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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiff's Opposition (Dkt. No. 31) ("Opposition" or "Opp.") highlights that she has no theory of this case beyond a general distaste for how she was portrayed in the Book[1] and a dislike of Kipnis. Notably, she fails to distinguish this case from binding authority from the Seventh Circuit that requires dismissal of both her claim for publication of private facts and defamation. And she makes no serious effort to resolve the fundamental contradiction between her defamation claim, which is premised on the alleged falsity of how she is portrayed in the Book, and her publication of private facts claim, which is premised on the notion that the Book's portrayal of her is true. Instead, she appears to rest her whole legal theory on the idea that she does not like the fact that Kipnis reached certain conclusions about admittedly truthful and public facts. The First Amendment shields the Defendants from liability under these circumstances. This Court should, therefore, dismiss the Complaint with prejudice.

ARGUMENT

I. PLAINTIFF CANNOT STATE A CLAIM FOR PUBLICATION OF PRIVATE FACTS

Plaintiff's publication of private facts claim fails because that tort requires, among other things, that "the matter published was not of legitimate public concern" and that the facts at issue be "private, not public." *Doe v. TCF Bank Ill., FSB*, 707 N.E.2d 220, 221 (Ill. Ct. App. 1999); *see also* Mot., § I. Plaintiff cannot establish either of those elements.[2]

[1] All defined terms herein have the same meaning as in Defendants' opening Memorandum, Dkt. No. 25 ("Mot.").

[2] Despite the fact that Plaintiff has herself written an article about Kipnis under her own name, and despite the fact that both Plaintiff's name and many details of her relationship with Ludlow are a matter of public record in the action *Ludlow v. Nw. Univ.*, No. 1:14-cv-4614 (N.D. Ill.) (the "Ludlow Litigation"), Defendants did not use her name in the Book, referring to her pseudonymously as "Nola Hartley."

First, Plaintiff concedes[3] that the subject of the Book – a critique of overreaching Title IX policies at colleges and universities – is a "legitimate matter[] of public concern." Opp. at 16; *see also* Compl. ¶ 1. Nonetheless, Plaintiff argues that her claim should survive because the specific details of her relationship with Ludlow are *not* newsworthy. But the Seventh Circuit Court of Appeals and numerous other courts have rejected this very argument.

In *Haynes v. Alfred A. Knopf, Inc.*, the plaintiffs sued over the portrayal of their private lives in a book chronicling the history of the Great Migration and made exactly the same argument Plaintiff attempts to advance here. 8 F.3d 1222, 1224-26 (7th Cir. 1993). They accepted the public interest in the book's general subject matter, but "question[ed] whether the linkage between the author's theme and their private life really is organic" and "point[ed] out that many social histories do not mention individuals at all, let alone by name." *Id.* at 1233; *compare with* Opp. at 16 ("Plaintiff takes no issue with Kipnis's decision to write about Title IX or sexual assault on college campuses or HarperCollins's decision to publish a book that explores these issues. Those are legitimate matters of public concern. But *Unwanted Advances* goes farther – impermissibly using the most intimate details of Plaintiff's life as fodder, revealing highly personal, never-before-publicized facts that are no one's business.").

The Seventh Circuit squarely rejected that argument, holding that "we do not think the law of privacy makes it (or that the First Amendment would permit the law of privacy to make it) the exclusive format for 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.'"

[3] Contrary to Plaintiff's representation (Opp. at 14), Defendants do dispute that any matter publicized in the Book was "highly offensive to a reasonable person," but this is simply not an argument Defendants advanced at this stage given the requirement that a plaintiff's allegations be taken as true for purposes of a motion to dismiss.

Haynes, 8 F.3d at 1233 (citation omitted). For this reason, the Seventh Circuit held, details about the Hayneses' personal lives *were* newsworthy and their publication was not wrongful even where, unlike in the Book, the Hayneses were identified by name and not by pseudonym. *Id*. at 1233. The Seventh Circuit's holding in *Haynes*, then, precludes Plaintiff's claim for invasion of privacy.

