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TAMAR HERMAN,

Plaintiff,

vs.

IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIR-FOUNDATION INC., and CAIR NEW JERSEYA/K/A CAIR NJ A/K/A CAIR NJ INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
UNION COUNTY – LAW DIVISION

CIVIL ACTION

DOCKET NO. UNN-L-002913-22

MEMORANDUM OF LAW IN SUPPORT OF
MOTION BY DEFENDANT CAIR FOUNDATION INC. TO DISMISS THE COMPLAINT

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Rule 4:6-2(e) 1, 15

Defendant CAIR Foundation, Inc., d/b/a Council on American Islamic Relations ("CAIR Foundation") submits this memorandum of law in support of its motion to dismiss with prejudice the Complaint of Plaintiff Tamar Herman for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e).

PRELIMINARY STATEMENT

On October 6, 2021, teacher Tamar Herman pulled back the hijab of one of her second-grade students—a girl she knew to be an observant Muslim—exposing the girl's hair in violation of her religious beliefs ("the Incident"). By her own account, Herman did not ask for the girl's consent and did not know whether the girl was wearing any other head covering underneath the hood she pulled back. Her action had the effect of exposing the girl's hair to her classmates. Herman admits all these facts in her Complaint. Compl. ¶ 9. The Muslim-American Olympic medalist and public figure, Ibtihaj Muhammad, posted an account of the Incident on social media, which gained widespread attention and drew condemnation of Herman's behavior, including comments from New Jersey Gov. Phil Murphy supporting an investigation into the Incident. Id. ¶ 16.

Based on Muhammad's social media posts, the executive director of the New Jersey chapter of the Council on American Islamic Relations ("CAIR-NJ"), and later the CAIR Foundation itself, reacted to Herman's offensive act with statements that emphatically denounced Herman's seemingly sacrilegious actions and highlighted the pain and public humiliation the student must have felt.

Now, in a misguided campaign to absolve herself and impose liability upon her critics, Herman brings libel and false light claims against the CAIR Foundation, CAIR-NJ, CAIR-NJ's executive director Selaedin Maksut, and Muhammad. Among other things, Herman claims that her actions should not have been described as "pull[ing] off" or "forcefully stripping off" the child's head covering, since she claims she merely "brushed [it] back." Id. ¶¶ 33, 39. She also claims that it was false and defamatory for the CAIR Foundation to refer to "Islamophobia" and to challenge her fitness to teach when discussing the Incident since, according to Herman, she did not subjectively *intend* to expose the child's hair (though she admits this was the consequence of her actions). Id. ¶ 120.

Measured in light of her Complaint's clear admissions, however, Herman's claims amount to a non-actionable dispute in which she seeks to censor discussion on a matter of utmost public importance. The law of defamation not only requires that a plaintiff plead materially false statements of fact, but also requires a pleading of actual malice where, as here, the challenged statements are on a matter of public concern and the plaintiff, as a public-school teacher, is a public figure in her community.

Our state's defamation law requires that in adjudging this Motion to Dismiss this Court must exercise its gatekeeper function in order to evaluate Herman's claims and determine whether they are indeed actionable. As fully discussed below, the Complaint should be promptly dismissed because the statements challenged by Herman are not actionable for at least the following four reasons:

- First, the Complaint itself establishes that the CAIR Foundation's statements were substantially true. There can be no dispute from the Complaint that Herman did in

fact pull back the hijab of a second-grade student in front of a classroom of boys and girls without consent.

- Second, the CAIR Foundation's emphatic and subjective references to "Islamophobia" and descriptions of Herman as "not fit to be a teacher," constitute classic protected opinion, which cannot be the basis for a defamation claim because these statements do not set forth false assertions of fact.
- Third, Herman has not alleged either the necessary elements of actual malice or any facts from which actual malice by the CAIR Foundation could be inferred, as she must in order to state a defamation claim. Indeed, by pleading that the CAIR Foundation statements were based upon Muhammad's published account and by providing no reason that the CAIR Foundation should have doubted that account, the Complaint precludes any inference of actual malice.
- Finally, Herman's tag-along, duplicative claim for false light invasion of privacy must be dismissed for the same reasons as her libel claim.

FACTUAL BACKGROUND

Even accepting the facts as pleaded by Plaintiff Herman, as is required on a motion to dismiss, the Complaint fails to state a cognizable cause of action.

A. The Parties

Plaintiff Tamar Herman ("Herman") is a teacher, currently on administrative leave from teaching second grade at Seth Boyden Elementary School (the "School"), a public school in the South Orange Maplewood School District located in Maplewood, New Jersey. Complaint ("Compl.") ¶¶ 1, 12. She is a resident of Union County, New Jersey. Id. ¶ 2.

Defendant Ibtihaj Muhammad is a member of the United States Fencing Team and a former United States Olympic Sabre fencer. Id. ¶ 3. She is known for being the first woman to compete for the U.S. in the Olympics while wearing a hijab and the first female Muslim-American athlete to win a medal at the Olympics. Id. ¶ 3. Muhammad attended Seth Boyden Elementary School in Maplewood, NJ. Id. ¶ 82. She is an author and businesswoman and resides in New Jersey. Id. ¶ 3.

The CAIR Foundation is a nonprofit organization that focuses on Muslim civil rights and advocacy. Id. ¶ 5; see also https://www.cair.com/about_cair/cair-at-a-glance/ ("Through media relations, lobbying, education and advocacy, CAIR works to make sure a Muslim voice is represented.") (last visited Feb. 1, 2023). CAIR-NJ is an independent chapter of the CAIR Foundation. Compl. ¶¶ 5-6.[1] Defendant Selaedin Maksut is Executive Director of CAIR-NJ. Id. ¶ 4; see also Press Release, CAIR NJ NAMES SELAEDIN MAKSUT AS NEW EXECUTIVE DIRECTOR, (Dec. 26, 2019), available at https://cair-nj.org/cair-nj-names-selaedin-maksut-as-new-executive-director. He is a resident of New Jersey. Compl. ¶ 4.

[1] Although Herman asserts her claims against all Defendants, the Complaint does not allege a theory of vicarious liability against the CAIR Foundation. Though CAIR-NJ is a "chapter" of the CAIR Foundation, Compl. ¶¶ 5-6, the two organizations are independent legal entities. Thus, there is no basis for holding the CAIR Foundation liable for statements made by CAIR-NJ or any other Defendant. Accordingly, this Motion specifically addresses only statements published by the CAIR Foundation. Nonetheless, to the extent the Complaint purports to hold the CAIR Foundation liable for statements published by CAIR-NJ or Maksut, all of those claims must similarly be dismissed for the reasons set forth in this Motion and in the dismissal motion filed by co-defendants, CAIR-NJ and Maksut (which are incorporated herein by reference). See Memorandum of Law in Support of Defendants Selaedin Maksut and CAIR-NJ's Motion to Dismiss the Complaint. Since the Complaint suggests that the CAIR Foundation is somehow responsible for statements by CAIR-NJ without any basis in fact, that allegation will be assumed to be true, strictly for the purposes of this Motion. Should any claim against CAIR-NJ survive Defendants' motions to dismiss, discovery can be had, if necessary, to determine what liability, if any, the CAIR Foundation should have for CAIR-NJ's statements.

