews, Jackie told Erdely that she had recently told Ms. Eramo about two other supposed, anonymous Phi Kappa Psi gang rape victims (known only to Jackie). (CSF ¶ 304.) Jackie told Erdely that she did not want to make a formal complaint or pursue misconduct proceedings regarding her assault and insisted on retaining her

anonymity, that Ms. Eramo had spoken with the Dean of Students about whether the University could take away the fraternity's charter in the absence of an adjudicated complaint and while preserving Jackie's anonymity, and that the Dean of Students had concluded that if another student came forward so that there were multiple reliable, anonymous reports about sexual assault at Phi Psi, the University could and would seek to remove Phi Psi's charter. (*Id.*) Jackie told Erdely that Ms. Eramo's reaction to Jackie's claim of knowing another unnamed girl who was also gang raped at Phi Psi was to say, "you have to have her come in," that "[Ms. Eramo] got pissed at the frat, and she said two fraternities lost their charter this year it wouldn't bother me at all to add a third." (*Id.* ¶ 305.) Jackie told Erdely that Ms. Eramo repeatedly pressed Jackie to encourage this other supposed victim to come forward to the Dean of Students Office, but Jackie claimed the young woman was unwilling to do so. (*Id.*) Jackie confirmed to Erdely that she did not tell Ms. Eramo the names of these two other supposed victims, and that UVA did not know who they were. (*Id.*)

Also in July of 2014, Emily Renda told Erdely that Ms. Eramo and Dean of Students Allen Groves were pursuing ongoing action against Phi Psi and that they were working to get Jackie's supposed two anonymous other Phi Psi victims to come forward. (CSF ¶ 306.) Renda told Erdely that Ms. Eramo was "very passionate" about punishing Phi Psi and seeing justice done in Jackie's case. (*Id.*) Renda also communicated to Erdely that the two other supposed gang-rape victims were known only to Jackie, and that Renda and the university did not know who they were but were working to convince them to come forward. (*Id.* ¶ 307.) Renda also communicated to Erdely that it was very difficult for the university to take action against Phi Psi in the absence of formal reports from Jackie or the supposed other victims. (*Id.*) Renda further communicated to Erdely that there were serious due process concerns with taking action against

a fraternity without a formal allegation and adjudication, but that Ms. Eramo was doing everything in her power while respecting the due process rights of the accused. (*Id.* ¶ 308.)

Jackie also told Erdely that after an incident in April 2014 in which fraternity members allegedly assaulted her with a bottle for speaking out about her sexual assault, Ms. Eramo again encouraged Jackie to speak to the police and to pursue a university sexual assault trial. (*Id.* ¶ 309) Jackie again confirmed her refusal to pursue criminal charges regarding her assault. (*Id.*) Jackie also told Erdely that she had met with the Charlottesville Police through Ms. Eramo. (*Id.* ¶ 310.) In August 2014, Jackie forwarded to Erdely correspondence between Jackie and Ms. Eramo in April 2014 reflecting that Ms. Eramo arranged multiple meetings between Jackie and police officers and detectives and that the detectives had been aggressive about investigating Jackie's claims, but that Jackie had refused to proceed with an investigation. (*Id.*) Amazingly, ***Defendants never asked Jackie about her discussions with the detectives regarding her sexual assault.*** (See generally *id.* ¶ 278.)

Rolling Stone's Deputy Managing Editor, Sean Woods, admitted that prior to publication of the article he knew Ms. Eramo had taken Jackie to the police, testifying that "[t]here were emails that I was maybe made aware of that sort of show that there had been a – that Eramo had helped her go to the police.... We had a police report that it had happened and that Dean Eramo was helping Jackie." (CSF ¶ 311.) Woods also admitted that *Rolling Stone* knew prior to publication that Ms. Eramo was passionate about seeing Jackie pursue her allegations, testifying, "We have an email where Eramo is saying, We want to bring these men to justice. We have Eramo in an email with Emily Renda – or Emily Renda stating Eramo is very hot about this, and is looking to investigate Phi Psi, which is one of the reasons they – Renda doesn't – and this is my memory of it ... but that Renda said, you know, Eramo wants to bring Phi Psi to justice."

(*Id.* ¶ 317.) Despite claiming in the article that Ms. Eramo had a “nonreaction” to Jackie’s allegations of sexual assault, and that Ms. Eramo took no action out of regard for campus safety in response to Jackie’s allegations, Defendants nowhere mention in the article the fact that Jackie had multiple meetings with police officers and detectives, let alone the fact that these meetings were arranged and encouraged by Ms. Eramo. Importantly, an early draft of the article *did* mention Jackie’s interactions with the police, but Woods made the decision to cut it from the final, published version of the article. (*Id.* ¶ 314.)

Defendants’ attempted *post hoc* rationalization for their intentional omission of the police meetings from the article is that they believed that the meetings pertained only to Jackie being assaulted with a bottle in retaliation for speaking out about her sexual assault, and not to her sexual assault. (*See, e.g.*, Decl. of Sabrina Rubin Erdely [Dkt. 104] at 85.) As an initial matter, there is no rational reading of this email that would lead a reasonable reader to believe that the only topic Ms. Eramo sought Jackie to communicate with the police about was the bottle incident. In the email, Jackie reaches out to Ms. Eramo about “an issue I experienced ... with some boys who were very upset about things I had said about their fraternity”—in other words, for Jackie speaking out about her alleged gang rape at Phi Psi. (CSF at Ex. 61.) Later in the email chain, Ms. Eramo thanks Jackie for meeting with the police, and apologizes to Jackie for “the CPD officer [being] a little aggressive about investigating,” and suggesting to Jackie that if “we can get good video and check photos of them from the [Fraternity Sorority Life] rosters, we might be able to find them without having to go to the fraternities.” She continues that “[i]f the individuals are already caught up in the legal system, they (and their brothers) will have a strong disincentive from retaliating against you. Never forget, however, that it is YOUR choice. Just let the detective know what you are willing to do and I’m sure they will follow suit.” (*Id.*) Thus, it

is plain from the text of the email that Jackie, Ms. Eramo and the detectives spoke about the bottle incident as retaliation for Jackie speaking out about her alleged rape, that the officer intended to investigate the matter aggressively, that Ms. Eramo conveyed to Jackie that it was her decision whether to pursue a complaint against the fraternity brothers for the alleged assault, and that if Jackie would agree, the police might be able to identify the alleged perpetrators by using the Fraternity Sorority Life rosters. If anything, on its face this email suggests *Rolling Stone* had in its possession—before publication—a significant red flag that Jackie was unwilling to allow an investigation into either her alleged rape or the alleged bottle incident.

But even if it were true that Defendants believed that Ms. Eramo only sought to have Jackie report the alleged bottle incident and not the alleged rape, it would not excuse the clear defamatory implication created by intentionally omitting this information from the article, which specifically claims that Jackie told Ms. Eramo about the bottle attack but fails to mention that Ms. Eramo subsequently and immediately took Jackie to the police. (CSF ¶ 277.) Moreover, the jury is not required to credit Defendants’ implausible claim that they did not imagine that Jackie’s supposed sexual assault was reported to police detectives during multiple meetings with those detectives to discuss an alleged retaliatory attack on Jackie by fraternity men who attacked her *specifically* for, as the article claims, sharing her story of being gang-raped at a fraternity. (CSF ¶ 309; *id.* at Ex. 16 at RS001078) Erdely’s implausible claim is further contradicted by the objective evidence that shows that just days prior to the publication of the article, Jackie told Erdely that she (Jackie) had discussed the impending article with the “head of university police” out of safety concerns that she could be retaliated against for going public with the story of her sexual assault allegations. (CSF ¶ 312.) During that same conversation, Jackie confirmed to Erdely that the police were aware of her allegations, that the officer she had recently spoken with

was the same officer she had met with the previous April, and that he in fact told her, “I’m glad you guys did this, everyone should know.” (*Id.*)

The jury is entitled to assess the intention and motivation of Defendants in intentionally omitting from the article the fact that Ms. Eramo arranged multiple meetings between Jackie and police detectives long before Erdely ever arrived at UVA, and to gauge the credibility of Defendants’ implausible claim that they had no idea that Ms. Eramo had made the police aware of Jackie’s sexual assault allegations in light of the (overwhelming) countervailing evidence. *See Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (“The proof of ‘actual malice’ calls a defendant’s state of mind into question ... and does not readily lend itself to summary disposition.”) (citing 10B Wright et al., Fed. Prac. & Proc. Civ. § 2730 (“[T]he jury should be given an opportunity to observe the demeanor ... of the witnesses whose states of mind are at issue.”)). The intentional omission of these facts from the article is also clear and convincing evidence that Defendants were aware of “apparently reliable information that contradict[ed] [their] libelous assertions, but nevertheless publishe[d] those statements anyway,” as well as clear and convincing evidence of an intent to “deliberately or recklessly convey[] a false message” by omitting “exculpatory” details that would have “eliminated the false innuendo” that Ms. Eramo was indifferent to, and did nothing to respond to, Jackie’s supposed sexual assault. *See Tomblin*, 434 F. App’x at 210-11. Such evidence is more than sufficient to create, at the very least, a genuine dispute of material fact as to Defendants’ actual malice.