Plaintiff's attempt to distinguish *Haynes* fails. Plaintiff suggests that the Book reveals "intimate" details of Plaintiff's life[4] where the book at issue in *Haynes* did not. Opp. at 17. Yet the alleged private facts disclosed in *Haynes* are very similar to those at issue in this case –that the plaintiffs were involved in an extramarital affair. *Compare* 8 F.3d at 1225, 1230 *with* Compl. ¶ 75 ("Among the private details of Plaintiff's life that Defendants have made public include the Plaintiff's prior relationship with a married man . . . ."). And here, as in *Haynes*, Plaintiff's characterization of the Book and "claim that the book depicts [her] 'sex life'" are "misleading." *Compare Haynes*, 8 F.3d at 1230 *with* Opp. at 17. Neither the Book nor the *Haynes* book "narrat[e] . . . a sexual act." *Compare Haynes*, 8 F.3d at 1230 *with generally* Book. Without more, the *Haynes* claims failed and Plaintiff's should as well.

Plaintiff's concocted "misconduct" distinction is also without basis in law. There is no rule that "bad actors" have fewer privacy protections than victims. In fact, in *Florida Star v. B.J.F.*, the Supreme Court held that a newspaper's publication of the name of a rape victim related to a matter of public concern. 491 U.S. 524 (1989). The plaintiff rape victim, who obviously had not committed any misconduct, similarly argued that, while the subject matter of the article as a whole was newsworthy, the personal detail at issue – her name – was not. As the

[4] Plaintiff's reliance on *Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. Ct. App. 1996) is misplaced. Opp. at 16. *Green* involved the publication of details far more intimate than those at issue in this case – a grieving mother's statements to her dead son and photographs of her teenage son, lying dead in the hospital. 675 N.E.2d at 256.

Seventh Circuit would later do in *Haynes*, however, the Court rejected this distinction, holding that the defendant was entitled to publish the victim's name because "*the article generally*, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* at 536-37 (emphasis added); *see also Rozhon v. Triangle Publ'ns, Inc.*, 230 F.2d 359, 361 (7th Cir. 1956) (defendant's inclusion of story of teenager's death in article about teenage drug addiction related to matter of public concern). Plaintiff's claim that only "misconduct" is deemed newsworthy is legally unsupported.[5]

Plaintiff's only other response is to assert – without citing any legal authority – that the Court may not decide whether a statement relates to a matter of public concern on a motion to dismiss. Opp. at 18. This is also incorrect. Courts can and often do decide this issue at the pleading stage. *See, e.g.*, *Best v. Berard*, 776 F. Supp. 2d 752, 757-59 (N.D. Ill. 2011) (noting on motion to dismiss that "[t]he question of whether speech involves a matter of public concern is an issue of law," and holding that it warranted dismissal of private facts claim); *Kapotas v. Better Gov't Ass'n*, 30 N.E.3d 572, 597 (Ill. Ct. App. 2015) ("The question of whether the articles published by the defendants publicized a matter of legitimate public concern is a proper subject for a section 2-615 motion to dismiss.")[6]; *see also Bogie v. Rosenberg*, 705 F.3d 603, 614 (7th Cir. 2013) (affirming dismissal of Wisconsin appropriation claim on newsworthiness grounds).

[5] As if to underscore the meaninglessness of the "misconduct" distinction Plaintiff attempts to draw, the *Haynes* court expressly relied on *Florida Star* and other cases about rape victims and others whose personal lives became newsworthy through no fault of their own. *Haynes*, 8 F.3d at 1232.

[6] Plaintiff appears to argue that the *Kapotas* case is distinguishable because "the Plaintiff conceded the issue of public concern at an early stage." Opp. at 18. That is simply incorrect. Although the plaintiff in *Kapotas* admitted some contextual facts relevant to the public concern inquiry in his complaint (as Plaintiff did here, *see* Compl. ¶ 1), the public concern question was clearly a live issue before the appellate court, which explicitly held that it was appropriately resolved on a motion to dismiss. *See Kapotas*, 30 N.E.3d at 597.

