IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

JANE DOE, Plaintiff, v. HARPERCOLLINS PUBLISHERS LLC and LAURA KIPNIS, Defendants.	)	No. 1:17-cv-03688 Hon. John Robert Blakey, Judge

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Plaintiff's claims in this action arise from her fundamental disagreement with the opinions expressed in the book *Unwanted Advances: Sexual Paranoia Comes to Campus* by Laura Kipnis (the "Book").[1] In the Book, Kipnis critiques what she calls an "officially sanctioned hysteria" about sex on college campuses that transforms romantic relationships between consenting adults into predatory assaults on helpless victims. At universities across the country, Kipnis argues, students and professors are ruined by Title IX investigations that allow purported victims to rescind consent after the fact. As part and parcel of this important and polarizing discussion, Kipnis examines, among other things, a well-known Title IX complaint filed against former Northwestern University philosophy professor Peter Ludlow by the Plaintiff[2] (who is not named in the Book).

Plaintiff and Kipnis obviously have opposing views regarding the import of Plaintiff's Title IX complaint, about Title IX and feminism in general, and about the interplay among sexual consent, gender, and the academy. Yet that disagreement does not give rise to any viable cause of action – not for publication of private facts (Count 1), defamation (Count 2), false light (Count 3), nor intentional infliction of emotional distress ("IIED") (Count 4). The First Amendment reserves the determination of the merits of these opposing views to the court of public opinion, not this Court. Plaintiff's claims therefore must be dismissed as a matter of law.

Plaintiff cannot state a claim for publication of private facts where those allegedly "private" facts are true, relate to an issue of public interest, and were a matter of public record in

[1] The Declaration of Matthew E. Kelley ("Kelley Decl."), attached hereto as Exhibit A, appends a copy of the Book as Exhibit 1. Because the Book is referred to in the complaint and is necessarily central to Plaintiff's claims, it is appropriately considered to be part of the pleadings. *Lott v. Levitt*, 556 F.3d 564, 567 (7th Cir. 2009).

[2] Although Plaintiff's full name is available in the records of another case, discussed *infra*, because this Court has yet to rule on Plaintiff's motion to proceed pseudonymously – and because neither defendant has used her name publicly – Defendants have chosen to refer to Plaintiff merely as "Plaintiff."

this Court well before the Book's publication. Further, Plaintiff cannot, on the one hand, seek to hold Defendants liable for publishing true, "private" facts and, on the other hand, seek to hold Defendants liable for voicing allegedly defamatory opinions based on those facts. Plaintiff's defamation claim should also be dismissed because, though the nature of her allegations is unclear, the negative conclusions allegedly conveyed by the Book about Plaintiff and Title IX in general are either true statements of fact or constitute constitutionally protected, pure opinion. Plaintiff's inability to state a defamation claim also is fatal to her false light claim, and her IIED claim fails because speech about matters of public concern cannot give rise to that cause of action. As set forth more fully below, the Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

A. The Parties

Defendant Laura Kipnis, the author of the Book at issue here, is a tenured professor in Northwestern's School of Communication. Compl. ¶ 9. Kipnis is a vocal critic of the use of Title IX and related proceedings to assess the relationships between adult students and their professors and has written several essays on the subject. HarperCollins Publishers LLC is a publisher based in New York City that published the Book. *Id.* ¶ 8.

Plaintiff is a PhD student at Northwestern whose Title IX claim against Ludlow "received local and national media coverage." *Ludlow v. Nw. Univ.*, 125 F. Supp. 3d 783, 786 (N.D. Ill. 2015) ("*Ludlow II*"). While Plaintiff has sought to proceed in this action anonymously, Dkt. No. 8, her identity is far from secret. In fact, Plaintiff – using her own name – has already litigated the facts at issue in her Title IX claim in this very Court. *Id.* at 787[3]; *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 829 (N.D. Ill. 2015) ("*Ludlow I*"). As a result, Plaintiff's complaint against

[3] This Court may take judicial notice of the contents of court records without converting a motion to dismiss into one for summary judgment. *Ennenga v. Starns*, 677 F.3d 766, 773-74 (7th Cir. 2012).

Ludlow, the details thereof and its outcome are discussed in two opinions of this Court, in which Judge Ellis used Plaintiff's name no fewer than 80 times.

B. The Title IX Proceeding Brought By Plaintiff Against Ludlow And Ludlow's Litigation Against Plaintiff and Northwestern

Plaintiff and Ludlow had a relationship between October 2011 and January 2012. Plaintiff describes it as a non-romantic one in which Ludlow used his power as a professor in her department to pressure her emotionally and professionally. She admits to "making compromises in terms of allowing some physical intimacy." Compl. ¶¶ 23-33. Plaintiff alleges Ludlow had sex with her once while she was too drunk to consent. *Id.* ¶ 31. Ludlow described their relationship as a consensual, romantic relationship. *See Ludlow II*, 125 F. Supp. 3d at 785-86.