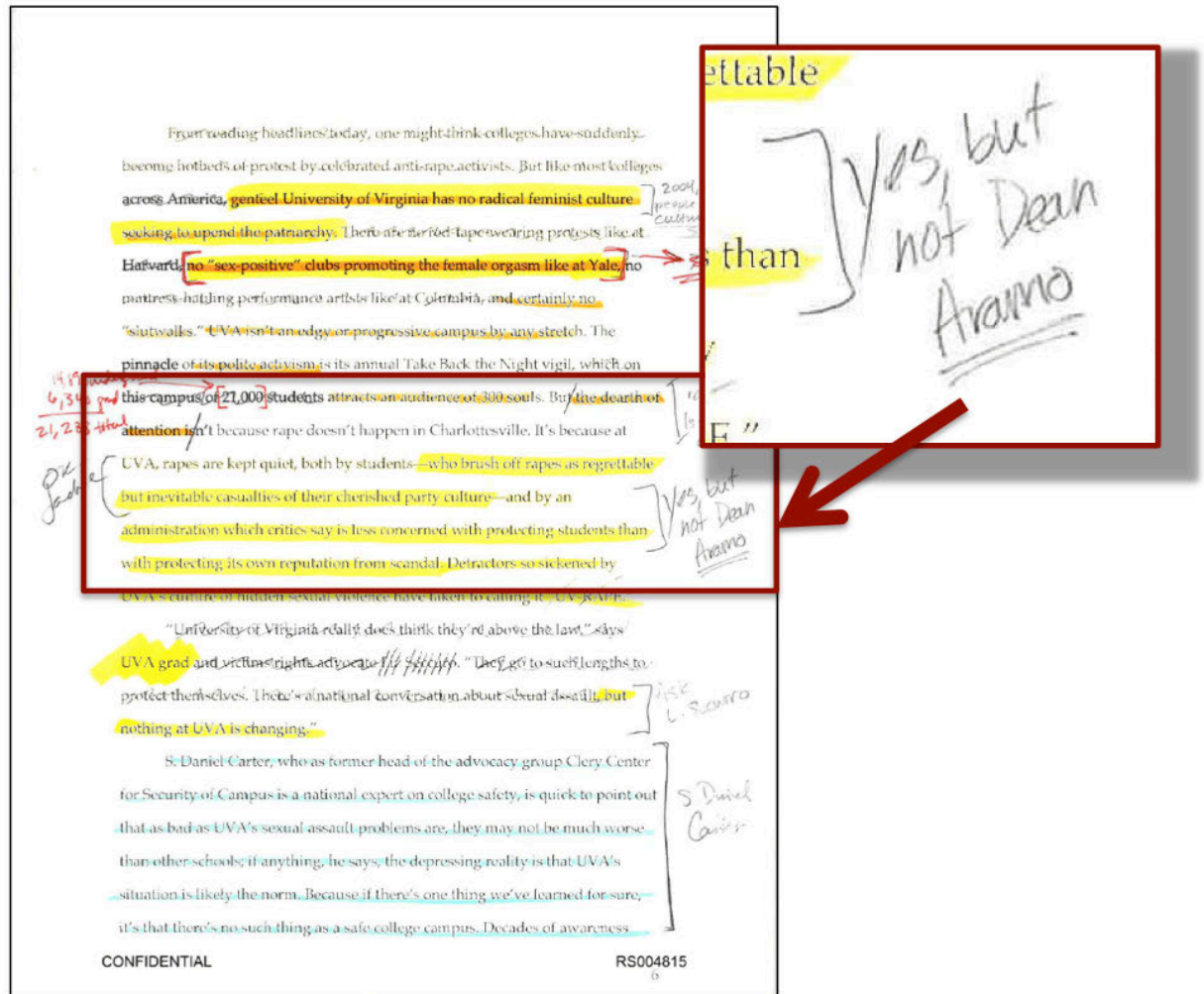
3. *Rolling Stone’s Own Fact-Checker Tried To Correct The False Statements About Ms. Eramo, But Defendants Intentionally Rejected Her Corrections.*

In their brief, Defendants baldly claim that “[a]fter nearly a year of discovery, Eramo is unable to produce any evidence — let alone the ‘clear and convincing evidence’ required — that Defendants believed the article was false or entertained serious doubts as to the truth of any

challenged Statements.” (Defs. Mem. 51.) Defendants’ own internal documents, however, show otherwise. Indeed, perhaps the most astonishing and convincing evidence of *Rolling Stone*’s utter and reckless disregard for the truth of its statements about Ms. Eramo is the undisputed evidence showing that *Rolling Stone*’s own fact-checker — quite literally, the employee charged with examining the veracity of the article — repeatedly warned her superiors at *Rolling Stone* that many of Defendants’ intended statements in the article about Ms. Eramo were false. Despite the fact-checker’s warnings and attempts to correct *the very statements at issue in this case*, *Rolling Stone* ignored its own fact-checker and proceeded with recklessly defaming Ms. Eramo. This evidence is not only clear and convincing, it is conclusive.

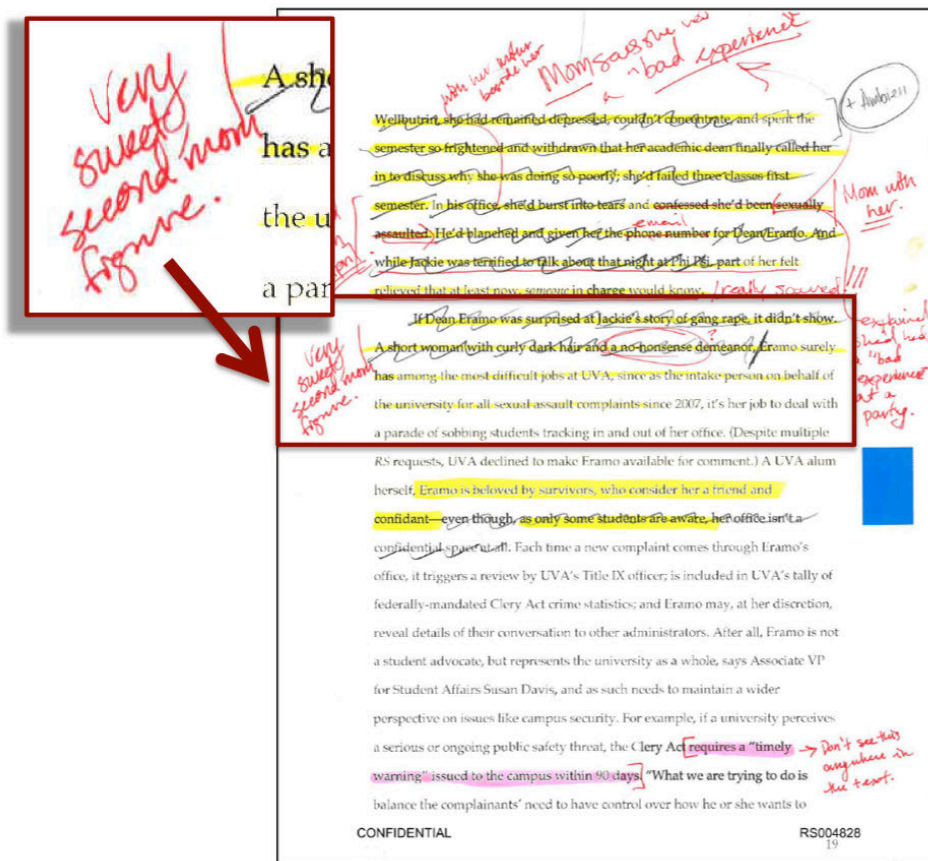
Rolling Stone assigned its employee, Elisabeth Garber-Paul, to fact-check “A Rape on Campus.” (CSF ¶ 220.) Her role was to make sure that the article Erdely wrote was accurate before it was published, and to make suggested edits and corrections to ensure its accuracy. (*Id.* ¶ 221.) However, *Rolling Stone* Deputy Managing Editor Sean Woods had the final say as to any proposed edits or changes. (*Id.* ¶ 222.) Garber-Paul made handwritten fact-checking edits on three different drafts of the article. (*Id.* ¶ 223.)

