SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

EUGENE GU,

Plaintiff,

- v -

THE VERGE, VOX MEDIA, INC., VOX MEDIA, LLC, LAURA YAN,

Defendant.

INDEX NO. 152394/2020

MOTION DATE 05/08/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. SHLOMO S. HAGLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32
were read on this motion to/for DISMISSAL.

Plaintiff Dr. Eugene Gu, appearing pro se in this media defamation case, is an online activist involved in a series of controversies, ranging from a Congressional investigation into research use of human fetal tissue, to online debates about racial discrimination and white supremacy, to a federal lawsuit challenging former President Trump's use of Twitter to block critics. Dr. Gu claims, on Twitter and elsewhere, to be the victim of retaliation, harassment, and online bullying for his activism, while his critics, on Twitter and elsewhere, claim that he is the bully and harasser.

In this action, Dr. Gu challenges a news profile about him which was published on March 5, 2019 (the Article [NYSCEF Doc No. 9]) by defendants Vox Media, LLC, and its reporter, Laura Yan (defendants). Although the complaint names The Verge and Vox Media, Inc. as defendants, defendants contend that Vox Media, LLC is the correct entity name. The Article chronicles Dr. Gu's rise to fame and the controversies in which he has been embroiled, including interviews with Dr. Gu and a number of his critics. Dr. Gu contends that seven discrete statements within the

Article are defamatory, and asserts claims for defamation and intentional infliction of emotional distress.

Defendants now move, pursuant to CPLR 3211 (a) (1) and (a) (7), for dismissal of the amended complaint (NYSCEF Doc No. 3) on the ground that it fails to state a claim against defendants upon which relief can be granted.

For the reasons set forth below, defendants' motion is granted, and the amended complaint is dismissed.

FACTS

Plaintiff's Activism

Dr. Gu is a doctor and an outspoken social justice advocate on Twitter (amended complaint, ¶¶ 8 [referencing "activism for Asian American issues that Gu was involved in on social media"]; 28 [referencing Dr. Gu's "'taking the knee' as a symbolic gesture to fight racism as an Asian American doctor"]; *see* Dr. Gu's Twitter feed [NYSCEF Doc No. 10]). On his Twitter account, @eugenegu, he has more than 443,000 followers (amended complaint, ¶¶ 8-9; *see* Twitter feed). He posts regularly about his experiences as an Asian American in the medical field, his activism on Twitter, and retaliation and online harassment he has received in response (*id.*).

Dr. Gu has also published opinion pieces, appeared on camera for interviews, and been the subject of numerous press reports on these topics (*see e.g.* Democracy Now interview transcript [NYSCEF Doc No. 11], at 8 ["I took the knee to fight against the very racism that I was the victim of .... And I was punished for it"]; Independent article [NYSCEF Doc No. 12], at 3 [discussing "Republican war on medical research involving fetal tissue" and Congressional subpoena]; Buzzfeed article [NYSCEF Doc No. 12] [discussing viral Tweet in support of Colin Kaepernick]).

Dr. Gu has also appeared as a named plaintiff in a widely publicized lawsuit challenging former President Trump's practice of blocking critics on Twitter as a violation of his and other Twitter users' First Amendment rights (*see Knight First Amendment Inst. at Columbia Univ. v Trump*, 928 F 3d 226, 239 [2d Cir 2019], *cert granted and judgment vacated sub nom Biden v Knight First Amendment Inst. at Columbia Univ.*, ___ US ___, 141 S Ct 1220 [2021]).

The Verge's Article on Dr. Gu and the Surrounding Controversies

On February 20, 2018, Yan contacted Dr. Gu, identifying herself as a freelance writer from Brooklyn who wanted to do a profile or story on him. Dr. Gu agreed to an interview, and spoke with Yan via Skype on February 22, 2018, and then again on April 2, 2018 (amended complaint, ¶ 8). Dr. Gu alleges that most of the discussion was about activism for Asian American issues that he was involved in on social media (*id.*).

Dr. Gu further alleges that, in May 2018, he discovered that Yan was publicly communicating on Twitter with an anonymous user claiming to be a physician called #MedTwitter. This anonymous user went by various Twitter handles including @nefariousMD, @nefariousBFT, and @thephoenixMD1. Dr. Gu alleges that, on multiple occasions, this anonymous account harassed him with racial epithets about his Asian American heritage, false accusations of domestic violence, and ganged up with other physicians on #MedTwitter to publicly ask him to commit suicide, and donate his organs to these physicians for further study (*id.*). On June 7, 2018, Gu emailed Yan, explaining that, because of her tweets to anonymous user @nefariousMD, @thephoenixMD1, and @ñcfariousBFT who are believed to be the same individual, he would terminate communication with Yan, and pursue a defamation lawsuit if any malicious article resulted from baseless accusations without evidence (*id.*, ¶ 9).

The ensuing Article was published on the Vox Media website The Verge on March 5, 2019, and is entitled, "The Strange Case of Eugene Gu," with the subheading, "Behind one of Twitter's most outspoken social justice personalities is a history of abuse" (Article at 1). The Article starts with an overview of Dr. Gu's rise to fame on Twitter, including his growing number of followers, a viral tweet showing Dr. Gu taking a knee to protest white supremacy, and his participation in the First Amendment challenge to the President's Twitter practices (*id.* at 1-2). Next, the Article states that "Gu had learned just how powerful the platform [Twitter] could be .... Eventually, the same platform that built him up would threaten to be his undoing" (*id.* at 2).

1. Dr. Gu's Claims about Research, Social Justice, and Retaliation

By his own description, Dr. Gu's "story began" in April 2016, when a Congressional investigation into the use of human fetal tissue sought information about his research, which used fetal tissue (*id.*). The Article reports that Vanderbilt University Medical Center, where he worked at the time, "advised him to speak very little about his research," but that Dr. Gu "no longer wanted to stay silent," and instead appeared on NPR to discuss his research and the subpoena (*id.* at 2-4).