In 2014, Plaintiff filed a Title IX complaint against Ludlow arising out of their relationship, alleging that Ludlow sexually assaulted her. Compl. ¶¶ 42-47. In response, Northwestern hired an independent investigator, Patricia Bobb, who concluded that Ludlow had sexually harassed Plaintiff, "but found that she did not have enough evidence to determine whether or not a sexual assault had occurred." *Id.* ¶¶ 48-49; *see also Ludlow II*, 125 F. Supp. 3d at 787. Ludlow later resigned from Northwestern during a termination proceeding. Compl. ¶ 50.

In June 2014, Ludlow filed suit in this Court against Northwestern, Plaintiff, and others involved in the Title IX proceedings. *See Ludlow v. Nw. Univ.*, No. 1:14-cv-4614, Dkt. No 1 (N.D. Ill. June 18, 2014). In dismissing the complaint, the Court accepted the pleaded allegations as true and described them in detail—including references to text messages and details of a personal, sexual relationship between the two. *Ludlow I*, 79 F. Supp. 3d at 829-31.

C. The Public Interest In The Ludlow Case

The allegations against Ludlow and Northwestern's handling of the matter drew international media attention and became wrapped up in a public debate regarding sexual harassment and assault on university campuses. *See* Kelley Decl. Exs. 2-6 (examples of media

coverage of the Ludlow controversy).[4] There were articles about it in publications ranging from *The Daily Beast* in the U.S. to *The Guardian* of London. In addition, among other things, a group of Northwestern faculty launched an online petition calling for stronger policies against sexual assault and harassment, *id.* Ex. 5; and one writer opined that the case "shows how students are changing America" by protesting against Ludlow. *Id.* Ex. 6.

D. The *Chronicle of Higher Education* Essays And Title IX Complaints Against Kipnis

In early 2015, Kipnis wrote an essay for *The Chronicle of Higher Education* titled "Sexual Paranoia Strikes Academe" (the "First Essay"), which discussed rules prohibiting professor/student dating. The First Essay, which was entirely based on public information, mentioned the Ludlow case and referred to Plaintiff only as "a former grad student [Ludlow] previously dated." Kelley Decl. Ex. 7 (copy of the First Essay);[5] *see also* Book at 30.

Plaintiff and another Northwestern student then filed Title IX complaints against Kipnis, claiming that these few words in the First Essay "misrepresented certain facts about the Plaintiff's complaint" against Ludlow. Compl. ¶ 52. Kipnis reports in the Book that Plaintiff claimed the essay "was retaliatory and created a hostile environment," and that Northwestern's investigation cleared her of any misconduct, including toward Plaintiff. Book at 137-148. Kipnis wrote a follow-up essay for the *Chronicle* titled "My Title IX Inquisition." Compl. ¶ 53.

The essays and Plaintiff's Title IX complaint against Kipnis drew even more national media attention; as a writer for *Vox* commented, the essays "added to a raging debate about campus culture, sexual assault, and how much students should be protected from trauma and

[4] The Court on a motion to dismiss may take judicial notice of the fact that these articles were published. *United States ex rel. John v. Hastert*, 82 F. Supp. 3d 750, 764 (N.D. Ill. 2015).

[5] Like the Book, the First Essay is incorporated into the Complaint by reference. *See supra* n. 1, 3.

discomfort." Kelley Decl. Ex. 9; *see also id.* Exs. 10-11. The *Chicago Tribune* observed that Kipnis had "sparked a national debate over academic and sexual freedom." *Id.* Ex. 11 at 1.

Notably, Plaintiff herself weighed in to the debate, publishing an article on a very well-trafficked website (under her own name and with a thumbnail photo) excoriating both Kipnis and Northwestern's president for invoking academic freedom as a defense to the Title IX claim against Kipnis.[6] In that article, Plaintiff identifies herself as a member of the very small Northwestern philosophy department and complains that "when a professor writes about your Title IX sexual assault complaint in an erroneous, misleading, and condescending way, that pretty straightforwardly raises questions about retaliation under Title IX."