In one round of fact-checking edits, Garber-Paul made a notation on the draft of the article next to the statement, “But the dearth of attention isn’t because rape doesn’t happen in Charlottesville. Its because at UVA, rapes are kept quiet, both by students — who brush off rapes as regrettable but inevitable casualties of their cherished party culture — and by an administration which critics say is less concerned with protecting students than protecting its own reputation from scandal.” (*Id.* ¶ 246.) Garber-Paul’s fact-checking edit to this statement said, “*Yes, but not Dean Aramo [sic]*” (emphasis in original).



(*Id.* ¶ 246.) Garber-Paul admitted that she wrote this notation because Jackie specifically told her that Ms. Eramo was not less concerned with protecting students than with protecting UVA's reputation from scandal. (*Id.* ¶ 247.) But Defendants disregarded Garber-Paul's fact-checking note, and included the same statement, unedited, in the final, published version of the article. (*Id.* ¶ 248.)

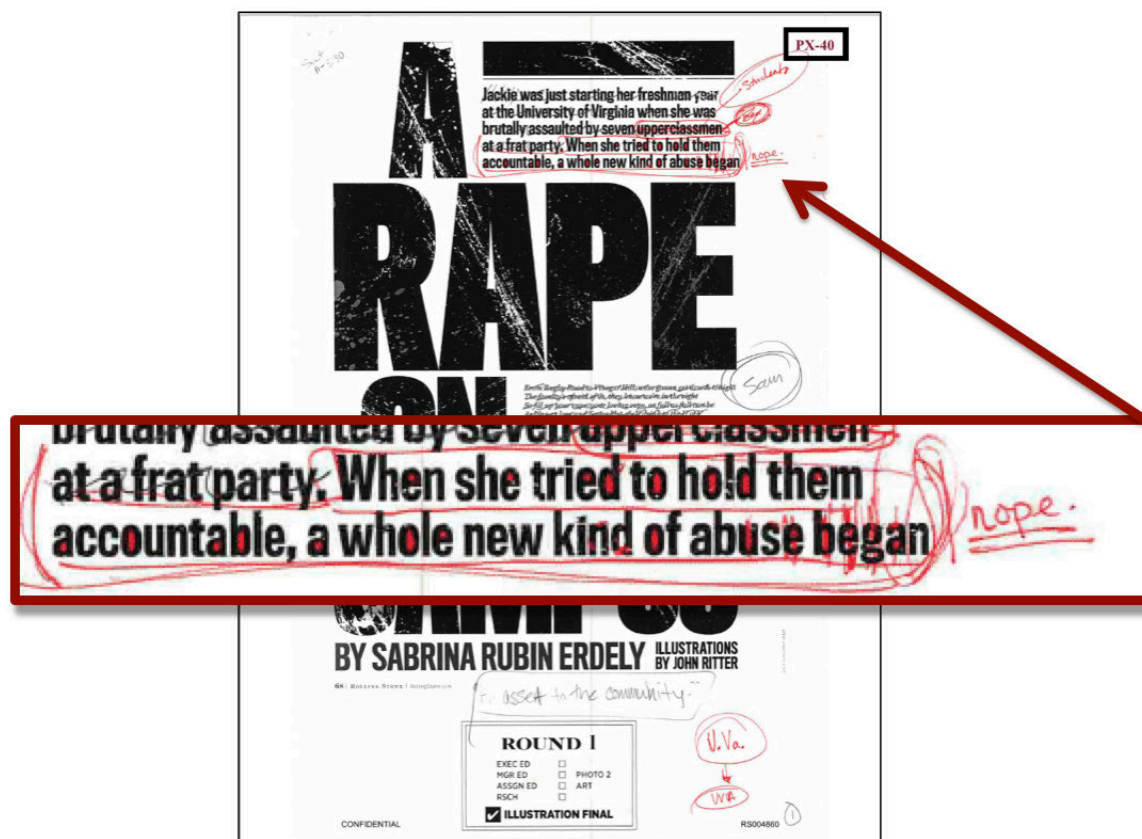
In addition, in the draft article where Erdely described Ms. Eramo as "a short woman with curly, dark hair and a no-nonsense demeanor," Garber-Paul circled this statement, wrote a question mark next to it, and wrote, "Very sweet, second mom figure."



(*Id.* ¶ 249.) Garber-Paul made this edit based on her conversation with Jackie, who told her that she disagreed with this characterization of Ms. Eramo and felt that it had a negative connotation. (*Id.* ¶ 250.) But, again, Defendants disregarded Garber-Paul’s fact-checking note, and included the same statement, unedited, in the final, published version of the article. (*Id.*)

Exhibit 54 to Plaintiff’s Counter-Statement of Material Facts shows Garber-Paul’s second round of fact-check edits on an updated draft of the article. (*Id.* ¶ 251.) This draft of the article contained the “deck,” the large, bolded statement on the first page of the article that said, “**Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven upper classmen at a frat party. When she tried to hold them accountable, a whole new kind of abuse began.**” (*Id.* ¶ 252.) On the draft, Garber-Paul circled in red pen the statement, “When she tried to hold them accountable, a whole new kind of abuse

began.” (*Id.* ¶ 253.) Next to this statement, in red pen, Garber-Paul wrote, “nope.” The “nope” was double underlined:



(*Id.*) Garber-Paul specifically discussed her concerns about this statement with Deputy Managing Editor Sean Woods, and Woods made the decision to retain the statement. (*Id.* ¶ 254.) The statement, “When she tried to hold them accountable, a whole new kind of abuse began” appears, unedited, in the final, published version of the article. (*Id.*)¹⁷

¹⁷ Defendants’ sole argument in favor of their request for summary judgment with respect to this statement is their claim that it does not refer to Ms. Eramo. (Defs.’ Mem. 53.) As explained above and at length in Ms. Eramo’s Memorandum of Law in Support of her Motion for Partial Summary Judgment, this argument is facially implausible in light of the context of the statement and repeated statements throughout the article charging Ms. Eramo with helping Jackie to hold her attackers accountable, as well as the uncontroverted testimony of numerous individuals who understood this statement to be of and concerning Ms. Eramo (*See infra* Part I.B.1; Pl. SJ Mem. [Dkt. 98] at 34-36.)

Also during the second round of her fact-checking, Garber-Paul suggested multiple edits to the statement in the draft article that said, “Lots of people have discouraged her from sharing her story, Jackie says with a pained look, including the trusted UVA dean to whom Jackie reported her gang rape allegations more than a year ago.” (*Id.* ¶ 256.) Garber-Paul admitted that this sentence refers to Ms. Eramo. (*Id.* ¶ 257.) Garber-Paul suggested editing this sentence to read, “Lots of people have discouraged Jackie from sharing her story *so publicly*...” so that readers would not get the impression that *Rolling Stone* was suggesting that Ms. Eramo discouraged Jackie from speaking with the authorities regarding her sexual assault. However, Defendants rejected this edit, and Sean Woods made the decision not to include that change in the final, published version of the article. (*Id.* ¶¶ 258-59.) Garber-Paul made yet another proposed edit to this sentence, suggesting it be further edited to say, “Lots of people have discouraged Jackie from sharing her story *so publicly*, Jackie tells me with a pained look, including the trusted UVA dean to whom Jackie reported her gang rape allegations more than a year go, *who fretted that the article might complicate future proceedings*.” Again, Defendants did not include Garber-Paul’s suggested edit in the final, published version of the article. (*Id.* ¶¶ 260-61.) Finally, Garber-Paul wrote an additional note next to this statement about Ms. Eramo supposedly discouraging Jackie from sharing her story, in which she said, “*At best, some may be worried about [Jackie’s] mental health, but...*”

article — a concern *Rolling Stone* apparently shared, since it did not include Jackie’s full name in the article — which does not in any way support the truth of the statement that Ms. Eramo discouraged Jackie from sharing her story or dispute the fact that Defendants knew this statement was false. (See Defs. Mem. 54.) Defendants point to ***no evidence whatsoever*** that Ms. Eramo ever discouraged Jackie from sharing her story with anyone, let alone with *Rolling Stone* magazine, or that Jackie ever made that claim to *Rolling Stone*. Moreover, Defendants’ then-Managing Editor, Will Dana, unequivocally testified that the article states and implies that Ms. Eramo discouraged Jackie from reporting her gang rape allegations, admitting, “[t]hat’s exactly what the story says.” (CSF ¶ 356.) Defendants’ Deputy Managing Editor, Sean Woods, further admitted that Defendants ***knew*** that Ms. Eramo did not in any way discourage Jackie from pressing charges with UVA or with the police. (*Id.* ¶ 320.) In light of the admissions from their fact-checker, Deputy Managing Editor, and then-Managing Editor, Defendants simply cannot demonstrate that there is no genuine issue of material fact with respect to whether Defendants made this statement with reckless disregard for the truth.