It is, accordingly, appropriate for this Court at the pleading stage to determine that the alleged private facts are a matter of public interest.

Here, as in *Haynes*, the (pseudonymous) details of Plaintiff's relationship with Ludlow and the subsequent Title IX investigation are related to the conceded public interest in the Book. As such, Plaintiff's private facts claim (Count I) should be dismissed.

Second, Plaintiff's private facts claim fails because it arises from facts that were already public prior to the Book's publication, and, indeed, are contained in the public records of this Court. Public court filings from Plaintiff's prior litigation with Ludlow included not only Plaintiff's name – a fact Defendants still have not disclosed (even though they believe it should be public in this litigation) – but also included the same details about their relationship and Plaintiff's romantic history that form the basis for the private facts claim. Mot., § I, at 11-13.

Plaintiff's Opposition cites portions of the Book in which Kipnis suggests Ludlow provided her with new information in the course of Kipnis's research. Opp. at 14-16. But Plaintiff's claim that Kipnis had unprecedented access to Ludlow's files does not render the facts contained therein any more or less private, particularly where many of them had already been disclosed to the public – by the filing of the Ludlow Litigation. Plaintiff herself makes this point more clearly than Defendants ever could. Plaintiff's Opposition includes a description of supposedly private information published in the Book – "excerpts of Plaintiff's intimate conversations with Ludlow and sensitive details about their relationship; disclosure of Plaintiff's prior relationship with a married man who taught at a different academic institution; and information contained in confidential University records stemming from the investigation of Plaintiff's sexual harassment and sexual assault complaint against Ludlow" (Opp. at 16). In the Motion, however, Defendants pointed to places in the Ludlow Litigation's public Court filings

containing *every single one* of those facts. Mot., § I, at 12-13. And Plaintiff participated in that litigation *under her own name*, and this Court described many allegedly private details in its published opinions. *Ludlow v. Nw. Univ.*, 125 F. Supp. 3d 783, 786 (N.D. Ill. 2015); *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 829 (N.D. Ill. 2015). Because Plaintiff's "private facts" are not private, this claim must be dismissed.

II. PLAINTIFF CANNOT STATE A CLAIM FOR DEFAMATION

Next, Plaintiff's defamation claim should be dismissed. Plaintiff's Opposition does nothing to clear up the inherent tension and contradiction between her private facts claim and her defamation claim. It fails to explain how Defendants can be held liable for Kipnis's expression of opinions drawn from facts that Plaintiff concedes to be true, and it makes no serious effort to show how allegations in the Complaint can support an inference of actual malice requisite to sustain her claim. Consequently, Plaintiff's defamation claim must be dismissed.

First, Plaintiff has failed to plausibly state a defamation claim because she has not identified the words she alleges to be false and defamatory with any particularity, much less sufficient particularity. *See* Mot., § II, at 13-14; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to survive motion to dismiss, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). Plaintiff argues that she states "the ***what***" (Opp. at 8-9) but she does not. Instead, she merely provides categories of statements as "examples" of types of words complained of, quotes some case law, and simply claims that's enough. *Id.* at 9. At the same time, she seemingly proposes that her defamation claim is based on "insinuat[ions]" rather than express statements. *Id.* at 8. But, as Plaintiff herself concedes, she is required to "set[] forth the substance of [the allegedly defamatory] statements with sufficient precision and particularity so as to permit both initial judicial review and the formulation of an answer and potential affirmative defenses." *Green v.*

Rogers, 917 N.E.2d 450, 459 (Ill. 2009). Beyond a bare assertion that her Complaint "is sufficiently specific," Plaintiff never explains how her pleading meets this standard. Opp. at 9.[7] Indeed, the cases she cites demonstrate that merely pleading categories of statements is manifestly insufficient. *See Green*, 917 N.E.2d at 460 (complaint insufficient where it "set forth only a summary of the types of statements" complained of).