B. The Hijab in Context

Within Islam, the Arabic word "hijab"—meaning "cover," "barrier," or "partition"—refers to the principle of modesty to be upheld by both men and women that requires Muslims to cover certain parts of the body in order to "guard their modesty."[2] The most well-known form of hijab is the head covering ("khimar" or "veil") worn by Muslim women.[3] This covering—similar to the head covering or wig worn by Orthodox Jewish women—is worn in the presence of men outside of a woman's family and in the presence of non-Muslim women.[4]

Colloquially, "hijab" refers to a headscarf or khimar, but a hijab can be any garment or item that fulfills this purpose, including a curtain or screen separating men from a woman's body.[5] The religious texts do not mandate specific requirements for the hijab itself.[6] Each girl or woman may decide the type of head covering and how much of the body is covered.[7] The coverage of the hijab thus ranges from concealing the hair, at minimum, to concealing the face and neck as well.[8] Most Islamic scholars consider "the practice of women covering their heads" as mandatory for

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[2] See BBC, "Religions: Hijab," (September 3, 2009), available at https://www.bbc.co.uk/religion/religions/islam/beliefs/hijab_1.shtml, (last visited Feb. 2, 2023).

[3] See Dr. Tesneem Alkiek, "Is Hijab Religious Or Cultural? How Islamic Rulings Are Formed", Yaqueeninstitute.org, (January 14, 2022), available at https://yaqeeninstitute.org/read/paper/is-hijab-religious-or-cultural-how-islamic-rulings-are-formed.

[4] See BBC, supra note 2.

[5] See BBC, supra note 2.

[6] See Alkiek, supra note 3 (identifying only Qur'an verses 24:30-31 and 33:59 as the source of the modesty requirement).

[7] See BBC, supra note 2 ("Modesty rules are open to a wide range of interpretations. Some Muslim women wear full-body garments that only expose their eyes. Some cover every part of the body except their face and hands. Some believe only their hair or their cleavage is compulsory to hide, and others do not observe any special dress rules.")

[8] See BBC, supra note 2; see also Alkiek, supra note 3 (the necessity of wearing "loose and opaque" clothes as part of the practice of modesty is assumed.)

observant Muslims.[9] Once only customary, it has been "transform[ed] into a divine commandment that one should try their best to fulfill."[10] In short, for many Muslim women and girls, it is not if the hijab will be worn but how.[11] Accordingly, when Herman describes her observant Muslim student wearing a "hood" to cover her head with nothing else underneath, Compl. ¶ 9, that "hood" was the Student's hijab.

While hijabs are fairly common in the United States—nearly 60% of Muslim women in America report wearing the hijab at least some of the time[12]—the hijab is also a lightning rod for discrimination as it increases the wearer's visibility and manifests the religious beliefs of the wearer. Since September 11, 2001, instances of discrimination and violence against Muslims have increased,[13] including numerous incidents against Muslim women that seemingly centered on their hijabs.[14] Indeed, harassment of school girls wearing hijabs has been previously documented.[15]

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[9] See BBC, supra note 2; see also Alkiek, supra note 3.

[10] See Alkiek, supra note 3.

[11] See id.

[12] Pew Research Center, "U.S. Muslims Concerned About Their Place in Society, but Continue to believe in the American Dream", (July 26, 2017) available at https://www.pewresearch.org/religion/2017/07/26/religious-beliefs-and-practices/.

[13] The ACLU reports that hate crimes against Muslims rose 674% between 2000 and 2006. American Civil Liberties Union, "Discrimination Against Muslim Women Fact Sheet" (2008), available at https://www.aclu.org/other/discrimination-against-muslim-women-fact-sheet; see also U.S. Equal Employment Opportunity Commission, "Questions and Answers about the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs under the Equal Employment Opportunity Laws" (January 17, 2017) available at https://www.eeoc.gov/fact-sheet/questions-and-answers-about-workplace-rights-muslims-arabs-south-asians-and-sikhs-under ("Since the attacks of September 11, 2001, the Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices agencies have documented a significant increase in the number of charges alleging workplace discrimination based on religion and/or national origin.").

[14] See ACLU Discrimination Fact Sheet, supra note 13, at n.12-21.

[15] See ACLU Discrimination Fact Sheet, supra note 13, at n.13-16 (For example, in Hearn v. Muskogee School District, No. 6:03-cv-00598 (E.D. Okla. filed Oct. 28, 2003), a sixth-grade girl

In this context, wearing the hijab is a personal choice that can be both an empowering symbol of devotion and religious freedom and fraught with the potential for violence and discrimination.

C. The Incident

On October 6, 2021, Herman was teaching a second-grade class at the School. Compl. ¶ 9. Herman alleges that while the class worked on an assignment, she noticed one of her students (the "Student") was "wearing a hood that was blocking her eyes." Id. Herman admits she knew the Student was an observant Muslim and "regularly wore a form-fitting hijab," and alleges that she believed that "the Student's hijab was being worn under the hood." Id. Herman pleads that she asked the Student to "brush back her hood." Id. Herman further claims that when the Student did not respond, she moved the head covering herself, "brush[ing] the hood back a few inches to uncover the Student's eyes." Id. The Complaint avers that after moving the Student's head covering, Herman "noticed the Student's hair" because she was not wearing a "form-fitting hijab underneath." Id. Upon realizing that she had, in fact, moved the child's hijab and exposed her hair, Herman alleges she "brushed the hood back to cover all the Student's hair" and "apologized to the Student." Id. In short, Herman admits that she moved her Student's head covering, without consent, exposed the girl's hair to her class, and realized that she had committed an inappropriate act for which she apologized. Id.

Following these events (the "Incident"), the Student's mother contacted the school. Id. ¶ 10. Herman met with the Principal and Assistant Principal of the School on October 7 to discuss the Incident. Id. Herman was placed on administrative leave later that day. Id. ¶ 11. She remains

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was suspended for refusing to take off her headscarf, after being told it violated the school's dress code, which prohibited hats, caps, bandanas, or jacket hoods inside school buildings.).

on administrative leave. Id. ¶ 12. In addition, a criminal investigation into the Incident was opened, which concluded in January 2022 without charges. Id. ¶¶ 62-63. In March 2022, the Student's parents filed a discrimination lawsuit against the school district and Herman. See Compl. ¶ 87 n.79; see also Complaint, Wyatt v. South Orange Maplewood School District, et al., ESX-L-001491-22 (March 4, 2022) (the "Wyatt Suit"). The lawsuit, which is pending settlement, alleged that Herman "approached [the Student] and grabbed her hijab, pulling it back, touching her face and hair and exposing [her] uncovered head to the class." Wyatt Suit Compl. ¶¶ 6-15. The parents' lawsuit also alleged other instances of Herman's inappropriate conduct toward her Black students. Id. at ¶¶ 15-28.

D. Ibtihaj Muhammad's Comments about the Incident

Following the Incident, on October 7, 2021 at 4:03 PM Eastern Time, former Olympian, Ibtihaj Muhammad posted about the Incident on her Facebook and Instagram accounts. Muhammad's posts described the same events as those set out in Herman's Complaint, but also stated that the child "resisted, by trying to hold onto her hijab" and that Herman, in the wake of the Incident, appeared to walk back her actions by saying the child's hair was "beautiful" and she "did not have to wear [a] hijab." Compl. ¶¶ 18-19, Exs. C-D. Muhammad's full post reads:

> I wrote this book [*The Proudest Blue: A Story of Hijab and Family*][16] with the intention that moments like this would never happen again. When will it stop? Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. Schools should be a haven

[16] *The Proudest Blue: A Story of Hijab and Family* (Little Brown & Co. 2019) is a children's book written by Muhammad and S.K. Ali about two sisters wearing hijabs to school for the first time, only to face bullying. A sequel, *The Kindest Red: A Story of Hijab and Friendship*, is scheduled to be published in 2023. See Compl. ¶ 3.