Further, during fact-checking, Garber-Paul also made a note on the draft article where it claimed that Ms. Eramo told Jackie UVA did not publish sexual assault statistics “because nobody wants to send their daughter to the rape school.” (*Id.* ¶ 267.) Next to this statement, Garber-Paul wrote, “Did Jackie describe this? Ask Sean.” (*Id.*) Garber-Paul admitted that she had discussions with Sean Woods about whether Defendants should publish the supposed “rape school” quote from Ms. Eramo because it had no source for, or confirmation of, this supposed quote other than from Jackie. (*Id.* ¶ 268.) Defendants knew that UVA was willing to — and in fact did — provide answers to non-FERPA protected information, including providing statistics on reported sexual assaults at UVA (information complied by Ms. Eramo) and other information

about Ms. Eramo's employment with UVA. (CSF ¶¶ 280-83.) Accordingly, there was no reason whatsoever that Defendants could not have asked UVA to confirm the veracity of this alleged quote from Ms. Eramo. But they did not. Defendants nevertheless decided to include this quote attributed to Ms. Eramo, and it appears twice in the final, published November and December versions of the article. (*Id.* ¶ 269.) In light of the evidence that Defendants subjectively questioned the propriety of attributing this quote to Ms. Eramo based solely on Jackie's word, that Defendants knew they could have confirmed the veracity of the quote through UVA, and coupled with the overwhelming evidence that Jackie was not a credible source (*see infra* Part II.C.4), Defendants cannot demonstrate that there is no genuine issue of material fact with respect to whether Defendants made this statement with reckless disregard for the truth.

Exhibit 55 to Plaintiff's Counter-Statement of Material Facts is Garber-Paul's third round of fact-checking edits, on a round that included the photo illustrations accompanying the article. (*Id.* ¶ 270.) This draft included the so-called "photo illustration" of Ms. Eramo, which Defendants had doctored to make it appear as if Ms. Eramo was sitting at her desk, smiling and giving a "thumbs up" to a crying assault victim while protestors march outside the window. (*Id.* ¶ 271.) Next to this doctored photograph of Ms. Eramo, Garber-Paul wrote a note, asking, "Is this too mean?":

¶ 276.) The evidence shows that Woods and Erdely, however, thwarted her efforts. The plain fact is that the *objective, contemporaneous* evidence shows that *Rolling Stone's* own fact-checker alerted Defendants to the probable falsity — prior to publication — of nearly all of the statements from the article that are at issue in this litigation.¹⁸ Indeed, far from there being insufficient evidence of actual malice to go before a jury, this actually *is* one of those “rare[]” cases where Plaintiff can “successful[ly] [] prov[e] awareness of falsehood *from the mouth of the defendant [it]self*.” See *Herbert*, 441 U.S. at 170. Defendants cannot explain away this powerful evidence of their pre-publication knowledge merely by filing a self-serving declaration that attempts to give *post hoc*, inherently implausible explanations for each of Garber-Paul’s contemporaneous statements. (See generally July 1, 2014 Decl. of Elisabeth Garber-Paul in Supp. of Defs.’ Mot. for Summ. J. [Dkt. 105].) It is for the jury to determine the plausibility of Defendants’ *post hoc* rationalizations and the credibility of Garber-Paul in making them, see *United States v. Beidler*, 110 F.3d 1064, 1070 (4th Cir. 1997), and “the jury may reach their conclusion as to the defendant’s subjective knowledge based on inferences from objective evidence,” *McAvoy v. Shufrin*, 518 N.E.2d 513, 518 (Mass. 1988) (further explaining that “the defendant cannot ensure a favorable verdict merely by testifying that he published under the subjective belief that the statements were true.”); see also, e.g., *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 49 (D.D.C. 2005) (“[T]he question of actual malice is ordinarily one for the jury to decide.”). The objective evidence of Defendants’ knowledge of probable falsity is more than sufficient to create a triable issue of genuine fact on the issue of actual malice.

¹⁸ As an employee of *Rolling Stone* with responsibility for checking the accuracy of its publications, Ms. Garber-Paul’s knowledge is imputed to *Rolling Stone*. See *Helton v. AT&T, Inc.*, 709 F.3d 343, 356 (4th Cir. 2013).

4. Erdely And *Rolling Stone* Knew That Jackie Was Not A Reliable Source, But Bullied Her Into Cooperating With The Article Anyway.

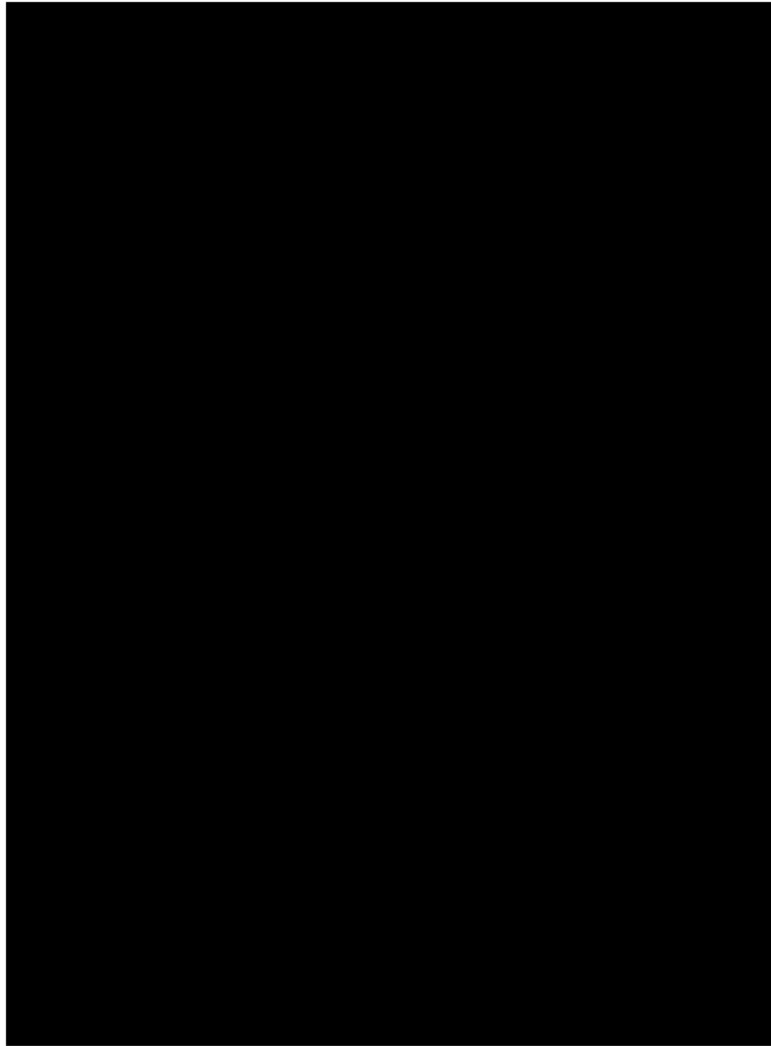
Perhaps the most astonishing evidence of Defendants' reckless disregard for the truth and knowledge that Jackie was not a reliable source is the fact that Erdely knew, prior to publication of the article, that Jackie had told multiple inconsistent stories about her sexual assault, yet Erdely never once questioned or confronted Jackie about these inconsistencies. For example, Erdely was aware, prior to publication, that Jackie had told her friend Emily Renda that five men raped her. (CSF ¶¶ 52-53.) Jackie's story to Erdely, on the other hand, was that she was gang-raped by seven men, while two others looked on and provided instruction to the rapists. (*Id.* ¶ 47.) When Erdely interviewed Jackie's freshman year roommate, Rachel Soltis, Ms. Soltis told Erdely that the original story Jackie told her was not one of gang-rape or vaginal sexual assault at all, but rather that Jackie had been coerced into performing oral sex on a number of men. (*Id.* ¶ 55.) Soltis also referenced Jackie telling her that she was wearing a blue dress on the night of her assault, whereas Jackie had told Erdely an elaborate and detailed story about her mother destroying the red dress that Jackie wore the night of the alleged attack. (*Id.* ¶¶ 79-81.) And Soltis told Erdely that Jackie had later told her that she had been raped by six men — not five as she told Renda, and not seven as she told Erdely. (*Id.* ¶ 55.) Another friend of Jackie's, Annie Forest, told Erdely that Jackie had claimed to her that she was sexually assaulted with a coat hanger during the attack — whereas Jackie had claimed to Erdely that a completely different foreign object was involved. (*Id.* ¶ 58.) Only after the article was published did Erdely acknowledge that she had known all along that Jackie's story had changed, admitting that she "discovered in [her] reporting that some details of [Jackie's] account had morphed with time — early on, she had told friends that she had been forced to perform oral sex on a group of men, and her story had later changed to one of vaginal rape." (*Id.* ¶ 60.)