In fact, Plaintiff's Complaint is so vague that neither the Defendants nor the Court can be sure exactly which passages from the 245-page Book are at issue in this case. Plaintiff claims she was defamed by, for instance, "[f]alse statements about the nature of Plaintiff's personal and professional relationship with Ludlow, suggesting that it was a consensual dating relationship and that Ludlow was not in a position of evaluative authority with respect to Plaintiff," Compl. ¶ 59(i), but she leaves Defendants and the Court guessing as to which statements in the Book "suggest" these purported false facts.[8] She also purportedly sues over "[f]alse statements [in the Book] about the contents of Plaintiff's single Title IX complaint against Kipnis," Compl. ¶ 59(iv), but does not give Defendants or the Court any way to know which statements in the Book about the Title IX complaint contain false statements. The Complaint is simply too vague.

[7] Plaintiff's request that she be given an opportunity to amend her Complaint if necessary to allege the specific words complained of should be denied as well. Any such amendment would be futile given that it could not resolve the contradiction between the private facts and defamation claims. Further, any amendment should also be denied because Plaintiff had an opportunity under this Court's Standing Order to amend her Complaint in response to this Motion and chose not to do so with knowledge that "if the moving party prevails, the Court may dismiss the case with prejudice and not provide further opportunity to amend the pleading absent extraordinary circumstances."

[8] It is hard to determine how these categories of statements could, in any event, give rise to a claim for defamation. It is simply not defamatory to say that two consenting, unmarried adults are in a relationship, nor is it defamatory to say that Ludlow did not have supervisory authority over Plaintiff. *See Polsby v. Spruill*, 1997 WL 680550, at *8 (D.D.C. Aug. 1, 1997). In addition, Plaintiff concedes in her Complaint that she had an intimate, emotional and even sexual relationship with Ludlow. Compl. ¶¶ 28, 29, 32. These categories of statements, therefore, have their basis in truthful facts.

Plaintiff's unwillingness to identify the basis of her action is much more than a technical defect. It underscores the irreconcilable tension between her private facts claim – which "presupposes the truth of the facts disclosed," *Haynes*, 8 F.3d at 1230 – and her defamation claim, which requires her to prove that facts in the Book are false. *Id.* Plaintiff seeks to have it both ways, pleading that the allegedly true "[p]ersonal details about Plaintiff's relationship with Ludlow never before made public" give rise to a private facts claim and that the seemingly very same "[f]alse statements about the nature of Plaintiff's personal and professional relationship with Ludlow" give rise to a defamation claim. *Compare* Compl. ¶¶ 56(i) and 59(i). Because truthful facts cannot also be false facts, however, Plaintiff cannot have her cake and eat it, too. *See, e.g., Clark v. Viacom Int'l, Inc.*, 617 F. App'x 495, 511 (6th Cir. 2015) (affirming dismissal of defamation claim where allegation of falsity was contradicted by other allegations in complaint). The defamation claim fails as a matter of law.

Second, the real crux of Plaintiff's claim is that she does not like the conclusions Kipnis forms about the truthful facts laid out in the Book. Those conclusions, however, are nonactionable statements of opinion that cannot give rise to a defamation claim. *See* Mot., at 15.

In responding to this argument, Plaintiff once again resorts to restating agreed-upon legal principles and making vague and conclusory assertions that "amidst the sea of opinions that Kipnis offers in her book . . . Kipnis makes multiple, provably false statements of fact regarding Plaintiff, her activities, and her experiences." Opp. at 9-10. Nevertheless, Plaintiff identifies no such factual statements.[9] Instead, she concedes that the Book advances "an alternative *theory* about [Ludlow's] conduct," Compl. ¶ 65 (emphasis added), based on admittedly truthful facts.

[9] Plaintiff's Opposition claims that the Book defames her by falsely calling her a "serial Title IX filer." Opp. at 11. But this, too, is inadequately pled. Plaintiff admits filing at least two Title IX claims and following the Book's publication – and after filing this lawsuit – Plaintiff filed yet another (unsuccessful) Title IX case against Kipnis about the Book. Opp. at 11. Plaintiff's own pleadings undercut her position that any implication that Plaintiff is a "serial" Title IX filer is false.