> to all of our kids to feel safe, welcome and protected—no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.nj.us and the superintendent rtaylor@somsd.k12.nj.us

Id. Ex. C. The Instagram version of this post tagged the CAIR Foundation and CAIR-NJ. Id. ¶ 21, Ex. D. At 4:30 PM, Muhammad posted another, substantially identical statement on her Instagram account, again tagging the CAIR Foundation and CAIR-NJ. Id. ¶¶ 25-26, Ex. E.

E. Selaedin Maksut and CAIR-NJ's Comments about the Incident

On October 8 at 12:41 AM, CAIR-NJ's executive director Maksut reacted on Twitter to Muhammad's social media posts, stating, "Absolutely unacceptable. Teacher pulls off 7 year old's hijab…in front of the class. Our @CAIRNJ office is calling for immediate termination. Racist teachers like this cannot be trusted around our children." Compl. ¶¶ 30-31, Ex. F. Later that morning at 7:34 AM, Maksut appeared on an ABC network Good Morning America segment, entitled "CAIR-NJ Director on ABC Amid Calls for Firing of Teacher Who Allegedly Pulled Off Student's Hijab"[17] (the "GMA Report"), where he stated "The hijab, you know, is much like any other article of clothing for a Muslim woman. To remove that publicly can be very humiliating. Anyone who thinks it's OK to do this to a student clearly is not fit to be a teacher." Id. ¶¶ 42-43. At 2:13 PM, Maksut replied to his own first tweet, stating "Call and email the Superintendent, Dr. Ronald G. Taylor, today, and let him know Tamar Wyner Herman is unfit to be a teacher," and providing the phone number and email address of the superintendent. Id. ¶¶ 36-37, Ex. G. This tweet was later deleted. Id. Maksut was also quoted by CBS News New York, stating "The teacher

[17] Available at https://www.youtube.com/watch?v=az-6Xr44bfI (last visited Feb. 1, 2023).

not only put her hands on her, removed her headscarf. And this is, of course, humiliating for any Muslim woman to be exposed this way, in public." Id. ¶¶ 49, 71.

On October 8 at 11:49 AM, CAIR-NJ posted twice on Twitter, with both posts containing Maksut's quote from the CAIR Foundation Press Release, described below. Id. ¶¶ 52, 56-58, Ex. J. CAIR-NJ also posted the Maksut quote on Facebook at 11:34 AM. Id. ¶ 59.

On October 9, WCBS NEWSRADIO 880 quoted Maksut speaking about Herman (while not naming her), "Clearly she's demonstrated she cannot be trusted around students." Id. ¶ 50. Maksut also stated in a phone interview with NBC's Today Show that "Anything less than removing her from the classroom would be unacceptable. If she can't respect the religious practices of her students, then she shouldn't be teaching." Id. ¶ 51. Also on October 9 at 10:56 AM, CAIR-NJ posted a clip of the GMA Report to its Facebook account. Id. ¶ 45.

F. The CAIR Foundation's Statements about the Incident

On October 8, the CAIR Foundation posted five statements on social media relating to the Incident (together, "the CAIR Foundation Statements"). These statements, which form the basis of Herman's claims against the CAIR Foundation, are indicated in **bold** and underlined as follows[18]:

Statement #1: At 9:45 AM, following Maksut's initial post, the CAIR Foundation posted a link on its Facebook and Twitter accounts to an NBC-New York story headlined, "NJ Teacher Accused of Pulling Hijab Off 2nd Grade Student's Head"[19] (the "First NBC News Story"), along with the following message: "**A teacher pulled off a 7-year-old student's hijab in front of her**

[18] As fully discussed below, the bolded words constitute substantially true statements of fact and the underlined words constitute non-actionable expressions of opinion.

[19] Available at https://www.nbcnewyork.com/news/local/nj-teacher-accused-of-pulling-hijab-off-2nd-grade-students-head/3313080/ (Oct. 8, 2021).

class. This is completely unacceptable, and we are calling for immediate termination. Our children are not safe with #Islamophobia in the classroom." Compl. ¶¶ 33-34, Ex. F.

Statement #2: At 11:28 AM, the CAIR Foundation posted a press release on its website, entitled, "CAIR-NJ Calls for Immediate Firing of Teacher Who Allegedly Pulled Off Muslim Student's Hijab." Id. ¶ 46, Ex. H (the "Press Release"). The Press Release summarized Muhammad's allegations about the Incident, linked to the First NBC News Story, and reported that "Maplewood Police are investigating the incident." Id. ¶ 46, Ex. H. The Press Release also included the following quote from Maksut:

> "We call for the immediate firing of the **Maplewood teacher who pulled off the headscarf of a young Muslim student.** Anything less is an insult to the students and parents of Maplewood, NJ. **Forcefully stripping off the religious headscarf of a Muslim girl** is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience.
>
> Muslim students already deal with bullying from peers, it's unthinkable that a teacher would add to their distress. Islamophobia in our public schools must be addressed in NJ. Classrooms are a place for students to feel safe and welcome, not fear practicing their faith."

Statement #3: At 11:42 AM, the CAIR Foundation posted a link to the Press Release on Twitter, along with the following message: "Our children must be protected from anti-Muslim bigotry and abuse at school. **The teacher who pulled a second grader's hijab off in class** must be fired immediately. #Islamophobia @cairnj @MSeladein." Id. ¶¶ 54-55, Ex. I.

Statement #4: At 3:56 PM, the CAIR Foundation posted a link to another NBC News story headlined, "Olympian accuses New Jersey teacher of pulling off girl's hijab, school district investigating"[20] (the "Second NBC News Story") along with the following message: "**CAIR-NJ Exec. Dir. Selaedin Maksut: 'Forcefully stripping off the religious headscarf of a Muslim girl** is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience.' @CAIRNJ @Mselaedin #Islamophobia." Id. ¶¶ 39-40, Ex. G.

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[20] David K. Li, NBCNEWS.COM, (Oct. 8, 2021), available at https://www.nbcnews.com/news/us-news/olympian-accuses-new-jersey-teacher-pulling-girl-s-hijab-school-n1281117.

Statement #5: Also on October 8, the CAIR Foundation posted a video clip of the GMA Report on its YouTube account. Id. ¶ 45. In the clip, Maksut states, "The hijab, you know, is much like any other article of clothing for a Muslim woman. **To remove that publicly** can be very humiliating. … Anyone who thinks it's OK to do this to a student clearly is not fit to be a teacher." Id. ¶¶ 42-43. On October 9, the CAIR Foundation posted the same video clip on its Facebook and Twitter accounts. Id. ¶ 45.

G. The Complaint

Herman commenced this action on October 5, 2022. Her Complaint asserts two claims, naming all Defendants, the first a claim for "defamation per se" (libel[21]) and the second a claim for false light invasion of privacy. Compl. ¶¶ 94-172. The Complaint alleges that Herman was defamed by Muhammad's original social media posts, Maksut's subsequent social media posts

[21] The Complaint pleads the first count as "defamation *per se*," which refers to a defamatory statement whose meaning is allegedly clear on its face. Lawrence v. Bauer Publ'g & Printing, Ltd., 89 N.J. 451, 459 (1982). Since the CAIR Foundation Statements are all in written form, Plaintiff's count against the CAIR Foundation is more properly described as a claim of libel. Defendant will refer to the First Count as a "libel" claim throughout this Memorandum of Law.

and press statements, and CAIR-NJ's posts repeating Maksut's statement from the Press Release. As to the CAIR Foundation, the Complaint alleges that the five CAIR Foundation Statements set forth above were false because, even though Herman admits she "brushed back" the Student's hood exposing her hair to the class, she did not "pull off" or "forcefully strip[] off" the Student's hijab, e.g., id. ¶¶ 108, 114, "did not engage in an act of Islamophobia," id. ¶ 126, and is a "highly fit teacher." Id. ¶ 117.

