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**SUPERIOR COURT OF NEW JERSEY
UNION COUNTY – LAW DIVISION**

TAMAR HERMAN,

Plaintiff,

v.

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

Defendants.

DOCKET #: UNN-L-002913-22

**PLAINTIFF'S BRIEF IN
OPPOSITION TO
DEFENDANTS'
MOTIONS TO DISMISS
AND MOTION FOR
SUMMARY JUDGMENT**

TABLE OF AUTHORITIES

Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739 (1989).....8

Hotaling & Co., LLC v. Berry Sols. Inc., 2022 U.S. Dist. LEXIS 178066.....16

Palladino ex rel. United States v. VNA of S.N.J., Inc.,
68 F.Supp. 2d 455, 476 (D.N.J. 1999).....16

G.D. v. Kenny, 205 NJ 275, 294 (2011).....17

L.C. v. Middlesex County Prosecutor’s Office, 2021 N.J. Super. Unpub. LEXIS 598.....18

Carrabba v. Morgat, 2014 U.S. Dist. LEXIS 7799.....18

Lynch v. New Jersey Educ. Ass’n, 161 N.J. 152, 167 (1999).....19

Ward v. Zelikovsky, 136 N.J. 516, 533 (1994).....19

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT & STATEMENT OF THE CASE 1

II. LEGAL STANDARD 7

III. ARGUMENT..... 8

a. Defendants’ Motions Are Mooted By The Proposed First Amended Complaint 13

b. Substantial Truthfulness 14

i. Defendants’ Arguments Regarding Substantial Truthfulness Cannot Be Decided On A Motion To Dismiss Or Pre-Discovery Summary Judgment Motion..... 15

ii. Defendants’ Statements Were Not Substantially True..... 16

c. Defendants’ Statements Were Not Protected Opinions 19

d. Plaintiff Sufficiently Alleged Actual Malice 21

IV. IN THE ALTERNATIVE, PLAINTIFF REQUESTS LEAVE TO AMEND AND AN OPPORTUNITY FOR DISCOVERY 21

V. CONCLUSION 23

I. PRELIMINARY STATEMENT & STATEMENT OF THE CASE

Plaintiff Tamar Herman (“Herman”) respectfully submits this memorandum of law in opposition to motions to dismiss by Defendants Ibtihaj Muhammad (“Muhammad”), Selaedin Maksut (“Maksut”), CAIR Foundation Inc. (“CAIR”) and CAIR NJ (collectively, “Defendants”) and motion for summary judgment by Muhammad.

As set forth in Herman’s Complaint (the “Complaint” – see **Exhibit A** attached to the Certification of Dykema in opposition to motions to dismiss by Defendants Muhammad, Maksut, CAIR, and CAIR NJ, and motion for summary judgment by Muhammad [“Dykema Cert.”]) and in the Certification of Herman accompanying this memorandum of law (“Herman Cert.”), Herman is a beloved teacher with a stellar reputation earned at Seth Boyden Elementary School (the “School”) in the South Orange Maplewood School District (the “District”) in Maplewood, New Jersey for twenty years, with more than thirty years of overall teaching experience. (Complaint at ¶ 1, Exhibit A; Herman Cert. at ¶¶ 6, 8). On October 6, 2021 Herman was teaching her second-grade class at the School when she noticed one of her students (the “Student”) wearing a hood that was blocking her eyes. (Complaint at ¶ 9; Herman Cert. at 9). While Herman was aware that the Student—who was 7 years of age—regularly wore a form-fitting hijab, the article of clothing Herman witnessed on October 6, 2021 did not resemble the hijab that this student wore every day prior. (*Id.*). Accordingly, Herman believed in good faith that the student’s hijab was being worn under the hood. (*Id.*). Intending to encourage the Student to engage in her schoolwork as her eyes were partially blocked by the hood, Herman—in accordance with school policy which indicates the students should not be allowed to wear items that block their vision—asked the Student to brush back her hood. (*Id.*). This was a particularly reasonable request as the rest of the Student’s face was already significantly covered by a mask

being worn to protect against COVID-19. (*Id.*). When the student did not respond to Herman’s request, Herman, believing the Student’s hijab was underneath, gently brushed the hood back a few inches with her hand to uncover the Student’s eyes. (Complaint at ¶¶ 9, 96, 100, 120, 123, 126, 138, 141, 161, 165; Herman Cert. at ¶¶ 2, 9, 10). While “lightly brushing back the hood itself, and without making contact with the Student physically, Herman noticed the Student’s hair and that the Student was not wearing her regular form-fitting hijab underneath.” (Complaint at ¶ 9; Herman Cert. at ¶ 9). “Herman immediately brushed the hood back to cover all the Student’s hair and apologized to the Student.” (Complaint at ¶¶ 9, 96; Herman Cert. at ¶¶ 2, 9, 10). “The hood never left the Student’s head, and the classroom learning went on as normal.” (*Id.*). During this interaction, Herman did not remove the hood from the Student’s head or use physical force of *any* kind on the Student and her hijab, including grabbing, pulling, ripping, or stripping; rather, Herman merely *brushed* the hood back, and gently or lightly, at that. (Complaint at ¶¶ 2, 9, 100, 103, 105, 108, 114, 120, 123, 126, 138, 141, 144, 147, 153, 159, 162, 165, 167; Herman Cert. at ¶¶ 2, 9, 10).

