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March 13, 2019

BY HAND

Susanna Molina Rojas
Clerk of Court
Supreme Court of the State of New York
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: Haggis v. Breest, Index No. 161123/2017

Dear Ms. Rojas:

We are counsel to Plaintiff-Appellant Paul Haggis. We write to notify the Court that Mr. Haggis hereby withdraws his Notice of Appeal dated September 13, 2018 in the above-captioned action. This appeal was not perfected prior to its withdrawal.

Please note, however, that Mr. Haggis has *not* withdrawn his Notice of Appeal (which was also dated September 13, 2018) in the parties' related action entitled *Breest v. Haggis*, Index No. 161137/2017 (the "Related Action"). Mr. Haggis perfected his appeal in the Related Action yesterday, and Mr. Haggis intends to proceed with that appeal.

Please do not hesitate to contact us with any questions.

Respectfully,

Jeffrey M. Movit
A Professional Corporation for
MITCHELL SILBERBERG & KNUPP LLP

cc: Counsel of Record (by hand)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PAUL HAGGIS, Plaintiff, v. HALEIGH BREEST, Defendant.	INDEX NO. 161123/2017 Hon. Robert R. Reed (J.S.C.) IAS Part 43 **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiff Paul Haggis, by his attorneys Mitchell Silberberg & Knupp LLP, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from those parts of the Order of the Honorable Robert R. Reed, Justice of the Supreme Court of the State of New York, County of New York, which granted Defendant Haleigh Breest's Motion to Dismiss Plaintiff's Complaint pursuant to CPLR 3211(a)(7), which Order was entered in the office of the Clerk of the Court on August 15, 2018. A copy of the so-ordered transcript comprising the Order appealed from is attached hereto.

B308179.1

Dated: September 13, 2018
New York, New York

MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Christine Lepera

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Paul Haggis,

Plaintiff,

-against-

Haleigh Breest,

Defendant.

Index No. 161123/17

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached is a true and correct copy of the Court transcript dated July 26, 2018 and so ordered on August 14, 2018 by the Honorable Robert R. Reed, Supreme Court of the State of New York, County of New York, and duly entered in the office of the Clerk of the Court on August 15, 2018.

Dated: August 15, 2018
New York, New York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 43

PAUL HAGGIS,

Plaintiff,

-against-

Index No.
161123/17

HALEIGH BREEST,

Defendant.

MOTION

111 Centre Street
New York, New York
July 26, 2018

B E F O R E:

HONORABLE ROBERT R. REED,

JUSTICE

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OFFICIAL COURT REPORTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 43

HALEIGH BREEST,

Plaintiff,

-against-

Index No.
161137/17

PAUL HAGGIS,

Defendant.

MOTION

111 Centre Street
New York, New York
July 26, 2018

B E F O R E:

HONORABLE ROBERT R. REED,

JUSTICE

A P P E A R A N C E S:

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THE CLERK: While I realize there are plaintiffs and defendants there are two different actions where each one is vice versa. We'll deal with these matters sequentially, so 161123 of 2017 is Haggis, Paul versus Breest, Haleigh. We'll do motion sequences number one and two on that action first.

THE COURT: Can I have appearances, please.

MS. LEPERA: Good morning, your Honor. Christine Lepera, Mitchell Silberberg and Knupp and my colleague, Jeff Movit, counsel for Paul Haggis as plaintiff in the Haggis versus Breest case and as a defendant in the Breest versus Haggis case.

MR. MAAZEL: Good morning, your Honor, Ilann Maazel with Emery Celli Brinckerhoff and Abady. We represent Haleigh Breest both -- in both actions.

MS. SALZMAN: Good morning, your Honor, Zoe Salzman, also from the law firm of Emery Celli Brinckerhoff and Abady, and with us is our partner, Jonathan Abady.

MR. ABADY: Good morning, your Honor.

MS. LEE: Good morning, Lillian Lee for Mitchell Silberberg and Knupp, also for Paul Haggis.

MS. LEPERA: My associate.

THE COURT: This is the motion to strike, we'll do that one first and we'll move along.

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You can have a seat.

MS. LEPERA: I'll stand, I'm going to stand.

THE COURT: Yes.

MS. LEPERA: So the motion to strike in the Haggis versus Breest action is really centralized with respect to the motion to dismiss the Haggis action and the primary opposition to the motion to strike is really their motion to dismiss.

So if I might, your Honor, just lay the ground work here of the scenario so that we can appreciate the scenario.

So essentially the claim that we brought on behalf of Mr. Haggis, who is a very well-known director, academy award winning director, is for intentional infliction of emotional distress. And the claim was premised on a series of communications, and I view it as, essentially, a campaign, albeit short-lived, to extract, based on false allegations of rape, a very, very serious matter -- generally, but in today's world even more so. There's an automatic assumption of guilt associated with it and the press has a field day with any suggestion by anyone of having done anything such as that.

So Mr. Haggis received a very detailed and very lurid, salacious drafted complaint to him personally

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which contained a single claim of gender violence and it basically accused Mr. Haggis of extremely violent and inappropriate conduct in 2013.

Mr. Haggis retained us very, very distressed, very, very concerned. Ultimately, denies, vigorously, these allegations, and was confronted with a situation of a rock and the hard place, if you want to call it that.

So we had some discussions with Ms. Breest's counsel, there was some correspondence which may not be in the record because it contained some confidential information regarding Mr. Haggis's business agreements and relationships that he was very scared about losing, and we vigorously disputed the allegations and made an effort to dissuade Ms. Breest's counsel from filing or even continuing to threaten to file.

It became very apparent and we felt very strongly that this was -- I'll just use a nonlegal term -- a holdup, and that was confirmed when, because Mr. Haggis wanted me to continue communications just to ultimately flush out the scenario, when I was given a number of $9 million as hush money in order to prevent the filing of the action, at which point Mr. Haggis went -- beyond, beyond pain, beyond anguish, because he realized that at this point there's no way he's doing

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that -- he can't even do that.

And number two, it is clear that this is the leverage, it's either file the action and have no leverage to extract from me or don't file the action, which is clearly the goal, and get an exorbitant amount of money for what -- which is clearly false.

THE COURT: How should we distinguish, in any legal setting whether a demand for settlement is an item of extortion?

MS. LEPERA: Yes, I think that's a very good point, your Honor, because that is what they particularly focused on.

THE COURT: I think we generally desire people to try to engage in a settlement of their differences prior to instituting suit. It's expected in, for example, contract cases that you will provide a demand letter so that the other side knows exactly what it is that you are seeking by way of damages.

It would be normal practice, I would think, in personal injury matters for someone to say here is my -- here are my injuries and this is what I seek in damages. So if someone does that, how does that become -- how does that become a recoverable claim?

MS. LEPERA: Let me explain, first of all, I never agreed to have any settlement communications with

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Breest's counsel. I was essentially given the instruction with waiving privilege to go at them and attempt to circumvent what they were doing.

When it became clear and it was apparent, which we concluded was occurring, that it was effectively an extortion effort, not an effort to settle a claim which we were engaging in as a meeting of the minds, that's a fact question and I suggest that when you look at the settlement privileges and you look at the issues relative to those goals, they are discussions about liability and the value of the claim, a particular claim, and we were not -- we were not in any way, shape or form using that, other than as effectively -- even though there's no criminal extortion in New York, there is a criminal penal code for extortion, and the conduct that they engaged in specifically --

THE COURT: And the way you addressed that then is saying, District Attorney Vance, the attorney for this particular party have come to me with something that I consider to be extortionate and ask you to intervene.

MS. LEPERA: And that occurred, and Mr. Haggis did that, but there's no remedy -- and actually the courts that we cite acknowledge that when you threaten a litigation, false allegation of a heinous crime such as

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this, which they did and they put statutes in their pleading that you are going to be in a criminal -- fear of your life situation, not to mention in this climate losing everything you have and if you don't want to do that, give me $9 million. When you do something like that, the question is whether it's outrageous conduct.

Now, we all know that rape is an outrageous situation, but what is equally outrageous, and this is where we need some ability to have reckoning is if it is a false allegation of rape, which is our position, that is used to create an emotional distress and a loss in someone so drastic, there has got to be recourse in a civil proceeding, and the only place where that can be is in IIED claims, and there are cases in our brief where there were false allegations --

THE COURT: Tell me where those are, because I didn't get that --

MS. LEPERA: Sure -- actually, all the cases that Breest counsel cite they talk about it's a drastic claim and not favored and talk about threat of litigation, all that, those are not sexual abuse cases, they are not sexual assault cases.

If you look at the cases of -- Nigro --

THE COURT: So there's a separate standard for sexual assault cases versus other cases --

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MS. LEPERA: Yes.

Let me read this to you --

THE COURT: -- either there a baseless claim or there is not or either there's -- a baseless claim can serve as grounds for intentional infliction of emotional distress or not. Which case are you referring to?