Several months later, Dr. Gu tweeted a photo of himself, dressed in scrubs and medical gear, taking a knee in support of National Football League (NFL) quarterback Colin Kaepernick and others who did so, to protest police brutality and racial inequality (*id.* at 2, 4-5; amended complaint, ¶¶ 8, 28). Dr. Gu explained that this photograph, which was retweeted more than 51,000 times, was motivated by a "very traumatic event" in which he claims he was "racially and physically attacked" in the parking lot outside of his workplace, and what he describes as the police's "preposterous" response (Article at 4-5).

The Article also describes how, shortly thereafter, Vanderbilt placed Dr. Gu on administrative leave, and subsequently decided not to renew his residency contract (*id.* at 5). Dr.

Gu claimed that Vanderbilt was "trying to suppress me so hard and ruin my career," and posted that "[n]obody should be punished for taking a knee to fight white supremacy or speaking out against physical violence and bullying" (*id.* at 5-6). Nonetheless, Vanderbilt claimed that its decision arose due to Dr. Gu's performance issues (*id.*). The Article included a screen shot of Dr. Gu's tweet, links to Vanderbilt's publicly posted statement, and links to coverage of the dispute in the news outlets Buzzfeed and USA Today (*id.* at 6-7).

2. Interpersonal Conflicts and Allegations of Abuse

The Article also reports on the conflict between Dr. Gu's view of himself as a victim of racism and retaliation, and several other reports shared online by his critics, ranging from alleged online harassment, to questionable sexual encounters, to physical violence.

First, the Article describes Dr. Gu's relationship with Allison (a pseudonym), which began as an online discussion of his activism on Twitter, and progressed into a relationship and in-person visit in Nashville (*id.* at 7). Among other things, the Article describes two sexual encounters that Allison later publicly posted about on Twitter—a brief encounter that left Allison "a little upset," because she had not been sure she wanted to sleep with Dr. Gu, and a later incident that left her in tears:

> "You're the only person in the world I can talk to," Gu told her. "If it wasn't for you, I might have killed myself tonight." Back at Gu's apartment, he started 'pawing' at her while she tried to refuse. She tried to push him away. He kept at it. "It was just like that until he passed out. That's when I got up, turned on the shower, and was crying"

(*id.* at 8). The Article also includes a cautionary note at the beginning: "Warning: this piece contains descriptions of sexual assault" (*id.* at 1).

As the Article also reports, Dr. Gu does not deny an intimate relationship or the in-person visit but has claimed—again, publicly, on Twitter—that Allison's allegations were "100 percent

empathetically [sic] false" and that Allison had seduced and harassed him (*id.* at 14-15). The Article notes his claim that several suggestive text messages, "a sexually explicit voicemail and a drunk voicemail that he allegedly received from Allison" are "evidence of his innocence" (*id.* at 15; *see also* amended complaint, ¶¶ 11-12 [alleging same]). The Article includes both versions of the encounter—and, as defendants explained to Dr. Gu, snippets of text messages can be taken out of context or "easily doctored" (amended complaint, ¶¶ 11-12; *see* email correspondence between Kevin Nguyen, Yan's editor, and Dr. Gu [NYSCEF Doc No. 13] ["I believe the 'hard evidence' you cite in your email are the voicemails and texts you sent along. (If you mean something else, please let me know.) We included a reference to the voicemails in the story, but did not include the texts. The text screenshots are difficult to corroborate and can be easily doctored, and you sent them along very late in the process for this story"]).

Second, the Article reports on Dr. Gu's Twitter feud with another user, a user by the name @NefariousMD, who posted about allegations of domestic violence made by Dr. Gu's ex-wife in court filings (*id.* at 10-11). Dr. Gu does not deny that his ex-wife made allegations of domestic violence or obtained a restraining order against him (*see id.*; *see also* 2/9/15 Temporary Restraining Order in *Gu v Gu* [Super Ct, Alameda County, CA] [NYSCEF Doc No. 15]). However, he does deny the truth of his ex-wife's allegations, and contends—as the Article reported—that they were "tactics of an overly aggressive lawyer," and that dismissed or expunged records should not be discussed (Article at 11; *see also* amended complaint, ¶ 8).

The Article also reported that, when Dr. Gu learned the author had contacted @NefariousMD during the reporting of the Article, Dr. Gu cut off all communications with Yan, stated that it would be "a gross miscarriage of journalistic integrity" to include input from

@NefariousMD, and threatened litigation if the domestic violence allegations were referenced in the Article (Article at 11; amended complaint, ¶ 9).

Third, the Article reported on claims that Dr. Gu used fake Twitter accounts to harass his critics, including through a "bizarre, aggressive, and confrontational" account by the name @MaryLauryMD, which Dr. Gu acknowledged that he used and helped to create (Article at 12-13). In contrast to Dr. Gu's official profile, @MaryLauryMD messaged Allison about her relationship with Dr. Gu and their sex life, criticized @NefariousMD as often as 60 times per day, and even alleged that @NefariousMD was responsible for a patient's death (Article at 11).

Dr. Gu's Allegations

Subsequently, Dr. Gu brought this action against defendants, asserting one claim for defamation, based on the Article. On March 18, 2020, he filed an amended complaint, which expanded on his allegations, and added a second claim for intentional infliction of emotional distress.