In the two days following this interaction with the Student, Defendants published numerous false and malicious statements about Herman and her interaction with the Student. (Complaint at ¶¶ 18-61, Exhibits C - J; Herman Cert. at ¶¶ 11 - 25). Defendants—seeking to enhance their reputations and stature with their followers, and to profit—portrayed Herman in a false light as a racist and child abuser, and falsely accused Herman of using physical force to remove the Student’s hijab. (Complaint at ¶¶ 3, 18-61, 88, 98; Herman Cert. at ¶ 2). Defendants’ statements created a firestorm of public outrage with explosive and lasting consequences, including but not limited to: Herman being subjected to threats to her physical safety, antisemitic vitriol and hatred, relentless harassment from strangers, merciless bullying and ridicule, shaming in local

and national news stories, being subjected to a criminal investigation and the threat of criminal charges by the Essex County District Attorney’s Office, and being placed by the District on indefinite administrative leave from her teaching position. (Complaint at ¶¶ 1, 66, 69, 70, 130, 170; Herman Cert. at ¶¶ 11 - 25). The firestorm burned so intensely that even Governor Phil Murphy weighed in with a Twitter post expressing that he was “[d]eeply disturbed” by Defendants’ false claims.¹ (Complaint at ¶¶ 1, 16, 130, 170; Herman Cert. at ¶ 17).

Accordingly, the Complaint contains two counts: (1) Defamation *Per Se*, and (2) False Light Invasion of Privacy. These counts relate to the numerous false statements maliciously published by the Defendants about Herman on and at the following dates² and times³: two statements posted by Muhammad on her Facebook and Instagram accounts on October 7 at 4:03 p.m. and 4:30 p.m. in which she falsely claimed that Herman “forcibly removed” the Student’s hijab and “pulled the hijab off,” that Herman told the Student “her hair was beautiful and she did not have to wear a hijab to school anymore,” and suggested that Herman’s conduct was abusive, bigoted, and racist (the “Muhammad Statements” – *see Exhibit B* attached to the Dykema Cert.; Complaint at ¶¶ 19-29, Exhibits C-E)⁴; a statement posted by Maksut on his Twitter account on October 8 at 12:41 a.m. together with a reply to that statement at 2:13 p.m. in which he falsely claimed that Herman “pulls off” the Student’s hijab and is a “[r]acist teacher” who is “unfit” to teach (“Maksut Statement #1 Including Reply – *see Exhibit C* attached to the Dykema Cert.

¹ <https://twitter.com/govmurphy/status/1446584729550168066?lang=> (last visited April 8, 2023).

² All of Defendants’ statements were published on October 7, 2021, October 8, 2021, and October 9, 2021.

³ All times are Eastern Standard Time.

⁴ [https://www.facebook.com/ibtihajmuhammadusa/posts/pfbid0bPq5p9fcXfLg1EkbhTKjjrtXrv9XLC3w9r4NqQ9LMHheShN5UdkxrSVifgYNZy1tl?__cft__\[0\]=AZVVbtaH4560iVVGos8egm58u42qwnf7eJk3NdgDvvLX7IPcabfA_gR34ViLCjEHpabIOh89-8HWr2NEBHaoj-2zOcywQtZXkxqtouPkcoHJ0I19y1QJ8QEflsOUwnaYocRqdXOKIuHaR2G8oP52ME7&__tn__=%2CO%2CP-R](https://www.facebook.com/ibtihajmuhammadusa/posts/pfbid0bPq5p9fcXfLg1EkbhTKjjrtXrv9XLC3w9r4NqQ9LMHheShN5UdkxrSVifgYNZy1tl?__cft__[0]=AZVVbtaH4560iVVGos8egm58u42qwnf7eJk3NdgDvvLX7IPcabfA_gR34ViLCjEHpabIOh89-8HWr2NEBHaoj-2zOcywQtZXkxqtouPkcoHJ0I19y1QJ8QEflsOUwnaYocRqdXOKIuHaR2G8oP52ME7&__tn__=%2CO%2CP-R) (last visited April 8, 2023);

https://www.instagram.com/p/CUvWR81MkOQ/?utm_source=ig_web_copy_link (last visited April 8, 2023); https://www.instagram.com/p/CUvZrQHsB6-/?utm_source=ig_web_copy_link (last visited April 8, 2023).