During a dinner interview with Erdely in September 2012 attended by Jackie's friend Alex Pinkleton and Jackie's then-boyfriend, Pinkleton let slip that Jackie had claimed to her that she had [REDACTED]. (*Id.* ¶ 73.) This was news not only to Erdely, but also Jackie's then-boyfriend, who told Erdely that he was unaware of [REDACTED]. (*Id.* ¶ 74.) When Erdely asked Jackie for [REDACTED] corroborating this [REDACTED], Jackie repeatedly demurred and never provided any documentation supporting it. (*Id.* ¶¶ 75-78.)

On several occasions during her reporting of the article, Erdely was aware that Jackie was lying to her and others — about both mundane details (revealing her lack of credibility) and about her interactions with Ms. Eramo — yet Erdely made no effort to question or confront Jackie about these falsehoods. For example, Jackie told Erdely that her mother attended Brown University, but when Erdely looked up Jackie's mother online prior to publication, she learned that Jackie's mother in fact attended Providence College, not Brown. (CSF ¶ 87.) Erdely specifically noted this discrepancy and the fact that Jackie had misled her in her notes. (*Id.*) During a telephone call with Jackie, when Erdely told Jackie thought she may have found full names and contact information for people that Jackie had refused to put her in touch with, Jackie told her she had found the wrong individuals. (*Id.* ¶ 88.) Erdely wrote in her notes that she believed Jackie was not being truthful with her, stating, "She tells me it's not them, but I don't really believe her." (*Id.*) And when Erdely asked Jackie's former roommate, Rachel Soltis, how Jackie first came in contact with Ms. Eramo, Ms. Soltis said that Jackie told her that she met Ms. Eramo when she had been called in to testify as a witness at a sexual misconduct trial involving a victim who was sexually assaulted a way similar to Jackie. (*Id.* ¶ 89.) Erdely knew that this was a completely different story than she had heard from Jackie — which was that

Jackie first met with Ms. Eramo and claimed that she was sexually assaulted after being called in for failing grades — and even wrote in her notes, “IF SO, THIS IS NEWS TO ME.” (*Id.* (emphasis in original).) Yet Erdely never confronted or questioned Jackie about this glaring inconsistency.

Jackie also repeatedly told Erdely about how she had visible scars on her body from being gang-raped for hours on a shattered glass table, and that her friends were always asking about the scars. (*Id.* ¶ 67.) But when Erdely asked Rachel Soltis, Jackie’s former roommate, if she had ever seen any such injuries on Jackie, Soltis said she had not. (*Id.* ¶ 69.) During a dinner with Jackie on September 11, 2014, Erdely asked to see the scars and Jackie directed her to look at her wrist, yet Erdely saw nothing. (*Id.* ¶ 70.) During the dinner interview the following evening with Alex Pinkleton and Jackie’s then-boyfriend, Jackie’s boyfriend flatly denied to Erdely ever having seen any scars on Jackie. (*Id.* ¶ 71.) In a December 17, 2014 email she wrote to Jackie after the article was published, Erdely acknowledged being aware that Jackie had lied about her claimed injuries, stating, “You also told me ‘all’ of your friends have asked about the scars on your back – but none of your friends I’ve spoken with have ever seen scars on your back, including your boyfriend [REDACTED]. (If you recall, he said this when we were at dinner in September.)” (*Id.* ¶ 82.) Similarly, when Jackie sent Erdely a photograph purportedly showing injuries on her face from being attacked with a bottle in retaliation for speaking out about her sexual assault, Erdely told Jackie that she subjectively believed that the supposed injury looked like face paint. Erdely expressly told Jackie “*“it looked like paint—like something smeared on your face.”*



(*Id.* ¶¶ 96-97.)

Particularly relevant to Defendants’ reckless disregard for the truth in publishing the false “rape school” quotation from Ms. Eramo is the fact that Erdely also knew that Jackie had a habit of playing fast and loose with supposed derogatory quotes that she attributed to others. In an early interview, Jackie told Erdely that a friend of a friend whom she did not know said to her at a party that she should have just had fun with being raped by a bunch of hot Phi Psi guys. (CSF ¶ 90.) When Erdely later specifically asked Jackie about being told this at a party, Jackie reversed course and claimed that it was actually her former friend Kathryn Hendley — “Cindy” in the article — who said that to her two weeks after the alleged assault. (*Id.*) Erdely recognized

the about-face at the time, writing in her notes that she was “confused” about this contradictory story. (*Id.*) Nevertheless, Erdely did not confront Jackie about this discrepancy, and Defendants published this shockingly callous, supposed quote in the article, and attributed it to Kathryn Hendley without seeking comment from Ms. Hendley to confirm the alleged quote. (*Id.*)

Jackie also regularly and repeatedly refused Erdely’s requests for names, contact information, and documentation that could back up her claims. Jackie claimed to Erdely that her three best friends met with her immediately after her gang rape, and that these individuals discouraged her from going to the hospital or the police. (CSF ¶ 101.) Although Erdely asked for these individuals’ names “many, many times,” Jackie refused to tell Erdely their full names or to provide contact information for them. (*Id.* ¶ 102.) Jackie told Erdely that she would not provide their names to Erdely because Jackie had a “strained relationship” with these individuals, an obvious red flag that Jackie was concerned they would contradict her story. (*Id.* ¶ 103.) Erdely’s editor, Sean Woods, testified that he repeatedly asked Erdely to locate and interview these individuals, but that Erdely told him that she could not find out who they were and that neither Jackie nor any of her acquaintances would give Erdely their last names. (*Id.* ¶ 112.) But Erdely did not even attempt to do so, even though she had in fact learned the full name of one of the friends — Katherine Hendley — from Jackie’s friend Rachel Soltis before the article was published. (*Id.* ¶¶ 113-15, 116-17.) Tellingly, then-Managing Editor Will Dana admitted that if he had known that Erdely in fact had Hendley’s full name, he would have expected that Erdely would have contacted her to try and corroborate Jackie’s account. (*Id.* ¶ 124.)