See Book at 34 ("[A]s you've probably gathered, going through a Title IX investigation . . . has made me a little mad and possibly a little dangerous: transformed from a harmless ironist into an aspiring whistleblower."). That is precisely the sort of "pure opinion" that the First Amendment protects. *See Gist v. Macon Cty. Sheriff's Dep't*, 671 N.E.2d 1154, 1157 (Ill. Ct. App. 1996) ("An expression of pure opinion occurs when the maker states the nondefamatory (or defamatory but true) facts on which he bases his opinion of the plaintiff and then proceeds to express an opinion about the plaintiff's conduct or character."); *Haynes*, 8 F.3d at 1127 (defining opinion as "an interpretation, a theory, conjecture, or surmise").

Theories like Kipnis's are exactly what the Seventh Circuit found important to protect in *Haynes*. There, the book claimed that Luther Haynes's drinking caused his son's birth defects, and that he left his first wife for financial reasons. 8 F.3d at 1126. Although each of those statements would no doubt have been "provably false" under Plaintiff's analysis, the Seventh Circuit held them to be nonactionable statements of opinion. The Court noted that the underlying facts – the son's condition and the respective wives' financial circumstances – were unchallenged, and the author and his source "were entitled to their interpretation of them." *Id.* at 1226-27; *see also Chicago Conservation Ctr. v. Frey*, 40 F. App'x 251, 257 (7th Cir. 2002) (statement constituted non-actionable opinion where speaker "merely offered a theory as to the cause of damage" to paintings in gallery); *Boese v. Paramount Pictures Corp.*, 952 F. Supp. 550, 557 (N.D. Ill. 1996) (statement that "appears to be [the speaker's] interpretation of these recent events" amounted to opinion).

Thus, even if Plaintiff does not like them, Kipnis's theories or conclusions are not legally actionable. In addition, the Opposition understates the importance of the Book's tone and style. The very language Plaintiff cites in the Opposition underscores the fact that the Book holds itself

out as a polemic. Opp. at 15. Any reasonable reader coming to it expects it to contain Kipnis's opinions. *See Partington v. Bugliosi*, 56 F.3d 1147, 1153-54 (9th Cir. 1995). At bottom, a reasonable reader, seeing the statements at issue "amidst the sea of opinions that Kipnis offers in her book" (Opp. at 9-10) would readily recognize that Kipnis "claim[s] insight, not information that the plaintiff might be able to prove false in a trial." *Haynes*, 8 F.3d at 1227.

Accordingly, even if Plaintiff is correct and the Book is susceptible to a defamatory interpretation, dismissal of Plaintiff's claim is warranted because the Book contains only statements of opinion, which are protected by the First Amendment.

Finally, Plaintiff's defamation claim should be dismissed for failure to plead actual malice. Plaintiff does not dispute that she must plausibly allege that Defendants published the statements at issue with "actual malice" – knowledge of falsity or a reckless disregard for the truth. *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 733 (7th Cir. 2004); *see* Opp. at 12-14. Nor does she dispute that, in order for her defamation claim to survive a motion to dismiss, Plaintiff must "point to details sufficient to render a claim [of actual malice] plausible." *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013). Conclusory statements and allegations that would not be relevant to proving actual malice at trial are both insufficient. *See, e.g., id.* (disregarding allegation of defendant's failure to investigate as irrelevant to actual malice); *Biro v. Condé Nast*, 807 F.3d 541, 546 (2d Cir. 2015) (considering only "nonconclusory" allegations of actual malice in assessing sufficiency on pleadings motion). Nonetheless, Plaintiff fails to point to even one nonconclusory, relevant allegation of actual malice in the Complaint.