E. The Book

As a result of her experiences and the reactions to her essays, Kipnis decided to write a book about sexual paranoia on university campuses and its role in Title IX investigations because she felt it was a topic of tremendous public importance. *See* Compl. ¶ 54; Book at 1-43. The Book holds itself out from the very start as a polemic. Its cover is red and reads in large letters, "[i]f this is feminism, it's feminism hijacked by melodrama." The copy on the front flyleaf begins: "Feminism is broken, argues Laura Kipnis. Anyone who thinks the sexual hysteria overtaking American campuses is a sign of gender progress is deranged." *Id.* (flyleaf). Kipnis discloses in the introduction that she decided to make Ludlow's situation one focal point of the book because, "the more I learned about his situation, the more I saw his case as a lens through which the excesses and hypocrisies of the current campus hysteria came into focus." *Id.* at 31. Although the *Ludlow* litigation predated the Book, Kipnis does not name Plaintiff, using the pseudonym Nola Hartley instead. *Id.* at 91.

[6] Because Plaintiff's motion to proceed pseudonymously has not been decided, Defendants are omitting a citation to that publicly available article, but will provide a copy to the Court on request.

In Chapter 2 of the Book, Kipnis describes some of the investigative records and hundreds of texts and emails between Ludlow and Plaintiff. *See id.* at 91-157. Kipnis suggests that they contradict Plaintiff's characterization of the relationship, writing about the texts that:

> There are mutual professions of love, and trading of pet names – she called him '1000 angels' (a *30 Rock* reference), and made it his nickname on her phone – though she'd later say it meant nothing. There were frequent exchanges about domestic and social arrangements (they were spending most nights together), the sharing of departmental gossip, philosophical ruminations, and household minutiae (she: "Why did you buy rice milk *and* soy milk?").

Id. at 92-93. Kipnis writes that Northwestern policy did not prohibit professors from dating graduate students they did not supervise, and states that the investigation found Ludlow did not have evaluative authority over Plaintiff – though Plaintiff argued otherwise. *Id.* at 92, 124.

Kipnis also discusses what she believes are inconsistencies in Plaintiff's allegations of nonconsensual sex. Plaintiff alleges that one night she got drunk with Ludlow and awoke the next morning naked in his bed, without a memory of what had happened but believing Ludlow had sex with her without her consent. Compl. ¶ 31. Kipnis writes that Plaintiff's texts from the following morning reference Ludlow's attempt the previous evening to break off their relationship because she had another boyfriend; include Plaintiff's expression of love for Ludlow and apology for hurting him; and say nothing about any nonconsensual sex. Book at 101-102.

Kipnis argues that the evidence suggests Plaintiff's complaint against Ludlow represented a retroactive withdrawal of consent for the relationship, which Kipnis says is a larger issue:

> The question becomes how seriously we, and the campus officials who adjudicate the sorts of charges Hartley would later bring, should take a retrospective retraction of consent to a relationship by one of the parties two years later. (What would it mean to not consent to sending *a thousand texts and emails?*) Let me add that consent-retraction isn't an issue in this case alone. It features in many others around the country . . .

Id. at 95. The Book received widespread media attention after its April release. Compl. ¶¶ 1, 68.

F. This Lawsuit

Plaintiff filed this action a month later. Plaintiff's 96-paragraph Complaint purports to assert claims for publication of private facts (Count 1), false light invasion of privacy (Count 2), defamation *per se* (Count 3), and intentional infliction of emotional distress (Count 4). Plaintiff asserts that the Book tortiously published the private facts that she had a sexual relationship with a professor at another school (whom the Book calls "Professor X"); personal details about her relationship with Ludlow and private text messages between them; and excerpts from confidential records of Northwestern's investigations. Compl. ¶¶ 56, 75. She claims the book defamed her and placed her in a false light by suggesting her interaction with Ludlow "was a consensual dating relationship and that Ludlow was not in a position of evaluative authority over her;" stating that she had filed six Title IX complaints, including one against a fellow graduate student; making unspecified false statements about Plaintiff's Title IX complaint against Kipnis; and insinuating that Plaintiff lied about being raped. *Id.* ¶¶ 59, 80 & 87. She seeks an unspecified amount of compensatory and punitive damages. *Id.* at 22 (request for damages).

ARGUMENT

This court should dismiss Plaintiff's Complaint because it fails as a matter of law. When presented with a Rule 12(b)(6) motion to dismiss, a court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations must be sufficient to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678-79. The court must "accept the well-pleaded facts in the complaint as true, but legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth." *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011). It is

apparent from the Complaint, and from related documents of which the Court may take judicial notice, that Plaintiff cannot state any plausible claim for relief.