If Erdely had contacted any of the three friends — Ryan Duffin, Alex Stock, or Kathryn Hendley — they would have told Erdely that when Jackie called them claiming she had been forced to perform oral sex on a group of men, they actively encouraged her to go to the hospital

and the authorities, and that they never said the callous quotes attributed to them in the article. (CSF ¶¶ 120-22, 125-29.) They would have further told Erdely that Jackie lied to Erdely about the location where they met her, the time that they met her, the details of her alleged assault that she relayed to them, and that Jackie appeared composed and uninjured. (*Id.*) They would have further told Erdely about a troubling pattern of lying and manipulation by Jackie, including the fact that she invented the individual that she claimed to them orchestrated her assault, Haven Monahan, in a bizarre effort to win the romantic affections of Mr. Duffin, who had previously rejected her advances. (*Id.*)

Similarly, Jackie refused to tell Erdely the name of the supposed ringleader of her gang-rape or any of the other participants. (*Id.* ¶ 137.) Jackie also refused to tell Erdely the names of, or to provide contact information for, two other women Jackie claimed to know who, according to her, were also gang-raped at Phi Kappa Psi. (*Id.* ¶ 158.) Jackie also failed to provide [REDACTED] documenting [REDACTED] she claimed to have [REDACTED], despite multiple requests from Erdely that she do so. (*Id.* ¶¶ 75-78.) Sean Woods, *Rolling Stone*'s Deputy Managing Editor, admitted that Jackie's refusal to provide information to *Rolling Stone* was a "roadblock" to Erdely's reporting, and further admitted that when he reviewed Erdely's reporting notes, he saw a clear "pattern" of Jackie being "intent on controlling her narrative." (*Id.* ¶¶ 133, 170.)

Defendants' knowledge that Jackie was not a reliable source is further evidenced by the fact that Jackie repeatedly stopped speaking to Erdely for long stretches and attempted to withdraw from the article, but Erdely repeatedly pressured her to continue cooperating. In August of 2014, after Erdely asked Jackie to provide her with the names of the alleged ringleader of her assault and the other supposed Phi Psi gang rape victims Jackie claimed to know, Jackie

stopped returning Erdely's calls and answering Erdely's emails for two weeks. (*Id.* ¶¶ 175-77.) When Erdely told Jackie on September 16 that she would need the name of the supposed ringleader of Jackie's assault in order to reach out to him for comment, Jackie stopped communicating with Erdely for more than a month. (*Id.* ¶¶ 179-80.) When Erdely reestablished contact with Jackie in October and again told Jackie that *Rolling Stone's* lawyer was going to insist that she reach out to Jackie's alleged assailant for comment before *Rolling Stone* could publish, Jackie's friends Sara Surface and Alex Pinkleton communicated to Erdely that Jackie now wanted to pull out of the article entirely. (*Id.* ¶¶ 182-84.) On October 23, 2014, Erdely emailed Sean Woods, telling him that Jackie was in "full freakout mode" and "thinking of pulling out entirely." (*Id.* ¶ 186.)

From: Sean Woods
Sent: Friday, October 24, 2014 12:25 AM
To: Sabrina Rubin Erdely
Subject: Re: uh oh

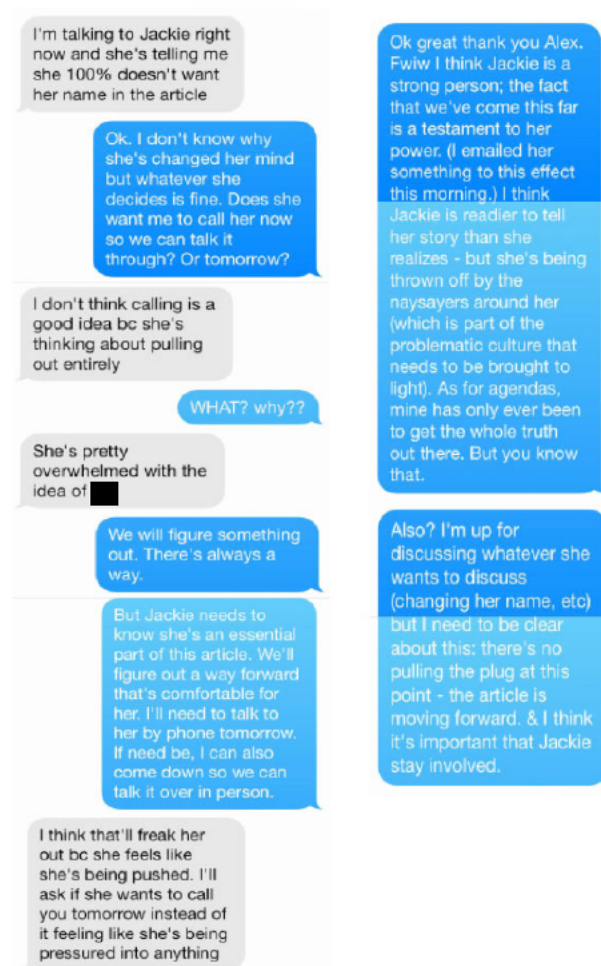
Oy!

Sent from my iPhone

> On Oct 23, 2014, at 11:06 PM, "Sabrina Rubin Erdely" <sabrina@sabrinaerdely.com> wrote:
>
> FUCK. Jackie is apparently in full freakout mode right now – her friend Alex texted to say that Jackie is right now saying she wants her name out of the piece and is "thinking of pulling out entirely." Neither girl will answer my call.
>
> It's so weird, because the last I spoke with her, on Tuesday, she was talking about how optimistic she was feeling about this story, and that she wanted to use her first name. We went over the latter point, like, five times, just to be sure. But then I brought up contacting that guy and I guess she fell apart?
>
> I think this also has something to do with other forces trying to talk her out of cooperating – namely this one UVA "activist" named Sara who works closely with the administration, who has twice tried to talk Jackie out of using her name (including yesterday). In fact Sara called me this afternoon, having found out about some of the newer material I'd discovered, and seemed furious with me about it – she wanted to give me the deans' point of view. She also got upset about my use of her quotes. What a mess.
>
> I guess I'll wait and see how things shake out in the morning... But I suspect that I may need to go back to Charlottesville to hash things out with Jackie face to face. Fuck.

(*Id.*) When Pinkleton texted Erdely on October 24, 2014 to tell her that Jackie was "overwhelmed" and "thinking about pulling out" of the article, Erdely responded by telling

Pinkleton, “I need to be clear about this: there’s no pulling the plug at this point — the article is moving forward.” (*Id.* ¶ 192.)



(*Id.*) That afternoon, Erdely emailed *Rolling Stone*’s photo editor, telling him that “Jackie is right now not communicating with me,” and would not “be available for photographing,” but that the article would move forward. (*Id.* ¶ 190.) On November 3, 2014, Erdely left a similar voicemail on Jackie’s phone, telling Jackie that the article was moving into the production process and that Jackie needed to remain involved. (*Id.* ¶ 198.) Erdely was going to use Jackie’s story as the lead regardless of Jackie’s participation — indeed, none of the drafts of the article removed Jackie’s story from the text. (*See generally* CSF at Exs. 52, 54, 55.) Jackie’s friends Alex Pinkleton, Sara Surface, and Emily Renda all testified that they witnessed Jackie attempting

to pull out of the article, and Erdely pressuring Jackie to continue to cooperate. (*Id.* ¶¶ 193-96.)

Jackie herself told friends [REDACTED]

[REDACTED]. (*Id.* ¶ 200.)

Jackie further testified [REDACTED]

[REDACTED]. (*Id.* ¶ 201.)

Erdely herself acknowledged that during her reporting for the article, “Jackie’s fragile mental state” became “increasingly apparent.” (CSF ¶ 212.) Erdely acknowledged that she believed Jackie suffered from mental illness (*id.* ¶ 209), and Erdely confided to Emily Renda in September 2014 that she was “concerned about [Jackie’s] emotional and mental wellbeing” (*id.* ¶ 216.) Sean Woods, the Deputy Managing Editor, admitted that prior to the publication of the article, he was “concerned about [Jackie’s] mental health,” and thought she was a “fragile person.” (*Id.* ¶ 214.) With respect to his November 3, 2014 email to Erdely in which he inquired whether she had heard from Jackie, Woods testified, “Again, I mean, I just can’t stress this enough how concerned I was about Jackie and her mental health.” (*Id.* ¶ 215.) ***Erdely has also admitted her subjective knowledge***, prior to publication of the article, that Jackie may not have been a reliable source due to her apparent mental health issues. In a draft statement she wrote about her reporting of the article, Erdely acknowledged, “I asked myself at the time ... if it was wise to build the opening of the story around someone who seemed so emotionally fragile.” (*Id.* ¶ 213.) Erdely further acknowledged that she disregarded signs that Jackie was not a stable person, and that she should have let Jackie back out of the article, stating, “Jackie’s emotional fragility and reluctance should have been a signal that she may not have been up to the challenge of disclosing her full story, whatever the reason. It should have been cause for me to scrutinize

her further, if I felt she could withstand it, or else to back off her story.” (*Id.* ¶ 217.) Instead, however, Erdely took advantage of a mentally unstable woman, who Erdely knew was easily manipulated. (*Id.* ¶ 211.)