MS. LEPERA: I'm talking about Nigro versus Pickett, 39-AD 3d, 720 --

THE COURT: Where is that in your papers?

MS. LEPERA: Just one second, your Honor. It is on page six of our opposition brief and in this particular case, your Honor, what is really telling is there was a -- using of the threat of making a public false allegation of sexual harassment and sexual assault in order to settle, in order to obtain -- pressure the plaintiffs to settle.

So this is -- and then similarly we are DeJesus which is a case in this Court where there was a denial of summary judgement to dismiss an IIED claim where the defendants had allegedly falsely accused plaintiff of sexual assault.

So there are authorities that are more analogous, even if they keep saying it's not the First Department -- well, they haven't found one that says no. It is a similar situation on point to Nigro, which is a

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Second Department which is obviously clearly valid and persuasive court here.

And there's also another case in the Second Department where there was a valid IIED claim where defendant attempted to coerce plaintiff's resignation by false charges of an affair.

Now that one is even less of a serious charge, but when you're talking about -- and particularly in today's society, your Honor, it is a new world. It's not 1980, 1990 or even 2000. Here, we have a situation with the climate that the emotional distress that is caused by publicizing in the press and accusing someone of a crime, which is obviously an implicit threat, they can go and make him a criminal, but you're accused of being a criminal, publicly, and to say that that conduct should not be subject to some sort of reckoning in a claim when you don't have -- you know, there's no other tort that fits the complexion, is my point, your Honor. That's why the courts say if there's a tort that fits the complexion better of the actions, then, fine. Don't go with the IIED.

But in this court, and in this climate, that is the measure of how you get recompensed for outrageous conduct, and outrageous conduct has been deemed in this jurisdiction to be false allegations of sexual assault

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or rape pressuring someone to basically settle and give them something that they wouldn't give them, it's coercive, and the reason I bring up the statute of coercion, because these facts that I'm talking about, basically threatening someone to do something by accusing them of something false that is so outrageous can be a crime. It is obviously outrageous. So to the suggestion it is not outrageous just because it's cloaked or purportedly cloaked in some sort of a settlement guise, which it's not, because that's how you distinguish, your Honor, between an actual effort to settle in good faith. All they would have had to have done was to simply say, you know, we're filing this action, we're happy to talk about settlement communications. At some point let's have a -- you know -- are you willing to do that as opposed to just insisting if they didn't -- if they didn't get some sort of, you know, response and/or money, then they were going to continue to promote this in coming back to him, to us and say: We're going to do this.

He had to stop it. He had to stop it. It was going to come to the point where whether or not she actually filed it -- and of course she's filed it now after him -- but whether or not she actually filed it, he suffered this incredible distress, family, medical,

loss of opportunity -- I mean the business is, you know, he had to come forward with it and explain what was going on in order to pursue the claim, and it is validly stated, the elements are met, it is a motion to dismiss, it's at the pleading stage, has to be liberally construed and there's no justification to simply say IIED does not work in this context. There's no case that they cite -- in fact, the only cases that they cite for the situation where a settlement conversation was not held to be actionable, it was in the context of a defamation case. Defamation case says qualified privileges or prelitigation statements and the like. This is not a settlement conversation that falls into any privilege, it doesn't fall into any bucket of excusion under the CPLR for evidence because it's not a conversation about the validity of the claim.

So these are the distinctions here and it's important in this day and age, your Honor, to not let one side of the story and make it simply defensive be told. When -- and I will say this, if what I'm saying is right and my client didn't do what they say he did and what they put in that pleading, if that's not outrageous conduct, I don't know what is.

THE COURT: Well, outrageous conduct is what is alleged in the Nigro case where they say that they

threaten to make public.

MS. LEPERA: Correct. That's what they did.

THE COURT: Saying that you are going to file a lawsuit is not saying you are going to make something public.

MS. LEPERA: That automatically becomes public, that's the whole point of it --

THE COURT: But the law is different between matters of defamation, all these different types of cases, you can kind of cloak what you are doing in this kind of veil, you can protect yourself by making your claims and submitting them to court, as opposed to going to a particular tabloid or newspaper or television news or going on the Internet, and saying here are my claims.

By saying that they have prepared their version of what -- prepared their version of what they say has happened to their client and that they're prepared to put that for consideration, for due consideration by a court, and they're telling you ahead of time that that's what they're going to do, it seems --

MS. LEPERA: If that's all they did, your Honor, that would be different. The difference here --

THE COURT: Well --

MS. LEPERA: -- is the nine million.

THE COURT: The difference is they asked for a

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number? You said that --

MS. LEPERA: It --

THE COURT: -- is it a campaign simply because they make a demand number that you deemed as outrageous?

MS. LEPERA: Yes. See, the point being if you --

THE COURT: I don't see it. That means every time -- every time in a contract case or personal injury case someone goes into discussions with counsel for the other side and offers a number that one side deems as outrageous, then they now have a legal claim --

MS. LEPERA: No, your Honor, that's because the conduct in those cases are not threatening to falsely accuse someone of rape or sexual abuse and that's the distinction that we have here.

THE COURT: Is there any case law that suggests that that is a fair distinction? If you go in and say that you are prepared to say that the Metropolitan Transit Authority took no steps to protect a passenger, and as a result that passenger was rendered a quadriplegic and as a result now there's a $25 million potential claim. MTA doesn't want that in public. It doesn't matter -- I am looking for some suggestion that case law says that -- simply that that particular nature of a claim is different --

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MS. LEPERA: Yes. Okay --

THE COURT: -- because what you are tying this to is a demand, a demand that you are unhappy with.

MS. LEPERA: I'm tying it to the allegation that's going to be made. In the MTA example you gave, your Honor, obviously the person is a quadriplegic, there's no doubt, maybe there's a causation issue. There's something that happened.

Here, if you read -- I'm going to read this quote into the record because I think this is the pivotal point you are trying to get to, which I believe is the distinction. It is the nature of the false allegation. It is the nature of the effect of that false allegation in the public.

The MTA, obviously, didn't intentionally intend to hurt this person.

If you are merely accusing someone of a crime, is not enough, perhaps, to state a cause of action for intentional infliction of emotional distress.

Falsely accusing someone of sexual assault goes beyond filing a criminal complaint. A conviction or even an arrest for sexual assault is a serious offense with a myriad of consequences. A conviction might force plaintiff to register as a sex offender, lead to incarceration, and here's the most important part, and

the mere accusation is typically accompanied by an incredibly negative social stigma. That's the DeJesus case on page seven of our brief, which is another case where they let an IIED claim go forward based on this false -- our saying it is a false accusation, they're saying it is a false accusation.

It should not be compared to a situation where you have a contract dispute, you have a personal injury case, you have, you know, nonheinous type of accusations that are, I would say, maybe very sad or whatever but not in -- not in this context. And that's why the coercion statute is relevant to this issue, because it talks about a person being guilty of coercion. When he compels or induces a person to engage in conduct which, the latter has a legal right to abstain from engaging in, i.e. pay money, okay, by instilling fear in that person, if the demand is not complied with, and -- okay, and that accusation is to accuse someone of a crime or cause criminal charges or expose a secret or publicize an asserted fact whether true or false, intending to subject -- true or false, whether intending to subject some person to hatred, contempt or ridicule.

So when you use a device of calling someone something like a pariah that they will lose everything, that causes -- if that's not outrageous conduct where

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you lose everything, I don't know what is.

THE COURT: I think it argues too much, counsel.

What you're saying -- you are calling for a chill --

MS. LEPERA: No.

THE COURT: Well, that's --

MS. LEPERA: No I'm not. She could have filed a complaint any time she wanted to.

THE COURT: So if she filed a complaint without telling you --

MS. LAPERA: That would have been fine.

THE COURT: -- that would have been preferred --

MS. LEPERA: No, that would have been fine -- an extortion claimant or IIED claim is because she didn't want to file, she wanted $9 million. She wanted to not file it. She didn't want to pursue her claim.

THE COURT: What you're saying, counsel, is that it is -- what you're saying, counsel, is that although courts would like parties to avoid litigation, they can't do so in cases involving sex -- claims of sexual misconduct --

MS. LAPERA: I'm not --

THE COURT: -- so that's chilling --

PROCEEDINGS

MS. LAPERA: No, no. I'm not saying it's chilling --

THE COURT: I'm not saying that you're saying it, I'm saying as a matter of policy, it is -- what you are suggesting would have a chilling effect. It would say you would set up a standard where in any case involving sexual misconduct, that the party who is making that allegation does not go about things the normal way. Which is to present their claims to the other side and seek -- and make a demand. What you're saying is that if someone who says to someone, has acted in a way -- well, if someone claims that another person has engaged in sexual misconduct against them, that they should not go about things in the way that the Court policy prefers which is to sit down and make a settlement demand outlining their claims of injury and make a settlement demand, because you say merely the -- you say that merely because someone is a -- is prepared to make a claim involving sexual misconduct that it is necessarily going to be perceived as this threat that can be -- can be perceived as a threat that kind of morphs into a pattern of outrageous behavior.