In his first cause of action, Dr. Gu objects to seven discrete statements in the Article:

- "Behind one of Twitter's most outspoken social justice personalities is a history of abuse" (the First Statement);

- "Warning: this piece contains descriptions of sexual assault" (the Second Statement);

- "Eventually, the same platform that built him up would threaten to be his undoing" (the Third Statement);

- "I [the author] tweeted at an especially ardent critic, the (now deleted) @NefariousMD, asking for his perspective on Gu. @NefariousMD often posted screenshots of an unsettling piece of Gu's past: a series of arrest citations, including filed restraining orders and allegations of domestic violence" (the "Fourth Statement");

- "Maybe it was how easily Gu sounded indignant during our interviews, or the tense, charged terms he used to describe the alleged discrimination he suffered, or how, in every narrative, he was always the victim" (the "Fifth Statement");

> • "'You're the only person in the world I can talk to,' Gu told her [Allison]. 'If it wasn't for you, I might have killed myself tonight'" (the "Sixth Statement");
>
> • "Back at Gu's apartment, he started 'pawing' at [Allison] while she tried to refuse. She tried to push him away. He kept at it. 'It was just like that until he passed out. That's when I got up, turned on the shower, and was crying'" (the "Seventh Statement")

(amended complaint, ¶¶ 19 [a]- [g]).

Dr. Gu alleges that each of these statements is false, and claims that defendants should have known this because of the voicemails and transcripts that Dr. Gu provided. Dr. Gu asserts that his reputation has been damaged by these statements, but does not identify any individual whose opinion of him has changed, or any financial or other harm that resulted.

In his second cause of action, Dr. Gu takes issue with the date the Article was published—his birthday—and the illustrations used, which he contends cause him to look "sinister" (*id.*, ¶¶ 27, 28). Dr. Gu also asserts that defendants "conspired with" his opponents by contacting his critics as part of Yan's investigation, and "published the defamatory article with the knowledge that it would inflame bullying against Gu" (*id.*, ¶ 29)

DISCUSSION

"'On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), [the Court must] accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). At the same time, however, allegations consisting of bare legal conclusions are not entitled to any such consideration (*id.*; *Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Dismissal is also warranted under CPLR 3211 (a) (1) "'where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538-39 [1st Dept 2019], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] ["When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff has stated a cause of action to whether it has one'"] [citation omitted]). On a motion to dismiss under CPLR 3211 (a) (1) and 3211 (a) (7), the court may consider documents referenced in the complaint (*see Donoso v New York Univ.*, 160 AD3d 522, 524 [1st Dept 2018]).

Construing the claims in the generous matter to which they are entitled, this court nevertheless concludes that defendants' motion to dismiss must be granted, as none of the alleged defamatory statements identified by plaintiffs is actionable, and the intentional infliction of emotional distress claim is legally deficient on its face.

Defamation (First Cause of Action)

"To state a cause of action alleging defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (*Rosner v Amazon.com*, 132 AD3d 835, 836-837 [2d Dept 2015]; *see also Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]).

The defamation claim fails, as a matter of law, because Dr. Gu has not identified any actionable statements in the Article (*see Brian v Richardson*, 87 NY2d 46, 50-51 [1995] ["The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory"]).

First, a complaint must identify specific statements of fact, not opinion. "Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 380-81 [1977] [claim that judge "is incompetent and should be removed," accompanied by factual basis, was opinion and "each reader may draw his own conclusion"]; *Silverman v Daily News, L.P.*, 129 AD3d 1054, 1055 [2d Dept 2015] [statement that plaintiff's writings were "racist," accompanied by quotations from materials, was non-actionable opinion]; *McGill v Parker*, 179 AD2d 98, 105 [1st Dept 1992] [report that horse stables were "completely unacceptable and unsuitable" was opinion, based on undisputed facts about the stables]).

Second, falsity is a required element of a defamation claim (*Rinaldi, Inc.*, 42 NY2d at 380 ["the plaintiff must establish that the statement was, in fact, false"]). Thus, a defamation action must be dismissed when the statement at issue is "substantially true" (*Tannerite Sports, LLC v NBCUniversal News Group*, 864 F3d 236, 242 [2d Cir 2017]). "'[A] statement is substantially true if the statement would not have a different effect on the mind of the reader from that which the pleaded truth would have produced'" (*id.* [citation omitted], *see also Masson v New Yorker Magazine, Inc.*, 501 US 496, 517 [1991] [a statement is not "false" so long as "'the substance, the gist, the sting, of the libelous charge [is] justified'"] [citation omitted]). When assessing substantial truth, "'[t]he entire publication, as well as the circumstances of its issuance, must be considered'" (*Tannerite*, 864 F3d at 243 [citation omitted]; *see also Stepanov*, 120 AD3d at 38). Courts apply this standard liberally, to prevent the media from being "damaged by an overly technical or exacting conception of truth in publication" (*Tannerite*, 864 F3d at 243).

Finally, the specific challenged statements must be capable of a defamatory meaning, that is, it must "'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an

evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (*Rinaldi*, 42 NY2d at 379 [citation omitted]). If a statement is "not reasonably susceptible" of such a defamatory meaning, it is not actionable as a matter of law, and "cannot be made so by a strained or artificial construction" (*Aronson v Wiersma*, 65 NY2d 592, 594 [1985]; *Klepetko v Reisman*, 41 AD3d 551, 551 [2d Dept 2007] [same]).

It is for the court to decide whether each challenged statement is actionable (*see Rinaldi*, 42 NY2d at 381 ["Whether a particular statement constitutes fact or opinion is a question of law"]; *Greenberg v Spitzer*, 155 AD3d 27, 44 [2d Dept 2017] [the "'issue of whether particular words are defamatory presents a legal issue to be resolved by the court'"] [citation omitted]). Courts "consider the content of the communication as a whole, as well as its tone and apparent purpose" (*Brian*, 87 NY2d at 51), "'against the background of its issuance' with respect to 'the circumstances of its publication'" (*James v Gannett Co.*, 40 NY2d 415, 420 [1976] [citation omitted]). They should not "pick out and isolate particular phrases" or "strain to place a particular interpretation on the published words," but must consider "its effect upon the average reader" (*id.* at 419-420).