The claim for false light invasion of privacy arises from the same challenged statements as Plaintiff's libel claim. See id. ¶¶ 146-48, 152-54, 155-57, 158-60, 161-163, 166-68.

ARGUMENT

When deciding a motion to dismiss, "courts must assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor." Banco Popular North America v. Gandi, 184 N.J. 161, 166 (2005) (internal quotation marks omitted). However, "after such inferences are afforded, dismissal is appropriate if plaintiff's complaint . . . has failed to articulate a legal basis entitling plaintiff to relief." Stonehill v. Nesta, No. DC-9066-06, 2007 WL 4258328, at *3 (N.J. App. Div. Dec. 6, 2007) (dismissing defamation claim) (internal quotation marks omitted and alteration in the original); see also Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005) (a plaintiff's complaint must "make allegations, which, if proven, would constitute a valid cause of action"); Banco Popular, 184 N.J. at 166 ("Obviously, if the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy."). A complaint that recites "mere conclusions without facts" or relies on subsequent discovery is not legally sufficient. Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). Further, courts have also held that "when allegations contained in a complaint are contradicted by the document it cites, the document controls." Myska v. New Jersey

Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (quoting Rapaport v. Robin S. Weingast & Assocs., 859 F. Supp. 2d 706, 714 (D.N.J. 2012)).

Pre-discovery dismissal of meritless defamation claims is especially appropriate where, as here, a plaintiff's claims implicate bedrock principles of freedom of speech and the right to comment on matters of public concern. See Maressa v. New Jersey Monthly, 89 N.J. 176, 196 (1982) ("courts should resolve free speech litigation more expeditiously whenever possible").[22] This policy reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." Sedore v. The Recorder Publishing Co., 315 N.J. Super 137, 146, (App. Div. 1998) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). Prompt dismissal of meritless libel claims is also consistent with the New Jersey Constitution, whose free speech protections are even "more sweeping in scope than the language of the First Amendment." Sisler v. Gannett Co., Inc., 104 N.J. 256, 271 (1986) (citing N.J. Const. art. I, § 6.).

Consistent with these principles, New Jersey state courts routinely decide defamation suits by way of a pre-answer motions to dismiss for failure to state a claim. See, e.g., Darakjian, 366 N.J. Super. at 238; Dello Russo v. Nagel, 358 N.J. Super. 254 (App. Div. 2003). In particular, the very issues raised by this motion are appropriately resolved on a motion to dismiss because they are, by definition, threshold issues of law for the court to determine:

> Unlike in most litigation, in a libel suit the central event—the communication about which suit has been brought—is ordinarily before the judge at the pleading stage.

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[22] See also Darakjian v. Hanna, 366 N.J. Super. 238, 250-51 (App. Div. 2004) (reversing trial court's denial of defendants' motion to dismiss a defamation suit under Rule 4:6-2(e)); cf. Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1077 (3d Cir. 1985) (acknowledging that although a defamation suit "fundamentally is a state cause of action," it is also "replete with First Amendment implications"); Time Inc. v. Hill, 385 U.S. 374, 389, 401-02 (1967) (Douglas, J., concurring) (recognizing that the expense in defending meritless defamation suits can have a chilling effect on First Amendment rights).

> * * * Thus, courts routinely consider, on motions to dismiss, motion for judgment on the pleadings, or demurrer, issues such as whether the statement at bar is capable of bearing a defamatory meaning . . . whether it is "of and concerning" the plaintiff, whether it is protected opinion . . . and whether the suit is barred by privilege or the statute of limitations, and they frequently grant motions on these grounds and others.

Hon. Robert D. Sack, 2 SACK ON DEFAMATION, Libel, Slander and Related Problems, 16.2.1 (5th ed. 2022).

Moreover, as explained below, Herman, as a public-school teacher, is not only a public official but the issues here are also unquestionably a matter of public concern. Thus, she is required to prove actual malice with convincing clarity. In this regard, New Jersey courts have cautioned against permitting defamation complaints to proceed where, like here, the allegations regarding actual malice "are limited to the fact of publication and a bare conclusory assertion that the [] defendant[] 'knew and/or reasonably should have known that the statement . . . was false,' with no other factual reference to lend support to the contention[.]" Darakjian, 366 N.J. Super. at 248.

As explained by the Appellate Division in Darakjian:

> [T]he court may not simply take the facial assertion as a given, but rather must evaluate the circumstances as best it can to determine whether there is any reasonable basis upon which the defamation claim can be seen to be viable. Were it otherwise, any person or entity claiming First Amendment protection would be at the mercy of a claimant's empty assertions unsupported even by any contentions regarding surrounding facts.

Id.

In accord with these well-established principles, Herman's claims must be examined closely at this early stage to determine whether they can meet the strict legal requirements for claims that arise from speech involving a public official or speech on matters of public interest. They cannot do so for the reasons set forth below.

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION

To state a claim for defamation based upon a statement about a public official or figure, or touching on a matter of public interest or concern, a plaintiff must allege "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and was not privileged); and (3) that the defendant published the defamatory statement with actual malice." Durando v. Nutley Sun, 209 N.J. 235, 248 (2012). Moreover, unlike "factual assertions that could be proven true or false," expressions of opinion are not actionable because they are not amenable to being disproven. Ward v. Zelikovsky, 136 N.J. 516, 531 (1994).

Plaintiff's defamation claims against the CAIR Foundation fail on several independent grounds. *First*, the CAIR Foundation Statements that describe Herman's actions are substantially true. Herman's own admissions confirm the gist of these statements—that she pulled back a Muslim student's hijab without the girl's consent, exposing her hair to others in violation of her religious beliefs. *Second*, the statements referring to "Islamophobia" and complaining that Herman is "not fit" to be a teacher are non-actionable epithets as well as opinions based on Herman's admitted actions. *Third*, Plaintiff has failed to make any non-conclusory allegations of actual malice against the CAIR Foundation. As such, the defamation claims against the CAIR Foundation must be dismissed.

The table below summarizes the reasons why each CAIR Foundation Statement is not actionable as a matter of law, followed by a detailed legal explanation:

CHALLENGED CAIR FOUNDATION STATEMENTS ANALYZED

The Complaint alleges that the following statements by the CAIR Foundation are false and defamatory.

Bold text means the statement is substantially true (because Herman admits to pulling back her student's hijab without consent). (*See* Section A, *infra*.)

Underlined text means the statement is pure opinion based on disclosed facts, epithets, or rhetorical hyperbole, which are not actionable as a matter of law. (*See* Section B, *infra*.)

Herman has failed to plead actual malice as to any of the CAIR Foundation Statements. (*See* Section C, *infra*.)

Statement #1	"**A teacher pulled off a 7-year-old student's hijab in front of her class**. This is completely unacceptable, and we are calling for immediate termination. Our children are not safe with #Islamophobia in the classroom" (via Twitter). Compl. ¶¶ 33-34, Ex. F.
Statement #2	"We call for the immediate firing of the **Maplewood teacher who pulled off the headscarf of a young Muslim student.** Anything less is an insult to the students and parents of Maplewood, NJ. **Forcefully stripping off the religious headscarf of a Muslim girl** is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience. Muslim students already deal with bullying from peers, it's unthinkable that a teacher would add to their distress. Islamophobia in our public schools must be addressed in NJ. Classrooms are a place for students to feel safe and welcome, not fear practicing their faith" (quote from Maksut included in the Press Release). Compl. ¶¶ 46-47, Ex. H.
Statement #3	"Our children must be protected from anti-Muslim bigotry and abuse at school. **The teacher who pulled a second grader's hijab off in class** must be fired immediately. #Islamophobia @cairnj @MSelaedin." Compl. ¶¶ 54-55, Ex. I.
Statement #4	"'**Forcefully stripping off the religious headscarf of a Muslim girl** is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience.' @CAIRNJ @Mselaedin #Islamophobia" (quote from Maksut via Twitter). Compl. ¶¶ 39-40, Ex. G.
Statement #5	"'The hijab, you know, is much like any other article of clothing for a Muslim woman. **To remove that publicly** can be very humiliating. … Anyone who thinks it's OK to do this to a student clearly is not fit to be a teacher'" (quote from Maksut within GMA Report). Compl. ¶¶ 43-44.