MS. LEPERA: I think it's fact-specific case by case, but I think that the cases that we cite which actually address the pariah significance and stigma that

someone can use to extract something, it's very different and it's not a typical situation, your Honor, it is not a typical case where the policy of the court is being impacted or challenged. That's what they would like the Court to believe, but I am telling you, with respect, your Honor, that when you are in a situation in this climate of someone -- and if we're right -- falsely accusing you of doing something, unless you give them hush money, then they are going to destroy your life, that puts you in that moment in time in absolute terror, fear, distress, because you know once that's publicized, it is going to be destruction, and that's what they intend. They want to use the leverage and the lever of the fear, as noted in the coercion statute, to extract something based on an accusation that is going to create someone to have this fear of becoming a pariah. That kind of a case, your Honor, is not the run-of-the-mill settlement policy, et cetera. It is effectively extortion. And if we are right and this is a lie, then he's got no remedy.

THE COURT: They said civil extortion is not a claim in New York.

MS. LEPERA: It's not, but it's treated at IIED by the Nigro case and the other cases we cite because it was extortion that was being committed. So they use --

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THE COURT: The Nigro -- let me get back to it. The Nigro case makes a point of them threatening to go outside of court, all right. Did they threaten to go outside the Court? Do your papers say that they threatened to go outside --

MS. LEPERA: To file false complaints. They threatened to file false complaints.

THE WITNESS: Nigro case talks about them threatening to go public and --

MS. LEPERA: Both.

THE COURT: Both.

And I'm asking, in this case, did they threaten to go to the tabloids and not go to court --

MS. LAPERA: They --

THE COURT: -- and not go to court, or did they simply say they were going to present their case in court --

MS. LAPERA: They litigated their case in the press. They -- up to today, I get calls all the time from the New York Post saying Mr. Haggis, we're told he was going to be in court today. They published depositions notices, they published letters to the court -- to the press on a regular basis. The way they drafted the complaint, if you read the complaint --

THE COURT: I read your complaint, too, and the

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way you draft your complaint is exactly the same thing they do, and from what I gather in looking through these papers, your side has talked to the press, as well.

MS. LAPERA: We absolutely filed this case, there's no question. It became public and we addressed it --

THE COURT: From what I gather, this became public because you filed your complaint first.

MS. LAPERA: Yes, because we wanted to stop the campaign of trying to extract the money. Now they can't extract the money through an extortion effort of saying we're not going to publicize if you pay me. They don't want to -- they don't want to file the case, they wanted $9 million. This was not like a good faith settlement concept. That's where I think the Court is being misled, with all due respect. It is a situation -- I think you can appreciate it if you put yourself in the shoes of someone who is falsely accused of a horrible, horrible act and when I -- I don't think my complaint has lurid details of violence and torture, as theirs do, all of which is not true, and you have that that's being threatened to be used against you, it's different. It's just different and I believe they have no case on point.

The coercion statute, I think is extremely relevant when it talks about outrageous conduct, that is

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outrageous conduct. And if we're right and that's what they did, then the fact of doing that is what this is about. It's not about settling their case. It's about what they were doing and the motivation to essentially create the sphere and this terror which is the whole point of an emotional distress claim, it's at the pleading stage. I think we're entitled to, respectfully, proceed.

THE COURT: Actually, the case we were supposed to be arguing -- the motion we were supposed to be arguing about was the motion to strike.

MS. LEPERA: I understand. That was just with respect to -- okay, the motion to strike is with respect to four paragraphs that we think are press arguments not following the CPLR and we believe that those, you know, should be stricken, but that's not the core of this issue in this case, is what we've been talking about, your Honor.

THE COURT: Thank you.

MR. MAAZEL: Thank you, your Honor, and I think your Honor has hit the nail on the head in this case in multiple respects.

Mr. Haggis is asking this Court to create a special rule for people accused -- men accused of sexual misconduct to be able to sue their accuser simply for

giving them the opportunity to settle the case.

They're using the IIED claim, which is the most disfavored claim in New York. As your Honor knows, the Court of Appeals said the conduct must be so outrageous in character go beyond all possible bounds of decency and be utterly intolerable in civilized community, and there's not been a single case in the entire history of the New York Court of Appeals where they have upheld an IIED claim, it's never happened.

We've cited 15 to 20 First Department Court of Appeals cases that threw out IIED claims with much more -- substantial allegations of outrageousness. Publicly threatening to kill a pregnant woman? First Department in Owen said as a matter of law on a motion to dismiss, that's not enough.

Secretly filming someone's death in a hospital and broadcasting it on national television? The Court of Appeals in Schwenk said it's reprehensible, it's atrocious, but on a motion to dismiss doesn't come close to meeting the standard for an IIED.

Trespassing a psychiatric facility and publishing a picture of the patient and outing him to the entire world. The Court of Appeals in Howell said that doesn't come close to stating an IIED claim on a motion to dismiss.

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Broadcasting images of rape victims on television after promising them anonymity. The First Department in the Doe case -- the First Department said that doesn't come close to stating an IIED claim.

Making false statements to the police, causing arrests and incarceration, the First Department on a motion to dismiss in Matthaus said that doesn't come close to stating IIED claim.

Same in the Slatkin case -- threatening arrest and criminal prosecution.

Threatening to paint a swastica on someone's house, Seltzer case, that doesn't come close.

The First Department Court of Appeals have also held that even filing frivolous lawsuits, no matter what the allegation is, cannot be an IIED claim.

So in the Kaye V Trump case, the allegation was that the defendant filed two baseless lawsuits. Also filed a false criminal complaint against the plaintiff, also attempted to instigate the arrest of plaintiff and her daughter and the First Department in the Kaye case said that's not IIED, as a matter of law.

Threatening to file a lawsuit also cannot be IIED, that is the plain holding of Court of Appeals and the First Department, just a few cases.

The Court of Appeals said in Howell, the actor

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is never liable where he's done no more than to insist upon his legal rights in a permissible way.

Court of Appeals in Wehringer, a threat to do what one has a legal right to do is not actionable.

The Ahmed case, threatening to bring a frivolous lawsuit, quote unquote, a frivolous lawsuit, that cannot be IIED, even if the -- there was an explicit threat to destroy someone's reputation. That's a quote from Ahmed case, Southern District quoting New York cases.

The First Department case in Steiner, threatening litigation, not enough.

The Siegelman case, quote, actions such as threatening to file a lawsuit cannot be viewed as utterly intolerable in a civilized community, close quote.

Now, as your Honor noted --

THE COURT: What are we to do with the Second Department cases of Nigro versus Pickett and Sullivan versus Board of Education?

MR. MAAZEL: Okay, of course the first point is that's not the First Department.

THE COURT: Not the First Department, so I need to -- so I need a First Department case to say that those cases don't matter, they are Appellate Division

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cases, so I am bound by them unless a First Department case says that those cases aren't accepted in the First Department or there's a First Department case that's squarely on point, and goes the other way.

MR. MAAZEL: Those cases, I believe -- while those -- well, those cases are wrong but they're distinguishable -- first let me discuss while they're distinguishable.

First of all --

THE COURT: And do it in the context again of this being a motion to dismiss, not a motion for summary judgement.

MR. MAAZEL: Sure.

THE COURT: In a motion to dismiss, we accept their statement that these cases -- excuse me, that the allegations of your client are without basis. That's where we begin. From their standpoint, an individual has been advised that someone is going to make false allegations against him of sexual misconduct during a current climate which includes, you know, Harvey Weinstein and me too -- hash tag me too movement, and so in this particular context that someone is being met with what they say are false allegations and then being told that the only way to rid himself of those allegations is to pay $9 million, which they consider to

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be an outrageous figure representing a level of extortion.

MR. MAAZEL: Sure. So -- and I think I'm glad your Honor mentioned -- it is a motion to dismiss and we should only focus on the allegations in the complaint, and the only allegations in the complaint are at paragraph 17 through 20. Those are the only allegations, factual allegations, and what they say -- paragraph 17 to 18 -- is that an attorney for Ms. Breest sent Mr. Haggis a draft legal complaint and with a cover e-mail or letter that said if you are, quote, interested in discussing a resolution of this matter without resorting to litigation, you can feel free to contact us. And so as a courtesy he was given prior notice of the lawsuit. That is in their own complaint.

Paragraph 19 says that they decided to avail themselves of the opportunity to have a the settlement discussion. They didn't have to have a settlement discussion if we didn't hear from them. We could have just filed. They called us. They admit it. It's in their own complaint. They wanted to have a settlement discussion.

If we look at Document 35 in the record, Ms. Lepera's office sent an e-mail to my office asking for the terms of your settlement demand in writing.