Where, as here, a plaintiff cannot identify a defamatory, false statement of fact, dismissal is appropriate under CPLR 3211 (*see e.g. Jimenez v United Fedn. of Teachers*, 239 AD2d 265, 266 [1st Dept 1997] [affirming dismissal where contested statements were not defamatory, constituted nonactionable opinions, or were privileged]; *McGill*, 179 AD2d at 105 [affirming dismissal where plaintiff identified only substantially true statements or non-actionable opinion]; *Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 537 [1st Dept 2013] [affirming dismissal where "challenged statements … when read in context, do not constitute false factual statements, which is a sine qua non of a libel claim"]).

1. The First Statement

Dr. Gu challenges the Article's subheading, which reads, "Behind one of Twitter's most outspoken social justice personalities is a history of abuse" (amended complaint, ¶ 19 [a]; Article at 1).

In order to determine whether the headline, or in this case, a subheading, of a news article is defamatory in nature, "the court must initially determine whether the headline was a fair index of the article with which it appears" (*Mondello v Newsday, Inc.*, 6 AD3d 586, 587 [2d Dept 2004]; *see also Test Masters Educ. Servs., Inc. v NYP Holdings, Inc.*, 603 F Supp 2d 584, 589 [SD NY 2009] [a headline is not actionable so long as it is a "fair index of the substantially accurate material included in the article"] [internal quotation marks and citation omitted]). "'The rule is general that both the headline and the item to which it is attached are to be considered one document in determining the effect of an article being complained of as defamatory'" (*Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 426 [1st Dept 1968] [citation omitted], *affd* 25 NY2d 943 [1969]; *see also Von Gerichten v Long Is. Advance*, 202 AD2d 495, 496 [2d Dept 1994] [holding that the "headline of the article [] must be read and evaluated in conjunction with the text it precedes"]). This is a threshold question of law for the court (*see Pritchard v Herald Co.*,120 AD2d 956, 956 [4th Dept 1986]). "If the headline is indeed a 'fair index' of the related news article, it is not actionable as a matter of law" (*White v Berkshire-Hathaway, Inc.*, 10 Misc 3d 254, 255 [Sup Ct, Erie County 2005], citing *Gunduz v New York Post Co.*, 188 AD2d 294, 294 [1st Dept 1992]; *see also Cabello-Rondón v Dow Jones & Co., Inc.*, 2017 WL 3531551 at * 6, n 3, 2017 US Dist LEXIS 131114 at * 16, n 3[SD NY, Aug. 17, 2017, 16-CV-3346 (KBF)] [granting motion to dismiss]).

Under this standard, "[a] newspaper need not choose the most delicate words available in constructing its headline" (*Test Masters Educ. Servs.*, 603 F Supp 2d at 589). In fact, "it is permitted some drama in grabbing its reader's attention" (*id.* [using "Scam" in headline to refer to company was fair index of article reporting that Consumer Protection Bureau had investigated the company and demanded it provide refunds]; *see also Gunduz*, 188 AD2d at 294 [headline, "Public Enemy No. 1," was non-actionable fair index of article even though plaintiff, a taxi driver, had not committed a crime]). Even if a headline is "unfortunate, sensationalist and drafted simply to garner attention," it is not actionable where it is a fair index of the underlying article (*Louis v NYP Holdings, Inc.*, 54 Misc 3d 1222[A], 2017 NY Slip Op 50276[U], * 2 [Sup Ct, NY County 2017]).

Here, the subheading is a fair summary of the content in the Article, which reports on the various allegations of verbal, domestic, and sexual abuse that have been levied against Dr. Gu. As such, it is not actionable (*see Schermerhorn v Rosenberg*, 73 AD2d 276, 287 [2d Dept 1980] ["If the headline is a fair index of an accurate article, it is not actionable"]).

Moreover, this statement is substantially true, because Dr. Gu does not dispute key factual statements that the subheading merely summarizes (*see McGill*, 179 AD2d at 105 [affirming dismissal where plaintiff did not dispute material facts, only conclusion drawn from them]). The Article describes allegations of domestic violence, claims of sexual misconduct, and reports of online harassment surrounding Gu, as well as his response to these allegations (*see* Article at 1-4, 14-15). Although, in opposition, Dr. Gu contends that the underlying allegations are false (*see* opposition memorandum [NYSCEF Doc No. 30], at 17-19), he does not deny that the allegations exist (*see* Article at 11 [arguing that domestic violence allegations were "the tactics of an overly aggressive lawyer"]; *id.* at 15 [conceding involvement in @MaryLauryMD account]; amended complaint, ¶¶ 11-12; *see also Gu v Gu* court filings]).

Finally, even if the court were to construe the first statement as endorsing the veracity of these allegations, rather than just reporting on their existence, the statement would still be protected as non-actionable opinion based on disclosed facts. New York courts recognize an important distinction between a statement of opinion that implies a basis in facts which are not disclosed to the reader or listener, and a statement of opinion that is accompanied by a recitation of the facts on which it is based, or one that does not imply the existence of undisclosed underlying fact (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). "[T]he latter are not actionable because ... a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture" (*id.* at 154; *see also Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986] ["A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based"]). The Article here fulfils those requirements, setting forth the facts supporting the suggestion that there is "a history of abuse," and that "each reader may draw his own conclusion" (*see Rinaldi*, 42 NY2d at 381; *Fleischer*, 104 AD3d at 537 [contested statements were "an inference well supported by the record"]).