Plaintiff argues that her Complaint contains three categories of allegations of actual malice. First, she says that the Complaint alleges that "the [B]ook was fueled by Kipnis's

retaliatory motive." Opp. at 12. But the contention that "retaliatory motive is evidence of actual malice" (Opp. at 13) is simply incorrect. *See* Mot., § II, at 18-19. "[W]ithout something more concrete, ill will towards a public plaintiff cannot provide a sufficient basis for a finding of actual malice." *Madison v. Frazier*, 539 F.3d 646, 658 (7th Cir. 2008). The only case cited by Plaintiff in arguing to the contrary (Opp. at 13), *Mauvais-Jarvis v. Wong*, is not about actual malice at all. 987 N.E.2d 864 (Ill App. Ct. 2013). *Mauvais-Jarvis* dealt with the distinct doctrine of *common-law* malice.[10] *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) ("Actual malice . . . should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.").[11] Plaintiff's allegations of ill will therefore do not plausibly allege actual malice.

Next, Plaintiff says that she has plausibly alleged actual malice by pleading that "Defendants had reason to know the [B]ook's portrayal of Plaintiff was false." Opp. at 12. Though Plaintiff goes so far as to argue this was "obvious" (Opp. at 13), Plaintiff fails to plead any facts regarding why the "veracity of Kipnis's statements" should have been so apparently doubted. Such a bare assertion is exactly the sort of conclusory allegation that courts hold to be insufficient to withstand a motion to dismiss. *See, e.g.*, *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 56 (1st Cir. 2012); *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012). The dearth of factual specificity in Plaintiff's Complaint is simply not sufficient to plausibly allege malice.

[10] Common-law malice can defeat the application of a qualified privilege in defamation cases, which is how it came up in *Mauvais-Jarvis*. There is no issue of qualified privilege in this case.

[11] For the same reasons, allegations elsewhere in the Complaint that HarperCollins had reason to know about Kipnis's alleged ill will towards Plaintiff also do not suffice to state a claim against HarperCollins. *See* Opp. at 13 (citing Compl. ¶¶ 65, 82).

Plaintiff finally attempts to show she plausibly alleged actual malice with her erroneous argument that "Defendants avoided the truth by never contacting Plaintiff to determine the accuracy of the information about her in the book or to confirm the authenticity of the text messages relied upon." Opp. at 13. But it is well-settled that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish" actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). A plaintiff therefore "cannot prove actual malice merely by asserting that a publisher failed to contact the subject of his work." *Davis v. Costa-Gavras*, 654 F. Supp. 653, 657 (S.D.N.Y. 1987); *see also Pippen*, 734 F.3d at 614 (dismissing claim because defendant's failure to contact plaintiff prior to publication not probative of actual malice); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 704 (11th Cir. 2016) (allegation that defendants never "attempt[ed] any real outreach to uncover if any truth existed relating to the matter that was being asserted" in the article at issue insufficient to survive motion to dismiss). Instead, "the plaintiff must plead facts giving rise to a reasonable inference that the defendants acted to intentionally avoid learning the truth." *Michel*, 816 F.3d at 704; *see also Harte-Hanks*, 491 U.S. at 692 (actual malice requires "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges"); *Kisser v. Coalition for Religious Freedom*, No. 92-cv-4508, 1995 WL 3996, at *4 (N.D. Ill. Jan. 5, 1995) (duty to investigate "arises only after the publisher discovers 'an obvious reason to doubt' the accuracy of the story").

Plaintiff never alleges – much less provides factual detail suggesting – that Defendants "acted to intentionally avoid learning the truth" as required by *Michel* and *Harte-Hanks*. Even as recast in the Opposition, her allegations are nothing more than classic complaints about a failure to investigate. *See* Opp. at 13; Compl. ¶¶ 64-67 ("Defendants . . . did not adequately investigate

the truthfulness of Kipnis's statements about Plaintiff . . . Neither Defendant . . . ever bothered to reach out to Plaintiff to determine the accuracy of the information about her contained in the book.").[12] As the Seventh Circuit recognized in *Pippen*, Plaintiff's allegations do not adequately plead actual malice.