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They asked for a demand. This is what they wanted. They wanted to have a settlement discussion.

Then Paragraph 19 to 20 of the complaint is an allegation that the plaintiff made a settlement demand. Sort of thing that happens every day in this State, probably happening hundreds of times in New York State as we speak. This is what your Honor noted New York courts encourage, settlement discussions.

Then, after that settlement demand was made, according to the record, Document 36, their office sent another e-mail asking for a follow-up call after that discussion. And then after that, Document 37, they sent another e-mail saying, instead of speaking today, we're filing this IIED complaint against you.

In short, instead of having further settlement discussions, we're going to sue you for having settlement discussions.

Now there is no case, not Nigro, not Sullivan, no case that remotely supports the proposition that merely having a settlement discussion is the basis for an IIED claim.

In the Nigro case, the plaintiff -- or the defendant, quote, filed a false complaint with the NYPD. That was essential to the Nigro case. That did not happen here.

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In the Nigro case the defendant, quote, threatened to make public a false allegation. That wasn't about having a routine settlement discussion the likes of which happen all the time. That was about something quite different.

And the Sullivan case, again had nothing to do with settlement discussions, that was just someone spreading false rumors about affairs.

So there is really -- there is no case that they can cite that supports their position.

On the other hand, there are so many cases in the First Department and the Court of Appeals that squarely reject this proposition that you can sue someone for alleging what we all agree is very bad conduct. And just as an example, the Como case, First Department, that was a case where the defendants circulated a false statement that a coworker was racist and, quote, had an office cubical containing a statuette of a black man hanging from a white noose and -- which is pretty outrageous -- and the First Department said let's assume that was a false complaint, let's assume it was deliberately false, let's assume it was intended to cause emotional distress. The First Department said on a motion to dismiss, that allegation of racism is not -- does not come close to stating an IIED claim.

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Now what we just heard here, and I think as your Honor noted, is they want a special rule for men accused of sexual misconduct, sort of an anti me too rule -- you get to sue your accuser for having settlement discussions or for saying that you -- you will file a lawsuit.

There is absolutely no court that has ever upheld such an outrageous rule. And I should point out, as your Honor noted, of course settlement is strongly encouraged in this State and in every state in this country.

The Jakubowicz case, as a matter of policy, settlement is favored as a means of facilitating the resolution of disputes.

Jones Lang, First Department, settlement discussions are encouraged as a matter of judicial policy.

So what would happen if this claim could go forward? I think very important policy implications really being the first court to allow a claim like this to go forward. The first thing that will happen is the parties will not try to settle cases or at least parties in this special rule of plaintiffs who were victims of sexual misconduct. They're not going to try to settle cases. People are going to sue first and ask questions

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later, because why should anyone risk having their client be sued simply because they tried to engage in settlement. No one is going to do that. We gave them the courtesy, we gave them notice, now they sue us? I don't think so. That is going to lead to a huge burden on the judiciary. Totally unnecessary --

MS. LEPERA: Can I be heard briefly in response --

MR. MAAZEL: I'm not finished --

MS. LEPERA: I thought you were finished.

MR. MAAZEL: I'm not finished --

MS. LEPERA: Okay, finish.

MR. MAAZEL: The second point, this kind of a rule allowing this kind of claim to get beyond a motion to dismiss is going to turn lawyers into witnesses. The witnesses to the settlement discussion are counsel, defense counsel. Ms. Lepera was on that call. The basis, the basis for their claim was what was said on a phone call between lawyers, and I can just inform your Honor, and it is in the record at Document 24, that when Ms. Lepera heard the demand, did she say this demand goes beyond all possible bounds of decency? No.

Did she say, this demand is utterly intolerable in a civilized community? No.

What she actually said is that's the demand I

expected.

That's what she said. And if this case goes forward to a fact finder, a jury is going to have to hear Ms. Lepera talk about exactly what happened in that call.

So the public policy implications of allowing an IIED claim to go forward based on settlement negotiations, you will need one set of lawyers for settlement and then you will need a second set of lawyers for the actual lawsuit, because the settlement discussion will become the basis for the IIED claim.

And the third public policy implication here, which we touched on is that they do want a special rule for men accused of sexual misconduct. That's the rule they've articulated today, and it would be quite ironic if we had a rule like that given that in the First Department victims of sexual misconduct usually cannot bring an IIED claim. That's the holding in the Clayton case, the First Department.

So are we going to have a regime where if you are a victim of sexual misconduct, you cannot bring an IIED claim? But if you're accused of sexual misconduct, you can. We're going to have a rule that allows the sexual abuser to sue the victim but not the victim sue the sexual abuser? It's absurd.

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So I think we should see this case for what it is, it's something that falls well below, well below the standard of at least 15 to 20 First Department Court of Appeals cases. It has no support in the Second Department. It's really nothing more, your Honor, and that -- I don't see this but it's nothing more than a publicity stunt because they filed this case -- first Mr. Haggis raped Ms. Breest, then he sued her. And then the first thing they did is they leaked this case to the press and said, look, we sued. Look what we did.

Ms. Breest heard about this case through the press, because defense counsel apparently shared the complaint with the press before -- before she'd even heard about it.

So it's an outrageous case. The only thing that's outrageous in the case is the case itself. It has no support in the case law and we urge the Court to dismiss this IIED claim, not let it go forward another day and, of course, if your Honor does that as we believe you should, the motion to strike would be moot.

MS. LEPERA: May I your Honor, just briefly, please.

THE COURT: Yes.

MS. LAPERA: Notice he didn't answer the question about Nigro and why it's not binding because it

is and it's not been rejected in the First Department because it hasn't, number one.

Number two, let me just correct him because First Department has made it very clear that it's not about a man or a woman it's about the accusation of a heinous act. The First Department in Caixin, C-A-I-X-I-N Media versus Guowengui, G-U-O-W-E-N-G-U-I, January 11, 2018, denied dismissal of an IIED claim because the revelation of Ms. Hughes, private information, accusations of criminal and immoral conduct and threats to reveal videos and other information about her sexual history created significant distress.

So he's wrong on that point.

He's also wrong on the point about -- there's another First Department case which deals with a false child abuse allegation. These are different than talking about -- in the issue with respect to the case where the woman was not present in the room where somebody threatened to kill her, she wasn't even present. I forget the name of the case but he cited that right off the bat.

Then another --

THE COURT: Mr. Haggis wasn't present when you had the discussions about the $9 million; right?

MS. LEPERA: Well, he wasn't present, but it

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was affecting him in the sense that if this was not --

THE COURT: He wasn't present. Nothing about this --

MS. LAPERA: No.

THE COURT: There were no words that were uttered to him, except by you.

MS. LAPERA: Well, of course. I had to.

THE COURT: Okay, but you are --

MS. LAPERA: I had to.

THE COURT: -- but you are the person who is conveying the words that you say caused him emotional distress.

MS. LAPERA: Yes.

THE COURT: You didn't have to convey those words. You could have just said it was an outrageous number, if you wanted to, I'm just saying, but as a factual matter -- and this is part of what he said, you -- it almost screams for a -- it almost screams for a disqualification, right? In order to establish -- in order to establish the -- in order to establish your claim, you would have to say that you had settlement discussions with counsel that were -- presumably shouldn't be allowed in testimony or in the record, confidential settlement discussions, and then you conveyed that information to your client and you saw

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that your client was visibly shocked and appalled, and then your client will say the same thing, that I had a conversation, I'm waiving attorney-client privilege, I had a conversation with my attorney and based on what she told me, hearsay, about what some other person said, that I was now so shocked and appalled that I suffered X amount of dollars in damages.

MS. LAPERA: My point, your Honor, is not about the conversation. My client received the letter -- if it wasn't me, it would have been him or someone else finding out how long they were going to continue to send these communications. We wrote letters. They don't read my complaint accurately. I didn't say I entered into settlement discussions and when I said, your Honor, it's what I expected --

THE COURT: What does your complaint say?

MS. LAPERA: My complaint says: Plaintiff, through this attorney, soon thereafter, contacted defendant's attorney in order to vigorously dispute the factual and legal basis of the claim. The fact that they made a demand, a demand doesn't have to be a settlement demand. There's a demand in the coercion statute that talks about making someone do something by instilling a fear in them that they're going to become essentially a pariah. It's not -- none of the cases

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that they cite, none of the cases challenge Nigro, none of the cases validate what he is saying. In fact, in the Halperin case that they rely on so heavily, it was a baseless litigation when they allowed an IIED to go over a class action. They are stretching it to the limit and trying to avoid what is something that they tried to do to make him so concerned and so afraid because it's like in the Nigro case, it's like in Caixin where someone is being viewed as a despicable person in society to lose everything. They've not pointed to one other situation where IIED in terms of racial slurs -- yes, they're horrible. In terms of being on a blurred screen when you're in a hospital, horrible, doesn't make you look like a pariah, doesn't make you lose everything. That's why Nigro and DeJesus, which they cannot distinguish and they cannot challenge the authority of on this court.