2. The Second Statement

The Second Statement, "Warning: this piece contains descriptions of sexual assault" (amended complaint, ¶ 19 [b]), is also non-actionable opinion. No "reasonable reader would have concluded that he or she was reading … facts[] about the plaintiff" (*Silverman*, 129 AD3d at 1055). Rather, a reasonable reader would consider this statement in context, and understand that it was an alert to readers who may be sensitive to certain subjects, commonly known as a trigger warning. The purpose of a trigger warning is to provide a warning to viewers that the post includes content related to trauma. Importantly, the trigger warning here does not provide commentary. Instead, it merely highlights the fact that the Article contains descriptions or references to sexual violence,

or physical abuse. At most, a reasonable reader would understand this to be defendants' opinion that some readers might find portions of the story about a disputed sexual encounter uncomfortable, not any statement of fact about Dr. Gu that could be proven true or false.

Although Dr. Gu asserts that trigger warnings are used "to attract people to the article as being more salacious, pernicious, and damaging to Plaintiff Gu's reputation," (opposition memorandum at 24), this assertion is not supported by the Article (and not alleged in the amended complaint), and thus, need not be credited by the court (*see Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006] ["The court, however, is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence"]).

3. Third, Fifth and Sixth Statements

The third, fifth and sixth statements identified by Dr. Gu are not actionable because they are not capable of a defamatory meaning as a matter of law:

> "'Eventually, the same platform that built him up would threaten to be his undoing.'
>
> 'Maybe it was how easily Gu sounded indignant during our interviews, or the tense, charged terms he used to describe the alleged discrimination he suffered, or how, in every narrative, he was always the victim.'
>
> 'You're the only person in the world I can talk to,' Gu told her. 'If it wasn't for you, I might have killed myself tonight'"

(amended complaint, ¶ 19 [c], [e], [f]; Article at 1).

In the amended complaint, Dr. Gu does not suggest any reason why these statements would "expose the plaintiff to public contempt, ridicule, aversion or disgrace," and no reasonable reader would understand them as such (*Rinaldi*, 42 NY2d at 379; *see also James*, 40 NY2d at 419-20 [court should not "strain to place a particular interpretation on the published words," but must consider "its effect upon the average reader"]). There is nothing inherently defamatory about being

characterized as "indignant" or being a victim, nor is it defamatory to say that Dr. Gu was threatened by the very platform that made him famous. Indeed, the third and fifth statements are also clear expressions of an opinion (that Twitter would threaten to undo Gu or that Gu played the victim), supported by the facts in the Article, and not actionable on that ground as well (*see Fleischer*, 104 AD3d at 537).

Likewise, with regard to the potential suicide reference, this statement is not defamatory as a matter of law, as millions of people in the United States suffer with mental health issues on a daily basis, and thus "does not arouse in the mind of the average person in the community an evil or unsavory opinion [] or expose plaintiff to public hatred, contempt, or aversion" (*Pritchard*, 120 AD2d at 956). Rather, such a statement would tend to induce sympathy or empathy in the mind of the average reader.

Accordingly, these statements are not defamatory, and Dr. Gu's claim based on them must be dismissed

4. The Fourth Statement

The statement regarding @NefariousMD and his publication of allegations of domestic violence against Dr. Gu is also not actionable under New York's fair report privilege for discussions of court records:

> "I tweeted at an especially ardent critic, the (now deleted) @NefariousMD, asking for his perspective on Gu. @NefariousMD often posted screenshots of an unsettling piece of Gu's past: a series of arrest citations, including filed restraining orders and allegations of domestic violence"

(amended complaint, ¶ 19 [d]).

New York Civil Rights Law § 74 sets forth the fair report privilege, which provides absolute immunity from civil liability for defamation: "A civil action cannot be maintained against any person, firm, or corporation, for the publication of a fair and true report of any judicial

proceeding, legislative proceeding or other official proceeding" (Civil Rights Law § 74; *see Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009] [it is "incumbent on the party asserting the privilege to establish that the statements at issue reported on a 'judicial proceeding'"]). "The privilege afforded by Civil Rights Law § 74 is an affirmative defense to a claim of defamation" (*Greenberg v Spitzer*, 155 AD3d 27, 42 [2d Dept 2017]). New York courts routinely grant motions to dismiss defamation claims based on the fair report privilege where, as here, they arise from reporting on government proceedings, including court proceedings (*see e.g. Holy Spirit Assn. for the Unification of World Christianity v New York Times Co.*, 49 NY2d 63 [1979]; *Akpinar v Moran*, 83 AD3d 458 [1st Dept 2011]; *Misek-Falkoff v American Lawyer Media*, 300 AD2d 215, 216 [1st Dept 2002]). Whether an article presents a fair and true report of a judicial or official proceeding is a threshold question of law for the court to decide (*see, e.g.*, *Holy Spirit*, 49 NY2d at 65-68).

The fair report privilege has been liberally interpreted to provide broad protection for news reports of judicial proceedings (*Holy Spirit*, 49 NY2d at 67). Thus, this privilege applies "where the publication is a comment on a judicial, legislative or other official proceeding . . . and is a 'fair and true' report of that proceeding" (*Saleh v New York Post*, 78 AD3d 1149, 1151 [2d Dept 2010]). Courts construe the first element broadly, and the report or article need not stem directly from a judicial proceeding, but rather, can be *about* a judicial proceeding. Accordingly, statements in an article reporting on court papers "are part of a 'report of [a] judicial proceeding'" which fall within section 74's privilege (*Russian Am. Found., Inc. v Daily News, L.P.*, 109 AD3d 410, 413 [1st Dept 2013]).

As to the "fair and true" element, courts again take a broad view, with the Court of Appeals noting that for a report to be characterized as fair and true, "it is enough that the substance of the

article is substantially accurate" (*Holy Spirit*, 49 NY2d at 67). Minor inaccuracies will not remove the article from the ambit of the statute (*Saleh*, 78 AD3d at 1153; *Posner v New York Law Publ. Co.*, 228 AD2d 318, 318 [1st Dept 1996]). In summary, a court "must look for substantial and contextual accuracy of the news report as the standard for determining a fair report under [section 74]" (*Rakofsky v Washington Post*, 39 Misc 3d 1226[A], 2013 NY Slip Op 50739[U], * 9 [Sup Ct, NY County 2013]).