Complaint at ¶¶ 30-32, 36-38, Exhibits F & G)⁵; a statement posted by CAIR on its Facebook and Twitter accounts on October 8 at 9:45 a.m. substantially resembling Maksut’s October 8, 12:41 a.m. Twitter post, in which it falsely claimed that Herman “pulled off” the Student’s hijab in an act of “Islamophobia” (“CAIR Statement #1” – *see Exhibit D* attached to Dykema Cert.; Complaint at ¶¶ 33-35, Exhibit F)⁶ a statement posted by CAIR and Maksut on their Twitter accounts on October 8 at 3:56 p.m. in which Maksut falsely accused Herman of “forcefully stripping off the religious headscarf” of the Student (“Maksut Statement #3” – *see Exhibit E* attached to Dykema Cert.; Complaint at ¶¶ 39-41, Exhibit G)⁷; a statement made by Maksut on ABC’s Good Morning America on October 8 at 7:34 a.m. and republished by CAIR on its CAIRtv YouTube account on October 8, its Facebook account on October 9 at 9:52 a.m., its Twitter account on October 9 at 9:53 a.m., and by CAIR NJ on its Facebook account on October 9 at 10:56 a.m., in which Maksut claimed that Herman “remove[d]” the Student’s hijab publicly and was “not fit” to be a teacher (“Maksut Statement #4” - Complaint at ¶¶ 42-45)⁸; a press release posted by CAIR on its website and by CAIR NJ on its Facebook account containing a quote by Maksut on October 8 at 11:28 a.m. in which he demanded Herman’s firing based on the false accusations that she “pulled off” and was “[f]orcefully stripping off” the Student’s “headscarf” in an act of “Islamophobia” (“CAIR Statement #2” – *see Exhibit F* attached to the

⁵ <https://twitter.com/MSelaedin/status/1446334944960204832> (last visited April 8, 2023).

⁶ <https://www.facebook.com/CAIRNational/posts/pfbid0SBgbx8u1iBXDpH775ByQZCKLk6uYL4RoApNz7T83o8esGCFJNyDesyEBNDrepGtWl> (last visited April 8, 2023); <https://twitter.com/CAIRNat> (last visited April 8, 2023).

⁷ <https://twitter.com/CAIRNational/status/1446565117584367617?s=20&t=qeNRv4dZCurq8s44mQ2Wnw> (last visited April 8, 2023).

⁸ <https://www.youtube.com/watch?v=az-6Xr44bfl> (last visited April 8, 2023); <https://www.facebook.com/CAIRNational/posts/pfbid0cJuXHt7BZCmnPUHeCum4Y34iejYWCU5FpKWCjgctQYWUrLvm8jdHraobaVmNqG9l> (last visited April 8, 2023); <https://twitter.com/CAIRNational/status/1446836255430488071?s=20&t=qeNRv4dZCurq8s44mQ2Wnw> (last visited April 8, 2023); <https://www.facebook.com/CAIRNewJersey/posts/pfbid0akivLSeWcmFTEjoC66G1mkJynY7dExTXWzE78oYqHxstDcJok3i77RW8rX2XVEmEl> (last visited April 8, 2023).

Dykema Cert.; Complaint at ¶¶ 46-48, Exhibit H)⁹; a statement posted by CAIR on its Twitter account on October 8 at 11:42 a.m. in which it falsely asserted that Herman had engaged in an act of “anti-Muslim bigotry and abuse” and had “pulled [the Student’s] hijab off,” and called for Herman’s firing (“CAIR Statement #3” – *see Exhibit G* attached to Dykema Cert.; Complaint at ¶¶ 54-55, Exhibit I)¹⁰; a statement posted by CAIR NJ on its Facebook and Twitter accounts on October 8 at 11:34 a.m. and 11:49 a.m. in which it called for Herman’s firing and falsely accused her of having “pulled off the headscarf” and “[f]orcefully stripping off the religious headscarf” of the Student in an act of “Islamophobia” (the “CAIR NJ Statement” – *see Exhibit H* attached to Dykema Cert.; Complaint at ¶¶ 56-60, Exhibits J & K)¹¹ a statement made by Maksut to CBS News on October 8 in which he falsely claimed that Herman “removed” the Student’s “headscarf” (“Maksut Statement #2” – Complaint at ¶ 49)¹²; a statement made by Maksut to WCBS NEWSRADIO 880 on October 9 in which he demanded that Herman be fired and asserted that “she’s demonstrated she cannot be trusted around students” (Maksut Statement #5 – Complaint at ¶ 50);¹³ and a statement made by Maksut to NBC’s TODAY in a phone interview on October 9 in which he again demanded that Herman be removed from the classroom because she “can’t respect the religious practices of her students” (Maksut Statement #6).¹⁴

⁹ https://www.cair.com/press_releases/cair-nj-calls-for-immediate-firing-of-teacher-who-allegedly-pulledoff-muslim-students-hijab/ (last visited April 8, 2023).

¹⁰ <https://twitter.com/CAIRNational/status/1446501232399556631?s=20&t=qeNRv4dZCurq8s44mQ2Wnw> (last visited April 8, 2023).

¹¹ <https://twitter.com/CAIRNJ/status/1446502941507129344> (last visited April 8, 2023).

¹² Teacher Accused of Forcefully Removing 2nd Grader’s Hijab (Oct 8, 2021) (last visited Sep. 14, 2022) <https://www.cbsnews.com/newyork/news/teacher-accused-of-forcibly-removing-2nd-graders-hijab-inclass/>

¹³ Peter Haskell and Marta Zielinska, NJ mom says daughter who allegedly had hijab pulled off head by teacher is ‘very, very sad,’ WCBS NEWSRADIO 880 (Oct 9, 2021), <https://www.audacy.com/wcbs880/news/local/nj-teacher-accused-of-removing-students-hijab-in-class> (last visited April 8, 2023).