A. The (Bolded) Challenged Statements Are Substantially True

Herman's claims that she was libeled by the CAIR Statements above in **bold** fail because she does not contest—and in fact she admits—the essential gist of the Incident, namely that she pulled back the hijab of an observant Muslim second grade student and exposed her hair to the class, in violation of the girl's religious practice. Since falsity is the bedrock requirement of any defamation claim, "[a] plaintiff does not make a *prima facie* claim of defamation if the contested statement is essentially true." Hill v. Evening News Co., 314 N.J. Super. 545, 552 (App. Div. 1998). Further, in evaluating whether a statement is true or false, "[t]he law of defamation overlooks minor inaccuracies, focusing instead on 'substantial truth,'" and therefore "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" G.D. v. Kenny, 205 N.J. 275, 294, (2011) (citing Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-17 (1991)).

In Kenny, for example, the Court found substantial truth where the defendant said in a campaign flyer that plaintiff was "a DRUG DEALER who went to JAIL for FIVE YEARS for selling coke near a public school," though in reality plaintiff's conviction for possession of drugs had been expunged, plaintiff claimed he never actually sold any of the drugs, and he did not ultimately serve five years. Nevertheless, because he had pled guilty and essentially stood convicted of possessing cocaine with intent to distribute and the offense had occurred near a public school, the Court said:

> As a matter of law, we conclude that the campaign flyer's statement that G.D. "went to jail for five years" is, at the very least, substantially accurate, however imprecise the flyer's language may be. Certainly, the "substance," "gist," and "sting" of that statement when measured against G.D.'s sentence cannot serve as the basis for a claim of falsity in a defamation action.

205 N.J. at 306; see also La Rocca v. New York News, Inc., 156 N.J. Super. 59, 63 (App. Div. 1978) (cartoon criticizing police arrest of a school teacher was not actionable on the basis of

substantial truth where the arrest had occurred inside a classroom, since the mistake was "unimportant and unrelated to the 'gist or sting' of the alleged libel"); L.C. v. Middlesex Cnty. Prosecutor's Off., No. A-3654-18, 2021 WL 1327169, at *22-23 (N.J App. Div. Apr. 9, 2021), cert. denied, 250 N.J. 11 (2022), reconsideration denied, 250 N.J. 493, (2022) (claim dismissed on the basis of substantially truth, since describing plaintiff's conduct as "sexual assault" maintained the gist and sting of plaintiff's actual charges of, among others, conspiracy to commit aggravated criminal sexual conduct, criminal sexual contact, and aggravated assault); O'Keefe v. WDC Media, LLC, No. CIV. 13-6530 CCC, 2015 WL 1472410, at *4 (D.N.J. Mar. 30, 2015) (activist arrested and charged with a misdemeanor for entering a U.S. Senator's office pretending to be a repair man and trying to get access to the central phone system claimed his intention was to stage a stunt, not to tap any phones, and therefore statements that he was "apparently trying to bug" and "trying to tamper with" the phone system falsely accused him of felony wiretapping. In granting the motion to dismiss the libel suit, the court held that the phrases should be "understood in the colloquial sense," and did not "alter the fundamental gist" of the otherwise accurate report).

Here, Herman's Complaint, at best, claims that she did not subjectively intend to pull back the hijab and disputes the *extent* to which the Student's hijab was removed, alleging that she only "brushed [it] back" rather than "pull[ing it] off" or "forcefully stripping [it] off." Compl. ¶¶ 9, 108, 113. In the same breath, however, Herman admits that she knew the Student was religiously observant and regularly wore a head covering, and that she did not know or *even ask* the Student whether she had another head covering on under the "hood" hijab she wore that day. Id. ¶ 9. And yet, Herman admits she nonetheless intentionally put her hands on the Student's hood and uncovered the child's hair without permission, a plainly inappropriate act. Id. ¶ 9. The gist and sting of this admitted truth is precisely what the CAIR Foundation Statements convey, and whether

Herman pulled back the hijab two inches, five inches or completely off the Student's head is legally immaterial.

Indeed, Herman's actions would have been shocking in any religious context. "Brushing back" a Muslim girl's hijab would be akin to tugging on or adjusting an Orthodox Jewish woman's wig without her consent in mixed company and assuming no offense would be taken by that violation; or knocking off an Orthodox Jewish boy's hat without warning—even playfully—and expecting a yarmulke underneath. Each of these intentional actions interferes with religion-mandated garb and risks compromising—and in Herman's case *did* compromise—the religious observance of the wearer. Any reasonable person would understand that it is deeply disrespectful to touch another person's religious garb (meant for modesty and/or to display observance) without consent, much less to move that garb, regardless of intent. Indeed, Herman must have known that her behavior was inappropriate, since she felt compelled to apologize to the child.[23] Id. ¶ 9.

In short, whether or not Herman intended to uncover her student's hair, she cannot dispute that she intended to pull back her Muslim Student's head covering without her consent and did, in fact, uncover her hair. Nor can she honestly dispute the humiliation the child must have felt under any version of events. In light of these admitted and indisputable facts, the CAIR Foundation's characterization of Herman's intentional action as "pulling off" or "forcefully stripping" the Student's hijab is substantially true. At most, the use of these words reflects an emphatic gloss on

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[23] Moreover, regardless of the Student's religion or Herman's intent, pulling on the girl's clothing, as Herman admits she did, is inappropriate under any circumstance and evidences poor judgment on Herman's part. Indeed, such conduct by definition amounts to battery, which encompasses "any non-consensual touching." Kelly v. Cty. of Monmouth, 380 N.J. Super. 552, 559 (App. Div. 2005) (quoting Perna v. Pirozzi, 92 N.J. 446, 460–61 (1983)) (noting that battery "is established by 'proof of an unauthorized invasion of the [victim's] person, even if harmless'" and liability "extends 'to any part of the body, or to anything which is attached to it and practically identified with it,'" including clothing, papers, or even the victim's chair or car).

the disclosed, admitted fact that Herman pulled back the child's head covering and exposed her hair *without consent*. See Weiss v. Pinnacle Ent., Inc., No. A-4711-10T1, 2012 WL 1448050, at *6 (N.J. App. Div. Apr. 27, 2012) (describing plaintiff's business as a "really tawdry adult bookstore," was not actionable since the business *did* sell adult books and the term "'really tawdry' expressed [the defendant's] opinion, nothing more.").

Because Herman has admitted the truth of "the substance, the gist, the sting" of the **bolded** CAIR Foundation Statements, those statements cannot be the basis for a defamation claim.

B. The (Underlined) Challenged Statements Are Non-Actionable Opinion

The underlined CAIR Foundation Statements in the Chart above are epithets and expressions of opinion, and thus cannot support Plaintiff's defamation claim.

To establish a claim for defamation, the challenged statement must be provably false. See, e.g., McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 312 (App. Div. 2000) (emphasis added). Unlike "factual assertions that could be proven true or false," expressions of opinion are not actionable precisely because they are not amenable to being proven false. Ward, 136 N.J. at 531; see also Lynch v. New Jersey Educ. Ass'n, 161 N.J. 152, 167 (1999) ("[O]pinion statements do not trigger liability unless they imply false underlying objective facts."). Not only are expressions of opinion protected under New Jersey state law, but First Amendment principles likewise require that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law." Milkovich v. Lorian Journal, Co., 497 U.S. 1, 19-20 (1990).