Importantly, section 74 protects reporting on allegations made in official proceedings, regardless of whether the underlying allegations are true or false (*see e.g. Mulder v Donaldson, Lufkin & Jenrette*, 161 Misc 2d 698, 705 [Sup Ct, NY County 1994] ["(t)he question is not whether or not the statement is 'true.' The question is whether it is a substantially accurate description of the claims made in the … proceeding"], *affd*, 208 AD2d 301 [1st Dept 1995]; *see also Zappin v NYP Holdings, Inc.*, 2018 WL 1474414, * 7, 2018 US Dist LEXIS 49479, * 20 [SD NY Feb. 2, 2018, 16 CV 8838 (KPF)] ["(t)o invoke the § 74 privilege properly, Defendants need not prove that the statements made at the ... proceeding were, themselves, accurate; rather, all that matters for the application of § 74 is that the article is a substantially accurate rendering of what was said, even if the testimony given was not true"], *affd* 769 Fed Appx 5 [2d Cir 2019]).

Under this standard, the statement regarding @NefariousMD and his publication of allegations of domestic violence against Dr. Gu is not actionable. Court files from Dr. Gu's divorce show that his ex-wife sought and obtained a Temporary Restraining Order for domestic violence prevention against Dr. Gu on February 9, 2015, and that the order remained in place until March 9, 2015, when she declined to pursue the matter further (*see Gu v Gu* court filings]. Even if Dr. Gu denies the truth of his ex-wife's allegations, the Article's description of family law or arrest records "including filed restraining orders and allegations of domestic violence" (Article at

10-11), is "a fair and substantially accurate portrayal" of the proceedings, and is therefore absolutely privileged under Civil Rights Law § 74 (*Cholowsky*, 69 AD3d at 115; *see e.g. Tenney v Press-Republican*, 75 AD3d 868, 869 [3d Dept 2010] [report on complaint was absolutely privileged, even where plaintiff disputed the allegations and article did not address other pleadings]; *Gillings v New York Post*, 166 AD3d 584, 587 [2d Dept 2018] [article's "fair report" of "divorce action commenced against the plaintiff by his former wife" was absolutely privileged]).

5. The Seventh Statement

The final statement upon which the amended complaint asserts a claim is also substantially true and/or protected as opinion:

> "Back at Gu's apartment, he started 'pawing' at her while she tried to refuse. She tried to push him away. He kept at it. "It was just like that until he passed out. That's when I got up, turned on the shower, and was crying"

(amended complaint, ¶ 19 [f]; Article at 8).

Such a statement might potentially be actionable as a statement of false fact if, for example, a plaintiff denied that an incident occurred. But here Dr. Gu does not deny his relationship with Allison, the in-person visit, or that they had a sexual relationship (amended complaint, ¶¶ 11-12). The only dispute is how the two parties to that encounter characterized the interaction. Dr. Gu has contended—as defendants reported—that "Allison was the seducer, and he the unwilling victim" (Article at 15). Dr. Gu only takes issue only with Allison's characterization of their tryst—i.e., that he was "pawing" at her, that she tried to push him away—but this is opinion, based on disclosed facts, and is not actionable (*see Rinaldi*, 42 NY2d at 379). The Article explains the basis for Allison's opinion, provides Dr. Gu's response, and discusses the contradiction in the two individuals' opinions (*see* Article at 7-8, 14-15). Indeed, the author even describes her own

conflict over including the "unresolved questions from [Dr. Gu's] past" (*id.* at 14-15). This statement is therefore protected opinion, and thus cannot properly provide the basis for his defamation claim.

In opposition to the motion, Dr. Gu argues that the Article asserted that he "was not merely accused of domestic violence, but that he actually committed domestic violence" (opposition memorandum, at 9). However, the Article never states that Dr. Gu committed domestic violence:

> "@NefariousMD often posted screenshots of an unsettling piece of Gu's past: a series of arrest citations, including filed restraining orders and allegations of domestic violence. I'd come across the allegations early in my research, and asked Gu about it in our interviews"

(Article at 10-11).

Dr. Gu also claims that the Article reports that "upon Laura Yan's investigation, Plaintiff Gu actually committed sexual assault" (opposition memorandum, at 15, 22). Dr. Gu's characterization of the Article is incorrect. In fact, the Article writes that Allison took to Twitter and 'described ... a date that turned into something resembling sexual assault" (Article at 14). The Article also recounts Dr. Gu's "own account of what happened between the two of them," which he also shared on Twitter (*id.* at 15), and the Article makes no evaluation of these two competing stories.

In his opposition, Dr. Gu fails to rebut defendants' argument that this statement is not actionable because it is Allison's opinion of events that Dr. Gu does not dispute. While Dr. Gu objects to the characterization of the encounter as sexual assault (which, again, is not what the Article states), he does not deny the encounter, only Allison's interpretation and reaction to it.

The opposition also ignores the fact that the Article includes Allison's quote as part of a larger conversation about the accusations against Dr. Gu, and his denials and responses to those allegations. Instead, Dr. Gu insists that defendants "falsely claimed ... that he committed sexual

assault," but that language is simply not in the Article, nor is any accusation of rape, as Dr. Gu would have the Court believe (*see* opposition at 22, 28 ["Needless to say, there is a huge difference between having sexual intercourse and raping someone"]). The quoted language reflects Allison's opinion and description of an undisputed encounter and is not actionable.

Thus, none of the seven statements identified in the amended complaint are actionable, defamatory statements of fact. Accordingly, the defamation claim is dismissed.