¹⁴ Alyssa Newcomb, New Jersey teacher under investigation after allegedly pulling hijab off student, Today Show (Oct 9, 2021) <https://www.today.com/news/new-jersey-teacher-underinvestigation-after-allegedly-pulling-hijab-student-t233784> (last visited April 8, 2023).

In seeking dismissal and/or summary judgment, Defendants make essentially the same arguments. First, they argue that Defendants’ statements were substantially true. (*See* Memorandum of Law in Support of Motion by Defendant CAIR Foundation Inc. to Dismiss the Complaint (“CAIR Mem.”) [Trans ID: LCV2023468800] at pp. 2-3, 17-22; Memorandum of Law in Support of Defendants Selaedin Maksut and CAIR NJ’s Motion to Dismiss the Complaint (“Maksut/CAIR NJ Mem.”) [Trans ID: LCV2023467237] at pp. 1-2, 9-17, ; Letter Brief in Support of Defendant Ibtihaj Muhammad’s Motion to Dismiss (“Muhammad Mem.”) [Trans ID: LCV20231010661] at pp. 7-11. Second, they argue that certain statements regarding Herman’s fitness to be a teacher and her allegedly racist conduct are subjective in nature and thus protected opinion. (*See* CAIR Mem. at p. 3; Maksut/CAIR NJ Mem. at pp. 1-2, 17-18, 22-29; Muhammad Mem. at pp. 5-9). Third, they argue that Herman has not alleged the necessary elements of actual malice or facts from which actual malice could be inferred. (*See* CAIR Mem. at pp. 3, 30-33; Maksut/CAIR NJ Mem. at pp. 9-10; Muhammad Mem. at pp. 11-18). Fourth, they argue that the false light claim must be dismissed for the same reasons as the defamation claim. (*See* CAIR Mem. at pp. 3, 33-34; Maksut/CAIR NJ Mem. at pp. 2, 17-19; Muhammad Mem. at pp. 18).

As discussed at length hereinafter, Defendants’ motions should all be denied, for the following reasons. First, Defendants’ statements were *not* substantially true—on the contrary, their statements were clearly and objectively false. Seeking to evade responsibility for the devastating consequences of their reckless and malicious libel of Herman, Defendants rely on an utterly disingenuous sleight of hand: they argue that the words and/or phrases “forcefully stripping,” “pulled,” “pulled off,” “pulls,” “pulls off” and “removed” have substantially the same meaning as the words and/or phrases “brushed,” “gently brushed,” and “lightly brushing.” This is

a distortion of the English language at odds with the plain meaning of these words and phrases. This absurd transformation of Herman's gentle and momentary brushing back of the Student's hood to facilitate learning into an imagined forceful removal of a hijab is analogous to the difference between tapping someone versus hitting someone, or assisting an elderly person down a staircase versus shoving an elderly person down a staircase. Second, their efforts to evade responsibility for their incendiary accusations of abuse, racism, and Islamophobic misconduct by characterizing these accusations as protected opinion should be disregarded because there is no evidence before the Court whatsoever that Herman engaged in any of these abhorrent practices or harbors any such beliefs. Third, the evidence of actual malice—reckless disregard for the truth—is overwhelming. As discussed hereinafter, Muhammad based her social media posts on a thirdhand account of events emanating from a most unreliable source, that being a young child. More importantly, Muhammad, despite her claims to the contrary in support of her motions, knew Herman well and had the ability and opportunity to communicate with Herman about the allegations, yet inexplicably declined to do so. Maksut, CAIR, and CAIR NJ, for their part, clearly didn't care about the truth—they simply parroted Muhammad's false accusations without any concern for their accuracy. Fourth, as Herman's defamation claims are meritorious, her false light claims are likewise meritorious. In addition, simultaneously with the filing of this opposition memorandum of law, Herman is also filing a cross-motion for leave to file a proposed amended complaint, which moots Defendants' motions.

II. LEGAL STANDARD

The standard for a motion to dismiss limits the court to examining the facts in the complaint, accepting them as true, and giving Plaintiff every favorable inference and an opportunity to amend

prior to dismissing any count of the complaint. *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739 (1989).

III. ARGUMENT

None of the Defendants deny making the statements at issue in this matter. Instead, Defendants generally argue that while they *did* make the defamatory statements, they should not be held liable for them. All Defendants' challenges to Plaintiff's Complaint use substantially the same arguments: (i) that the statements were substantially true, (ii) that the statements were protected opinion, and (iii) that actual malice was insufficiently alleged. Defendants further argue that Plaintiff's false light claims should be dismissed for substantially the same reasons as the defamation or libel claims.

Specifically, Defendants Maksut and CAIR NJ argue that their defamatory statements are "substantially true and/or protected opinion speech," and that the Complaint "fails to plead that [the] alleged defamatory statements were made with actual malice." *See* Maksut Br. p. 9-10. The Maksut Br. similarly argues that Plaintiff's False Light claim fails because Defendants Maksut and CAIR NJ's statements were "substantially true." *See* Maksut Br. p. 18.