I. PLAINTIFF CANNOT STATE A PUBLICATION OF PRIVATE FACTS CLAIM

To state a claim under Illinois privacy law for publication of private facts, a plaintiff must plead and prove that "(1) defendant gave publicity; (2) to h[er] private, not public, life; (3) the matter publicized was highly offensive to a reasonable person; and (4) the matter published was not of legitimate public concern." *Doe v. TCF Bank Illinois, FSB*, 707 N.E.2d 220, 221 (Ill. Ct. App. 1999). Plaintiff must base this claim on *truthful* facts. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1230 (7th Cir. 1993). Plaintiff's claim should be dismissed with prejudice because the Book contains only newsworthy, public facts.[7]

The Book contains information about a matter of public concern. The United States Supreme Court has held that if a media defendant "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star v. BJF*, 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)). Moreover, the Court made clear that in assessing whether "a matter of public significance" is involved, the relevant question is whether the subject-matter "of the [publication] generally" implicates a matter of public concern, not whether a specific fact such as

[7] As a threshold matter, the invasion of privacy claim should be dismissed because it is in large measure too vague to meet the plausibility standards of *Iqbal* and *Twombly*. In the Seventh Circuit's words, it "lacks the factual specificity required to raise it above the speculative level." *Golden v. Helen Sigman & Assocs., Ltd.*, 611 F.3d 356, 362 (7th Cir. 2010). A plaintiff must describe the allegedly private facts the defendant made public to properly plead the publication of private facts tort. *Chisholm v. Foothill Capital Corp.*, 940 F. Supp. 1273, 1285–86 (N.D. Ill. 1996) ("*Chisholm I*"). The Complaint does not meet this standard. For example, Plaintiff alleges that the "private facts" divulged in the Book include "[p]ersonal details about Plaintiff's relationship with Ludlow never before made public," Compl. ¶ 56(ii), but never specifies what those "personal details" are.

a rape victim's "specific identity" would, in isolation, be significant. *Florida Star*, 491 U.S. at 536-37.

Whether the information disclosed is of legitimate public concern is a threshold question of law that is properly decided on a motion to dismiss. *Kapotas v. Better Gov't Ass'n*, 30 N.E.3d 572, 597 (Ill. Ct. App. 2015). A matter of public concern is "any matter of political, social, or other concern to the community, or [that] is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal marks omitted). As the Seventh Circuit has said:

> People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.

Haynes, 8 F.3d at 1232.

The Seventh Circuit's decision in *Haynes* is dispositive of Plaintiff's claim. In that case, plaintiff Luther Haynes was mentioned in *The Promised Land*, a 1991 book that examined the social issues related to the 20th Century migration of African-Americans from the South to the North through the experiences of several individuals, including Haynes' ex-wife. *Id.* The book included many unflattering details about Haynes, including his drinking, adultery, and neglect of his family. *Id.* at 1225-26. He sued, arguing that material was unnecessary to the book's discussion of broader social issues. *Id.* at 1232-33.

The Seventh Circuit affirmed dismissal, explaining that "[p]ainful though it is for the Hayneses to see a past they would rather forget brought into the public view, the public needs the information conveyed by the book, including the information about Luther and Dorothy Haynes, in order to evaluate the profound social and political questions that the book raises." *Id.* at 1233. Moreover, privacy law cannot foreclose publication of "a social history of living persons that

tells their story rather than treating them as data points in a statistical study. Reporting the true facts about real people is necessary to obviate any impression that the problems raised in the [book] are remote or hypothetical." *Id.* (internal marks omitted). *See also Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1993) (no invasion of privacy claim for publicizing recordings of private telephone calls because "[sports] recruiting abuses by a public university are undoubtedly a matter of public interest. Pearl's intent was not to embarrass Thomas but to call attention to unfair and illegal practices by a rival university."). This principle has been widely echoed by federal courts throughout the United States. *See, e.g., Anderson v. Suitors*, 499 F.3d 1228, 1236 (10th Cir. 2007) (videotape of Plaintiff's alleged rape was "substantially relevant to a matter of legitimate public interest."); *Cinel v. Connick,* 15 F.3d 1338, 1346 (5th Cir. 1994) (videotapes of clergyman's sexual activities "were substantially related to Appellant's story," and "we are not prepared to make editorial decisions for the media regarding information of public concern."); *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989) (no cause of action for privacy for naming a rape victim because "communicating that this particular victim was a real person with roots in the community, and showing WCCO's knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story.").

There can be no reasonable dispute that the Book is about a matter of public concern – indeed, Plaintiff concedes as much. *See* Compl. ¶ 1. And Kipnis is explicit in the Introduction that she is discussing the details of Plaintiff's relationship with and claims against Ludlow as a way to explore the broader public interest in the intersection of Title IX enforcement and sexual attitudes on university campuses. Book at 31; *see also id.* at 33 ("the story . . . should see the light of day exactly because this *isn't* just Ludlow's story" (emphasis in original)). As in

Haynes, reporting the true facts of Plaintiff's relationship with Ludlow is necessary to obviate the impression that Kipnis's concerns about Title IX enforcement are illusory or hypothetical.