THE COURT: DeJesus is not --

MS. LEPERA: No, Nigro.

THE COURT: And Nigro is distinguishable. Nigro specifically says that they threaten to make public, and the case law with respect to defamation, all that is very clear that there's a difference between what you say in court in court filings versus what you say in a television interview.

MS. LAPERA: It was an IIED claim, not a

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definition claim, your Honor, in Nigro.

THE COURT: I understand that, but the point is that in -- there is a difference between saying something is -- in saying something is going to be made public by going directly to the press, going directly to the media, going on a campaign, letter writing campaign versus presenting, as is your right as a citizen, your claims to a court.

MS. LAPERA: Presettlement discussions including false and defamatory -- prelitigation, excuse me, statements including false and defamatory accusations are only given a qualified privilege -- they constantly talk about settlement communications being privileged. There's no privilege that attaches to them. And this is another situation where they ignored the Front V Khalid case.

THE COURT: The privilege isn't really relevant. The issue is the discussions are made to the lawyer for the person who they are prepared to sue. They didn't -- you don't have in the complaint an allegation that they made these -- made statements to the press or to the media outside of -- outside of the litigation, or that they said they were going to make these statements, that they threatened to make these statements to the press or to the media outside of

litigation. What you say is that they said here is a copy of what we are prepared to file in court.

MS. LAPERA: And implicit in that, your Honor, which they know very well, and why the nine million was posited, they sent that letter to my client, he was distressed upon getting that letter right out of the gate with the horrible accusations in it, himself, and then obviously wanted to see what was going on here. This is not true, kept telling them it's not true.

When I said it's what I expected, he's mis-construing that because what I meant by that is we knew at that point in time it was a holdup and an extortion, it's exactly what I expected. I did not expect them to be suggesting, know, anything like, oh, something that would be consistent with not being a holdup. Let's put it that way.

They also, you know, they mischaracterized my statement because I basically knew where they were coming from. I think that in this situation on a motion to dismiss, your Honor, given Nigro and given the circumstances where they misrepresented that this is only applicable to men, it is not. It's applicable when there's a threat to make something public and it doesn't have to be isolated simply because it is a litigation. They get that privilege when they file it. They don't

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get the privilege to use it outside of the court system because they know it's going to have the public leverage of creating a pariah environment. That is something that instills tremendous fear, and that's how you use the course of effect to get someone to do something they don't have to do otherwise. And if we're right, which we will prove, we're right, this didn't happen. The man has a valid claim as to what they did to him.

With respect, your Honor, I'd ask you to please deny the motion and let us proceed into discovery on this matter.

THE COURT: Why would you need discovery? According to you -- and according to you on your claim, the basis of your claim is the conversation you had with him and the letter he sent you --

MS. LAPERA: And the falsity of it all. This is false and what they've done is they used a court pleading that they can't prove --

THE COURT: No, no.

MS. LAPERA: -- to intimidate my client to paying nine --

THE COURT: Proposed court pleading that you sent to your client, that you forwarded --

MS. LAPERA: No, no, I didn't send it to him. They sent -- directly to my client's house. They didn't

send it to me, they sent it to him. They sent this draft complaint with a letter to Mr. Haggis, which sent him over the top to begin with.

THE COURT: And then he engaged you.

MS. LAPERA: Then he engaged me.

The only thing I offered was the nine million, and I did not say -- people know how to say 408 settlement communication, they know how to put the CPLR section up. I do it every day. They do it every day. They does ask to have a settlement conference -- what I call a demand and what they call a settlement demand are different things. They call it a settlement demand. They can characterize it that way, but even if it is, it doesn't insulate them from creating extortion on someone. You can't use --

THE COURT: Except that you conceded that there is no civil extortion in this state --

MS. LAPERA: It's used in the cases as an IIED claim, those facts of extortion. If associated with creating a stigma which causes distress and that's why so many of these cases said no because it was not outrageous what was going to happen to the person, they couldn't have suffered that much distress by somebody simply saying, you know, okay, I'm going to film something -- in that case they were blurred -- this case

involving the woman that I just mentioned, if you can have an IIED case with threats about saying something about someone's sexual history because if that's revealed, however it's revealed, you don't file a case with lurid details but for the press. You want to file a case? You just put a couple of facts, put a claim in, you don't put in 5 to 10 pages of purported outrageous false conduct, which makes the person when it's out there seem to be horrible and then one paragraph of a claim. It's clear on its face what the intention is. We can't allow in society the process of the court.

There's another problem, your Honor. There's a policy of not using the Court to do things like that. That's not what the court is for. There's a reason why we have a court system to adjudicate facts. If we are going to turn this over to people being able to use a mechanism that is violative of good conscious and also case law, and criminal statute and use that to effectuate something to which they would not be entitled to under the law or in the court because of the fear that's instilled, if we allow that, we are allowing misuse of the system, which is a policy in and of itself that they don't want to acknowledge.

THE COURT: We're going to move on to --

MS. LEPERA: Thank you, your Honor.

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THE COURT: -- we're going to have to do this more quickly, I have other matters.

With respect to the Index Number 161137, 2017, I will hear -- in the motion to amend the supplemental pleadings.

MS. SALZMAN: Thank you, your Honor.

Leave to amend, as your Honor noted in the prior argument under the CPLR 3025 (b) shall be freely given, unless there is prejudice to the other side. There is no prejudice in allowing this amendment in this case.

Defendant, Mr. Haggis, hasn't even attempted to articulate prejudice and, of course, nor could he. The case is in its infancy, he hasn't filed an answer yet, discovery hasn't begun. We're talking about adding a new cause of action pled on the same facts, the same allegations, the same transactions and occurrences.

Again and again, the First Department has said that does not cause prejudice to the other side, leave to amend should be granted.

The claim is also clearly meritorious. CPLR 213 (c) allows for an extended statute of limitations for exactly this kind of claim, rape in the first degree and other sexual misconduct in that statute.

Again, no showing by Mr. Haggis that there is

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any lack of merit to this motion to amend.

Their opposition --

THE COURT: Explain for me, counsel -- it seems like there's -- seems like there's a gap here. The CPLR 213 (c) extends the statute of limitation, but what conveys the private right of action to enforce the Penal Law provisions that you set forth?

MS. SALZMAN: It's not a civil claim to enforce the Penal action, your Honor, it is a civil claim for the damages arising out of those acts.

THE COURT: I understand, so the question is what is the cause of action that you are seeking -- what is the cause of action by which you are proceeding?

Say there is -- they offer that, perhaps, you intended to file under a civil assault claim or perhaps you intended to file under civil battery claim, but what I am presented with is Penal Law sections that you say have been violated and a procedural statute that allows for the extension of statute of limitation to enforce acts -- to enforce a claim for acts that might also be false, might also be the cause for Penal Law violations but I don't have, in between, something like assault or battery that would be a cause of action that I could present to the jury. By the end of the day, I must be able to present to the jury instructions on the law. I

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can't present to the jury, by themselves, Penal Law statutes, because there's no private right of action with respect to those Penal Law statutes. I can only present what is authorized under the law.

So it seems like there's some potential gap without there being something like assault or battery, which you say also happened to violate Penal Law section.

MS. SALZMAN: The complaint absolutely pleads an assault and a battery, your Honor.

THE COURT: What section does it say that?

MS. SALZMAN: What section of the complaint?

THE COURT: Yes. What section is entitled assault and battery --

MS. SALZMAN: The proposed amend the complaint, your Honor, the second cause of action is entitled assault and battery.

What Mr. Haggis did was forcibly remove Ms. Breest's clothing, forcibly kiss her, forcibly penetrate her vagina with his fingers. Those assertions plead assault and battery, and the statute 213 (c) merely allows an extended statute of limitation if certain kinds of assault and battery rise to the level of violating certain enumerated sections of the Penal Law, which, very clearly, not all assault and batteries

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do. The intentional tort of assault and battery are far broader and CPLR 213 (c) extended the statute of limitation only for those intentional torts, only for those civil claims, as the legislature said in the CPLR, that amount to acts that would violate the Penal Law and they enumerate specific sections of the Penal Law which we had quoted in the proposed amended complaint in order to make it clear that 213 (c) is satisfied by the kind of assault and battery alleged to have occurred here.

The kind of assault and battery alleged to have occurred here would meet the Penal Law definition for rape in the first degree, for criminal sexual act in the first degree and aggravated sexual abuse in the first degree, which are some of the enumerated sections of the Penal Law listed in 213 (c).

So the claim is both proper as an assault and battery claim and timely under the extended statute of limitation set forth in CPLR 213 (c).

THE COURT: Go ahead, please.

MS. MOVIT: Your Honor, Section 213 (c) is an Article 2 entitled: Limitations of time.

Section 213 (c) is intended to extend limitations of time on certain causes of action if they meet the requirements thereunder, but is not a cause of action itself.