Defendant CAIR Foundation ("CAIR") argues that Plaintiff's Complaint fails to state a claim because some of their statements were "substantially true," that others were "opinions," and that the complaint "failed to make any non-conclusory allegations of actual malice." *See* CAIR Br. p. 17-18. CAIR likewise seeks dismissal of Plaintiff's false light claim for the same reasons. *See* CAIR Br. p. 33-34.

Similarly, Defendant Muhammad argues for the claims against her to be dismissed "for the same reasons in the other defendants' Motions to Dismiss" and that the allegations are "insufficient to prove constitutional 'actual malice.'" *See* Muhammad Br. p. 5-6, *see also* Muhammad Br. p. 7-

10, 11-14. However, Muhammad goes further and seeks pre-discovery summary judgment on these same issues on the basis of additional facts alleged by Muhammad. *See* Muhammad Br. p. 10-11, 14-17. Muhammad further argues that the Complaint fails to establish “ordinary negligence” and that Plaintiff’s false light claim should be dismissed for the same reasons as the defamation claim. *See* Muhammad Br. p. 17-18.

For the reasons that follow, Defendants’ Motions must be denied because, contrary to Defendants’ arguments, the statements are (i) not substantially true, (ii) not mere “opinions” but verifiable statements of purported fact, and (iii) Plaintiff has alleged actual malice.

For the convenience of the Court, the defamatory statements published by the Defendants are reproduced in the chart below. Although each statement is unique, the legal arguments addressing them are generally similar and thus they may be grouped together for the purposes of this Opposition to Defendants’ *Motions*.

DEFENDANTS’ DEFAMATORY STATEMENTS			
Date/Time	Defendant	Citation	Statement
Oct. 7, 2021 at 4:03 p.m. Eastern Time	Muhammad	Compl. at ¶19, Ex.s C, D	<i>I wrote this book 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. School should be a haven 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,</i>

DEFENDANTS' DEFAMATORY STATEMENTS			
Date/Time	Defendant	Citation	Statement
			<p><i>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</i></p>
Oct. 7, 2021 at 4:30 p.m. Eastern Time	Muhammad	Compl. at ¶25, Ex. E	<p><i>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 for 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 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</i></p> <p>@cair_national @cair.nj</p>

DEFENDANTS' DEFAMATORY STATEMENTS			
Date/Time	Defendant	Citation	Statement
Oct. 8, 2021 at 12:41 a.m. Eastern Time	Maksut	Compl. at ¶30, Ex. F	<i>Absolutely unacceptable. Teacher pulls off 7 year old's hijab...in front of the class.</i> <i>Our @CAIRNJ office is calling for immediate termination.</i> <i>Racist teachers like this cannot be trusted around our children.</i>
Oct. 8, 2021 at 2:13 p.m. Eastern Time	Maksut	Compl. at ¶36, Ex. G	<i>Call and email the Superintendent, Dr. Ronald G. Taylor, today, and let him know Tamar Wyner Herman is unfit to be a teacher.</i> <i>rtaylor@somsd.k12.nj.us (973) 762-5600</i>
Oct. 8, 2021 at 9:45 a.m. Eastern Time	CAIR	Compl. at ¶33, Ex. G	<i>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.</i>
Oct. 8, 2021 at 3:56 p.m. Eastern Time	CAIR, CAIR NJ, Maksut	Compl. at ¶39, Ex. G	<i>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."</i> <i>@CAIRNJ @Mselaedin</i> <i>#Islamophobia</i>
Oct. 8, 2021 at 7:34, 9:52, 9:53, 10:56 a.m. Eastern Time	CAIR, CAIR NJ, Maksut	Compl. at ¶¶43 - 45	<i>The hijab, you know, is much like any other article of clothing for a Muslim woman. To remove that publicly can be very humiliating.</i> <i>Anyone who thinks it's OK to do this to a student clearly is not fit to be a teacher.</i>

DEFENDANTS' DEFAMATORY STATEMENTS			
Date/Time	Defendant	Citation	Statement
Oct. 8, 2021 at 11:28 a.m. Eastern Time	CAIR, CAIR NJ	Compl. at ¶46, Ex. H	<p><i>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.</i></p> <p><i>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.</i></p>
Oct. 8, 2021 at 11:42 a.m. Eastern Time	CAIR	Compl. at ¶54, Ex. I	<p><i>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.</i></p> <p><i>#Islamophobia</i></p> <p><i>@cairnj @ Mselaedin</i></p>
Oct. 8, 2021 at 11:49 a.m. Eastern Time	CAIR NJ	Compl. at ¶56, Ex. J	<p><i>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.</i></p>
Oct. 8, 2021 at 11:34 and 11:49 a.m. Eastern Time	CAIR NJ	Compl. at ¶57, Ex. J	<p><i>Forcefully stripping off the religious headscarf of a Muslim girl is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience.</i></p> <p><i>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.</i></p>

DEFENDANTS' DEFAMATORY STATEMENTS			
Date/Time	Defendant	Citation	Statement
October 8, 2021	Maksut	Compl. at ¶49.	<i>The teacher 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.</i>
October 9, 2021	Maksut	Compl. at ¶50.	<i>Clearly she's demonstrated she cannot be trusted around students.</i>
October 9, 2021	Maksut	Compl. at ¶51.	<i>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.</i>

a. Defendants' Motions Are Mooted By The Proposed First Amended Complaint

Defendants' *Motions* are largely based on purported deficiencies in the pleading of Plaintiff's original Complaint. Plaintiff does not concede the existence of any deficiencies in its complaint. However, contemporaneously with the filing of this *Opposition*, Plaintiff submits its Proposed *First Amended Complaint* (FAC). The FAC alleges additional facts going to each of the issues raised in Defendants' *Motions*, including whether the defamatory statements were "substantially true," whether they were "protected opinion," and/or that actual malice was sufficiently alleged.