Plaintiff claims that the Book publicized the "private" fact of her relationship with "Professor X." Compl. ¶ 56(i); *see also id.* ¶ 75. But Kipnis discusses Plaintiff's affair with "Professor X" specifically because, she argues, it undercuts the premise "that Hartley was a spellbound naïf 'in awe of Ludlow because he was prominent in the philosophy world and revered in his area of teaching and writing.'" Book at 110. And the Book necessarily includes details from the Title IX files to make the point that Bobb adopted what Kipnis decries as a sexist view of women by concluding Ludlow manipulated Plaintiff into a relationship. *Id.* at 122.

Plaintiff argues that the details about her are "needless[]" and "gratuitous," and therefore are not only improper topics for discussion but actionable invasions of her privacy. Compl. ¶ 56. But the First Amendment leaves that determination to authors, not plaintiffs. Just as *The Promised Land* made points about poverty and social dysfunction using unpleasant details of Luther Haynes's past, the Book includes details about Plaintiff's relationship with Ludlow to examine profound social and political questions. *Haynes*, 8 F.3d at 1233. Here, as in *Haynes*, "[n]o detail in the book claimed to invade [Plaintiff's] privacy is not germane to the story the author wanted to tell, a story not only of legitimate but of transcendent public interest." *Id.*

Plaintiff's invasion of privacy claim fails for the additional reason that all relevant facts were public at the time the Book was published. *See, e.g., Chisholm v. Foothill Capital Corp.*, 3 F. Supp. 2d 925, 940 (N.D. Ill. 1998) ("*Chisholm II*"). Facts "that are contained in judicial records are beyond the power of tort law to conceal," even where the author did not gather those facts from court documents but instead "went to the source" – *i.e.*, one of the participants in the matter discussed. *Haynes*, 8 F.3d at 1233. Indeed, "the First Amendment creates a privilege to

publish matters contained in public records even if publication would offend the sensibilities of a reasonable person." *Id.* at 1231-32.

All of the facts about which Plaintiff complains were public before publication of the Book. The fact of Plaintiff's affair with Professor X, for example, has been available for years in the public records of this very Court because Ludlow alleged as much in his defamation suit against Plaintiff. *Ludlow v. Nw. Univ.*, No. 1:14-cv-4614, Dkt. No. 1 ¶ 39 (N.D. Ill. June 18, 2014) (Plaintiff "had a prior romantic and sexual relationship with another philosophy professor at a school which she had previously attended"). Similarly, Ludlow's pleadings included many details about his relationship with Plaintiff and their text messages and conversations. *Compare* Compl. ¶¶ 56, 75 *with Ludlow v. Nw. Univ.*, No. 1:14-cv-4614, Dkt. No. 47 ¶ 21(N.D. Ill. Feb. 26, 2015) ("During their relationship, [Plaintiff] sent [Ludlow] emails and text messages in which she regularly told him that she loved him, was 'in love' with him, and missed him when he was away."); *id.* ¶ 26 (discussing text messages from Plaintiff "the day after the alleged non-consensual encounter in which she told [Ludlow] that she loved him and in which she said nothing of an alleged incident of non-consensual sex"). Finally, what the Plaintiff describes as material from "confidential" records of Northwestern's investigation already were discussed in the Ludlow lawsuits. *Compare* Compl. ¶¶ 56, 75 *with Ludlow II*, 125 F. Supp. 3d at 787 ("Bobb did find that Ludlow violated Northwestern's policy against sexual harassment because he had unequal power in the relationship based on his purchase of expensive dinners for [Plaintiff] and the exercise of his 'charm.'"); *Ludlow v. Nw. Univ.*, No. 1:14-cv-4614, Dkt. No. 1 ¶ 32 (N.D. Ill. June 18, 2014) ("In her [Title IX] complaint, [Plaintiff] alleged that she and [Ludlow] had a consensual relationship two years prior during which she acknowledged they had had consensual sex. . . . During the investigation, [Plaintiff] admitted that she continued her consensual romantic

and sexual relationship with [Ludlow] after the alleged incident of non-consensual sex and even went on a vacation with him").[8] The allegedly "private" information Plaintiff identifies in this lawsuit was, in fact, not private at all: it has been public for years. Therefore, Plaintiff cannot state a claim for publication of private facts based on the Book.