Whether a challenged statement constitutes fact or opinion is a threshold question "of law to be resolved by the court." Kotlikoff v. The Cmty. News, 89 N.J. 62, 67 (1982). As such, defamation cases are routinely dismissed at the pleading stage where the challenged statement constitutes opinion. See, e.g., Weiss, 2012 WL 1448050, at *6 (affirming dismissal since calling

plaintiff's business "really tawdry" constituted opinion); Stonehill, 2007 WL 4258328, at *2-*3 (affirming dismissal since defendant police officer's statement to others that he was "not too sure about [plaintiff's] mental stability" constituted opinion); Baskerville v. Society Hill at Droyers Point Condominium Ass'n, No. L-1396-07, 2009 WL 3849693, at *9-*10 (N.J. App. Div. Nov. 16, 2009) (affirming dismissal because allegedly "slanderous and libelous comments" plaintiff made was "pure opinion"). In short, "[s]ince so much of defamation law commends itself to early intervention by a judge to decide the appropriate questions of law," a motion to dismiss a defamation claim on the ground that the challenged statement is nonactionable opinion is "ripe and proper for determination." Bardinas v. Delaney, No. BER-L-8291-06, 2007 WL 700502 (N.J. Law. Div. Feb. 8, 2007).

In considering whether a challenged statement is non-actionable opinion, New Jersey courts consider "the content, verifiability, and context of the challenged statements." Ward, 136 N.J. at 529. In examining the "content," courts "look[] to the fair and natural meaning" that a challenged statement "will be given . . . by reasonable persons of ordinary intelligence." Id. (internal quotation marks omitted). "Verifiability" requires courts to determine whether a statement "is capable of being verified," i.e., whether it can be proven true or false. Wilson v. Grant, 297 N.J. Super. 128, 137-38 (App. Div. 1996).

To determine a statement's "context," the court must "examine 'the statement in its totality in the context in which it was uttered or published.'" Id. (quoting Cole v. Westinghouse Broad. Co, Inc., 435 N.E.2d 1021, 1025 (Mass. 1982)). "[T]he context to be considered is both narrowly linguistic and broadly social." Wilson, 297 N.J. Super. at 137 (citing Ollman v. Evans, 750 F.2d 970, 982 (D.C. Cir. 1984)). Context will help determine "the listener's reasonable interpretation" of the content, which is "the proper measure for whether the statement is actionable." Wilson, 297

N.J. Super. at 137 (citing Ward, 136 N.J. at 532). Courts also take into account the "medium by which the statement is disseminated and the audience to which it is published." Wilson, 297 N.J. Super. at 137 (citing Cole, 435 N.E.2d at 1025).

An opinion is "pure"—and therefore not actionable—when "the maker of the comment states the facts on which he bases his opinion . . . and then states a view as to the plaintiff's conduct, qualifications or character." Kotlikoff, 89 N.J. at 68–69. The opinion can be "based on stated facts or facts that are known to the parties or assumed by them to exist." See Dairy Stores, Inc. v. Sentinel Pub. Co., Inc., 104 N.J. 125, 147 (1986); see also Lynch, 161 N.J. at 167 ("[O]pinion statements do not trigger liability unless they imply false underlying objective facts."). As the New Jersey Supreme Court has recognized, "[e]xpressions of 'pure' opinion on matters of public concern" can never be "the basis of an action for defamation." Kotlikoff, 89 N.J. at 69-71; see also Langert v. The Lakewood View, No. A-2815-12T1, 2014 WL 147320, at *5 (N.J. App. Div. Jan. 16, 2014) ("A claim cannot lie for one's expression of 'pure opinion,' particularly on a matter of public concern.").

Moreover, insults and epithets are on their face non-actionable regardless of whether they are based on any facts. Even "pejorative statements of opinion are entitled to constitutional protection no matter how extreme, vituperous, or vigorously expressed they may be." Kotlikoff, 89 N.J. at 71; see also McLaughlin, 331 N.J. Super. at 312–13 ("[M]ere insults and rhetorical hyperbole, while they may be offensive, are not defamatory.").

Importantly, "an accusation of bigotry is not actionable unless the statement suggests the existence of defamatory facts." Ward, 136 N.J. at 533 (citing Stevens v. Tillman, 855 F.2d 394, 402 (7th Cir. 1988), which held that calling a school principal "racist" was not actionable because

"accusations of 'racism' no longer are 'obviously and naturally harmful.'")). As the Ward Court stated:

> Although perhaps directly injurious to a person, name-calling does not have a defamatory content such that harm to reputation can be shown. The First Amendment does not embrace the trite wallflower politeness of the cliché that if you can't say anything good about a person you should say nothing at all. Indeed, name calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable. No matter how obnoxious, insulting or tasteless such name-calling, it is regarded as a part of life for which the law of defamation affords no remedy.

136 N.J. at 529-30 (holding that calling plaintiff a "bitch" who "did not like Jews" constituted opinion) (internal quotation marks and citations omitted); see also Edelman v. Croonquist, No. 09-CV-1938, 2010 WL 1816180, at *6 (D.N.J. May 4, 2010) ("characterization of [plaintiffs] as racists is a subjective assertion, not sufficiently susceptible to being proved true or false to constitute defamation").

Applying these principles, the CAIR Foundation Statements underlined in the Chart above cannot support a defamation claim because they are subjective views, epithets, and rhetorical hyperbole used to express the CAIR Foundation's deeply-held opinions about the Incident and Herman. See Langert, 2014 WL 147320, at *3 (affirming dismissal of defamation claim since statement would be reasonably understood as "nothing more than speculation and hyperbole, essentially constituting opinion"); Cibenko v. Worth Pubs., Inc., 510 F. Supp. 761, 765-66 (D. N.J. 1981) ("conjecture regarding an important social issue" held to be protected opinion); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.").

In its social media posts and its Press Release, the CAIR Foundation expressed (or republished) interpretations of the Incident and views about Plaintiff's "fitness" to teach a diverse

student population. These statements expressed the opinion that Herman's act of pulling back a devout Muslim girl's hijab was "humiliating" and "traumatizing" for the Student. Compl. ¶¶ 113-15. The statements also opined that such conduct was "unacceptable" and "exceptionally disrespectful," and that children "are not safe with #Islamophobia in the classroom" and "must be protected from anti-Muslim bigotry and abuse at school." Id. ¶¶ 33, 46, 54, 107-09, 113-15, 122-24, Exs. F, H, I. In the GMA Report reposted by the CAIR Foundation, Maksut opined that "[a]nyone who thinks it's OK to do this to a student clearly is not fit to be a teacher." Id. ¶¶ 43-44, 116-18. Ultimately, the CAIR Foundation called for Herman's immediate termination. Id. ¶¶ 54, 119-21, 122-24, Exs. H-I.

Context is key here. First, viewing the underlined statements in context, the CAIR Foundation's role as a staunch advocate for Muslim-Americans signals to readers that these underlined statements are not an assertion of objective fact, but as expressions of subjective belief and opinion from an advocate's point of view. See Ward v. Zelikovsky, 263 N.J. Super. 497, 519 (App. Div. 1993), rev'd, 136 N.J. 516 (1994) (describing prevailing defendants in Stevens v. Tillman—members of a parent association—as "community activists"). As a Muslim civil rights advocacy group, the CAIR Foundation aims to "enhance understanding of Islam, protect civil rights, promote justice, and empower American Muslims." Compl. ¶ 5. The CAIR Foundation advances that goal by raising awareness of events like the Incident and putting them in the context of the Muslim-American experience. In that regard, the CAIR Foundation and its community members are concerned about not only full-blown bigotry, but also microaggressions against Muslims that may often be ignored or downplayed as "unintentional," but humiliate and degrade nonetheless.