The Complaint's allegations of actual malice are remarkably similar to those very recently held to be insufficient in *Cabello-Rondón v. Dow Jones & Co.*, No. 16-cv-3346, 2017 WL 3531551 (S.D.N.Y. Aug. 16, 2017) (granting motion to dismiss). Like this case, the *Cabello-Rondón* plaintiff's actual malice claim rested on allegations that the defendant failed to "adequately investigate, vet, or otherwise verify the reliability of [its] alleged sources . . . despite the existence of circumstances that would have prompted it to do so," and that the defendant bore him ill will. *Id.* at **9-11. The court held that neither of these claims were sufficient to survive a motion to dismiss because the plaintiff's allegation of a failure to investigate "offers no plausible basis to infer that [the defendant] purposefully avoided or deliberately disregarded learning whether the facts set forth in the article were true" and because "allegations of viciousness and ill will are . . . irrelevant to his claim" of actual malice. *Id.* at **10-11. Plaintiff's defamation claim (Count II) should be dismissed for the same reasons.

III. PLAINTIFF CANNOT STATE A CLAIM FOR FALSE LIGHT

The deficiencies in Plaintiff's defamation claim are also fatal to her false light claim. *See* Mot., § III. In particular, as Plaintiff appears to concede in her Opposition, her false light claim cannot survive a motion to dismiss unless she has sufficiently alleged a claim for defamation. Opp. at 19; *see also Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1180 (Ill. Ct. App. 2014) (actual malice is an element of false light tort). She cites no other basis for saving her false light

[12] It is also inconsistent with Plaintiff's position, Opp. at 15, that Kipnis did extensive research and reviewed two thousand text messages in drafting the Book.

claim from dismissal. Because Plaintiff has not sufficiently stated a claim for defamation, then, her false light claim (Count III) also fails.

IV. PLAINTIFF CANNOT STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Finally, Plaintiff's Opposition barely touches on the flaws in her intentional infliction of emotional distress ("IIED") claim. Like her false light claim, the viability of Plaintiff's IIED claim is intertwined with the viability of her other claims discussed above. Plaintiff's IIED claim is undone by the fact that the First Amendment bars IIED claims arising out of speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). If the speech at issue in *Snyder*, in which the defendants picketed a soldier's funeral with signs bearing slogans such as "Thank God for 9/11," "Thank God for IEDs," and "You're Going to Hell," met this standard, surely Kipnis's thorough and well-documented critique of universities' investigations into professorial misconduct does as well. Indeed, the public interest in Title IX reform cannot be overstated – as this brief was being written, Secretary DeVos announced a decision to change the Title IX process because of the types of claims discussed in the Book, and great public debate followed.

Moreover, Plaintiff has failed to adequately plead the elements of an IIED claim. Not only does Defendants' publication of a book about matters of public concern *not* amount to the sort of "extreme and outrageous conduct" required for an IIED claim (*see* Mot., § IV, at 19-20), but Plaintiff has also failed to plausibly allege that she has 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). Instead of responding to this objection, Plaintiff simply points to two paragraphs of her Complaint (*see* Opp. at 19) – which together contain no details of emotional distress beyond a bare assertion that "Defendants' conduct caused severe emotional distress to Plaintiff." Compl. ¶¶ 94-95. This does not rise to the level of an IIED

claim. *See S.J. v. Perspectives Charter Sch.*, 685 F. Supp. 2d 847, 860 (N.D. Ill. 2010) (dismissing IIED claim where plaintiff's allegations "comprise nothing more than a recital of the three elements of an IIED claim, which is insufficient to state a claim under the standard set forth in *Iqbal*"). Plaintiff's IIED claim (Count IV) should therefore be dismissed as well.

CONCLUSION

For these reasons, Defendants respectfully request that this Court grant their Motion and dismiss the Complaint with prejudice.

Dated: September 8, 2017

Respectfully submitted,

By: */s/ Lauren J. Caisman*

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September 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