II. PLAINTIFF'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW

To properly state a defamation claim, a plaintiff must show "that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Green v. Rogers*, 917 N.E.2d 450, 459 (Ill. 2009). Plaintiff's defamation claim should be dismissed because she has failed to plead it with the requisite specificity and because the statements at issue are either not defamatory as a matter of law or protected expressions of opinion.

As an initial matter, Plaintiff has not plausibly alleged a claim for defamation within the meaning of *Iqbal/Twombly*. A defamation or false light plaintiff is required to allege the specific words complained of because "knowledge of the exact language used is necessary to form responsive pleadings" and to permit proper judicial review. *Woodard v. Am. Family Mut. Ins. Co.*, 950 F. Supp. 1382, 1388 (N.D. Ill. 1997); *see also Ludlow I*, 79 F. Supp. 3d at 842 (pleading that fails to state "the content or nature" of the challenged statements does not state a claim for defamation or false light). Plaintiff, however, has only vaguely referenced the statements she challenges as representative "categor[ies]" of allegedly actionable statements. Compl. ¶¶ 59, 85.

[8] Whether Northwestern treats the contents of the Title IX case files as "confidential" is irrelevant. The fact that a particular statute or policy deems particular records "confidential" does not automatically render the information therein "private" for purposes of the tort. *See Walker v. Braes Feed Ingredients, Inc.*, 2003 WL 1956162, at *5 (N.D. Ill. Apr. 23, 2003) ("[a]lthough EEOC regulations prohibit the Commission from disclosing a charge of discrimination until a complaint has been filed in court, nothing prevents an employer or charging party from disclosing the charge.") In addition, there is no private cause of action to enforce the statute governing student privacy, 20 U.S.C. § 1232(g). *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287-91 (2002).

These allegations are insufficient to provide notice to Defendants as to what Plaintiff claims is false or defamatory. They also underscore the nature of Plaintiff's claim – her nebulous dislike of Kipnis and Kipnis's conclusions about her. But as a matter of law, this sort of imprecise pleading is insufficient.

Rather than pleading specific allegedly defamatory statements, Plaintiff claims she was defamed by categories of statements about (1) the nature of Plaintiff's relationship with Ludlow; (2) the number of Title IX complaints Plaintiff initiated against Kipnis and others and the contents of the allegations contained therein; and (3) "insinuating that plaintiff is a liar who fabricated a false claim of rape against Ludlow." Compl. ¶ 59(i) - (v).

All of these categorical statements are statements of opinion. As the Seventh Circuit has observed, "[s]upercharged rhetoric is part of many political debates, as is the careless and inaccurate accusation; these inevitably injure, yet speech must be protected even when it injures, lest the scope of debate be curtailed." *Stevens v. Tillman*, 855 F.2d 394, 399 (7th Cir. 1988). Under the law, therefore, a challenged publication is not actionable if it constitutes constitutionally protected opinion – that is, if it does not imply unstated, defamatory facts. *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 727 (7th Cir. 2004). To qualify as "pure" opinion, the author must "state[] the nondefamatory (or defamatory but true) facts on which he bases his opinion of the plaintiff and then proceed[] to express an opinion about the plaintiff's conduct or character." *Gist v. Macon Cty. Sheriff's Dep't*, 671 N.E.2d 1154, 1157 (Ill. Ct. App. 1996). *See also Stevens*, 855 F.2d at 400 ("When a statement in the form of an opinion discloses the defamatory facts (or refers to facts in the public record), it is not actionable apart from those facts."). A statement of pure opinion is not actionable "'no matter how unjustified and unreasonable the opinion may be or how derogatory it is,'" because the audience can

determine for themselves whether to believe the speaker. *Mittelman v. Witous*, 552 N.E.2d 973, 983-84 (Ill. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977)). Whether a given statement is a non-actionable opinion is a question of law for the court. *Madison v. Frazier*, 539 F.3d 646, 654 (7th Cir. 2008).

There is no question that the complained of interpretations of the Book are Kipnis's opinions, but Plaintiff's strong disagreement does not render them defamatory. At the core of Plaintiff's defamation claim is her assertion that the Book falsely portrays her as having had a consensual relationship with Ludlow and having later lied about it. Compl. ¶ 59(v). To the extent that the Book could be fairly interpreted as advancing that view, it represents Kipnis's opinion based on the mountain of concededly truthful facts she discloses about the relationship between Plaintiff and Ludlow and the resulting Title IX investigation. For example, Kipnis bases her view that Plaintiff and Ludlow were dating on text and email exchanges –messages Plaintiff asserts are true as part of her privacy claim – that seem to describe a happy, domestic relationship. Book at 92-93. Kipnis also references the same concededly accurate text messages sent between Ludlow and Plaintiff both before and after the alleged nonconsensual sex and uses those, along with the conceded fact that Bobb found insufficient evidence to determine whether the alleged sexual assault occurred, to suggest that Plaintiff retroactively retracted her consent to the relationship and that "the idea that he'd raped her came later." *Id.* at 92-97. Kipnis then describes Plaintiff's interaction with another professor who strongly believed that the nature of a faculty/student relationship is such that a student can never give consent to a relationship with a faculty member. *Id.* at 119-22. It is from these fully disclosed facts, all of which Plaintiff concedes are true – given her use of them as the basis of her private facts claim – that Kipnis draws her conclusions about Plaintiff's relationship with Ludlow and Title IX generally.