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Assault and battery, as your Honor is well aware, are different torts with different elements. It's not one tort, it's two torts.

I believe in the reply brief on the motion to amend they claim that the second cause of action is actually four causes of action and they quote assault and battery, rape, criminal sexual act, aggravated sexual abuse, close quote.

Well, CPLR 3104 as your Honor is also well aware requires separate causes of action to be separately stated and numbered.

Mr. Haggis does not have -- it is a moving target were this claim allowed to proceed on 213 (c), as Mr. Haggis would not know what elements he would have to disprove because it's unclear what cause of action or multiple causes of action are being alleged. Assault is a tort. Battery is a different tort. Rape and criminal sexual act, aggravated sexual abuse is horrific, obviously, Mr. Haggis did not do that, but those are criminal statutes. CPLR 213 (c) does not give a private right of action under criminal statutes and this complaint as proposed -- complaint is drafted, does not give Mr. Haggis or the Court adequate notice of what the elements are that Ms. Breest is trying to prove.

THE COURT: Well, CPLR 213 (c) -- it's not

there for the district attorney, it is a civil statute providing some form of additional limitations period to allow a civil litigant to bring an action.

So it's clearly a complaint of dotting i's and crossing t's, but clearly the purpose of the -- the purpose of the statute is to allow for -- purpose of the statute is to allow for a civil litigant to bring a civil action based upon certain Penal Law violations -- transgressions of the Penal Law.

MS. MOVIT: Yes, your Honor. CPLR 213 (c) is intended to provide an extended statute of limitations for existing civil causes of action if the elements are also met for certain criminal statutes, but it's not creating any new causes of action. So this is a notice issue, your Honor, in that this pleading doesn't comport with CPLR 3014 as to this purported second cause of action, is it one cause of action, is it four causes of action, what are the elements, it doesn't make that clear, and therefore it fails. That assault is a different tort than battery, different elements. Other things they purport to plead are not civil causes of action.

This is supposed to extend the statute of limitations if the elements are not met and not create new rights of action.

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And if I may also, your Honor, the first -- the proposed second amended complaint also fails because the gender motivated violent prevention act claim is inadequately pled. That's pled identically to how it's pled in the first amended complaint, which is the currently operative pleading. This is a hate crime statute and has been uniformly interpreted as such. The claim under the statute requires not only an alleged crime of violence but that such crime be committed due, at least in part, to animus based on the victim's gender, and essentially, Ms. Breest's counsel is trying to write the animus element out of the statute. Interpreting the plain language of this statute, the New York courts have held that there must be nonconclusory allegations of animus in addition to the allegation of the horrific act of violence, which again, Mr. Haggis did not commit.

THE COURT: This act is based on the Violence Against Women Act and there is a multitude of -- a multitude of federal court cases that suggest that in cases involving -- involving rape, some even suggest that it's, per se -- per se case of gender bias, that's what the Ninth Circuit says, that's what the Eastern District of Pennsylvania says, that's what the Northern District of Iowa says, District of Colorado, District of

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Puerto Rico, I mean, I wouldn't need to specifically address that at this stage, whether it's per se violation, but what has been pleaded in their complaint is certain language that is alleged by Mr. Haggis to indicate his level of excitement at an idea that he is invoking fear into Ms. Breest or -- and claims that her claimed assault is a pattern of action against other -- against well. So I wouldn't necessarily need to say that every -- every rape is per se gender based, but that is out there and multiple courts have said that and this case, in addition to that allegation, they have certain factual assertions that they say we could rely upon.

MS. MOVIT: Your Honor, with respect to the factual allegations of what Mr. Haggis allegedly said, which he adamantly denies and disputes, the -- and the analogy to the federal statute, both of those were recently addressed by United States District Judge Pauley in the Southern District. It is a case that we e-mailed to your Honor's part, I don't know if your Honor received it. My associate has a copy to hand up if your Honor would like. Hughes V 21st Century Fox, 304 F Supp. 3d 429, and in that case both involves alleged statements that are very similar to those alleged by Ms. Breest, and in the Hughes case there was

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an alleged rape and there was alleged extended abuse, both physical and verbal thereafter. The allegation was that, among other things, that the defendant said, quote, you know you want it, close quote, and things that are of a similar nature to things that are alleged against Mr. Haggis. With respect to those statements, Judge Pauley held that, quote, while actions arising from the statute are in --

THE COURT: What statute is he looking at?

MR. MOVIT: He's looking at the New York City gender motivated violence protection act.

Judge Pauley said, while actions arising from the statute are invariably predicated on reprehensible conduct against female victims, this factor alone cannot sustain a GNBA claim, close quote.

And similarly in Gottwald V Sebert, which we cite, there was alleged improper statements being alleged, but they weren't directed towards well in general or they weren't using specific anti well slurs, four letter words and that sort of thing.

And also, in Cordero there was a despicable alleged -- allegations -- you know, allegations of despicable conduct in term of sexual assault, but there wasn't any kind of allegation of a hate crime, that this has been recognized by the Court to be a hate crime

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statute.

And that something beyond the despicable -- the allegation of despicable act of rape more is alleged to become a hate crime.

With respect to the analogies to the Violence Against Women Act, Judge Pauley recognized that the New York federal cases applying to Violence Against Women Act also, quote, require the gender animus element to be pleaded, close quote.

So while Ms. Breest has found cases from various jurisdictions around the country, which she says follow the federal statute in a way that bolsters her claim that it is a per se offence under the GMVA for their to be an alleged rape, that's not how New York courts work, as Judge Pauley recognized, that's not how New York courts interpreted --

THE COURT: We're getting both sides of things. Either we have judges saying that you -- if, you don't say it's gender based and in that conclusory fashion, then it is a problem and we have other courts saying that it doesn't matter whether you say it's gender based we need to establish by fact that it's gender based.

So if they have led -- given anything, your complaint -- not your complaint, your objection to their complaint is it's filled with too many facts. And then

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you're saying they have facts they don't need, not that there are simply conclusory statements regarding the nature of the claims.

MS. MOVIT: Your Honor, Mr. Haggis's position is that the complaint of Ms. Breest is filled with extensive unnecessary salacious details that he vociferously disputes and denies, however, what it is devoid of is evidence establishing -- under -- under the case law, cases courts consistently interpreting the New York City statute evidence of gender based animus in terms of this being a hate crime. Statements against --

THE COURT: What sites, courts are those, besides Judge Cardi --

MS. MOVIT: Judge Pauley --

THE COURT: -- Judge Pauley?

MS. MOVIT: Justice Kornreich in Gottwald V Sebert --

THE COURT: Gottwald verse Seibert case is something entirely different. I have some of those cases, and there are a multitude of suits all over the country between Kesha, the singer, her mother and her manager. They are mixed with a variety of facts related to business and with respect to claims of domination, as well as sexual -- possible sexual misconduct.

MS. MOVIT: With respect to the gender

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motivated violence claim -- the issues were the same. There was an allegation of alleged rape, but that was held to be insufficient because there was not allegations that it was a hate crime, such as, you know, statements against well in general or that sort of thing.

With respect to the allegations of other alleged acts of sexual misconduct -- your Honor, there is a serious notice problem under CPLR 2301 3 in that Ms. Breest's counsel refuses to state who these alleged anonymous victims are.

THE COURT: They would have to do that in discovery, right?

MS. MOVIT: They've not even agreed to do that. Mr. Haggis --

THE COURT: We haven't done any discovery. We're at the motion to dismiss stage. It's not a matter of agreeing. This is if we go forward in discovery and they're not prepared to give you names, then the matters will be stricken.

MS. MOVIT: Okay.

Let me just get to the motion to dismiss.

MS. SALZMAN: Absolutely, your, Honor.

The case that opposing counsel just cited the Hughes case did quote from some of the cases that have

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sustained gender motivated violence claims. And the quote that Judge Pauley found lacking in his case, but which is certainly satisfied here is, quote, animus can be shown through factors such as, the perpetrator's language, the severity of the attack, the lack of provocation, the previous history of similar incidents, the absence of other apparent motive and common sense. Those are the factors that New York federal courts and federal courts across the country have used to examine gender motivated claims of violence for animus.

Just like they look for animus in any other hate crime statute, those are the factors you consider. In every single one of those factors, while not pled in the Hughes case, is pled here.

The perpetrator's language. Mr. Haggis used explicitly sexist and derogatory comments during the course of his violent assault of Ms. Breest, including comments that explicitly referenced her female anatomy and gender, such as you're nice and tight, referring to her vagina; I've had a vasectomy so you can't get pregnant; you've been flirting with me for months. These are overt statements in Mr. Haggis's own language of gender bias.

The next factor, severity of the attack. That's also satisfied. The attack alleged in our

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complaint is rape, the most egregious form of gender violence a woman can ever suffer. It doesn't get more severe than rape.