The defamation claim fails on a separate and independent basis as well. Where, as here, the plaintiff is a public figure, he must plead (and ultimately prove by clear and convincing evidence) that a defendant published the challenged report "with 'actual malice'—that is, with knowledge that the statements were false or with reckless disregard as to their falsity" (*Biro v Condé Nast*, 807 F 3d 541, 544 [2d Cir 2015], citing *New York Times Co. v Sullivan*, 376 US 254, 279-80 [1964]; *James*, 40 NY2d at 421-25)

In order to protect speech on matters of public concern, the law of defamation distinguishes between private figures and officials and public figures—i.e., those who by their engagement with public life or public controversies expose themselves to greater criticism (*Gertz v Robert Welch, Inc.*, 418 US 323, 351 [1974]). There are two types of public-figure plaintiffs: One is a person of "such pervasive fame or notoriety" that he becomes a "public figure for all purposes and in all contexts," and the other is a person who "injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues" (*id.*).

The people in the latter group, "who *voluntarily inject* themselves into a particular public controversy[,] are considered limited purpose public figures" (*Lerman v Flynt Distrib. Co.*, 745 F2d 123, 136 [2d Cir 1984] [emphasis in original]). The "critical consideration" is whether the "plaintiff had taken affirmative steps to attract personal attention or had strived to achieve a

measure of public acclaim" (*Maule v NYM Corp.*, 54 NY2d 880, 881-82 [1981]; *James*, 40 NY2d at 422 ["The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention"]).

New York courts have found plaintiffs to be limited purpose public figures based on their political activities, solicitation of press coverage, and involvement in public controversies (*see e.g. James*, 40 NY2d at 423 [dancer became a limited purpose public figure by participating in interviews about and "welcome[ing] publicity regarding her performances"]; *Blum v State of New York*, 255 AD2d 878, 880 [4th Dept 1998] [former professor was a limited purpose public figure with regard to his public dispute with law school]; *see also Perks v Town of Huntington*, 251 F Supp 2d 1143, 1168-69 [ED NY 2003] [plaintiff became limited purpose public figure by giving press conferences and availing himself of the media to report harassment claims]).

Here, Dr. Gu has plainly "thrust [him]self into the public spotlight and sought a continuing public interest in [his] activities," (*James*, 40 NY2d at 423), by writing; appearing on camera; granting press interviews; and tweeting extensively about his social activism, racial discrimination against Asian Americans, and the retaliation and harassment he claims to have endured in response. Accordingly, Dr. Gu has clearly sought the public spotlight, and is thus a limited purpose public figure as it relates to his activism and the harassment and bullying surrounding it—precisely the issues explored by the Article.

Although Dr. Gu argues that he is a limited purpose public figure "only within medicine and healthcare" (opposition memorandum at 29), in reality, Dr. Gu's admissions in the opposition memorandum bolster defendants' argument. For instance, Dr. Gu contends that:

- "When I spoke up against those in power ... they intensely bullied me as a way to silence my speech" (*id.* at 6);

> • "I decided to 'take a knee' as an Asian American doctor as a symbolic gesture to fight white supremacy" and doing so "garnered attention on social media but caused significant controversy within the medical community" (*id.*);
>
> • "I also joined a lawsuit against President Donald J. Trump for blocking me and my co-plaintiffs on Twitter after I routinely spoke out against him on issues of racial discrimination, medicine, and politics," (*id.*); and
>
> • "Unfortunately, my dissent against those in power attracted the attention of President Donald J. Trump's eldest son, Donald Trump Jr.," (*id.*).

All of these statements demonstrate that Dr. Gu has "thrust [him]self into the public spotlight and sought a continuing public interest in" his social activism, and the bullying and retaliation he experienced in response, particularly on Twitter (*see James*, 40 NY2d at 423). As the Article describes Dr. Gu's social media activism and the criticism that followed, Dr. Gu is at least a limited purpose public figure for purposes of the Article.

However, the amended complaint does not allege any facts suggesting actual malice. Actual malice is a term of art under the First Amendment, which means that defendants published a challenged statement that they knew was false, "in fact entertained serious doubts as to [its] truth," (*St. Amant v Thompson*, 390 US 727, 731 [1968], or had a "high degree of awareness of [its] probable falsity" (*Garrison v State of Louisiana*, 379 US 64, 74 [1964]).

New York courts regularly dismiss claims where, as here, it is apparent from the face of the pleading that the plaintiff cannot prove actual malice (*see e.g. Jimenez*, 239 AD2d at 266 [affirming dismissal of public figure's defamation action because plaintiff "was required but failed to allege facts sufficient to show actual malice with convincing clarity"]; *Winklevoss v Steinberg*, 170 AD3d 618, 619 [1st Dept 2019] [affirming dismissal where limited purpose public figure failed to allege actual malice]; *Serratore v American Port Servs.*, 293 AD2d 464, 465 [2d Dept 2002] [affirming dismissal of defamation claim under CPLR 3211 (a) (7) where plaintiff's "mere conclusory assertions of (actual) malice do not suffice"]; *Red Cap Valet, Ltd. v Hotel Nikko (USA)*,

273 AD2d 289, 290 [2d Dept 2000] ["plaintiff failed to allege any facts from which malice could be inferred and its conclusory allegations of malice were insufficient"]).

Here, the amended complaint provides mostly conclusory allegations with respect to malice (*see* amended complaint, ¶¶ 11 ["The Defamatory Article obviously had a clear malicious motive, and also acted with reckless disregard for the truth"], 14 ["The Defamatory Article was written with actual malice, as alleged herein"]; 16 [defendants "acted with malice or at a bare minimum a reckless disregard for Gu's rights"]; 25 [same]). These allegations, however, are insufficient to support a claim for defamation (*Serratore*, 293 AD2d at 465 ["mere conclusory assertions of [actual] malice do not suffice"]).