This is paradigmatic opinion. Indeed, this is just the type of case the law was designed to protect. Plaintiff and Kipnis do not agree about the uses of Title IX, the meaning of consent in a teacher/student relationship or the sexual realities of life on a college campus. And they have both publicly criticized the other for those opinions. The pure opinion doctrine prevents the Court from rendering a verdict in that debate – it is best left to the marketplace of ideas.

That is particularly so where, as here, the Book holds itself out as opinion. Illinois courts look to the "literary or social context" to determine whether a work is one of protected opinion. *Solaia Tech., LLC v. Specialty Publ'g Co.*, 882 N.E.2d 825,839-40 (Ill. 2006). Everything about the Book's literary and social context signals to the reader that it contains Kipnis's opinions. It is written in a loose narrative style that combines academic, thoughtful language with rhetorical hyperbole, humor and sarcasm. *See, e.g.*, Book at 83. Kipnis talks at times in the first person or describes her own impressions and experiences. *Id.* at 12. *See also, e.g.*, *id.* at 157 ("Having found myself under interrogation for writing an essay . . . I'm pretty eager to hold on to what freedoms we have – and maybe even push them further. What's the point of having a freedom you're afraid to use?"). These characteristics establish that the Book self-evidently contains Kipnis's opinions. As such, it is factually similar to the memoir by famed prosecutor Vincent Bugliosi at issue in *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995). In determining that the book constituted opinon, the Ninth Circuit held that Bugliosi's "book is a forum in which a reader would be likely to recognize that . . . [it contains] the highly subjective opinions of the author rather than assertions of verifiable, objective facts." *Id.* at 1153-54. As in *Partington*, the Book by its very nature is an opinion piece and no reasonable reader could believe it to be anything but an expression of a subjective point of view. Even Plaintiff acknowledges as much, pleading that it "provides an alternative theory about [Ludlow's] own conduct." Compl. ¶ 65.

Further, Plaintiff's allegation that Defendants mis-described the number and kind of Title IX cases she has filed, *id.* ¶ 59(ii), is simply not defamatory. Illinois follows the "innocent construction rule," meaning that a challenged statement cannot be actionable as defamation *per se* if at least one reasonable interpretation of it is non-defamatory. *Green*, 917 N.E.2d at 463. In assessing whether there is an innocent construction, the court must "give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Id.* If an innocent construction is reasonable the court *must* interpret it that way; "[c]ourts need not weigh the relative value of competing constructions." *Lott v. Levitt*, 556 F.3d 564, 568 (7th Cir. 2009). Although the court on a motion to dismiss takes the plaintiff's factual allegations as true, "that does not mean that the court must take the plaintiff's *interpretation* of the allegedly defamatory words at face value," because a statement's meaning is a question of law. *Id.* at 569.

Here, it is clear that the alleged characterization of Plaintiff as a "serial Title IX filer" is subject to an innocent construction.[9] Plaintiff asserts that the Book's statements that Plaintiff had filed six Title IX complaints give rise to the defamatory implication that Plaintiff "makes up lies to harm professors" using the Title IX process. Compl. ¶ 87. The Book never draws this conclusion. Instead, it is also susceptible of the reasonable, innocent interpretation that Plaintiff – whose academic discipline is male-dominated, *id.* ¶ 11 – has stood up for herself and filed complaints rather than accept instances of sexual harassment, assault or discrimination. That is, of course, Plaintiff's view of the role of Title IX, and Plaintiff can be seen as advancing goals that she publicly embraced in her highly public online article. The existence of this innocent construction precludes Plaintiff's defamation claim.

[9] Defendants must accept the allegations of the complaint as true for the purposes of this motion only. *Ludlow II*, 125 F. Supp. 3d at 788. It is worth noting, however, that Plaintiff concedes in the complaint that she has filed at least two Title IX proceedings, and discovery will reveal the existence of the others.