The next factor, lack of provocation. Also satisfied. This is not a situation where we're alleging where there's any claim that these people were engaged in some sort of altercation or a tussle and out of that we're trying to plead a gender motivated crime of violence. This is a situation where far older more powerful man lured a young woman to his apartment and immediately violently, accosted and raped her. There is a complete lack of provocation.

THE COURT: Doesn't this seem to get back to your argument that -- depends on the argument that rape in and of itself is a gender based claim. Now, it is -- that has been -- you've indicated cases from multiple federal courts where that has been accepted as the standard. Justice Kornreich has made a comment that not every rape is necessarily motivated by gender. These statements that you just provided, these add detail, but they don't necessarily add any detail that this particular attack is motivated by animus against gender, motivated by -- maybe motivated by gender, the question is is it motivated by hatred of the gender and that's -- that's the question. If an argument on your side is

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that that isn't necessarily the case, but Justice Kornreich has said that she doesn't necessarily accept that to be the case.

MS. SALZMAN: The bulk of courts disagree with Justice Kornreich on that point, but as your Honor noted, you don't need to find that every rape is, as a matter of law, motivated by gender. That's not the issue here. The issue here is whether this complaint, as a matter of law, pleads facts sufficient from which a reasonable jury could conclude that Mr. Haggis demonstrated gender animus when he violently raped Ms. Breest and made these comments. This is an analysis that must be done, just like in a sexual discrimination, employment case or any kind of discrimination case, using the totality of the circumstances available. You can consider circumstantial evidence, you can consider indirect evidence. That is done all the time in discrimination cases and in hate crime cases.

Mr. Haggis was not required to say, I hate well, as he raped Ms. Breest for her to have a claimant for gender motivated violence. If that was the case, the statute would say that and it doesn't. And if that were the holding here, that would eviscerate the purpose of the city gender motivated violence law which was specifically enacted to facilitate and make easier

victims of sexual abuse accessing the courts. The Brzonkala case the Fourth Circuit, that case the court said the purpose of the statute will be eviscerated if it was required to claim that a plaintiff had to allege, for example, that defendant raped her and stated: I hate well. Verbal expression of bias is not required to plead a gender motivated claim of violence, but here, we have pled verbal expression of bias. Saying to a well while you were engaged in violent sexual intercourse with her that you are nice and tight, you've been flirting with me for months, you're scared of me, aren't you, those statements are explicitly, on their face, sexist, derogatory and evidence of disrespect for women. No one who respects women could say to a woman as he violently accosted her, you're scared of me, you are asking for it because you've been flirting with me for months, that's exactly the kind of verbal expression of bias that is considered again and again, not just for gender motivated crimes of violence, but four all hate crimes.

The other factors identified by the courts to consider in the totality of the circumstances include a previous history of similar incidents and that, too, we have pled in this case. Mr. Haggis has a history of violently sexually assaulting women. We've identified

three in the amended complaint and there are more.

This is not a man who rapes men and women alike. This is a man who specifically preys on women, and as the federal court, the Southern District of New York said in the Judd Mahon case which is cited in the Hughes decision defendant invokes here -- sorry -- an extensive history of unwanted sexual advances towards women, the fact that all, quote, previous victims of defendant's unwanted sexual advances were women underscores plaintiff's claim that defendant was motivated by a gender animus towards women.

In that case, Southern District of New York denied a motion to dismiss a gender motivated claim of violence, because the plaintiff had alleged the defendant had a private history, just like Mr. Haggis does here, and he made comments about her breasts when he fondled her and groped her.

We have pled that prior history here and neither in Gottwald nor in Cordero nor in Hughes was there any such prior history pled.

The next factor is the absence of any other apparent motive. What Congress and city counsel were concerned with when they wrote these laws was that not all random acts of violence against women be turned into a cause of action. A mugging or a robbery gone awry,

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for example, might in the meet this threshold, but what we're talking about here is rape, and there is no other basis for Mr. Haggis to lure Ms. Breest into his apartment and violently accost and rape her, other than a gender motive.

And finally, common sense, exactly what I just articulated. There is no other reason for Mr. Haggis to say these things, to act in that violent way and to have done that with multiple other women unless he exhibited gender animus.

At a very minimum, as a matter of law, on a motion to dismiss, when all facts alleged in the complaint are presumed to be true, this court cannot rule, as a matter of law, that a gender motivated claim of violence has not been pled. As the court said in the Chrisnino(ph) case, which is another Southern District of New York case cited by defendant, intent or animus in such cases is usually a question of fact. A question for the jury. The Court there denied the motion to dismiss a gender motivated claim of violence because the plaintiff had alleged that the defendant in that case pushed her. It wasn't even a rape, it was pushing her and calling her a bitch. If that was enough to meet the minimum threshold to plead and create an issue of fact, we have certainly satisfied it here.

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And there is no case, anything like this case that had been pled so far, in terms of the nature of the detailed pleadings, in particular, the nature of the pleading of a prior history of sexual abuse, which was properly pled using Jane Doe designations to protect the identity of third party witnesses at the pleading stage, your Honor, these are women who have not brought a lawsuit against Mr. Haggis, who are very much in fear of him and of the publicity that this case has engendered since the moment Mr. Mr. Haggis leaked it to the press when he filed it, and their identity needs to be protected. Ms. Breest herself could have filed this case as a Jane Doe plaintiff. That is the law in New York. That a plaintiff seeking to sue for sexual abuse, especially in a case that has garnered media attention, can bring it as a Jane Doe plaintiff. If we afford that protection to a plaintiff, certainly at a minimum it must be afforded to a third party witness.

The idea that the allegations concerning the Jane Doe witnesses are insufficiently detailed or conclusory, is frivolous. Paragraphs 83 through 132 of amended complaint state in detail what happened to those women. It is the very opposite of conclusory.

MS. MOVIT: Your Honor, very briefly.

THE COURT: Very briefly.

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MS. MOVIT: First, with respect to the analogy of employment discrimination cases, that exact analogy was rejected by Judge Pauley in the Hughes case, so I refer your Honor to that.

With respect to the Jane Does, the allegations are inconsistent, they're a constantly moving target. For example -- there's numerous examples in our brief, but to give one of them, the proposed amended complaint in the current complaint alleges a forced kiss, excuse me an attempted kiss, an attempted kiss. The brief alleges a forced kiss. This is exactly why those allegations are a moving target.

With respect to the factors under -- one particular case that Ms. Breest's counsel just referenced, the bottom line remains that the facts in Hughes, very, very similar. There was an alleged extended history of abuse. The words used by the defendant, allegedly, were very similar to what's alleged here, again, which Mr. Haggis denies. And, again, the statute has that extra element which as a matter of public policy Ms. Breest is trying to write out of the statute, in the bottom, it's in there, animus.

She talked about a case about a specific gender related slur that begins with a B. Again, there's no

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specific general related slur alleged here. This is a CPLR pleading issue that yes there would be an inference ultimately by the jury if it got that far as to malice, but there has to be facts pled that are non conclusory at this stage for it to even proceed beyond that part.

And with respect to the Jane Does, Mr. Haggis needs to know -- we can work out terms for it, but it's prejudicial for Ms. Breest's counsel to keep filing pleadings making statements about these alleged Jane Does. Mr. Haggis has -- disputes any and all such allegations of improper conduct and they're constantly changing the allegations of what actually happened here, so it's an extremely prejudicial situation.

THE COURT: The Court has a series of motions before it. There's a motion to strike portions of the defendant's answer in the matter of Haggis versus Breest, Index Number 161123 of 2017; there's also a motion, motion sequence number two, under Index Number 161123 of 2017, which is a motion to dismiss the action, Haggis versus Breest, as well as for attorneys fees and sanctions.

And there is under Index Number 161137, 2017, a motion to amend the complaint pursuant to CPLR 3025.

There is also a motion to dismiss the verified amended complaint or in the alternative, to strike

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certain allegations in the Breest versus Haggis matter under Index Number 161137 of 2017.

I note, as well, under Index Number 161123 of 2017, there is also a cross motion for sanctions. With respect to the motion to strike portions of defendant's answer, motion sequence number one under 161123, 2017, it is this Court's view that the pleadings here are not prolix and confusing and that the language, while filled with some level of either -- the language is, I guess, not temperate, but I don't see anything here in the language that would suggest that it is unrelated to the essential claims. There are, in addition, enumerated answers, and so I think is otherwise compliant with the CPLR, and accordingly it is hereby ordered that motion sequence number one with respect to Index Number 161123, 2017, is denied.