Said another way, from the CAIR Foundation's and its audience's perspective, knowingly moving a Muslim child's head covering without her consent is a thoughtless and disrespectful act, at best, that can be a deeply humiliating and traumatic experience for the child. The CAIR Foundation's audience would therefore expect its public statements regarding such an incident to reflect a high degree of outrage. Furthermore, several of the statements were posted on Twitter, where readers expect "a wide range of casual, emotive, and imprecise speech," and where character limits necessarily prevent a comprehensive account of events. See Sandals Resorts Int'l Ltd. v. Google, Inc., 86 A.D.3d 32, 43 (N.Y. App. Div. 2011) (noting that "[t]he culture of Internet communications . . . has been characterized as encouraging a 'freewheeling, anything-goes writing style'" and social media statements are thus given less "credence" by readers).

Second, to the extent these statements opine on Herman's fitness as a teacher, they represent a subjective viewpoint rather than a factual statement and are therefore not actionable. These statements are textbook examples of nonactionable "pure opinion." The CAIR Foundation disclosed throughout its statements that its condemnation of Herman was based on her pulling back the hijab of a Muslim student in her classroom—actions she admits to having taken. See Compl. ¶ 9; Id. Exs. F-I. Thus, CAIR stated "the facts on which [it] bases [its] opinion" and its "view as to the plaintiff's conduct, qualifications or character." Kotlikoff, 89 N.J. at 68–69. Herman alleges that she "is a highly fit teacher with a strong pedagogical record built over a thirty-three-year teaching career, with twenty years in the District." Compl. ¶¶ 108, 117. Plaintiff even submits reviews of her teaching as proof. See Compl. Exs. A-C. But these reviews do not transform subjective statements about her fitness into objectively provable factual assertions. Minds may differ about whether Herman's actions called her fitness as a teacher into question,

which is precisely why the opinions published by CAIR on this subject do not provide a basis for defamation liability.

Third, the use of the terms "Islamophobia" and "anti-Muslim bigotry" in the CAIR Foundation Statements are also non actionable for two reasons. First, they constitute "pure opinions" and, like other accusations of bigotry, are widely recognized as non-actionable name-calling. The CAIR Foundation Statements that criticized Herman for Islamophobia or anti-Muslim bigotry represent subjective views based on disclosed facts about Herman's admitted conduct. See Kotlikoff, 89 N.J. at 68–69. Second, even putting that aside, courts have recognized that terms such as "racist" have been "watered down by overuse, becoming common coin in political discourse." Stevens, 855 F.2d at 402.

Accordingly, New Jersey courts routinely dismiss claims arising from these kind of vituperative epithets. In Hagaman v. Angel, for example, the court found that calling the plaintiff a "Christian bigot," a "white trailer trash park bigot," and a "Christian Quisling Bigot" could not be the basis of a defamation claim as those terms are "non-actionable name-calling" that "do not qualify as defamatory statements." No. ATL-L-2408-03, 2005 WL 1390360, at *5 (N.J. Law Div. Mar. 4, 2005). More recently, a New Jersey federal court held that "calling someone a racist, hater, or bigot…will not result in defamation liability" when they are "characterizations" of a plaintiff's conduct. Jorjani v. New Jersey Inst. of Tech., No. 18-CV-11693, 2019 WL 1125594, at *6-7 (D.N.J. Mar. 12, 2019) (citing Lynch, 161 N.J. at 167).[24] In short, the law is clear that a defamation

[24] Similarly, in neighboring jurisdictions, claims that someone is racist or hateful are likewise routinely dismissed as a matter of law on the ground that such statements constitute non-actionable opinion. See, e.g., Russell v. Davies, 97 A.D.3d 649, 650-51 (N.Y. App. Div. 2012) (statements by reporters and local politicians interpreting an essay by electoral candidate as racist and anti-Semitic were opinion based on disclosed facts); Silverman v. Daily News, L.P., 129 A.D.3d 1054, 1055 (N.Y. App. Div.2015) (statement that former principal authored "racist writings" and had ties to a "white supremacist group" were protected opinion based on disclosed facts); Covino v.

claim cannot stand based on CAIR's use of the word "Islamophobia" or characterization of the Incident as "anti-Muslim bigotry."

Finally, the CAIR Foundation's use of the phrases "pulled off" and "forcefully stripping off," as opposed to "brush[ing] back," do not change the gist or sting of the Incident. See, supra at Section I-A. Equally important, this language conveys a subjective opinion. The CAIR Foundation was entitled to use "loose, figurative" language and "rhetorical hyperbole" to describe Herman's actions, Kotlikoff, 89 N.J. at 72, rather than Herman's carefully chosen words reflecting her view of the Incident. The CAIR Foundation's vocabulary choice does not change the factual underpinning, but merely reflects its subjective viewpoint that Herman's actions were grossly inappropriate and resulted in the child's hair being exposed. See, e.g., id (accusations that a mayor engaged in a "huge coverup" and "conspiracy" by refusing to name delinquent taxpayers were not "specific accusations of criminal activity, but rather merely . . . pejorative rhetoric, criticizing plaintiff in an identified, isolated instance of his performance in public office."). Therefore, these specific word choices cannot be the basis of a defamation claim.

* * *

In sum, because the five CAIR Foundation Statements are comprised of substantially true assertions, coupled with non-actionable opinion and name-calling, Herman's defamation claim should be promptly dismissed.

Hagemann, 165 Misc. 2d 465, 472-73 (N.Y. Sup. Ct. 1995) ("the epithet 'racially insensitive' cannot be verified as true or false" and it has "no meaning which is readily understood"); see also Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1297 (D.C. Cir. 1988) (agreeing that the term "anti-Semitic" is generally regarded as a statement of opinion); Jones v. City of Philadelphia, 73 Pa. D. & C. 4th 246, 259 (Pa. Com. Pl. 2005) (holding the term "anti-Semitic" is not capable of defamatory meaning); Rybas v. Wapner, 311 Pa. Super. 50, 55 (1983) (holding that classifying the term anti-Semitic as a factual assertion would, "restrict too severely the right to express such opinions, no matter how annoying or disagreeable," and "would be [a] dangerous curtailment of a First Amendment right").

C. The Complaint Fails to Plead Actual Malice

Even if Herman could overcome the hurdles described above—and she cannot—her claims against the CAIR Foundation must also be dismissed for the independent reason that the Complaint fails to plead any factual allegations that would support a finding of actual malice by the CAIR Foundation.

Preliminarily, there is no question that the actual malice standard applies to Herman's defamation claims. Actual malice must be pleaded (and eventually proven with convincing clarity) in a libel claim where the plaintiff is a public figure or where the subject matter of the statements is a matter of public concern. Actual malice is also a required element of a claim for false light invasion of privacy. Hornberger v. Am. Broad. Companies, Inc., 351 N.J. Super. 577, 598 (App. Div. 2002) ("the actual malice standard applies to the false light claim to avoid violation of the First Amendment's protection of freedom of expression.") (citing Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988)).