Plaintiff's defamation claim also must be dismissed because Plaintiff has failed to plead facts that give rise to a plausible inference that Defendants acted with actual malice. Where, as here, a challenged publication addresses an issue of public concern, *see supra* Section I.B., and the plaintiff seeks to recover presumed or punitive damages, the plaintiff must plead and prove that the challenged publication was made with "actual malice" – knowledge of falsity or a reckless disregard for the truth. *Republic Tobacco*, 381 F.3d at 733. The actual malice "inquiry is a subjective one – there must be sufficient evidence to permit the conclusion that the defendant published defamatory statements despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth." *Madison*, 539 F.3d at 658. Even at the pleading stage, actual malice must be alleged with "details sufficient to render a claim plausible." *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013).

Here, Plaintiff has fallen far short of meeting her burden. Plaintiff makes three arguments to support her allegations of malice. First, she claims that Kipnis harbored animosity against Plaintiff for filing Title IX complaints against her and Ludlow. Compl. ¶¶ 62 & 65. This is insufficient to plausibly allege malice because an author's personal antipathy toward the plaintiff does not equal subjective awareness of falsity. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (ill will is not "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [her] publication."). Next, Plaintiff claims that Kipnis failed to include unspecified facts that would have contradicted Ludlow's version of events. Compl. ¶¶ 66 & 82. But even if true, this allegation cannot support an assertion of actual malice because "[t]he fact that a commentary is one sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1307 (D.C. Cir. 1996).

Finally, Plaintiff's only allegation against HarperCollins is that it failed to adequately investigate Kipnis's claims before publishing. Compl. ¶¶ 64-67, 82. As a matter of law, however, "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish" actual malice. *Harte-Hanks*, 491 U.S. at 688. For all these reasons, Plaintiff's defamation *per se* claim should be dismissed with prejudice.

III. PLAINTIFF CANNOT STATE A FALSE LIGHT CLAIM

Plaintiff's failure to state a defamation claim is fatal to her false light claim. *Madison*, 539 F.3d at 659 (where an "unsuccessful defamation *per se* claim is the basis of [a] false-light claim, [the] false-light invasion of privacy claim fails as well"); *Brennan v. Kadner*, 814 N.E.2d 951, 959 (Ill. Ct. App. 2004) (protected statements of opinion are not actionable for false light). Further, because the existence of actual malice is an essential element of a false light claim, failure to plausibly allege actual malice also requires dismissal of a false light claim. *Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1180 (Ill. Ct. App. 2014).

IV. PLAINTIFF CANNOT STATE AN IIED CLAIM

Plaintiff's claim for IIED fails for three reasons. *First*, the United States Supreme Court in *Snyder v. Phelps* indicated that speech on a matter of public concern cannot provide the basis for an IIED claim. 562 U.S. at 458. *Second*, the First Amendment bars any IIED claim based on speech about matters of public concern where the plaintiff has failed to plead the fault requirements for a defamation claim. *Id.*; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988). Therefore, Plaintiff's failure to plead actual malice, discussed *supra*, dooms her IIED claim. *Third*, Plaintiff otherwise fails to plead the elements of an IIED claim. To state a claim for IIED, a plaintiff must allege that "the defendant's conduct was extreme and outrageous," meaning that it "go[es] beyond all possible bounds of decency, and [is] regarded as intolerable in a civilized community." *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 438 (7th Cir. 2009)

(internal marks omitted). Speech alone rarely sinks to this level. *See, e.g., Cook v. Winfrey*, 141 F.3d 322, 331 (7th Cir. 1998) (defamatory statements about plaintiff insufficient to support IIED claim). Publishing a Book that addresses an issue of public concern certainly cannot be considered intolerable in a civilized society. An IIED plaintiff also must plead and prove she suffered emotional distress "so severe that no reasonable man could be expected to endure it." *Welsh v. Commonwealth Edison Co.*, 713 N.E.2d 679, 684 (Ill. Ct. App. 1999). Conclusory allegations of distress are insufficient. *S.J. v. Perspectives Charter Sch.*, 685 F. Supp. 2d 847, 859–60 (N.D. Ill. 2010). Plaintiff's failure to specifically allege any facts suggesting that she suffered severe distress provides another basis to dismiss the IIED claim.

CONCLUSION

For all of these reasons, Defendants Laura Kipnis and HarperCollins Publishers LLC respectfully request that this Court grant their motion and dismiss the Complaint with prejudice.

Dated: July 21, 2017

Respectfully submitted,

By: */s/ Lauren J. Caisman*

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July 2017, a true and correct copy of the above and foregoing was sent via the Court's CM/ECF System to all counsel of record.

/s/ Lauren J. Caisman
Attorney for Defendants