Motion sequence number two is a motion to dismiss the complaint by the -- by Mr. Haggis that also seeks attorneys fees and also sanctions, and the argument here is that the claim here for intentional infliction of emotional distress is improper in that it does not allege conduct that could be considered outrageous within the meaning of that cause of action. And the argument is that the sole claim for intentional infliction of emotional distress arises out of the

allegation by Haggis, that he became distressed when it was communicated to him, pre-litigation, that in order to resolve allegations of sexual misconduct against him, which he denies to be true, he would have to pay an amount that he considered extortionate. There is no allegation in the complaint that prior to the institution by Mr. Haggis of this lawsuit that there were press stories or media stories that could be traced to the defendant. There are no claims that there were threats to go on a media or Internet campaign. The claim here is that the intentional infliction of emotional distress came as a result of one of the attorneys for Mr. Haggis conveying to him the facts and circumstances of settlement discussions, as well as a proposed complaint that was sent to -- directly to Mr. Haggis by counsel for the defendant in this action.

This Court is of the view that it would serve as a chill on the ability of persons who believe that another has committed sexual misconduct against them if they were unable to engage in pre-litigation discussions, including proposing settlement numbers, even outrageous settlement numbers, if such actions could serve as the basis for a suit against them.

It is this Court's view that would be in violation of public policy of the State of New York and

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would be an action that would be certainly something that is not to be encouraged. I look at that in the context of the great disfavor that New York courts have had with respect to intentional infliction of emotional distress cases, generally.

I also look at it in terms of cases where the First Department and the Court of Appeals which have held that the law establishes that settlement talks are not actionable and are not the basis for an intentional infliction of an emotional distress case.

I have heard counsel for Mr. Haggis with respect to the Second Department case of Nigro versus Pickett. The Court is fully cognizant that if the Second Department has produced a case that is on all fours with the case before this Court, that this Court is required to follow that authority, assuming there is no First Department authority to the contrary; however, this Court does not believe that the Nigro case is on point with respect to this case. In this case, the only threat that was made was that there would be a litigation instituted based upon the allegations of Ms. Breest. In the Nigro case, it is said that the defendant there threatened to make public the allegedly false allegation that the plaintiffs had subjected defendant to sexual harassment and sexual assault.

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There is also the statement that the defendant, with the intention of pressuring the plaintiff to settle whether it filed a false complaint with the New York City Police Department.

Here, there is no allegation that Ms. Breest threatened to do anything other than pursue her claims in a civil litigation forum. There is no indication that she threatened to go, in the first instance, to the press or to go to the press, other than by informing the press of what was a public filing and that is, in fact, not even in the complaint. And in the complaint what is suggested is Ms. Breest said that she would -- she was prepared to make her -- to file a civil action and provided Mr. Haggis with a copy of that proposed complaint and that after an exchange with counsel for Mr. Haggis, conveyed to that counsel the number that Ms. Breest was prepared to accept to avoid pursuing her civil litigation claim.

There is no allegation here that Ms. Breest has filed a false criminal complaint with the New York City Police Department.

There is no allegation that she had made prior to the institution of this suit, in any event, any public campaign by way of Internet or by way of press and media.

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The Court would cite, as well, the matter of Kaye versus Trump, another First Department, 58-AD3d, 579, in which it was held that the commencement of two baseless lawsuits did not constitute outrageous conduct necessary to support an intentional infliction of emotional distress case.

Counsel for Mr. Haggis has noted that we find ourselves in a climate, a particular climate currently at which there would be heightened scrutiny, and perhaps more ready acceptance by media or press to convey what they say are false allegations, and that there is a danger that the -- that a false allegation could be easily accepted in this climate and that that alone provides -- in addition to everything else, not alone, that, in addition to everything else, would establish Mr. Haggis's emotional distress.

I can't accept that -- I can't accept that. I don't say that it's not true, I can't accept it from a standpoint of addressing whether or not someone who alleges that they are a victim of some form of physical misconduct, should be chilled from making that assertion in a civil forum if that is the only place they go. If this was about claims made on the Internet, if this was about claims made in the press and the media without going to court, then perhaps this would be different,

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but I don't believe that it is. Accordingly, I believe it is inappropriate here to allow for the intentional infliction of emotional distress claim to be based upon, here, the pre-suit settlement discussions between the attorneys and even based upon the receipt by the plaintiff here of a draft of a complaint against him. Accordingly, it is hereby ordered that the motion to dismiss is granted.

In the court's discretion, given the complexity of this issue, the Court believes that the motion for -- to the extent the motion seeks sanctions by the defendant, it should not be granted and to the extent that the cross motion seeks sanctions in favor of the plaintiff, again, given the level of complexity of this matter, I don't believe that that cross motion for sanctions is appropriate either.

With respect to the motion to amend under Index Number 161137 of 2017, this Court has already noted earlier and today in another matter amendment should be freely given in the absence of prejudice. There is, at this early stage, very early stage, no prejudice in this Court's mind that would be had by including the amended claims. The Court notes the argument by Mr. Haggis's attorneys that perhaps some delineation might be had by virtue of the second cause of action, to the extent that

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assault and battery are conflated and not separately charged. I don't know that that's a substantive complaint. If it is, it can be explored by way of demand for a bill of particulars or some other litigation device that would require some specification. So I believe that can be addressed. There are substantial facts, the bulk of which Mr. Haggis denies. I don't believe this is a case of Mr. Haggis being unable to determine what he is being accused of.

To the extent that there is a challenge based on the New York City Victims of Gender Motivated Violence Protection Act, I'll address that in the motion to dismiss, not in change with respect to the motion to amend, to the extent that we're talking about the CPLR 213-c, that does allow for the extension on statute of limitations and makes clear that the intent of the legislature is to allow for a private right of action that identifies and relates the facts to the specified Penal Law provisions.

Accordingly, it is hereby ordered with respect to motion sequence number one, on Index Number 16 -- excuse me, 161137, 2017 that that motion to amend be granted and I will direct that counsel serve a copy of the amended complaint in the form attached to the moving papers within 15 days of today's date, and that the

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defendant in this case respond to that amended supplemental pleading within 30 days of service.

With respect to motion sequence number two, which is to dismiss the amended complaint, the Court -- the Court, viewing this as a motion to dismiss primarily under 3211 (a) 7 must accept the well-pled facts as true and allow for a liberal interpretation of those claims. The argument that the gender motivated violence cause that is established by New York City Administrative Code requires something. The argument by Mr. Haggis is that the gender motivated violence provision here requires some demonstration that the act is motivated by animus against women is one that the Court accepts. The question is whether we look at the 140, 150 paragraphs set forth in the complaint here, whether or not those facts adequately state a claim for violence motivated against women, the Court believes that is a -- that there is enough here, if we accept all those claims as true, that this is a matter of factual interpretation to be presented before the jury. There is language that the -- there's language that the plaintiff here, in this matter indicates a disrespect for women. There's language here that indicates an enjoyment of some level of violence as against women. There is an indication here of the lack of provocation or a lack of any form of

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confusion on the part of the alleged assailant here. The question is whether under the totality of circumstances here, this indicates a level of animus against women, I believe is one, as I said, may need to go to a jury, but certainly should be informed by further discovery between the parties.

It is also the case here, in particular, that there are allegations of -- allegations of a pattern and practice of activity that the plaintiff claims indicates an animus towards women by virtue of Jane Doe allegations of similar acts of alleged violence against women.

Those all need to be explored in discovery. The defendants will be entitled to explore whether those are made up out of whole cloth or whether they were actually individuals who are prepared to testify in some form or fashion, give evidence regarding those issues. Certainly, laying out that it is a hearsay statement that other women have said these things is not something that can go to a jury. So if you want to put flesh on those statements, then they need to be backed up with some kind of exchange of evidence; and if not, then before this matter is ready to be heard by way of summary judgement or by way of trial, those allegations will be stricken, and then we'd be left with a more

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focused determination under the statute.

Accordingly, it is this Court's view that the motion under Index Number 161137 of 2017 to dismiss the verified amended complaint or in the alternative to strike certain allegations is denied, to the extent that it still relates to the second amended complaint.

I will direct that the parties appear for a preliminary conference on October 25th at 9:30 a.m. in this part, in this courtroom. They are free to engage any form of discovery they wish to engage in ahead of time, hopefully, by agreement. If you are able to work on protective orders, that would be a normal thing that people seek to do, but we'll have a preliminary conference date in the event parties are not able to do that on their own, and that if they are able to do it on their own, will have it as an opportunity to check in.

I direct counsel for both parties to split the cost of the transcript of today's proceedings. Either one of those parties can submit the transcript to the Court or simply the court reporter can deliver it to the Court once the court reporter can deliver it to the Court once the parties have made appropriate arrangements, and the Court, once it receives the transcript, will so order that transcript. That so ordered transcript will reflect the Court's rulings of

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today and reflect the Court's decision and order of this date.

The record is closed.

* * *

CERTIFIED THE FOREGOING IS
A TRUE AND ACCURATE TRANSCRIPTION
OF THE PROCEEDINGS, THIS DATE.

VINCENT J. PALOMBO, RMR

SO ORDERED:

ROBERT R. REED, J.S.C.

8/14/18

BY HAND

msk

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