Thus, Defendants' *Motions* have been mooted by the FAC, because they are directed to a pleading that is no longer operative and should be denied.

b. Substantial Truthfulness

Each of the Defendants' *Motions* argues that the statements of which Defendant was accused are "substantially true." Defendants' arguments as to "substantial truthfulness" should be rejected for two reasons, as discussed in more detail below. First, because the question cannot be decided on a *Motion to Dismiss* or pre-discovery *Motion for Summary Judgment*. Second, because the purported "gist" of the statements – interpreted by Defendants' attorneys - differs from the facts plead by Plaintiff, and because Plaintiff denies the truthfulness of their statements, as expanded upon in the First Amended Complaint.

Def. Maksut and CAIR NJ admit that they made the statements: "Teacher pulls off 7 year old's hijab ... in front of the class," that Plaintiff had "removed" the student's hijab "publicly," that Plaintiff "pulled off the headscarf of" the student, that Plaintiff "[f]orcefully strip[ed] off the religious headscarf of a Muslim girl," that Plaintiff "put her hands on her" and "removed her headscarf." See Maksut Br. pp. 10-17.

Def. CAIR admit that they made the statements: "A teacher pulled off a 7-year-old student's hijab in front of her class," that Plaintiff "pulled off the headscarf of a young Muslim student," that she "forcefully stripp[ed] off the religious headscarf of a Muslim girl," that she "pulled a second grader's hijab off in class," that she "forcefully stripp[ed] off the religious headscarf of a Muslim girl," and that she "remov[ed]" the headscarf "publicly." See CAIR Br. pp. 19-22.

Def. Muhammad likewise admits that she made the statement: that Plaintiff "forcibly removed the hijab of a second grade student," and implied that Plaintiff had "stripped [the student] of [her] clothing in front of your classmates." See Muhammad Br. at 2-3.

Defendants' arguments, in sum and substance, are that their admitted statements are "substantially true" because Plaintiff pleads that she "brushed the hood back a few inches to

uncover the Student’s eyes ... without making contact with the student physically, ... noticed the Student’s hair,” and then “immediately brushed the hood back to cover all the Student’s hair.”

Compl. ¶9. For the reasons discussed below, Defendants’ arguments should be rejected.

i. Defendants’ Arguments Regarding Substantial Truthfulness Cannot Be Decided On A Motion To Dismiss Or Pre-Discovery Summary Judgment Motion

Each of the Defendants’ *Motions* argues that the statements of which Defendant was accused are “substantially true,” in part by relying upon their assertions as to the meaning of both Plaintiff’s and Defendants’ statements. *See, e.g.* Maksut Br. at 9 (“the ‘gist’ and ‘sting’ of Plaintiff’s act is that it caused the hijab to be removed...”), *see also* CAIR Br. at 20-21 (“[t]he 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.”), *see also* Muhammad Br. at 7 (“the gist here hardly changes...”)

While framed as attorney argument, these are factual allegations. The question of what was meant by Defendants’ statements, and how they would be interpreted by a lay person or audience is not a question of law suitable for disposition on a motion to dismiss, but – at best – a mixed question of law and fact requiring discovery and likely a jury to determine. Fact discovery – including depositions of Defendants, and discovery into contemporaneous documents or communications – could uncover what they meant by those statements. And fact discovery (including survey evidence) as well as expert testimony (interpreting survey evidence, linguistic science, and other matters) could also uncover what the “gist” of such statements is or would be to a lay person.

Said differently, Defendants’ arguments going to substantial truthfulness rest on the underlying assumption that, as a matter of law, no reasonable person could decide that statements like “pulled off the hijab,” “forcibly removed the hijab,” “forcefully stripped off the headscarf,” “put hands on her” and “removed her headscarf” mean something different from “brushed the hood back a few inches ... and immediately brushed the hood back.” Whether Defendants’ purported “gist” of their statements is justified by evidence of the connotation and denotation of these terms, or whether it is merely attorney argument, is a question of fact for a jury to decide after discovery; not a question of law for the Court to decide purely on the basis of attorney say-so. *See Hotaling & Co., LLC v. Berry Sols. Inc.*, 2022 U.S. Dist. LEXIS 178066, *16-17 (“Assuming, as we must, the truth of those allegations ... the ‘gist’ of [Defendants] statements ... was far from justified. While they may be able to prove otherwise after discovery, they cannot rely on ‘substantial truth’ as a basis for dismissal of the defamation [claim] at this stage of proceedings.”), *citing Palladino ex rel. United States v. VNA of S.N.J., Inc.* 68 F.Supp. 2d 455, 476 (D.N.J. 1999)(rejecting defendants’ argument regarding truth of allegedly defamatory statements, reasoning that ‘this is a motion to dismiss, and not a summary judgment motion.’”)