Erdely also had a financial incentive to strong-arm Jackie into cooperating with the article, and to push the article forward, despite Jackie’s attempts to extricate herself. Under the terms of her March 2014 contract with *Rolling Stone*, Erdely was required to provide seven feature stories accepted by *Rolling Stone* by June 2016. (*Id.* ¶¶ 204-05.) If the story had to be killed prior to publication, *Rolling Stone* may not have considered the story to be accepted under the terms of the contract. (*Id.* ¶ 206.) And if Erdely failed to produce the required number of articles, *Rolling Stone* could have terminated her contract. (*Id.* ¶ 206.) Thus, having spent months working on an article featuring Jackie’s story, Erdely faced the prospect of being unable to fulfill her lucrative contract with *Rolling Stone* if she scrapped the article. In fact, after the publication of the article, Erdely admitted to Alex Pinkleton that she knew Jackie’s claims lacked documentation and that she should have rewritten the article when Jackie refused to provide corroboration, but that she had already put so much work into it and “rewriting the whole story was so much work.” (*Id.* ¶¶ 173-74.)

The fact that Defendants knew that Jackie was emotionally fragile, that she suffered from mental health problems, and that she had changed her story multiple times, is alone sufficient evidence of Defendants’ actual malice in publishing the false quotation attributed to Ms. Eramo and the false descriptions of Ms. Eramo’s response to Jackie’s allegations to preclude summary judgment. *See Wells*, 186 F.3d at 542-44 (finding a genuine issue of material fact precluded summary judgment on actual malice where defendant had reason to know that his source had a history of mental illness and had changed his story multiple times); *see also Fitzgerald*, 691 F.2d

at 670 (reversing district court's grant of summary judgment for the defendant where "there is evidence in the record that raises a substantial question of material fact as to whether the defendants had obvious reasons to doubt the veracity of the informant on whom they relied for the allegedly libelous parts of the article."). Therefore, Defendants have failed to establish that there is no genuine dispute of material fact with respect to Defendants' reckless disregard for the truth in publishing false and defamatory statements about Ms. Eramo.

5. *Rolling Stone* Misleads Readers To Cover Up Reporting Gaps And Jackie's Lack Of Credibility.

Within hours of reading the draft article for the first time, the fact-checker, Garber-Paul, emailed Erdely, asking, "Quick question: did we ever get comment from 'Tom,' or reach out for one?" Referring to the pseudonym used for the alleged ringleader of Jackie's supposed gang rape, this was the first substantive question that Garber-Paul asked Erdely about the article. (*Id.* ¶ 224.) Erdely responded, "Unfortunately, the answer is no and no." (*Id.* ¶ 225.) Erdely knew that she had a journalistic "obligation" to reach out to and seek comment from the alleged ringleader of Jackie's gang rape, but Jackie refused to provide Erdely with the name of this individual. She told many of her sources about this journalistic obligation. For example, Erdely emailed Alex Pinkleton and explained that she needed to reach out to Jackie's alleged assailant because "it's part of my obligation as a journalist." (*Id.* ¶185.)

From: Sabrina Rubin Erdely <sabrina@sabrinaerdely.com>
Sent: Thursday, October 23, 2014 6:16 PM
To: Alexandria Pinkleton [REDACTED]
Subject: Re: Rolling Stone

Hi Alex – congrats on finishing your paper. Yep, I touched base with your & Annie’s friend and she was great – SO helpful. Thank you for helping to bring her into the fold.

So about Jackie, I get that she’s apprehensive about me contacting [REDACTED]. But the thing is, [REDACTED] is going to know about the article one way or another – because whether I tell him about it or whether he sees it on the newsstand, he’s going to read it, for sure. (I’d be surprised if he didn’t already know about it.) Either way I do need to reach out to him to see if he wants to comment – it’s part of my obligation as a journalist. Phi Psi would never give over a list of its fraternity members, unfortunately, that’s just not realistic. (Even if I got his name from a third party, it wouldn’t change the fact that Jackie is the one making the accusations, even though she didn’t want to name him.) If it makes Jackie feel better, I can let him know that she didn’t want him named in the piece (which he won’t be), and that she was reluctant to name him even privately. Would that help?

I’m going to call Jackie in a bit, to talk all this over. FYI now it looks like this story might actually run in an earlier issue, like before Thanksgiving —

Best,
Sabrina
--

(*Id.*) Erdely repeated this sentiment to Jackie when she told Jackie on October 20, 2014 that “I’m going to have to call [REDACTED] to offer him a chance to comment. I’m not going to use his name in the article, but I have to do my due diligence anyway. ... *I’m going to have to make this phone call. Our lawyer is going to insist.*” (*Id.* ¶ 182.) Moreover, Erdely also told Alex Pinkleton that if Jackie persisted in her refusal to identify her assailant, then in the article, “we’d have to say that she refused to disclose his name and so we couldn’t follow up. Not in those words, but that’s the sentiment. Unfortunately, it would diminish her credibility, so I really, really want to avoid that.” (*Id.* ¶ 147.)

Have you found out what has to be said if [REDACTED] last name isn't used?

Yes - we'd have to say she refused to disclose his name & so we couldn't follow up. (Not in those words but that's the sentiment.) Unfortunately it would diminish her credibility so I really really want to avoid that!

(*Id.*) Thus, not only did Erdely know that Jackie's refusal to provide her with crucial corroborating information diminished Jackie's credibility, but she also understood that *Rolling Stone* would need to admit this to readers so that they could fairly judge Jackie's credibility for themselves. But Defendants never provided that disclaimer to the readers of the article: although Defendants included such a disclaimer in an early draft of the article, they intentionally deleted it from the draft article so that readers had no way of knowing that Defendants did not even know the names or identities of any of the supposed gang-rapists. (*See id.* ¶¶ 148-49.)

Defendants also did not admit to readers that they never contacted any of the three friends — called Randall, Andy, and Cindy in the article — who supposedly met with a bruised and bloody Jackie following her gang rape. Erdely asked Jackie for their real names “many, many times,” but Jackie refused to provide them. (CSF ¶ 102.) Jackie repeatedly demurred about putting Erdely in touch with Ryan/Randall, and then ultimately claimed to Erdely that Ryan had refused to speak with her. (*Id.* ¶¶ 104-09.) Rather than make it clear to readers that Defendants had never spoken to the three individuals that could actually corroborate or refute Jackie's claims about that night, Defendants instead misled readers by using pseudonyms to cover up the fact that Defendants did not know their names, then included a statement saying that

Ryan declined comment, falsely implying to readers that Defendants had spoken with Ryan and knew his identity. (*Id.* ¶¶ 228-29, 236-37.) *Rolling Stone*'s fact-checker specifically pushed to edit this false attribution to make it clear to readers that Defendants never spoke with Ryan and that it was **Jackie** claiming he would not speak to Defendants, but the fact-checker's changes were rejected. (CSF ¶¶ 228-35.) Similarly, the fact-checker attempted to edit the article to make it clear to readers that callous statements supposedly made by "Andy" and "Cindy" to Jackie had come only from Jackie, and that Defendants had never interviewed these individuals. (*Id.* ¶¶ 238-39.) Again, Defendants rejected these proposed changes. (*Id.* ¶ 240.)

Similarly, Defendants did not admit to readers that they did not know the identity of the two other supposed Phi Psi gang rape victims mentioned in the article because Jackie refused to identify them, nor did Defendants admit to readers that they had not even verified that these people existed. (CSF ¶¶ 161-63, 165, 167.) In private email correspondence with Erdely just weeks before the article was published, Woods admitted to Erdely, "I worry we can't confirm the other two girls coming to Jackie and alleging gang rape at the same frat..." (*Id.* ¶ 164.) But again, Defendants did not acknowledge to readers that they had no idea who these women were, or that nobody ever claimed to know who these women were aside from Jackie. Instead, Defendants again put a statement in the article stating that neither woman was willing to speak with Defendants, falsely implying that Defendants knew who the women were, had reached out for comment, and had been rejected. (*Id.* ¶ 167.)