Moreover, the factual allegations that plaintiff does plead demonstrate, as a matter of law, that he will not be able to prove actual malice (*see Penaherrera v New York Times Co.*, 2013 NY Slip Op 34181(U), **17 [Sup Ct, NY County 2013] [plaintiff alleged actual malice in "conclusory" fashion or with allegation that "does not as a matter of law, establish actual malice"]). Plaintiff contends that he provided "certified transcripts, voicemails, emails, text messages, and police reports that showed that he was the victim of repeated sexual harassment" (amended complaint, ¶ 2), but as defendants explained to him, these could be "easily doctored" (*id.*, ¶ 11). In any event, even assuming they were from Allison, the messages are not evidence that Allison's description of her encounters with Dr. Gu was untrue. At most, they show that Allison continued her relationship with Dr. Gu after their visit, as she acknowledges, and the Article reported (Article at 14).

Dr. Gu also alleges that defendants acted with actual malice by contacting @NefariousMD and referencing his accusations in the Article (amended complaint, ¶ 14). However, even if @NefariousMD was "biased" against Dr. Gu, consulting with—or even relying on—allegedly

biased sources does not establish actual malice as a matter of settled law, "since it does not warrant the inference that the … defendants entertained serious doubts about the truth of the complained of statements" (*Gross v New York Times Co.*, 281 AD2d 299, 299 [1st Dept 2001]). This is particularly true where those allegations included undisputed court pleadings and were countered only by plaintiff's unsupported denials, which "are so commonplace … they hardly alert the conscientious reporter to the likelihood of error'" (*Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 691 n 37 [1989] ["the press need not accept 'denials, however vehement'" [citation omitted]).

Dr. Gu also argues again that "transcripts" of voice messages from Allison disprove her allegations, but he does not explain why these messages would actually contradict her depiction of the events (*see* opposition memorandum, at 9). Indeed, the voicemails and text messages he references could be "easily doctored" and, even assuming that they were from Allison, the messages are not evidence that Allison's description of her encounters with Dr. Gu was untrue. At most, they show that she continued her relationship with Dr. Gu after their visit, as she acknowledges, and the Article reported (Article at 14; *see* amended complaint, ¶ 12).

Moreover, plaintiff's allegations only demonstrate that defendants repeatedly sought his comment, considered his side of the story, and included multiple viewpoints throughout the Article. This is the opposite of actual malice (*see e.g. Biro v Condé Nast*, 963 F Supp 2d 255, 287 [SD NY 2013] [finding actual malice implausible where article itself sought comment from plaintiff and portrayed his views]), *affd*, 807 F3d 541 [2d Cir 2015]; *see also id.* at 288 ["while the Article may reflect an unflattering portrayal of (plaintiff), it is bereft of 'express accusations,' but rather 'lays out evidence that may raise questions, and allows reader to make up his or her own mind.… Such a style of reporting is far from what might be expected of an author acting with

actual malice" [citations omitted]; *Contemporary Mission, Inc. v New York Times Co.*, 665 F Supp 248, 270 [SD NY 1987] [in rejecting actual malice arguments, noting "its author made an attempt to report plaintiffs' side of the story"], *affd*, 842 F2d 612 [2d Cir. 1988], *cert denied sub nom O'Reilly v New York Times Co.*, 488 US 856 [1988]).

Accordingly, because Dr. Gu is a limited purpose public figure for purposes of the Article, and because the amended complaint does not support an inference of actual malice, the defamation claim must be dismissed on this separate and independent ground as well.

Intentional Infliction of Emotional Distress (Second Cause of Action)

In his second cause of action for intentional infliction of emotional distress, Dr. Gu alleges that defendants "engaged in conduct that was intentional and malicious, and done for the purpose of causing Plaintiff Gu to suffer humiliation, mental anguish, and emotional and physical distress" (amended complaint, ¶ 26). The conduct that plaintiff refers to is defendants' publication of the Article on his birthday (*id.*, ¶ 27) and a series of illustrative artworks, placed within the article, that were allegedly designed to make him appear sinister and evil (*id.*, ¶ 28). Plaintiff also alleges that "Yan actively conspired with physicians and anonymous Twitter users asking Plaintiff Gu to commit suicide and donate his organs to them, and published the defamatory article with the knowledge that it would inflame bullying against Gu to inhumane levels of emotional distress" (*id.*, ¶ 29).

All of these causes of action are based upon the same conduct as that alleged in the defamation claim – the statements published in the Article. As such, there are merely an attempt to recast the defective defamation claims as claims for negligent and intentional infliction of emotional distress and prima facie tort. New York courts routinely dismiss such derivative claims where, as here, they "fall within the ambit of other traditional tort liability, namely, [a] cause of

action sounding in defamation" (*Fleischer*, 104 AD3d at 538 [dismissing "causes of action alleging prima facie tort and intentional infliction of emotional distress against each of the defendants . . . as duplicative"]; *see also Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017] ["Supreme Court properly granted defendant's motion to dismiss plaintiff's claim for intentional infliction of emotional distress as duplicative of her defamation cause of action"]; *Bacon v Nygard*, 140 AD3d 577, 578 [1st Dept 2016] ["The intentional infliction of emotional distress and prima facie tort claims are duplicative since the underlying allegations fall 'within the ambit' of the defamation causes of action"]; *Stanley v City of New York*, 71 Misc 3d 171, 181 [Sup Ct, NY County 2020] ["As an initial matter, causes of action for intentional and negligent infliction of emotional distress are not permitted if they essentially duplicate tort . . . causes of action"]).

Because these claims are based on the same conduct as Dr. Gu's defamation claim – the statements published in the Article – they must be dismissed as duplicative.

Accordingly, it is

ORDERED that defendants' motion to dismiss the amended compliant herein is granted, and the amended complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

7/18/2023
DATE

SHLOMO S. HAGLER, J.S.C.

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