ii. Defendants’ Statements Were Not Substantially True

As discussed above, Defendants’ arguments as to substantial truthfulness depend on explicit and implicit factual assertions and must be rejected at the *Motion to Dismiss* stage. Defendants generally make a three-step argument. First, Defendants abstract away the violent, aggressive, and harmful factual specifics of the actual statements they made, into a milquetoast “gist” that fails to reflect the harmful, defamatory substance of their actual admitted statements. Then, Defendants abstract away the context and specifics of what Plaintiff actually plead, attempting to transform an

everyday interaction between a teacher and a student into an act of religious intolerance. Then, Defendants compare these two invented “gists” and declare them to be the same.

Defendants’ approach fails because the “substantial truth” doctrine does not permit the Defendant to ignore the violent, aggressive, and harmful content of their actual statement to identify a “gist” for purposes of comparison. The gist of “nurse helped the elderly person into the swimming pool” and “nurse shoved the old man into the water” are simply not the same for the purposes of defamation law – the “gist” of the first is that the nurse is trying to help the person, and the “gist” of the second is that the nurse is trying to kill him.

Similarly, the gist of the statement “[f]orcefully strip[ed] off the religious headscarf of a Muslim girl” (and the other variations admitted by the Defendants including as “pulled off” or “removed”) is simply not the same as the gist of “brushed the hood back a few inches” and then “immediately brushed the hood back to cover all the Student’s hair.” The “gist” of the first is religiously motivated, violent, and aggressive behavior, while the “gist” of the second is an act of caring and checking on a student to make sure she was OK.

Defendants, collectively or individually, cite no cases to the contrary. In fact the cases cited by Defendants persuasively show that “minor inaccuracies” allowed by the “substantially true” doctrine do not encompass allegations that transform a neutral act into an aggressive, bigoted, or violent one.

For example, Def. CAIR cites *G.D. v. Kenny*, 205 NJ 275, 294 (2011) for the proposition that “minor inaccuracies do not amount to falsity,” but the statement in *Kenny* was, in context, a minor inaccuracy: the statement that plaintiff was “a DRUG DEALER who want to JAIL for FIVE YEARS for selling coke near a public school” was a minor inaccuracy because the plaintiff, convicted of selling cocaine near a public school, did not ultimately serve five years. *See* CAIR

Br. at 20. In the context of *Kenny*, accusing someone of “selling drugs near a school” when they were actually only selling comic books would not be a minor inaccuracy, it would completely change the meaning of the accusation.

CAIR further cites *L.C. v. Middlesex County Prosecutor’s Office*, 2021 N.J. Super. Unpub. LEXIS 598, for the proposition that describing conduct as “sexual assault” when the charges were actually “conspiracy to commit aggravated criminal sexual conduct, criminal sexual contact, and aggravated assault.” See Cair Br. at 20. In the context of *L.C. v. Middlesex County Prosecutor’s Office*, accusing someone of “sexual assault” when they had merely pushed another person too hard at recess would not be a substantially true minor inaccuracy, it would completely change the meaning of the accusation.

Similarly, Def. Maksut cites *Carrabba v. Morgat*, 2014 U.S. Dist. LEXIS 7799 for the proposition that “even if a factual statement described something inaccurately, if the statement can be viewed as ‘fairly accurate’ it is not defamatory.”) See Maksut Br. at 11. But, the inaccuracies in *Carrabba* did not change a non-harmful situation into a harmful one, they merely misstated the degree of harm: Carrabba (a dog breeder) alleged false light over statements that two puppies he had provided had “problems” when only one puppy had one problem; and separately that it was inaccurate to say that a puppy “needed braces” when it did not, but did have “serious dental problems.” *Carrabba* at *36.

Thus, Defendants’ arguments relating to “substantial truthfulness” should be rejected, because in inventing a “gist” of the statements, Defendants misleadingly attempt to abstract away the harmful, aggressive, and/or violent content of their actual statements, completely changing the meanings thereof.

c. Defendants' Statements Were Not Protected Opinions

Defendants CAIR, CAIR NJ, and Maksut argue that each statement made by them is not actionable because they are merely “opinions.” *See, e.g.* Maksut Br. at 10 (“Here, Maksut is expressing his opinion based on the facts surrounding the underlying incident, namely that Plaintiff removed a second-grade student’s hijab...”); *see also* CAIR Br. at 22 (“the CAIR Foundation Statements underlined in the Chart above cannot support a defamation claim because they are subjective views, epithets, and rhetorical hyperbole...”).