After the article was published, as questions began to mount about the reporting of the article, Erdely and *Rolling Stone* continued to make intentionally misleading statements and outright lies in an effort to mislead the public into believing that Jackie was credible and to avoid admitting that their own source had refused to provide them with crucial information like the

identity of her alleged rapists. During an appearance on a *Slate* podcast episode that aired on November 27, 2014, the hosts repeatedly and directly asked Erdely whether she had spoken to or gotten comment from any of Jackie's alleged assailants. (*Id.* ¶ 344.) Each time, Erdely avoided directly answering the question and never acknowledged that *Rolling Stone* did not know who any of the alleged gang rapists were because Jackie refused to say. (*Id.*) In a November 28, 2014 email to a reporter from the *Washington Post*, Sean Woods falsely claimed that *Rolling Stone* did not identify any of the perpetrators by name for "legal reasons," when in fact *Rolling Stone* had no idea who they were. (*Id.* ¶ 345.) In an email exchange with the same reporter days later, Erdely flatly refused to comment on whether she had ever reached out to the alleged ringleader for comment. (*Id.* ¶ 346.) And on December 1, 2014, Sean Woods falsely told the *Washington Post*, "we verified [the assailants'] existence. I'm satisfied that these guys exist and are real. We knew who they were." (*Id.* ¶ 347.)

The fact that Defendants made multiple misleading statements about their reporting of the article, both in the article itself and in post-publication statements designed to cover up the fact that Jackie had not provided Defendants with corroborating evidence for her story, is powerful circumstantial evidence that Defendants were aware that Jackie's story had not been verified and that readers would question the veracity of the story if they knew that Jackie refused to provide crucial information and names to *Rolling Stone*. See *Herbert*, 441 U.S. at 164 n.12 (noting that actual malice may be shown by circumstantial evidence, including "subsequent statements of the defendant" tending to "show a reckless disregard of the plaintiff's rights."). Erdely and Woods acknowledged privately that the fact that Jackie refused to provide her with the names of her assailant, relevant witnesses, and other supposed Phi Psi victims detracted from her credibility,

but instead of acknowledging her recalcitrance to readers, Defendants repeatedly attempted to mislead the public into believing that Jackie did provide this information to Defendants.

6. Jackie Herself Has Repudiated *Rolling Stone's* Defamatory Claims About Ms. Eramo's Treatment Of Her.

Further evidence of Defendants' actual malice in claiming that Ms. Eramo abused Jackie, discouraged her from reporting her assault, was indifferent to her allegations, and sought to suppress her allegations can be found in the fact that Defendants' own supposed primary source for these statements — Jackie — has herself repeatedly repudiated and rejected Defendants' false claims about Ms. Eramo. In the weeks both before and after the publication of the article, Jackie repeatedly stated to [REDACTED], [REDACTED], and the general public that Erdely and *Rolling Stone* were intentionally misrepresenting Ms. Eramo and her treatment of Jackie. The fact that Defendants' own primary source has rejected Defendants' defamatory statements about her interactions with Ms. Eramo is alone sufficient to create a triable issue with respect to Defendants' reckless disregard for the truth. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (“[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”).

As early as September 19, 2014, two months before the article was published, Jackie texted a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CSF ¶ 321.) On November 7, just a week-and-a-half before the article was published, [REDACTED]

[REDACTED]

[REDACTED] (*Id.* ¶ 325.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*) Just three days later, on November 10, 2014 — nine days before publication — [REDACTED]

[REDACTED] (*Id.* ¶ 326.) Jackie stated that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

Immediately following the publication of the article, Jackie told [REDACTED] [REDACTED]. (*Id.* ¶ 329.) In response to the negative portrayal of Ms. Eramo, students that had worked with her compiled an open letter titled, “Letter: Advocating for Dean Eramo” in support of Ms. Eramo that they circulated to the President of UVA and the student newspaper. (*Id.* ¶ 330.) Jackie also contributed to the Open Letter in support of Ms. Eramo, writing that Ms. Eramo “saved [her] life,” that Ms. Eramo was “compassionate” and provided her with resources, and that at the time Jackie was “in no position to pursue legal or University action.” (*Id.*)

On December 3, 2014, Jackie texted her former friend Ryan Duffin — pseudonymously called “Randall” in the article — and stated:

“First off I want to say I’m SO SORRY for the way Sabrina [Erdely] wrote about you and Alex and Kathryn in the article. The story wasn’t even supposed to be about my assault. It was supposed to be about survivor support and advocacy at UVA since I’m super active in the advocacy community I agreed to take an interview with her in June and she asked me to explain what happened to me so I did but I never thought she would publish it... I had no clue what she was writing

about until October. I tried to pull out of it because I know her writing style and I know she would sensationalize things and take extreme artistic license (which she definitely did) but she said it would be published with or without me. I know she misrepresented you and Alex and Kathryn as well as Dean Eramo and a lot of other people in the story.

...

Yes [Erdely] definitely did her own thing and I had absolutely no control over what she published. It was the shittiest situation ever. I spoke with a reporter from the post explaining how Sabrina took the vast majority of what I said and twisted it and ultimately manipulated my assault to get something sensational... and I told him [Erdely] misrepresented you and Dean Eramo.

(*Id.* ¶¶ 332-33.) Jackie further told Duffin that “Erdely basically made up” the entire post-gang rape scene depicted in the article, where Erdely claimed that Jackie’s friends callously told her not to go to the police because it would hurt their social standing. (*Id.* ¶ 334.) Jackie confirmed in testimony [REDACTED]

[REDACTED]. (*Id.* ¶ 335.) Jackie further testified that [REDACTED]

[REDACTED]. (*Id.* ¶¶ 336-39.)

The fact that Rolling Stone’s *own and sole source* for its defamatory statements about Ms. Eramo’s treatment of Jackie has *emphatically and repeatedly* repudiated Defendants’ claims about Ms. Eramo, together with her statements that [REDACTED], and refused to allow her to withdraw from the article, is clear and convincing evidence of Defendants’ reckless disregard for the truth of their statements about Ms. Eramo. “If the disputed facts were resolved in [Plaintiff’s] favor, the record would provide evidence from which a jury could infer that [Defendants] acted with reckless disregard of the truth” in order to “deliberately or recklessly convey[] a false message to sensationalize the news” and convey “false innuendo” about Ms. Eramo. *See Tomblin*, 434 F. App’x at 210-11. These

facts demonstrate a genuine issue of material fact with respect to Defendants' reckless disregard for the truth, and Defendants have therefore failed to show that they are entitled to summary judgment.

CONCLUSION

For the foregoing reasons, Plaintiff Nicole Eramo respectfully requests that the Court deny Defendants' Motion for Summary Judgment.

Dated: July 22, 2016

Respectfully submitted,

By: /s/ Elizabeth M. Locke
Thomas A. Clare (VA Bar No. 39299)
Elizabeth M. Locke (VA Bar No. 71784)
Andrew C. Phillips (VA Bar No. 88880)
Joseph R. Oliveri (VA Bar No. 77152)
CLARE LOCKE LLP
902 Prince Street
Alexandria, Virginia 22314
Telephone: (202) 628-7400
tom@clarelocke.com
libby@clarelocke.com
andy@clarelocke.com
joe@clarelocke.com

Attorneys Plaintiff Nicole P. Eramo

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment was served on the below counsel of record on July 22, 2016 in accordance with the Federal Rules of Civil Procedure.

Michael John Finney & William David Paxton
GENTRY LOCKE RAKES & MOORE
P.O. Box 40013
Roanoke, VA 24022-0013
Telephone: (540) 983-9373
Telephone: (540) 983-9334
Fax: (540) 983-9400
Email: finney@gentrylocke.com
Email: paxton@gentrylocke.com

Elizabeth A. McNamara & Samuel M. Bayard
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
New York, New York 10020
Telephone: (212) 489-8230 / Fax: (212) 489-8340
Email: lizmcnamara@dwt.com
Email: samuelbayard@dwt.com

Alison B. Schary
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue NW, Suite 800
Washington, DC 20006-3401
Telephone: (202) 973-4248 / Fax: (202) 973-4448
E-mail: alisonschary@dwt.com

*Attorneys for Defendants Rolling Stone LLC,
Sabrina Rubin Erdely, and Wenner Media LLC*

Benjamin Gaillard Chew
MANATT, PHELPS & PHILLIPS, LLP
1050 Connecticut Avenue, NW, Suite 600
Washington, DC 20036-5303
Telephone: (202) 585-6511
Email: bchew@manatt.com

Attorney for Defendant Sabrina Rubin Erdely

Dated: July 22, 2016

By: /s/ Elizabeth M. Locke
Elizabeth M. Locke