Specifically, the First Amendment requires that public officials and other public figures plead and prove actual malice, i.e., that the statements at issue were made with knowledge of falsity or with reckless disregard for the truth, as an element of any defamation claim. Sullivan, 376 U.S. at 279-80. Second, since the establishment of this principle, "New Jersey accepted the invitation to provide greater protection to speech involving matters of public concern than mandated by the United States Supreme Court's First Amendment jurisprudence," under the rubric of the "fair comment privilege," Senna v. Florimont, 196 N.J. 469, 484–85 (2008); and therefore, New Jersey law also requires a showing of actual malice where a defamation plaintiff—whether she is a public figure or private figure—sues over a statement on a matter of public interest. Id. at 496-97, ("the actual-malice standard will apply when the alleged defamatory statement concerns a public figure or public official or involves a matter of public concern."); Sisler, 104 N.J. at 279; Dairy Stores,104

N.J. at 152 (recognizing that the actual malice requirement protects the rights of both "citizens and newspapers alike [to] speak their minds on matters of public concern.").

As a public-school teacher whose position is funded by and created for taxpayers, Herman's behavior toward her students in the classroom is plainly a matter of public interest. As the New Jersey Supreme Court has held, "[t]here is a strong public interest in the behavior of teachers, especially concerning their conduct with and around their students." Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 153, 156 (2000) (statements that schoolteacher plaintiff had been drinking and keeping students out late on a school trip addressed a matter of public concern). New Jersey courts also consider public school teachers—where, as here, the statements reflect on their status or conduct as teachers—to be public figures and have therefore required public school teachers and administrators to show actual malice as an element of their defamation claims. See, e.g., id; Walko v. Kean Coll. of New Jersey, 235 N.J. Super. 139, 153 (Law. Div. 1988) (citing cases where teachers were held to be public figures within their community); Standridge v. Ramey, 323 N.J. Super. 538, 545 (App. Div. 1999) (public school athletic director was a public official required to plead actual malice). Thus, for Herman's defamation claims to survive, she must allege actual malice and facts to support that allegation.

Under the actual malice standard, "reckless disregard for the truth" requires far more than negligent or accidental falsity. To meet this standard a plaintiff must plead facts that, if true, would establish that the defendant "actually doubt[ed] the veracity" of the statements, Durando, 209 N.J. at 252, or had a "high degree of awareness" as to their probable falsity. See Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 667 (1989) (internal quotation marks omitted); id. at 688 ("failure to investigate before publishing … is not sufficient to establish reckless disregard.");

see also Lynch, 161 N.J. at 165, 172 ("[n]egligent publishing does not satisfy the actual-malice test.").

Actual malice is a "high or strict burden," Sisler, 104 N.J. at 269, and is necessary to guarantee the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" Sullivan, 376 U.S. at 270; see also Senna, 196 N.J. at 491 (the actual malice standard ensures "adequate breathing room" for "speech involving matters of public interest and concern"). As such, New Jersey courts are directed to dismiss defamation claims at the pleading stage where the plaintiff's complaint fails to allege facts showing actual malice. See, e.g., Darakjian 366 N.J. Super. at 247-48 (allowing a defamation claim "to survive on the basis of a mere allegation of knowledge of falsity or reckless disregard affords insufficient breathing space to the critical rights protected, in the public interest, by the First Amendment."); Newton v. Newark Star-Ledger, No. A-3819-11T3, 2014 WL 3928500, at *4 (N.J. App. Div. Aug. 13, 2014) (actual malice not sufficiently alleged merely by averring a "litany of vague and bare conclusory assertions that the articles contained false statements of fact and the [defendant] purposely published the articles in reckless disregard for the truth") (collecting cases).

Herman's Complaint does not come close to meeting this strict standard. Instead, her allegations of fault as to CAIR Foundation are wholly conclusory. In boilerplate fashion, the Complaint pleads merely that the challenged statements were "knowingly and/or with recklessness and/or malice published to third parties." Compl. ¶ 129; see also id. ¶¶ 148, 154, 163, 168, 169 ("CAIR, in making this defamatory statement, acted in reckless disregard as to the falsity of the publicized matters and the false light in which Herman would be placed."). But such a rote recital of the actual malice standard is legally insufficient to meet the basic pleading requirements for a defamation claim. See, e.g., Darakjian, 366 N.J. Super. at 247-248 ("bare conclusory assertion"

of actual malice "with no other factual reference to lend support to the contention" is insufficient to plead actual malice); Newton, 2014 WL 3928500, at *4 (same).

Indeed, the Complaint undermines any claim of actual malice by alleging that a well-known public figure, Muhammad, first made the allegations against Herman, and that Maksut (who is quoted in two of the CAIR Foundation Statements) only began speaking out after "having seen Muhammad's social media posts." Compl. ¶ 30. The Complaint provides no reason that the CAIR Foundation should have doubted Maksut or Muhammad. See Biro v. Conde Nast, 807 F.3d 541, 546 (2d Cir. 2015) (dismissing complaint for failure to prove actual malice where there were no alleged facts that would have "prompted the … defendants to question the reliability of any of the named or unnamed sources"). Indeed, the Complaint's admission that Maksut, and by extension the CAIR Foundation, relied upon Muhammad's public account of the Incident forecloses even an allegation of negligence. See Crescenz v. Penguin Grp. (USA), Inc., 561 F. App'x 173, 177 (3d Cir. 2014) (it was not negligent "for an author, 'without a high degree of awareness of [the facts'] probable falsity, [to] rely on statements made by a single source even though they reflect only one side of the story'") (quoting Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1028 (5th Cir. 1975)).

In sum, the Complaint is completely devoid of *any* factual allegations capable of supporting an inference that the CAIR Foundation Statements—or any other statements pleaded in the Complaint—were made by the CAIR Foundation with actual malice. As such, Plaintiff's defamation claim must be dismissed.

D. Plaintiff's Tag-Along False Light Invasion of Privacy Claim Must Be Dismissed

Plaintiff's claim for false light invasion of privacy must also be dismissed. Although recognized in New Jersey, a false light claim is unavailable where, as here, it is based on the same

underlying conduct as a deficient defamation claim. Williams v. MLB Network, Inc., No. A-5586-16T2, 2019 WL 1222954, at *30 (N.J. App. Div. Mar. 14, 2019) (when there is no actionable defamation, "'there can be no claim for damages flowing from the alleged defamation but attributed to a different intentional tort whose gravamen is the same as that of the defamation claim'") (citing LoBiondo v. Schwartz, 323 N.J. Super. 391, 417 (App. Div. 1999)); Walko, 235 N.J. Super. at 155 (observing that "where the court has already determined that no reasonable reader would interpret [the statements] . . . as a factual claim about the plaintiff . . . the false light cause of action must also fail."). This bedrock principle ensures that a false light claim cannot be used to circumvent the protections and defenses available to defendants in defamation cases.

Upon even the slightest examination, it is clear that Herman's false light claim merely repackages her deficient defamation claim by relying on precisely the same conduct. Compare Compl. ¶¶ 94-135 to id. ¶¶ 136-172. Accordingly, Herman's false light claim must be dismissed for the same reasons as her defamation claim, namely that the CAIR Foundation Statements are substantially true or non-actionable opinion, and the Complaint fails to plead factual allegations of actual malice by the CAIR Foundation. See Kenny, 205 N.J. at 307-08 ("Because G.D.'s arguments in support of his false-light claim are essentially the same as those he advances on his defamation claim, the result can be no different."); Salek v. Passaic Collegiate Sch., 255 N.J. Super. 355, 360-61 (App. Div. 1992) (dismissing false light claim for failure to plead a false statement of fact and defamatory meaning); Hornberger, 351 N.J. Super. at 598.

CONCLUSION

For the foregoing reasons, Defendant the CAIR Foundation respectfully requests that this Court enter an order dismissing the Complaint against it in its entirety with prejudice, and for such other and further relief as the Court deems just and proper.

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Respectfully submitted,

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