Plaintiff does not dispute that opinion statements are not actionable. However, the cases cited by Defendants also make clear that “opinion statements” which imply false underlying facts are not protected. *See, e.g.* Lynch v. New Jersey Educ. Ass’n, 161 N.J. 152 at 167(1999) (“[O]pinion statements do not trigger liability **unless they imply false underlying objective facts.**”), *see also* Ward v. Zelikovsky, 136 N.J. 516, 533 (1994) (“an accusation of bigotry is not actionable **unless the statement suggests the existence of defamatory facts.**”)

Contrary to the arguments raised by Defendants, each of the purported “opinion statements” argued to be non-actionable by Defendants *is actionable* because, in context, they imply and suggest the existence of defamatory facts. Each of the statements by Defendants was made as part of a connected series of statements, to the same audience, and as part of the same “conversation.” The other portions of that conversation not only implied or suggested, they outright stated the defamatory facts. In this context, Defendant’s arguments that their statements are “mere opinions” should not be credited.

For example, Maksut’s statement from October 8, 2021 at 2:13 PM that Plaintiff is “unfit to be a teacher” was not made in isolation, apart from any other statement alleged herein. Rather, as Maksut admits, it was a Twitter “reply” to his own statement from that same day at 12:41 AM. A

“reply” links directly to the earlier statement, which a user may view simply by clicking on the arrow linking the two, or which may be viewed in the context of the other statement to which it is a reply, as shown by Maksut’s original tweet (attached to original Complaint as Ex. G.)



All of the Defendants “mere opinion” arguments suffer the same flaw – they are part of an ongoing conversation that Defendants were having with their audience(s), yet for the purposes of their opinion analysis *exclude* the false and defamatory factual allegation which is implied and

suggested by the purported “opinion” statement. These individual statements (or even portions of statements) cannot be excised from the conversations and context of which they are an integral part. For this reason, Defendants’ arguments regarding “mere opinion” must be denied.

d. Plaintiff Sufficiently Alleged Actual Malice

Each Defendant alleges that Plaintiff has failed to sufficiently allege “actual malice.” *See* Muhammad Br. at 11-13, CAIR Br. at 32, Maksut Br. at 10. Plaintiff respectfully disagrees. Plaintiff *has* alleged actual malice in the Original complaint. Moreover, as shown by the *Certification of Tamar Herman*, filed contemporaneously herewith, Defendant Muhammad falsely represented in her *Certification* in support of her *Motion for Summary Judgment* that she did not know Plaintiff. As the *Certification of Tamar Herman* makes clear, this is untrue. Defendant Muhammad’s willingness to make false statements in support of her efforts to avoid liability in this matter further evidence her actual malice, i.e. reckless disregard for the truth.

However, out of an abundance of caution, Plaintiff’s proposed *First Amended Complaint* remedies the deficiencies by pleading, *inter alia*, specific non-conclusory facts going to each Defendant’s reckless disregard for the truth or falsity of their statements. *See generally*, First Amended Complaint.

IV. IN THE ALTERNATIVE, PLAINTIFF REQUESTS LEAVE TO AMEND AND AN OPPORTUNITY FOR DISCOVERY

There has been no discovery in this case and no development of the factual record.

With respect to the *Motions* filed by all parties, even if this Court determined to decide the substance of Defendants’ *Motions* despite Plaintiff’s *Proposed First Amended Complaint*, and even if the Court was persuaded by any of Defendants’ arguments, it would be improper to grant such motions at before any discovery has taken place, and further improper to grant Defendants

relief in any way that would prejudice Plaintiff's ability to amend her complaint, including by dismissing this action in its entirety (potentially triggering statute of limitations issues) or by granting any such motion(s) "with prejudice."

Separately, specifically with respect to Defendant Muhammad's *Motion for Summary Judgment*, to the extent the Court is inclined to consider the facts beyond the complaint introduced with this motion, Plaintiff respectfully requests that a response to such motion be adjourned until Plaintiff has had an opportunity to conduct discovery into the issues. Plaintiff is entitled to discovery into the purported facts relied upon by Muhammad's motion, including the state of mind of the Defendant and other individuals introduced in her Certification; as well as the purported conversations and other events extraneous to the complaint described in that Certification.

For but one example of the need for discovery to rebut Muhammad's allegations, the Certification of Tamar Herman, filed contemporaneously herewith, details various pieces of evidence establishing that Muhammad's Certification filed in support of her *Motion for Summary Judgment* may have falsely represented that Muhammad did not know Plaintiff, when in fact Muhammad did know Plaintiff. Thus, Muhammad's *Certification* creates additional material factual disputes and precludes summary judgment at this stage.

Plaintiff thus respectfully submits that the proper course of action is for the Court to grant Plaintiff's *Cross Motion To Amend* permitting the filing of the First Amended Complaint, and deny Defendants' *Motions* as mooted by the amended pleading. However, to the extent that the Court is inclined to consider the substance of Defendants' *Motions* at this time, and to the extent that the Court is persuaded by any of the Defendants' arguments, Plaintiff respectfully submits that the proper course would be to deny Defendants' *Motions* without prejudice to renewal at the conclusion of discovery into the issues raised herein. Lastly, to the extent that the Court is inclined

to grant any aspect of any of Defendants' *Motions*, Plaintiff respectfully requests that any dismissal be without prejudice to Plaintiff's ability to further amend its Complaint.

V. **CONCLUSION**

Based on the foregoing, Plaintiff respectfully requests that this Honorable Court deny Defendants' *Motions*.

Dated: April 11, 2023
New York, New York

Respectfully submitted,

/s/ Erik Dykema
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